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THE DEPARTMENT OF THE INTERIOR

AND

GENERAL LAND OFFICE

IN

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

BRADBURY *v.* DICKINSON.

The sale of an undivided interest in the lands covered by an entry, prior to March 1, 1888, does not bring said entry within the confirmatory provisions of section 7, act of March 3, 1891.

Secretary Noble to the Commissioner of the General Land Office, January 2, 1892.

I am in receipt of your letter of July 18, 1891, requesting further instructions in reference to the case of Elwood S. Bradbury *v.* Martin F. Dickinson.

It appears that on January 4, 1887, Dickinson made soldier's additional homestead entry for the W ½ of the NE ¼ of section 12, T. 23 S., R. 44 W., Lamar, Colorado.

On June 9, 1887, said entry was held for cancellation by your office for the reason that the rights of the entryman were exhausted under the homestead law prior to said entry. On June 13, 1887, Dickinson filed affidavits showing that his rights under the law were not exhausted.

On the same day Elwood S. Bradbury applied to contest Dickinson's entry, alleging that the entry was made in the interest of one Thomas Doak, that the entry was made for purposes of speculation, and that the entry was illegal because Dickinson had previously exhausted his rights under the homestead law. The affidavit of contest was not corroborated, his application to contest was accordingly rejected by the register and receiver. Contestant appealed from said rejection to your office, where, on February 10, 1888, it was decided that Dickinson had exhausted his rights under the homestead law, and your decision of June 9, 1887, holding his entry for cancellation was adhered to.

Bradbury's appeal was dismissed and his application to contest refused on the grounds that said entry was then under investigation by your office and that the affidavit of contest was not corroborated.

Both Bradbury and Dickinson appealed from your said ruling to this Department, and on April 6, 1888, Dickinson filed a relinquishment of his entry, and on the same day one Thomas D. Parish was allowed by the local land officers to make a soldier's additional homestead entry for said tract.

Under date of July 27, 1889, the Department acting upon these appeals, held that the allowance of the entry of Parish was irregular. It was accordingly directed to be canceled. It was also held that your office was justified in refusing to allow Bradbury's application to contest. However, the decision of your office was reversed in so far as it canceled Dickinson's entry without a hearing, and it was held while there were facts in the record showing that his right to make an entry under the homestead law had been exhausted, still he offered to show, if an opportunity was given him, that his right had not been exhausted.

A hearing was ordered to determine the facts. In said departmental decision, Dickinson's relinquishment was not accepted, since it was made to appear that he had before that time sold all or nearly all of his interest in said tract.

In your letter of July 18, 1891, addressed to this Department, you state that Parish's entry has been canceled, and although a hearing was ordered August 12, 1889, as directed by the Department, it appears that the register and receiver have never fixed a day for said hearing. You suggest that the passage of the 7th section of the act of March 3, 1891 (26 Stat., 1095), may, when applied to said case, render a hearing on its merits unnecessary.

It appears from the facts as they are found in the departmental decision of July 27, 1889, that the entry of Dickinson was made, and a final receipt issued on January 4, 1887.

On January 6th following, he sold and conveyed the undivided one-half of said tract to Thomas Doak for a consideration stated to be $500, and about the same time he sold and conveyed for a valuable consideration, the undivided one-fourth interest in said tract to one William Groom, and that on March 2, 1887, Doak purchased this interest, leaving him the owner of an undivided three-fourth interest in said tract and leaving Dickinson the owner of the undivided one-fourth part thereof.

The tract was then platted by its owners, and laid out as an addition to the town of Grenada, and at the date when Dickinson's entry was held for cancellation, they had sold about one hundred and nineteen lots to different buyers.

Dickinson's sale of the undivided three-fourth interest in said tract was made after final entry, and before March 1, 1888, and before any action was taken against said entry.

In so far as is shown by the record, the sales were made for valuable considerations, no adverse claims originating prior to final entry exist, and no fraud has been found on the part of the purchaser; will such an

entry be confirmed under the provisions of the seventh section of the act cited? I think not.

The section relied upon for confirmation refers to certain entries classified as "entries made under the pre-emption, homestead, desert-land, or timber-culture laws" and provides that under certain conditions, they shall be confirmed and patented. One of these conditions is that where an entry has been sold after final receipt has been issued by the receiver of the land office, and prior to March 1, 1888, to a *bona fide* purchaser for a valuable consideration, such an entry shall be confirmed. No provision is made for confirming an entry where an undivided part of the tract covered thereby is so sold. Congress seems to have dealt with an entry as an entirety and to hold that it was the legislative intention to confirm where a purchaser has acquired three-fourths or one-half interest in the entry, would also require in a proper case, the holding that an entry was confirmed where a purchaser had acquired a one-tenth interest therein or even less.

I do not think this was the intention of Congress when the act was passed.

You are, therefore, directed to allow the case to take its regular course as directed by my decision of July 27, 1889.

NEW MADRID LOCATION—UNSURVEYED LAND.

BRITTON WILLIAMS.

A New Madrid location of unsurveyed land, made under the act of February 17, 1815, was unauthorized thereby, and while the law thus remained, such location was no bar to other disposition of the land.

The act of April 26, 1822, providing for the perfection of New Madrid locations that did not conform to the public surveys, did not operate to save a location on unsurveyed land, where said land had been previously sold by the government to intervening adverse claimants.

Secretary Noble to the Commissioner of the General Land Office, January 2, 1892.

It appears by your letter of June 8, 1887, to the local officers at Boonville, Mo., transmitted with the papers in this case, that the New Madrid claim of Thomas Huff, Jr. for two hundred arpents, or 170.14 acres, was allowed under act of February 17, 1815 (3 Stat., 211), upon which certificate of location (No. 135) was issued September 18, 1816, and located January 13, 1817, under survey No. 2537 at Franklin, Mo., land office.

The location of Huff embraced a part of the SW ¼ Sec. 36, T. 49 (south of Missouri river), range 17 west, to wit, 108.36 acres, and a part of the SE ¼ of section 35 adjoining, and was made in a square tract which did not conform to the sectional lines according to the survey of said township made in June 1818.

On April 14, 1819, Asa Morgan entered the balance of said SW. ¼ (51.64 acres) not embraced in said location, per certificate (No. 1967) for which a patent was duly issued November 1, 1827. That part of Huff's claim located in the SE. ¼ of Sec. 35, aforesaid, was adjudged January 18, 1820, in favor of David Burris, upon his pre-emption application (No. 1834) for the whole of said quarter, and the same was patented to him per certificate (No. 99) August 31, 1820. No patent has ever issued on any part of Huff's remaining claim.

On January 28, 1820, Britton Williams purchased the balance of said Huff location in said SW. ¼, containing 108.36 acres, at $2 per acre, and paid one fourth part thereof in cash, as appears by the following certificate of purchase (No. 4888), issued February 25, 1820:

It is hereby certified that Britton Williams of Cooper county, M. T. did on the 28th day of January, 1820, purchase the south and west part of the south-west qr. of section 36, in Frl. Tp. 49 (S. M. R.) north of the base line of range 17 west of the 5th principal meridian in the district of lands offered for sale at Franklin, which said part of qr. section contains 108.36 acres, and which has been sold to said Britton Williams at the rate of $2.00 per acre, amounting in the whole for said part of quarter section to two hundred and sixteen dollars and seventy-two cents ($216.72), of which there has been paid on account agreeably to law, to the receiver of public moneys at Franklin, the sum of fifty-four dollars and eighteen cents ($54.18), being one-fourth part of the purchase money for the said part of quarter section.

Now, therefore be it known, that if the remaining balance, being one hundred and sixty-two dollars and fifty-four cents ($162.54) shall be paid to the receiver of public moneys at Franklin, or to the Treas. of the United States at or before the dates and periods following, that is to say, fifty-four dollars and eighteen cents ($54.18) thereof on or before the 28th day of January, 1822; fifty-four dollars and eighteen cents ($54.18) thereof on or before the 28th day of January, 1823: and fifty-four dollars and eighteen cents ($54.18) thereof on or before the 28th day of January, 1824, then the said Britton Williams or his assigns, or other legal representatives shall be entitled to receive a patent for the part of the quarter section above described by right of pre-emption adjudged in his favor.

Said certificate of purchase was surrendered September 30, 1822, at said Franklin, by Charles Force, the heirs of Asa Morgan, and Mary Gilman, of Cooper county, Missouri, as assignees of said Britton Williams, and new declaration (No. 590) issued granting further credit in eight equal annual installments, the first due March 31, 1822, and the last March 31, 1829, under the act of March 2, 1821, Sec. 3 (3 Stat., 613), and the act of April 20, 1822 (3 Stat., 665).

Final payment was made, and register's final certificate (No. 2001) issued at said Franklin on March 28, 1829, for said tract under the act of March 21, 1828 (4 Stat., 259), certifying that Robert P. Clarke, Frederick Haux, and David Logan, all of Cooper county, as assignees, were entitled to a patent.

By your letter to the local officers at Boonville, Mo., dated November 18, 1890, you decided that,—"The representatives of Huff are entitled to patent for the said 108.36 acres upon an application therefor. Notify the parties in interest, that unless an appeal is taken within the sixty

days from notice, given in accordance with letter 'C' of September 24, 1890, the entry of Williams will be canceled." An appeal has been taken which now brings the case before me.

The following specifications of error are assigned:—

1st. That at the date of location of the New Madrid claim of Huff, January 13th, 1817, the land in controversy was not subject to the provisions of the act of February 17, 1815—the location having been made previous to the section lines having been run, said location was void. Ops. Atty. Gen. Jan. 19, 1820—Public Lands, Laws and Opinions, part 2, page 8.

2nd. That a valid pre-emption right to said land was recognized and adjudged in favor of Britton Williams, in January 1820, and no exceptions to said adjudications in favor of said pre-emptor appear to have been taken; and had a patent been issued at that time on said New Madrid certificate, the same would have been void. Ops. Atty. Gen., Jan. 27th, 1821, *vide* p. 16.

Upon a careful investigation and examination of the files and records, and a reference to the laws and instructions governing the disposition of the land here in controversy, it would be discovered that the officers of the land office were conversant with the law and the facts governing the disposition of the case and committed no error in permitting the pre-emption entry of said Britton Williams.

The circumstances under which the New Madrid certificates were issued are thus stated by Justice Bradley, in the Hot Springs Cases (92 U. S., 698, 707):

The earthquake, or succession of earthquakes, which occurred along the Mississippi below the mouth of the Ohio in 1811 and 1812, was particularly disastrous to the county and village of New Madrid, in Missouri Territory (then the district of Louisiana), leaving a large portion of the land now known as the "sunk country" under water. For the relief of the inhabitants, Congress, on the 17th of February, 1815, passed an act authorizing those whose lands had been materially injured by earthquakes to locate the like quantity of land on any of the public lands of the said Territory, the sale of which was authorized by law.

The first section of said act provides,

That any person or persons owning land in the county of New Madrid, in the Missouri Territory, with the extent the said county had on the tenth day of November, 1812, and whose lands have been materially injured by earthquakes, shall be, and they hereby are authorized to locate the like quantity of land on any of the public lands of the said territory, the sale of which is authorized by law. (3 Stat., 211)

Under this act certificates were issued to those inhabitants of New Madrid whose lands had been injured by earthquakes, which were in many instances located on lands which were unsurveyed, and the question arose whether such locations were valid under the last clause above cited, and this question was submitted to the Attorney General William Wirt, who gave his opinion that they were null and void.

Under date of May 11, 1820, he says (1 Op. 361, 362):

I am of the opinion that it was not the intention of Congress, in authorizing the sufferers 'to locate the like quantity of land on any of the public lands of the said Territory, the sale of which is authorized by law,' to change or affect in any manner that admirable system of location by squares, which had been so studiously adopted in relation to all their territories.

Again, under date of June 19, 1820 (1 Op., 373, 375), he says:

> The authority given is to make these locations on any of the public lands of the Territory *the sale of which is authorized by law*. But the sale is not authorized by law until the sectional lines are run; and, consequently, all locations previously made by those sufferers are unauthorized. The circumstance of their being located in a square is perfectly immaterial to the policy of the law; for, although in a square, they may not, and most probably will not, quadrate with the sectional lines of the general survey, since squares may lie to any and to every point of the compass—no two contiguous squares quadrating together; whereas the sectional scheme calls for parallel lines throughout the whole Territory.

Under date of June 22, 1820 (2 Laws, Instructions and Opinions, 14), he says, speaking of locations made on unsurveyed lands:

> The fundamental defect still remains, that the New Madrid locations were made on lands, the sale of which was not then authorized by law; those locations were, therefore, made without authority and are void, and patents, consequently, cannot issue on them. The contemporaneous survey of these void locations with the general survey, and the permitting them to produce the effect of causing fractions in the general survey, was unauthorized by law. On the law as it stands I should pronounce the sales of these fractions illegal and void, because the public law, of which every one is bound to to take notice, authorized no such fractions from such a cause. The sales ought to be set aside and the sections still subdivided according to law.

On July 5, 1820, the Commissioner of the General Land Office transmitted to the surveyor general certain opinions of the Attorney General, relative to locations made by New Madrid claimants, and instructions relative to the locations which have not been made conformably to law. "Those locations may be withdrawn and relocated, or amended so as to conform to sectional lines." (2 Laws, Instructions, and Opinions, 303)

As early as April 15, 1817, J. Meigs wrote to the surveyor general at St. Louis, relative to New Madrid claimants, as follows:

> They are authorized to locate on any of the public lands of the said Territory, *the sale of which is authorized by law*. Certainly lands confirmed to other persons are not of that description, nor do I think that lands which the President has not directed to be prepared for sale can, with propriety, be considered of that description. (2 Laws, Instructions, and Opinions, 816)

Justice Bradley, in the Hot Springs cases, *supra*, says upon this subject (page 715),

> The laws then were, as the Attorney General held them to be, that unsurveyed lands were not lands the sale of which was authorized by law; and as this doctrine was received and acted upon by the land department of the government, we should not feel authorized at this late day to reverse it.

It follows that the New Madrid location of Thomas Huff, Jr., made January 13, 1817, on unsurveyed land, was unauthorized by law, and, in the language of Attorney General Wirt, was "illegal and void," and that the local officers had a right to so receive the law and act upon it, and therefore to allow the pre-emption of Britton Williams on January 28, 1820, of the fraction of 108.36 acres in said SW. quarter, and the land office was fully justified in issuing a patent to David Burris for

said south-east quarter on August 31, 1820. The land officers and the local officers in so doing administered the law as it then was, and ever since has been construed.

But Congress came to the aid of the New Madrid claimants and passed the act of April 26, 1822 (3 Stat., 668), which provides as follows:

> That the locations heretofore made of warrants issued under the act of the fifteenth (seventeenth) of February, one thousand eight hundred and fifteen, entitled 'An act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes,' if made in pursuance of the provisions of that act, in other respects, shall be perfected into grants, in like manner as if they had conformed to the sectional or quarter-sectional lines of the public surveys; and the sales of fractions of the public lands, heretofore created by such locations, shall be as valid and binding on the United States as if such fractions had been made by rivers, or other natural obstructions.

But this act did not affect the location of Huff, the land of which had already been appropriated in part to Burris, and the balance to Williams. Intervening rights, which had vested prior to the passage of said act, were carved out of its operation.

In Wilcox *v.* Jackson (13 Pet., 498, 513), the court say,—

> That whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it.

In Lytle *v.* Arkansas (9 How., 314, 333), the court say,—

> The claim of pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law, it has no existence as a substantive right. But when covered by the law, it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it.

See also Frisbie *v.* Whitney, 9 Wall., 187; and The Yosemite Valley case, 15 Wall., 77.

It appears from the original certificate issued to Britton Williams above cited, that his right of pre-emption was "adjudged in his favor," on February 25, 1820, from which judgment no appeal appears to have been taken. This judgment must then have disposed of the Huff claim. It further appears that the assignees of Williams at the date of the final certificate issued to them on March 28, 1829, were also largely, if not wholly the assignees of the Huff claim. The deeds showing the chain of title from Williams to the said assignees are transmitted with the record, but those deeds do not show the chain of title from Huff, but they do show several assignments by persons claiming to own the Huff location, as if the intent was to unite both claims into one when final payment was made.

In view of these assignments, and of the statement made by the counsel for the appellants, that said "land has been held in actual open and notorious occupancy by said parties and their grantors for over

seventy years," it may well be doubted that there are now any claimants under the Huff location, aside from the appellants.

In my opinion patent should issue on the entry of Britton Williams.

Your judgment is reversed.

REPAYMENT—DOUBLE MINIMUM LANDS.

FREDERICK B. SOUTHWORTH.

The price of lands within the limits of the forfeited Texas Pacific grant remained at double minimum until the act of March 2, 1889, and under an entry made prior to said act, there is no authority to repay any part of said price.

Secretary Noble to the Commissioner of the General Land Office, January 2, 1892.

On the 4th of November, 1890, application was made to you, in behalf of Frederick B. Southworth, for repayment of the sum of two hundred dollars, being the excess above single minimum price paid by him at the Tucson land office, Arizona Territory, in the purchase of the NE¼ of Sec. 27, T. 8 S., R. 22 W., on the 28th of December, 1888.

On the 8th of November, 1890, you addressed a letter to the attorneys making the application, in which you declined to recommend such repayment. An appeal from your decision brings the question before me for consideration.

The twelfth section of the act of Congress approved March 3, 1871 (16 Stat., 573), granted certain lands to the Texas Pacific Railroad Company. On the 28th of February, 1885, Congress passed an act (23 Stat., 337), which declared,—

> That all lands granted to the Texas Pacific Railroad Company under the act of Congress entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March third, eighteen hundred and seventy-one, and acts amendatory thereof or supplemental thereto, be, and they are hereby, declared forfeited, and the whole of said lands restored to the public domain and made subject to disposal under the general laws of the United States, as though said grant had never been made: *Provided,* That the price of the lands so forfeited and restored shall be the same as heretofore fixed for the even sections within said grant.

The act of March 3, 1871, granting the odd numbered sections to the railroad increased the price of the even sections to two dollars and fifty cents per acre, and by the forfeiting act quoted above, this was fixed as the price for the restored lands, or the odd sections. This remained the price until the passage of the act of March 2, 1889, (25 Stat., 854) fixing the price of all public lands within the limits of railroad grants, which should be forfeited, at the price of $1.25 per acre.

The lands in question were within the limits of the Texas Pacific Railroad Company's grant, and the entry of Southworth was made prior to the passage of the act last mentioned. The price which he

paid was properly charged, and there is no authority for repayment of any part of said amount. Texas Pacific Grant (8 L. D., 530).

Your decision of November 8, 1890, from which the appeal before me was taken, is approved and affirmed.

RAILROAD GRANT—PRE-EMPTION FILING—ACT OF MARCH 3, 1887.

OLE HALVORSON.

An unexpired pre-emption filing of record at the date when a railroad grant becomes effective, excepts the land covered thereby from the operation of the grant.

Proceedings for the recovery of title are authorized where patent has erroneously issued for lands excepted from a railroad grant.

Prior to the institution of suit for the recovery of title in such case a demand for reconveyance must be made upon the company, and this demand can only be directed by the Secretary of the Interior.

Secretary Noble to the Commissioner of the General Land Office, January 2, 1892.

On December 18, 1889, Ole Halvorson through Hon. Knute Nelson, filed in this Department a petition representing that in July, 1884, he applied, at the Fergus Falls, Minnesota land office, to make timber-culture entry of the NW. ¼ of Sec. 13, T. 134, R. 45, basing his application upon the alleged facts that the land was excepted from the grant to the State (of Minnesota) for the St. Paul, Minneapolis and Manitoba Railway Company, by reason of the pre-emption filing of one Gunder M. Kallor made for said land June 22, 1871. That a hearing was had on said application before said local land officers on the 26th day of July, 1884, and after the hearing the case and testimony therein was forwarded to and filed with the Commissioner of the General Land Office. That while the case was pending in the General Land Office and undetermined, the land in question was erroneously and through mistake and inadvertence on the 13th day of February, 1889, patented and conveyed to the State of Minnesota, for and on account of said railway company, and the said State on the 13th day of March, 1889, conveyed said land to the railway company. That on the 17th day of June, 1889, the Commissioner of the General Land Office called the attention of the governor of Minnesota to this case and the facts therein, and requested the governor to reconvey or procure the reconveyance of the land to the United States. That afterwards the governor of said State requested the railway company to reconvey and relinquish the land, to the United States for the benefit of said Halvorson, and the company refused to comply with said request. Upon these facts the petitioner asks that a demand be made upon said company for a reconveyance of the land to the United States and in case the company fails to reconvey it, then that suit be recommended to cancel the patent issued for said tract.

Halvorson's application was referred to you for a report and under date of September 26, 1890, you reported thereon, from which it appears that on the 13th day of February, 1889, a patent was issued conveying lands to the State of Minnesota on account of the St. Vincent Extension of the Manitoba Railway Company and by inadvertence the tract applied for by Halvorson was embraced therein, his pending appeal and the pre-emption filing of Kallor having been overlooked.

The tract is within the twenty mile indemnity limits of the grant made by the act of March 3, 1855 (13 Stat., 525), in aid of what is known as the main line of the St. Paul, Minneapolis and Manitoba Railway extending to Breckenridge.

The orders of withdrawal of indemnity lands on account of said grant have been revoked and the lands not embraced in pending or approved selections have been restored.

No claim has ever been made to the tract on account of said main line and further consideration of said grant is unnecessary.

The tract is also within the forty mile limits of the grant to the Northern Pacific Railroad Company, but no selection of said tract has ever been made on account of that grant; the withdrawal under the grant to this road has been revoked and the further consideration of the same is also unnecessary.

Upon the definite location, December 20, 1871, of the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba Railway company, under the act of March 3, 1871 (16 Stat., 588), the tract came within the ten-mile granted limits of said line. The withdrawal on account of the grant to this road was ordered February 6, 1872, received at the local land office February 15, 1872. The tract in question was listed February 7, 1882, as inuring under this grant. The rights of the railway company under this grant attached, if at all, on December 20, 1871, the date of the acceptance of its map of definite location. At that date the filing of Kallor was intact upon the records. It was unexpired and a subsisting claim and served to except the land covered thereby from said grant. Malone *v.* Union Pacific Ry. Co. (7 L. D., 13); Northern Pacific Railroad Co. *et al. v.* John O. Miller (11 L. D., 1); Union Pacific Ry. Co. *v.* Phillips (11 L. D., 163); St. Paul, Minneapolis and Manitoba Railway Co. *v.* Northern Pacific Railroad Co. (12 L. D., 567).

The patent issued to said company was therefore illegally issued, and I concur in your recommendation that suit should be instituted to set it aside, in case the railway company shall refuse to reconvey the land to the United States. However, before such suit can be properly recommended it will be necessary under the second section of the act of March 3, 1887, (24 Stat., 556) to demand from the railroad company a reconveyance of the land embraced in said patent. The demand for reconveyance is a statutory requirement to be made only by direction of the Secretary of the Interior. Union Pacific Ry. Co. (12 L. D., 210).

You are accordingly directed to demand from the St. Paul, Minneap-

olis and Manitoba Railway company (St. Vincent Extension) a reconveyance of the tract embraced in Halvorson's application in accordance with section two of the act of March 3, 1887, and report the action taken thereunder by the company.

The papers in the case are herewith returned to be kept with the files in your office, and in case the railway company shall fail or refuse to reconvey the land to the United States, within the time prescribed by said act, you will return them with your report.

MINING CLAIM—MILL SITE—SECTION 2337, R. S.

HECLA CONSOLIDATED MINING CO.

The building of a tram road, or the grading of the road bed therefor is not such a use or improvement of the land as warrants the allowance of a millsite.

An application for a millsite cannot be allowed where it appears that the improvements are located on the line between two mill sites, without either location possessing the requisite improvements independently of the other.

Secretary Noble to the Commissioner of the General Land Office, January 2, 1892.

I have examined the papers transmitted by your letters of December 17, 1890, consisting of the certificate of incorporation of the Hecla Consolidated Mining Company, organized under the laws of Indiana, with its application for a patent for "The Everest Mill-Site No. 1," situate in T. 3 S., R. 10 W. Beaver Head county, Montana, Helena, Montana, land district, together with a plat of the survey, proof of notices properly advertised and posted, with all the necessary proceedings, including the final certificates of entry, also from the same company like certificate, papers, and proof with application for patent for "Everest Mill-Site No. 2" immediately adjoining No. 1 on the south.

It appears that when the surveys were made the company had expended five hundred dollars on each site, according to the certificate of the surveyor, but the same had been expended in grading half of a tram-way road-bed across a portion of each tract and about two and one-half miles long, worth two thousand dollars. It had expended no money in the erection of any mill or works for the reduction of ores, and you held that the building of a tram-road or the grading of the road-bed was not such improvement or use of the land as would warrant a patent as a mill-site, and you held the entries for cancellation. From this action, the company, in each case, appealed. Your decisions were certainly correct as the cases were presented, but after your decisions, evidence was presented and forwarded to the Department showing that the surveys were preliminary matters, and that the company followed up this initial step by erecting upon the ground surveyed, in the two sites, concentrating buildings, crushers, and the various buildings

machinery and apparatus for crushing and concentrating ores, one half of these being on each site.

I find the same witnesses in both cases making affidavits containing substantially the same statements in each case as to improvements, etc., locating the works on the line between the two sites and crediting to each one half the cost, but not showing any mill or reduction works on either, independent of the works on the adjoining site.

The law (Sec. 2337, Rev. Stats.) provides for the issuance of patents for mill-sites to owners of quartz mills or reduction works, and it limits each location to five acres.

It occurs to me, indeed it seems quite apparent, that this company has erected only the buildings and procured only the machinery necessary to one plant, and has so located two mill sites that this plant is to be in the centre of a ten acre parcel of land instead of being limited to five acres. I find from the evidence before me that it has expended over forty thousand dollars in improvements, but the certificate of the surveyor does not mention them.

They appear to have been made since the survey, it being made in 1880, while the application was not filed until December 26, 1888. I do not, however, find from the evidence that there is any quartz mill or reduction works or any buildings or machinery on either tract that is or can be used as a quartz mill or reduction works independent of the other, as the south line of No. 1 being the north line of No. 2, runs through the buildings, and whether there is any engine or boilers or crushers on either site does not appear from the evidence.

But it is the policy of the government to encourage the development of her mines and the investment of capital necessary to do this, and it may work a hardship to cancel these entries outright, and in view of the facts stated in the supplemental affidavits, I will set aside your decisions and return the cases to your office. You will allow the company to show, if such is the fact, by proper certificate of the surveyor general, as required by section 2325, Revised Statutes, and such other evidence as you may deem proper, that it has a quartz mill or reduction works upon either site, or upon both, as contemplated by section 2337, Revised Statutes.

It is not good practice to consolidate cases that have separate records, but these cases, Nos. 10718 and 10719 are, so far as appears, so intimately connected that I cannot pass upon them separately, and I have considered site No. 2 with No. 1, but if it shall appear that the company has a plant upon each, the records will be kept separate and the cases will not be consolidated. If it shall appear upon investigation that there is but one plant so situated and constructed; that it is on neither site, they will both be canceled, and the company will be allowed to make a new location of a mill-site, not exceeding five acres, embracing such quartz mill and reduction works.

The papers are herewith returned. Both cases may take the same course.

Upon receiving the evidence in the cases with proper certificates of the surveyor general, you will re-adjudicate them upon the lines herein indicated.

OKLAHOMA LANDS—TOWNSITE—HOMESTEAD—COSTS.

KINGFISHER TOWNSITE *v.* FOSSETT.

The fact that an acre of land in a quarter section has been reserved for the location of a land office, is not, in itself, sufficient to impeach the good faith of a homestead entry of such quarter section.

The commutation of a homestead entry under section 21, act of May 2, 1890, cannot be allowed, where it is apparent that the land covered thereby is intended for townsite purposes, and not for agricultural use.

Under section 22 of said act the homesteader may purchase for townsite purposes such legal sub-divisions of his entry as may be required therefor, and perfect title to the remainder under the homestead law on showing due compliance therewith.

In a contest where no preference right is claimed under the act of May 14, 1880, the costs should be apportioned in accordance with rule 55 of practice.

Secretary Noble to the Commissioner of the General Land Office, January 4, 1892.

This case involves title to the NW. ¼ of Sec. 15, T. 16 N., R. 7 W., Kingfisher land office, Oklahoma, embraced in homestead entry No. 5, made by W. D. Fossett, April 23, 1889. The present controversy arose upon an order for a hearing contained in departmental decision of October 1, 1889 (11 L. D., 330), and a brief reference to the former proceedings in the case is necessary to a proper understanding of the matter.

On April 23, 1890, Fossett and one John H. Wood made homestead entries covering the N. ½ of said section 15, and on May 4, 1889, the occupants of the townsite of Kingfisher made application to enter said tract for townsite purposes.

Hearing was duly had, and upon the record as made this Department held, in the decision of October 1, 1890 (*supra*):

> First: Fossett, at the time of making his homestead entry, was a legally qualified homesteader.
>
> Second: He settled upon the said NW. ¼ on April 22, 1889, and prior to the time that a townsite was actually taken.
>
> * * * * * * *
>
> In considering the case of Fossett, as he was the first settler upon the land, and his settlement was followed by residence and improvement, and whatever rights he may have acquired were properly held by your office to have attached at the time of his actual settlement, and not on the following day, when he made his claim of record at the local office. His rights cannot, therefore, be impaired by the subsequent occupation, on the same day, of the land embraced in his entry by the townsite settlers, and had not the integrity of his entry been impeached by said protest, it is clear, that as found by your office, the same should remain intact.
>
> I find, however, among the papers before me, an affidavit made July 23, 1890, by J.

P. Barnard, one of the said protestants against the withdrawal of the appeal here, which charges collusion between one Jillett (Fossett's attorney) the said Fossett, and said mayor and council, and a few of the occupants of said quarter-section, and to which is annexed a paper purporting to be a certified copy of an agreement, made May 5, 1890, by Fossett's said attorney and the 'townsite occupants and inhabitants,' upon the said north-west quarter, to the effect that the lots occupied by said parties would, upon the completion of Fossett's entry for a specified price, be conveyed to him, 'in case no appeal is taken' from the action of your office.

This introduces a new element into the case, indicating that Fossett did not make his settlement in good faith for homestead purposes, but for speculation, which should, in my opinion, be made the subject of inquiry, to the end that the validity of his entry may be properly determined. You will accordingly direct that a hearing be had, at which testimony will be taken for the purpose of ascertaining whether or not he has made or authorized any agreement for the sale of the lands, or any part thereof, or whether he made the entry for speculative purposes or in good faith as a homesteader. Should it be satisfactorily shown that Fossett has made, or authorized any such agreement, or that his entry was speculative, then his entry must be canceled, otherwise it will stand subject to his compliance with the law.

By this decision the entry of Wood was canceled.

This hearing in relation to Fossett's entry took place at the local office in November 1890, and upon the testimony the local officers rendered their decision, December 13, 1890, recommending that the contest be dismissed, and that the entry of the defendant be held intact. In said decision it was found:

1. That the said defendant, William D. Fossett, did not make or authorize any agreement for the sale of the lands covered by his homestead entry, or any part thereof, in the manner and upon the conditions named in the affidavit of the said protestant, J. P. Barnard.

2. That the said alleged agreement between one F. E. Gillett and the mayor and council of Kingfisher, was never accepted or executed by the said mayor and council.

3. That the homestead entry of the said defendant, William D. Fossett, was not speculative, but made in good faith in compliance with the homestead laws governing the settlement of Oklahoma.

Upon appeal, your decision of June 3, 1891, after reviewing the testimony, sustains that of the local office, and incidentally passes upon the question of the apportionment of costs incurred at the trial of the case, which you held should be governed by the rule laid down in the case of Milum *v.* Johnson, 10 L. D., 625. You also considered the commutation proof submitted by Fossett June 12, 1890, under the provisions of section 21 of the Territorial act, approved May 2, 1890 (26 Stat., 81), and as said proof disclosed the fact that a portion of the tract in question was *then* actually "occupied by townsite settlers," such proof was rejected, and he was required to comply with the requirements of the second proviso of the 22d section of said Territorial act.

It was further held that

Should he desire to purchase a portion only of said tract upon the terms therein prescribed, he will be permitted to do so. In that event, however, his entry, as to the remaining portions of the land covered thereby, will be canceled.

From your decision both parties appeal, the townsite from the finding as to the validity of Fossett's entry, and Fossett from the apportionment of costs and the holding that in the event that he purchase only a portion of the tract under section 22, as before set forth, that his entry must be canceled as to the remainder.

In addition to the briefs filed in the case, an oral argument was granted upon the request of the townsite.

From the foregoing, it will be seen that the allegations contained in the affidavit by J. P. Barnard were the moving cause of the investigation directed, and the examination of the case seems to have been conducted solely with reference thereto.

Under the order of this Department, however, an opportunity was offered the settlers to introduce any other evidence tending to show speculative intent on the part of Fossett in the making of this entry, but no such testimony was offered.

Both your office and the local office find as a matter of fact, that Fossett did not enter into or authorize the agreement referred to in said affidavit, and further find that his entry was not speculative, but made in good faith, and from a careful examination of the testimony I agree with said findings.

In the oral argument herein, counsel for the townsite urged that its case was greatly weakened by the exclusion of certain testimony on the re-trial of the case, and it was for the first time claimed, that the fact that one acre had been reserved for a land office in this quarter-section was, under the holding in the case of Guthrie townsite *v.* Paine et al., 12 L. D., 653, sufficient to establish the fact that the homestead entry made for such quarter-section was for a speculative purpose.

The opinion of the local officers states as follows:

> The testimony in this case is voluminous, and a large portion of it is wholly irrelevant and immaterial, and could only have been admitted at all, under the wide latitude that local land officers are required to extend to parties to controversies of this character. It has been the aim of this office to secure the most thorough investigation of all facts, in connection with this case, and in keeping with this purpose witnesses, especially for the plaintiff, have been allowed the greatest possible freedom in testifying as to circumstances, suspicions, motives, conclusions, conversations, rumors, street-gossip, etc.

An examination of the case shows that a large amount of irrelevant and immaterial testimony was admitted, and as to that excluded, it generally consisted of hearsay testimony and such other testimony as would have been excluded in any court.

I must therefore hold that there was no error in the conduct of the case, and that the charges made against the entry have not been sustained.

As to the application of the decision in the case of Guthrie townsite *v.* Paine et al. (*supra*), to the present case, it seems that counsel has misconstrued the holding in that case by magnifying the effect of what

was therein stated relative to the reservation of a tract in a quarter-section for land office purposes. It is true that it is stated therein that

> Every intelligent person is aware of the fact that for the last half century the establishment of a United States government land office was equivalent to the foundation of a town, or city, of greater or less magnitude; whenever a spot was selected for a land office, that became the center of population; it became a town, and the land ceased to be in a condition where it could be used for agriculture, but it became valuable for townsite purposes.

While the establishment of a land office is one of the indicia of a town which all homestead claimants are bound to take notice of, yet this idea is not the pivotal one on which that case turned. The fact that an acre had been reserved in the vicinity of the land entered for a land office was but one of the minor elements in the case, and not the main point of that decision. It was a circumstance, which, when taken in connection with all the other and more important facts and circumstances, actions and motives of the applicants, clearly determined their purpose and intent in making the entries then under consideration.

It will not do to enlarge upon a single idea, or an isolated sentence to rule upon the rights of parties, but the case must be considered as a comprehensive whole, in order to arrive at an intelligent understanding of what was decided.

The difference in the two cases is determined by the intent, design and purpose of the parties interested, when viewed in the light of their conduct and the circumstances surrounding each case.

All the testimony taken at the first hearing bearing upon the good faith of Mr. Fossett was considered when the case was first before this Department. It was then held that he was a qualified homesteader, and having first lawfully appropriated this tract under the homestead law, should not be required to surrender his rights to the claim of subsequent settlement of the townsite occupants, unless he had made the contract referred to in the affidavit by J. P. Barnard, or that his entry was speculative.

These questions were referred to the local office for trial.

The fact that an acre had been reserved in the quarter-section entered by Fossett for a land office was well known to the Department when the case was first considered, and had that fact of itself been considered sufficient upon which to base a finding of speculative intent in making entry for such quarter-section, there would have been no necessity for a further hearing; indeed, the order for a hearing, when viewed in such a light, was unjust, as it could result only in increasing the already great expense of this contest.

The local officers, as well as yourself, decided the case upon the second hearing in favor of the entryman, finding, as before stated, that Fossett did not enter into or authorize the agreement referred to in the affidavit by J. P. Barnard, and that his entry was not speculative, but made in good faith.

From a careful review of the whole matter, I do not feel justified in disturbing your conclusions.

But a small portion of this tract is actually occupied by townsite settlers, and they do not appear to have been encouraged in going upon the land by Fossett.

It would seem that this is a case clearly under the second proviso to section 22 of the act of Congress, approved May 2, 1890 (*supra*), which provides:

> That in case any lands in said Territory of Oklahoma, which may be occupied and filed upon as a homestead, under the provisions of the law applicable to said Territory, by a person who is entitled to perfect his title thereto under such laws, are required for townsite purposes, it shall be lawful for such person to apply to the Secretary of the Interior to purchase the lands embraced in said homestead or any part thereof for town-site purposes. He shall file with the application a plat of such proposed townsite, and if such plat shall be approved by the Secretary of the Interior, he shall issue a patent to such person for land embraced in said townsite, upon the payment of the sum of ten dollars per acre for all the lands embraced in such town-site, except the lands to be donated and maintained for public purposes as provided in this section. And the sums so received by the Secretary of the Interior shall be paid over to the proper authorities of the municipalities when organized, to be used by them for school purposes only.

In the case of Orlando Townsite *v.* Hysell *et al.* (13 L. D., 99), it was held that the commutation of an entry under section 21, act of May 2, 1890, can not be allowed where it is apparent that the land covered hereby is intended for townsite purposes and not for agricultural use. Under section 22, of said act, a homestead entryman may purchase for townsite purposes such legal subdivisions of his entry as may be required therefor, and perfect title to the remainder under the homestead laws on showing due compliance therewith.

The rejection of Fossett's proof was therefore proper, and he will be required to proceed as above indicated.

The Kingfisher townsite application for the tract covered by Fossett's entry will therefore stand rejected.

This disposes of all questions between the parties, except the matter of the apportionment of costs.

This is not a contest where any one is claiming a preference right of entry under the act of May 14, 1880, and rule 55 of practice, provides: "In other contested cases each party must pay the costs of taking testimony upon his own direct and cross examination."

This was the rule followed in the case of Milum *v.* Johnson (*supra*), to which you refer, and is, I think, applicable to the present case.

Your decision is therefore, with the above modification, affirmed.

RAILROAD LANDS—SECTION 4, ACT OF MARCH 3, 1887.

DRAKE ET AL. *v.* BUTTON.

One who has contracted to sell land purchased from a railroad company, to which title subsequently fails, is a proper party to perfect title under section 4, act of March 3, 1887, in order that he may comply with the terms of the contract.

The right of a purchaser from a railroad company to perfect title under said section, is not defeated by the fact that said purchaser is the president of the company, and trustee for the bond owners who hold a mortgage on the lands of the company, where there is no evidence of bad faith or advantage on the part of said purchaser as against the company or said bond owners.

The right of a purchaser from a railroad company to perfect title under said section is intended to cover cases where the lands were unearned under the grant, and erroneously patented or certified.

Secretary Noble to the Commissioner of the General Land Office, January 2, 1892.

I have considered the case of E. F. Drake and E. W. Sargent *v.* A. G. Button, on appeal by Drake from your decision of July 1, 1889, holding that his purchase was void, as made from the Sioux City and St. Paul Railroad Company, of lots No. 1 and 4 and E. ½ of SE.¼, SE.¼ of NE.¼, Sec. 34, T. 93 N., R. 48 W., Des Moines, Iowa, Land District.

The record in the case may be stated briefly as follows: These lands are a part of the lands which were patented to the State of Iowa June 17, 1873 under the act of May 12, 1864 for the Sioux City and St. Paul Railroad Company. They were held by the State, in trust for the company, until 1887, when they were, upon the adjustment of the grant in accordance with the decision of the United States supreme court, reconveyed to the government by the governor of Iowa. They were, on September 12, 1887, restored to the public domain and opened to entry by direction of the Secretary of the Interior (6 L. D., 47).

On March 5, 1888, Button made homestead entry for lot 1 and SE. ¼ of NE. ¼ of Sec. 31, being part of said tracts.

On December 7, 1887, E. F. Drake made an application for patent for the lands first herein described, under the 4th section of the act of Congress of March 3, 1887 (24 Stat., 556) supporting the same by affidavits tending to show his right thereto.

It appears that prior to the receipt of this application by your office, it was in receipt of letters from E. W. Sargent who claimed to be the owner of said land, and soon thereafter of a letter from L. Harrison, Esq., attorney for Buttou, claiming part of the land for his client by virtue of his homestead entry, and your office, on June 22, 1888, ordered a hearing to determine the rights of the respective parties.

A hearing was ordered accordingly, and all parties having been notified, appeared at the local office on September 27, 1888, and the testimony having been taken, the local officers disagreed in their conclusions of law and fact. The register found that Drake was a purchaser

in good faith, and Sargent had not purchased said lands of the company, while the receiver found that Drake was acting in the capacity of "president of the (railroad) company, and was a trustee in the matter," and that his purchase was void, and that he having agreed to sell the land to Sargent, that this agreement was also void.

On July 1, 1889, your office, upon consideration of the case, found that Drake was a director and president of the railroad company, and also trustee for the bond owners in the mortgage made to secure the bonds, and that as a matter of law, his purchase was *void ab initio*.

You found that his knowledge of the condition of the land, its legal status, etc., was such that he could not be a bona fide purchaser, upon whom the act of March 3, 1887 confers the right to a patent, and that if he were such, that he had sold to Sargent, and that Sargent was the proper party to the case, and that Drake had no right to a patent. From this ruling and decision, Drake appealed.

The testimony shows that this land in controversy was within the indemnity limits of the grant to said Sioux City Railroad Company. It was selected in lieu of land lost in place. The selection was approved by the register and receiver at Sioux City land office, and affirmed by the General Land Office, and on June 17, 1873, was patented to the State of Iowa by the President of the United States, for the benefit of the Sioux City and St. Paul Railroad Company.

The railroad company had an officer known as its "Land Commissioner" who was charged with the duties of selling its lands, selecting lieu lands and looking generally to the interest of the company in the matter of the lands granted to it. The company, it appears, bonded the road and its granted land to raise money to build the road, and all its lands were mortgaged to secure the bonds. Two persons were made trustees for the bond holders. By the terms of the mortgage, the lands held by the company were to be, by its commissioner, sold from time to time, and upon the sale of any tract, the purchase money was to be applied in payment of the bonds, and when so applied, the trustees were authorized to release the specified tract.

Elias F. Drake was a director and president of this corporation from 1871 to date of hearing herein. He and Alexander H. Rice were named as trustees for the bond owners and Edward Berreau was land commissioner of the company in 1875.

On October 25, 1875, Drake bought of the railroad company through said land commissioner, lots 1 and 4 and E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sect. 31, T. 93 N., R. 48 W. 5 P. M., at and for the consideration of $1,400, and paid the purchase money which was applied on the bonds, and the lands were released from the mortgage. He took a memorandum of agreement from the company, acknowledging the receipt of the money and binding it to make a deed to him, his heirs or assigns, upon request, at the land office of the company. Afterward, the board of directors approved the sale and a warranty deed was executed and delivered to Drake.

On December 3, 1875, Drake made an agreement with E. W. Sargent, by which he obligated himself to convey to Sargent the said lands for $2,000, he to pay $200 of principal, and $126 interest in advance on the deferred payments, the remaining $1,800 to be paid in six annual payments of $300 each with seven per cent interest, payable December 3d of each year.

It was stipulated that Sargent should take immediate possession of the land, and he was to pay the taxes thereon, and have the use of it, and if he failed to make the payments, any improvements placed upon the land were to remain. The payments were to be made punctually and strictly according to the letter of the agreement, "the time of payment being of the essence of this contract," and upon full payment, Drake was to make a deed for the premises.

Afterward, to wit, February 14, 1879, Sargent having made no further payment, a modification of said contract was made in writing as a part of the agreement, by which it was stipulated that as the State of Iowa had not made a deed to the railroad company, grantor of Drake, the times of payment of the several installments should be suspended, and the debt should not draw interest until such time as the railroad company should receive a deed for the land, at which time the payments were to commence drawing interest and time should then begin to run on the contract.

There has been much contention about the lands granted by the act of May 12, 1864 (13 Stat., 72) and the Sioux City and St. Paul Railroad Company and the Chicago, Milwaukee and St. Paul Railroad Company had a suit in court, involving the title to the lands granted each by said act, which suit was finally decided by the United States supreme court in March, 1886 (117 U. S., 406). The roads of these two companies cross each other, and the litigation arose out of the respective claims of the companies to the lands within the overlapping limits of the grants.

Upon the rendition of the judgment of the court, the governor of Iowa reconveyed to the United States 43,647.63 acres of land, including the land in controversy, that had been erroneously patented to the State in trust for said Sioux City and St. Paul Railroad Company, and on July 26, 1887, Secretary Lamar, in a letter to Commissioner Sparks, discussed the matter at length, and it is unnecessary, at this time, to go into a history of the grant or the several phases of that case. It will suffice to say that by said letter it was directed that the land so reconveyed be thrown open to settlement and entry.

By the 4th section of the act of March 3, 1887 (24 Stat., 556) it was provided, *inter alia*,

> That as to all lands except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid and which have been sold by the grantee company to citizens of the United States . . . . the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of purchase at the proper land office, &c.

Drake claims that under this section of this statute, he is, upon the facts shown, entitled to a patent for the lands in controversy.

The contract between Drake and Sargent was, by agreement of the parties, suspended until Drake's title should be completed, and this application by Drake is evidently made for the purpose of placing him in a position to comply with the terms of that contract. Under these circumstances, I think Drake should be considered a proper party to perfect title under the provisions of said act.

You hold that as Drake was a director and president of the railroad company, he could not be a purchaser, because he was a trustee, the corporation being *cestui que trust*, and in support of this view, you quote from Perry on Trusts (par. 207, p. 249) as follows:

> Contracts of trustees are of two classes. One class consists of contracts made by trustees with themselves or with a board of trustees or directors of which they are members. These contracts are void from the fact no man can contract with himself. . . . The other class of contracts is where a trustee contracts with the *cestui que trust* or a third person. (You say) It is clear, I think that he was of the class first mentioned and that his purchase was void *ab initio*.

It is very questionable whether Drake was of the first class.

The author adds to the matter quoted by your office, as follows:

> These contracts are not void, as where a director makes a purchase of property from the corporation itself acting independent of the directors the contract is not void but the same rules apply that apply to other trustees purchasing of the *cestui que trust*. The burden is upon the trustee to vindicate the transaction from all suspicion.

In Angell and Ames on Corporations (10 Ed., Sect. 233), it is said:

> By the common law and by the civil code, too, as a corporation aggregate may contract with persons who are not members so it may contract with persons who are members of it and the contract is not on this account invalid (Note 13 Mass., 406, 4 Blackf., 267–15 Vt., 522.)
>
> And though the member of the corporation be also one of the trustees of the corporation it would seem that this would not incapacitate him from contracting with it, . . . in a case where there is no evidence of such gross partiality in the contract as amounts to fraud (Note 19 Vt., 191–18 Vt., 409).

In Buell *v.* Buckingham (16 Iowa, 284, 85 Am., 516) three directors of a corporation, being a majority of the board, sold to one of their number (Buell) a mill belonging to the corporation. Certain creditors, upon judgments obtained against the corporation, levied upon the mill and sought by injunction to restrain the execution of the deed by the corporation to Buell.

The court said:

> There is no showing of any actual fraud on the part of Elijah Buell, in his purchase of the property from the board of directors . . . The rule is well settled, that a purchase of property by a trustee of his *cestui que trust* is not void in equity but only voidable at the election of the *cestui que trust*. A court will scrutinize such a transaction closely and will not only set it aside for fraud, but will do so upon a very slight showing of advantage, or bad faith.

Judge Dillon in a separate opinion said:

> The purchase . . . . is free from any taint of actual fraud. . . . . Being an officer in the corporation did not deprive Buell of the right to enter into competition with other creditors, and run a race of diligence with them, availing himself in the contest of his superior knowledge, and the advantage of his position to obtain security for the payment of his debt. . . . The act of Buell was not legally or constructively fraudulent in consequence of his being an officer or member of the corporation. See Whitwell *v.* Warner 20 Vt. 425 444; Angell and Ames Sect. 390—Sargent *v.* Webster 13 Metcalf 497—1st Spears Equity 562. . . . . Now the purchase of property by an agent or trustee or by any person acting in a fiduciary capacity is not void *ab origine* and absolutely. It is voidable only. It is valid in equity as well as law, unless the parties interested repudiate it, or complain of it; etc.

A great number of authorities are cited in support of this doctrine. This is in accordance, too, with the doctrine laid down by Tiffany and Bullard in their Law of Trusts and Trustees. On page 553, they say

> The contract must be one in which there is no fraud, no concealment of information acquired by him in his character as trustee, and no other advantage taken.

It thus appears to be well settled that, notwithstanding the relations of *trustee* and *cestui que trust* existed between Drake and the corporation, yet if the purchase was absolutely free from any taint of fraud, it should be upheld. Being voidable only, for some reason other than the simple fact of the fiduciary capacity in which Drake stood, some reason must be assigned other than that, and some facts proven reflecting in some way upon the *bona fides* of the transaction. Nothing is charged or proven or attempted to be proven that even tends to show fraud or deceit or overreaching by Drake in the purchase. For aught that appears, he paid the listed price for the land, what any one could have bought it for, and probably all it was at the time worth, the purchase money ($1,400.00) was applied upon the bonded indebtedness of the company. The bondholders are making no complaint, nor charging their trustees, Drake and Rice, with any laches, so I do not see that Drake's trusteeship for the bondholders cuts any figure in the case.

When the lands which had been certified to the State in trust for the comqany reverted to the government by the reconveyance by the governor of Iowa, they came free from incumbrance, unless incumbered by a sale made by the company, to a purchaser in good faith, while they were held by the State, for while they were so held by the State, the equitable title was in the corporation, and it could sell its equity to any one. The purchaser, of course, would take only such equitable title as the company had, subject to its infirmities, but Congress came to the relief of purchasers in good faith, and by the act of March 3, 1887, *supra* so far protected their equities as to give them a right to perfect their titles, notwithstanding the failure of the title of their grantor.

It is said in your decision that the position he occupied, his relation to the company and these lands, would enable him to know all about the status of the land, that it was liable to forfeiture, etc., and you say "Drake was not the *innocent* bona fide purchaser contemplated by said act and is not entitled to a patent thereunder."

It should be borne in mind that at the time of Drake's purchase (1875) the question of how much land this company would receive was not settled, in fact at that time it had scarcely been discussed. The tracts within the limits of this grant overlapping the limits of the grant to the Chicago, Milwaukee and St. Paul were in dispute. What it would lose in place or in the indemnity limits was unknown, and it was not known whether the tract it might lose here would be made up by other lands so as to make good the one hundred sections for each ten miles of road constructed, as provided by the granting act, and it was not until the decision of the supreme court in 1886 that any one knew the status of the lands patented to the State in trust for the railroad company. This want of knowledge caused the local officers, the Secretary of the Interior, and the President of the United States to mistake the number of acres that it was entitled to, and it will not do to hold Drake to a degree of knowledge it was impossible for any one to obtain.

In 1874, the legislature of Iowa authorized and directed the governor of Iowa to certify to the Sioux City and St. Paul Railroad Company "any and all lands which are now held by the State of Iowa in trust for the benefit of said company." It is quite difficult to see how Drake's position as president of the company could enable him to foresee the end of litigation not yet begun and the results of objections to the title to this land, which objections had not been made, much less could he predict the action of Congress in relation to the lands involved.

Your decision is founded in part upon the fact that this land is south of the terminal line even of the fifty-six and one-fourth miles of constructed road, and that no rights could attach to the land, and that the land was liable to forfeiture at any time after the company's failure to build the line of road, within the ten years' limitation. This being granted, the ten years had not expired when Drake purchased the land, as the State did not accept the grant and provide the necessary legislation for carrying out the act of Congress, until in September, 1866. Furthermore, this act of Congress of March 3, 1887 was passed to meet cases where the lands were unearned and had been "erroneously certified or patented." If this land had been earned by the company, and its rights had so attached that it was not liable to forfeiture, this action would never have been instituted, so I do not consider the fact that the land, on final adjustment of the grant, was found to be outside of the terminal line, and that it had not been earned and was therefore erroneously conveyed to the State of Iowa, affects the rights of Drake, under the statute.

The entryman, Button, is not in position to complain. He had lived with his father several years in the immediate vicinity of, and knew Sargent was in possession of the land which he (Button) entered. He knew Sargent lived on a "forty" adjoining, and that he had broken part of the land in controversy and claimed to own it by purchase from

Drake, and he went upon it in disregard of Sargent's rights, whatever they might prove to be.

I have carefully examined the entire record and the decisions bearing upon the questions which have, from time to time, affected the status of the lands, and fully considered the evidence in the case, and I do not find anything that justifies me in refusing Drake a patent for the land he bought and paid for, nor do I find any breach of good faith toward the company, of which he was the president, or the bondholders for whom he was trustee, nor that he overreached, deceived or defrauded the company in making the contract through its "land commissioner." I am therefore compelled to disagree with your findings of fact and conclusions of law.

Your decision is accordingly reversed, and Drake will be allowed a patent for the land by him purchased, according to the provisions of the statute.

SCHOOL LANDS—INDEMNITY SELECTION.

BUSH *v.* THE STATE OF WASHINGTON.

Where a misdescription of lands taken as school indemnity occurs through mistake of the selecting agent, and the error is corrected by the local office, so as to properly describe the lands intended to be selected, and the State ratifies such action prior to the intervention of an adverse claim, the selection will not be disturbed.

Secretary Noble to the Commissioner of the General Land Office, January 4, 1892.

On April 21, 1890, George S. Bush made application to file a preemption declaratory statement for the E. ½, NW. ¼ and E. ½, SW. ¼, Sec. 2, T. 31 N., R. 1 E., Seattle, Washington.

The same was refused by the register "for the reason that the tract applied for is embraced in list No. 4 of indemnity school selections." Upon appeal, you, by your decision of June 14, 1890, affirmed that judgment and he brings this appeal therefrom, assigning the following grounds of error:

1. In deciding that said tract is embraced in list No. 4 of indemnity school selections.
2. In deciding that the tract in question was "intended to be selected" as indemnity school land.
3. In deciding that list No. 4 is a valid selection so as to reserve the land therein enumerated from settlement.
4. In deciding that the officers of the land office have power to make indemnity school selections.

The facts, as disclosed by the record, are as follows:

On October 22, 1870, S. D. Howe, on behalf of the commissioners of Island county, filed list No. 4 of indemnity school selections in the Olympia (now Seattle) land district. On the same day the register and

receiver certified that the "selections are correct, and that there are no adverse interests conflicting therewith."

No objection is raised as to the validity of the basis, and it is shown that the deficiency in the township is six hundred and forty acres. The selections to make good this deficiency were lots 1, 2, 3, 4, 5, and the W. ½ of E. ½ of Sec. 2, T. 31 N., R. 1 E.; the S. ½ of NE. ¼; the NE. ¼ of NE. ¼ of Sec. 3, in same township, and lot No. 1, NW. ¼ of NE. ¼ in Sec. 6, also in same township.

There is no technical W. ½ of E. ½ of Sec. 2, since that area is in part covered by the donation claim of John Keineth, which extends 29.43 chains west of the eastern line of the section. That part of the W. ½ of E. ½ of Sec. 2, not covered by Keineth's donation claim, is surveyed as lots 2, 3, 4, and 5, which, as above seen, were selected in list 4.

It is manifest that the agent made a mistake in the description of the selected lands, since the W. ½ of the E. ½ of Sec. 2 (had the lines of the public survey been regularly run) embraces all of lots 2, 3, 4, and 5, and thus the selections of said lots and the said W. ½ of the E. ½ were made to cover in part the same land. It appears, however, that the register and receiver discovered the mistake prior to the time Bush filed his application, and had noted on the plat books the lands selected in Sec. 2 as lots 1, 2, 3, 4 and 5, and the W. ½ of that section.

While there was some irregularity in thus making the selection, yet, inasmuch as the error of the selecting agent was at most a clerical one, and since it is manifest that he intended to select the land in controversy, and since the lands were selected as indemnity for lands lost in place to the State, and the State intended to so select and acquiesced in and ratified the action of the local officers, prior to the date of this application, their action should be held to be that of the State.

The decision appealed from is, therefore, affirmed.

PRE-EMPTION—SECOND FILING.

FRANK MITCHELL.

A second pre-emption filing may be allowed where the first was abandoned on account of threats and actual violence.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 5, 1891.

Frank Mitchell has appealed from your decision of October 12, 1889, affirming the action of the local officers in rejecting his final proof based upon his pre-emption declaratory statement, No. 8300, for the W. ½ of the SW. ¼, the SE. ¼ of the SW. ¼, and the SW. ¼ of the SE. ¼, of Sec. 9, T. 3 S., R. 31 E., Le Grand district, Oregon.

The ground of said rejection was that he had made a former pre-emption filing, in Union county, in said State.

He admits the fact, but contends that he was justified in abandoning his former claim. He states, under oath:

> I built a house on the same, did some fencing, established an actual residence thereon, and so resided for about eight months; that during such residence I was told by several stock-men in the neighborhood that sheep and sheep-herders were not allowed there, and the best thing I could do was to get out; (I had my own sheep, grazed them on my own place, and they molested no one). A few days afterward, when coming to my house on the claim I found a notice posted on the door which read, "Mr. Sheep-herder, you leave these premises—they are occupied;" I paid no attention to it, having been before threatened several times. On the third day after seeing this notice I returned to my house—or where my house had been—and found the same entirely destroyed, with everything I owned in the world. . . . . Beginning to be alarmed, and knowing my life was not safe, I started that night with my sheep and traveled over four miles through the mountains, to seek safety, shelter, and food, and was advised by "knowing ones" never to return—which I have not done and would not do under any consideration. . . . . That it is impossible for me to corroborate this affidavit, as the only parties that seemed friendly to me there were three; two of these have left the country, their whereabouts being unknown to me, and the other is dead. . . . . I have never had the benefit of my pre-emption right in any way, except as herein stated.

The final proof to which this affidavit is attached shows that the claimant is a single man; that he had actually resided on the land from July 26, 1887, until date of proof, July 19, 1889 (two years, lacking one week); that he had been absent working, and boarding where he worked, for three and a half months from November, 1888; about two months from April, 1889; and was herding his sheep in the mountains for six weeks of hot weather in June and July, 1889—making an aggregate absence of about seven months in the two years covered by his proof; that these were temporary absences, as he had no home elsewhere than on his claim; that his house is a frame house, with a fireplace, door, window, and shingle roof, worth $150; that his claim is "all fenced with one wire and two poles, the posts set fourteen feet apart, $470"—total $620; that said house contains, and has contained since he estabilsed residence therein, a "bed, bedstead, table, chairs, and cooking utensils." As to cultivation he says (in the affidavit accompanying his appeal):

> The land is situated far in the mountains (foot-hills); it is rough, rocky, and valuable only for its grazing advantages, and there is no tillable land on it, and this is the reason I did not and could not cultivate any of it except a small patch of vegetables for my own use.

The main question at issue is, whether the claimant can properly be allowed, under the circumstances, to make a second pre-emption filing.

I do not find reported any case in which a person who had left, under duress, a tract on which he had made pre-emption filing, afterward applied to make a second filing. There are cases, however, where persons who abandoned their homestead entries under circumstances substantially similar to those in the case at bar, applied to make a second homestead entry.

Jackson C. Brown (8 L. D., 587,) having made a homestead entry, "thereafter built a house and endeavored to improve the land involved, but was prevented by a party who claimed to have purchased some improvements on the land." After making repeated efforts to comply with the law, he, believing his life to be in danger, relinquished said entry to the United States. Nothing is said as to *how* he was prevented from improving the land, or what was the character of the threats made, if any, that led him to believe that his life was in danger. It does not appear that his house was burned down. The statement of facts is not so full and specific, and the actual violence and loss inflicted does not appear to have been so gross, as in the case at bar. Brown was allowed to make a second entry. In the case of Thurlow Weed (8 L. D., 100), a second entry was allowed where the entryman relinquished because of "his limited ability to carry on a contest, of the dissuasions of his wife, of the advice of his friends, and because it was all along growing more apparent that the threatened contest was liable to engender the most bitter feelings between neighbors who ought to be friends." Charles Wolters (8 L. D., 131,) made homestead entry of a tract which, as he afterward discovered, had been settled upon by a man who had long before filed pre-emption declaratory statement for the land, but who had been, by reason of extreme poverty, unable to prove up and pay for the same, although the time for so doing had expired; here was no duress, but the Department held that it would be unjust that Wolters should suffer loss on account of his kindness in relinquishing in favor of the earlier settler, and allowed him to make a second homestead entry.

As the statutory provisions relative to making a second entry were (previous to the act of March 2, 1889—25 Stat., 854,) substantially the same under the homestead law and the pre-emption law, in my opinion the rulings of the Department in the matter of homestead cases should apply also in cases of application to make second pre-emption filing—where such application was made prior to the repeal of the pre-emption law (26 Stat., 1095).

Your decision holding Mitchell's entry for cancellation because of his having made a former filing is reversed. As your decision expressly disclaims entering into the question of his compliance with the requirements of the pre-emption law, the papers are returned herewith, and you will pass upon the proof on file in the case.

RIGHT OF WAY—DITCH—RESERVOIR—SURVEY.

ARMSTRONG AND OGLE.

In the survey of a ditch the termini should be definitely fixed with reference to a corner of the public survey; and at each point where the ditch crosses the lines of the public survey, the distance to the nearest established corner of said survey should be noted on the map. The sub-divisional lines of the section (quarter-quarter) should be laid down on the map, and the field notes of survey accompany the same.

In the survey of a reservoir the initial point of the survey should be determined by reference to a corner of the public survey, and in running the boundary line the points where it crosses the line of the public survey should be marked by a stake or a stone, and the distance to an established corner of the government survey, lying without the reservoir, noted on the map.

A map drawn to a scale of less than 2,000 feet to the inch may be accepted in the survey of a ditch or reservoir, if such map is not inconveniently large.

The certificate of the register should show that a true and correct duplicate of the map of survey has been filed in the local office.

Secretary Noble to the Commissioner of the General Land Office, December 12, 1891.

I am in receipt of your letter of October 19, 1891, transmitting an application of Armstrong and Ogle, partners etc., for right of way for a ditch, and for land for four reservoirs, the latter being situate in the W ½ of NW ¼ of Sec. 23, and E ½ NE ¼ of Sec. 22, in T. 25 S, R 67 W, Pueblo, Colorado, land district; the said ditch extending from near the northeast corner of the NW ¼ of NW ¼ of Sec. 23 of said township and range, to a point in the SW ¼ of Sec. 24, in the township west of that named, the number of which is not given.

Your letter says you submit a map, which you approve, and say is "filed in duplicate in the U. S. Land Office at Pueblo, Colorado," but you transmit only one map to the Department and do not account for the copy or duplicate, and the register at Pueblo does not show that a duplicate was filed in his office; on the contrary he certifies that "this map," the one transmitted, was filed in the Pueblo, Colorado, Land Office.

There are four reservoir sites located, on said map, in the E ½ of NE ¼ of Sec. 23, and W ½ of NW ¼ of Sec. 22, but these do not appear to have been surveyed. There are no boundary or meander lines given with any accuracy, or that can by any thing shown on the map be retraced in after years, and no point is, by any line, connected with the public surveys or any monument that is indicated on the map. There is actually nothing but an irregular line drawn around each space on the map which is numbered and called a reservoir site. On the map there is a statement of the number of acres in each, and the supposed capacity of each in cubic feet, but there is nothing to show that this is not merely a supposition. There does not appear to have been any line traced on the land, or any station or corner established and "witnessed,"

by which an adjoining proprietor can by any known process determine the boundary line of either of the parcels sought to be appropriated. So far as appears by the map, the survey of the reservoirs is a nullity.

There is an affidavit attached to the map, executed by Lavinus M. Sperry, in which he says he was employed by Charles E. Armstrong and Henry A. Ogle to survey the line of route of said ditch and the sites of the reservoirs; that the survey covers a distance of five and one-fourth miles, "beginning and ending as shown on the annexed plat." He gives the dates when the survey was made and says the ditch and reservoir "are accurately represented on the accompanying map."

The joint and several affidavit of Armstrong and Ogle is attached, corroborating the former affidavit, and they say they adopted the said route of ditch and said reservoir sites September 1, 1891, etc.

An inspection of the map shows that one end of the said ditch lies in the NE ¼ of NW ¼ of Sec. 23, T. 25 S., R. 67 W.; the other end lies in the SW ¼ of NE ¼ of Sec. 24 in the township adjoining on the west, the number of which is not given, as before stated, but neither terminus of the ditch is definitely fixed or located with reference to the public surveys, nor is the survey of the ditch in any way connected with the public surveys at any point.

In the case of Farmers Canal Company (13 L. D., 166) it was said:

> That these termini should be definitely fixed and described, is equally as important in these cases as in those of railroads, where it is absolutely required as a pre-requisite to the approval of a map. Rio Grande Southern R. R. Co. (12 L. D., 92); Continental Railway and Telegraph Co. (13 L. D., 18).

In addition to the termini being definitely fixed, with reference to a corner of the public survey, the line should be accurately surveyed and field notes of the survey should accompany the map. At each point where the said ditch crosses the lines of the public survey the distance to the nearest established corner of the public survey should be ascertained and noted on the map. The quarter-quarter lines should also be laid down on the map.

The scale on which the map is drawn is not according to that adopted for railroad and canal surveys, which is not less than 2,000 feet to the inch, but this is not as applicable to reservoirs, especially where they are small as those in this case, as it is to canals, and as this map on the scale of 800 feet to the inch is not inconveniently large, it may be accepted on that scale, as this will enable the surveyor to lay down on the map the "meander" or boundary lines of the reservoirs, when he shall have surveyed them as herein indicated. The width of the ditch should also be given.

In surveying the reservoir sites the initial point of the survey should be fixed and determined by reference to a corner of the public survey, and in running the boundary line the points where it crosses the lines of the public survey should be marked by a stake or stone, and the distance to an established corner of the government survey, lying without

the reservoir, should be ascertained and noted on the map. As the corners within the reservoir will be "lost" when submerged the distance to them is unimportant.

This map cannot be approved in its present form, and is therefore, with the papers in the case, returned to your office, that the parties may have a proper survey and map made. When a proper map is prepared, an exact duplicate of it should be made and filed, and the register should amend his certificate to show that a correct and true duplicate of the map has been so filed in the office.

RIGHT OF WAY—CANAL—RESERVOIR—SURVEY.

ALBERT J. BOTHWELL.

In the survey of a canal its width, and the course and distance of the line of route should be noted and duly shown.

Reservoirs should be so surveyed as to include only the land covered with water, as the right of occupancy is limited to such land, and fifty feet of marginal land for use in construction and repairs.

In the survey of canals and reservoirs the variation of the magnetic from the true meridian should be noted, and the field notes accompany the map and duplicate.

Secretary Noble to the Commissioner of the General Land Office, December 12, 1891.

I am in receipt of your letter of October 23, 1891, transmitting a map of a canal and certain reservoirs, located by Albert J. Bothwell, which canal and reservoirs are called the "Medicine Bow Irrigation System," situate in the county of Carbon, State of Wyoming, together with his application for the right of way over certain lands for canal purposes, and the right to overflow certain lands for reservoir purposes under sections 18 and 21 inclusive, of the act of March 3, 1891 (26 Stat., 1095). The said canal begins a little north of the center of section 5, T. 19 N., R. 80 W., and ends in section 26, T. 20 N., R. 84 W., Cheyenne land district, Wyoming.

The canal appears to have been laid out with some care, and in most cases the distance from the point where the line of the canal crosses the lines of the government survey, to an established corner is given. This should be done wherever the canal crosses a line of the public survey.

The termini of the canal are not fixed or determined with reference to any corner of the public survey: this should be done. See case of Farmers Canal Company (13 L. D., 166).

The course and distance of the line of route should be noted, and field notes of the survey should accompany the map.

There are four reservoirs laid down on the map, the boundary of each of which conforms substantially to the lines of the government surveys. Reservoir number four contains about 4,400 acres. It is quite apparent

from the inspection of the map that it is not laid out with reference to the topography of the ground. Section 18 of the act under which the application is made provides for the right to establish reservoirs, and it says "to the extent of the ground occupied by the water of the reservoir." It allows also fifty feet on the marginal limits thereof. So it was clearly the intention of Congress that the easement should be confined to the land used for reservoir purposes, and that the boundary line should be the shore line of the reservoir. These reservoirs should be so surveyed as to include the land to be actually flowed with water, as the right of occupancy is limited to this, and the fifty feet marginal land for use in construction and keeping in repair.

It is hardly in the nature of the land that the surface would be such that the water would rise to a right line five miles in length on each side, and there is no evidence that such is the fact. Mr. Bothwell must show that such is the fact, or he must have a traverse line run, tracing the perimeter of his reservoir, or such a line as will be the shore line when water is turned into the reservoir. This applies to all of the reservoirs as well as to number four.

Where the boundary line crosses the line of the public survey, stakes or stones should be set, and the distance to the nearest established corner on such government line outside of the reservoir should be determined and noted on the map. As the corners lying within the reservoir are to be submerged and become "lost corners," the distance to them will be of no practical use.

Field notes of the survey of the reservoirs as well as of the canal should be furnished with the map and duplicate, and the variation of the magnetic from the true meridian should be noted. These matters will prove important in after years, and should be provided for now while it can be done with accuracy.

An exact duplicate of the map should be filed in the local land office, and the register should certify to the fact of such filing and that such duplicate is true and correct.

I notice that the width of the ditch is not given; this should be done in all cases.

The map transmitted by your said letter cannot be approved in its present condition. It is therefore returned. The applicant may have leave to amend.

I notice the statement that the applicant has secured from the State the right of way over the land belonging to it, and from the Union Pacific Railroad Company the right of way over the odd numbered sections. This, however, does not affect the right of the government to have a proper survey and map made and filed.

HOMESTEAD ENTRY—TRANSFEREE—HEARING.

MANITOBA MORTGAGE CO. *v.* MOLLER.

A pre-emptor who, after due compliance with law, submits final proof and makes payment for the land, may thereafter lawfully enter another tract under the homestead law, though final certificate has not issued on his pre-emption proof.

The right of a transferee to be heard in defense of an entry should not be defeated through the collusive and fraudulent acts of the entryman.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 5, 1892.

On December 21, 1882, Peter Pape made homestead entry of lots 1 and 2 and the E. ½ of the NW. ¼ of Sec. 18, T. 99 N., R. 61 W., Yankton, Dakota.

He made commutation proof before the judge of the probate court of Hutchinson county, December 10, 1884, and, on January 12, of the next year, the register's final certificate was issued.

On March 22, 1887, his entry was held for cancellation, because the same was made before he had perfected a former pre-emption entry.

It appears that on May 26, 1882, he filed declaratory statement No. 5287, for the SW. ¼ of Sec. 12, T. 99 N., R. 61 W., in said land district, and, on the 19th day of December, 1882, he made final proof thereon before the clerk of the court of Hutchinson county, Dakota, at the same time paying the government price for the land.

For some reason, not fully explained, the local officers did not pass upon the proof, until January 10, 1883, when the same was approved and cash certificate issued.

In the meantime, however, and on December 21, 1882 (two days after he submitted said proof), he made homestead entry of the land involved in this controversy, having been advised, as he swears, that "as soon as his witnesses testimony was sworn to and the money paid for the land, he could make a legal homestead entry."

On July 20, 1887, Mr. C. W. Holcomb, of this city, filed in your office a motion, supported by sundry affidavits, asking for the revocation of the decision of March 22, 1887. On January 6, 1888, you denied the motion, and the local officers were instructed to advise Pape that he would be allowed sixty days from notice to elect whether he would have his entry canceled, with privilege of re-entering the same tract, or appeal to the Secretary of the Interior. He was duly notified of this action, and did not appeal, and on May 17, 1888, his cash certificate and original entry was canceled.

On May 29, 1888, Joseph B. Pape, a brother of Peter Pape, made homestead entry of the land, and on November 20, of that year, he relinquished the entry, and on the same day Karl Moller made homestead entry thereof.

On December 3, 1889, the receiver transmitted to your office the application of Eden Maxwell, agent for the Manitoba Mortgage and Investment Company, for the re-instatement of Pape's entry. The application, which was duly sworn to and corroborated, stated that Maxwell was then and had been for seven years the agent of said company; that he had placed numerous loans in said land district; that on the 23d day of April, 1885, he placed a loan of $500 upon the land described in Peter Pape's entry; that the said Pape conveyed the land by warranty deed prior to making said loan to one Ed. Anderson, to whom said loan was made, and to secure the payment of which said Anderson executed a mortgage to said company upon said tract of land, which was duly recorded in the office of the register of deeds of the county in which the land is situated; that no part of said loan has been paid; that said Anderson left the country in October, 1888, and, after diligent inquiry, his whereabouts could not be ascertained; that he would have moved in the matter much earlier had he been able to find the whereabouts of Anderson; that notice of the Commissioner's letter of May 17, 1888, and of June 6, 1888, was never served on said Anderson, said mortgage company, or the affiant; that he has but recently ascertained that Peter Pape was duly notified of the requirements of the Commissioner's letters; that Pape refused to comply with the same, or notify Anderson, or the affiant—at the same time acting collusively with his brother for the purpose of procuring the cancellation of said entry, and thereby enabling his said brother to re-enter said land, thus cheating and defrauding said Anderson and said mortgagees out of their interest in said land; that Peter Pape's brother, the said Joseph B. Pape, became alarmed, fearing he could not hold said land under his homestead entry, and relinquished the same and procured one Karl Moller to make entry thereof. He asked that Pape's entry be re-instated, or that a hearing be ordered to determine the rights of the parties.

By your decision of March 22, 1890, you denied the motion, and the mortgage company brings this appeal.

The first question to be determined is, as to the legality of Pape's entry; 2d, what rights, if any, the transferee or mortgagee has, in default of appeal by the entryman, after due notice.

It is well settled that a person cannot at the same time legally maintain one claim under the pre-emption law and another under the homestead law, since both laws require residence, and one cannot maintain two residences at the same time. Krichbaum *v.* Perry, 5 L. D., 403; Allen *v.* Curtius, 7 L. D., 444.

Pape made the entry in question on December 21, 1882, two days after he made his pre-emption proof and paid for the land. The purpose of that proof was to show compliance with the law up to the time it was made. If the proof in all respects showed, as it seems to have done, that the law had been complied with, final certificate would issue. While residence on the land subsequent to final proof would be addi-

tional evidence of good faith, yet it was not required. The pre-emptor rests his case upon the final proof and payment, and upon the showing therein made his good faith is determined.

While the final certificate is usually dated as of the time when it is passed upon, yet the judgment is formed upon the proof as presented upon the advertised date.

Since the law does not require further residence after satisfactory proof is submitted, an abandonment of the land immediately after final proof can not of itself be urged as showing bad faith. It follows, that after satisfactory proof is submitted, the entryman may change his residence, although final certificate has not issued. If he may thus change his residence after final proof, and before final certificate has issued, I see no reason why he may not make homestead entry of another tract of land, if he is otherwise qualified so to do.

In the case at bar, Pape was not required to reside upon the land covered by his pre-emption filing after he submitted final proof; further residence not being required, his entry of the land in question, two days after he submitted his final proof, was not contrary to law. His homestead proof covered no part of the time prior to that upon which his pre-emption proof was made; so that there was no period of time in which he claimed residence upon both tracts of land at the same time—the very condition which the laws and regulations forbid. His homestead entry not being illegal, the question arises as to the rights, if any, of his transferee and the mortgage company.

It will be observed that Pape was duly notified of your decision, holding the entry for cancellation, and of his right of appeal. He allowed the time to pass, without taking any action; nor did he inform his transferee or any agent of the mortgage company of the status of the land. Soon after his right of appeal had expired, his brother made entry of the land, and, on the latter's relinquishment, Moller made entry.

It is alleged, on the part of the company, that Pape, the original entryman, and Peter, his brother, and Moller, the present entryman, conspired together to procure the cancellation of the entry, thereby enabling the brother to re-enter the land, thus cheating and defrauding Anderson and the mortgage company out of their interest in the land.

When, by your letter of January 6, 1888, Pape was advised that he would be allowed sixty days from notice to elect whether he would have his entry canceled with the privilege of re-entering the same tract, or to appeal to this Department, he had then conveyed the land, by warranty deed, to Anderson. He was therefore under obligations, both to preserve his own and Anderson's rights, to duly notify the latter of the status of the land. But he allowed the time to pass without such notice, and immediately on its expiration, and on May 29, of that year, his brother Peter made entry of the land. Moreover, if he was notified of his right of appeal, and was cognizant of the mortgagee's interest in the land, and purposely withheld the information from said

company that his brother might enter the land, it was in fraud of the company's rights.

Anderson, the transferee, and his mortgagee, having failed to file with the local officers any evidences of their interest in the land, were not legally entitled to notice; but since, as above shown, the entry was erroneously canceled, the alleged conspirators should not, if the allegations set up in the motion be true, be permitted to thus profit by their wrongful acts.

I therefore return the papers, with directions that the hearing asked for by the mortgage company be ordered, with a view to determine whether Pape's entry shall be re-instated. The hearing should be directed to the ascertainment of the acts and conduct of the two Papes and Moller; and whether or not Moller's entry was the result of collusion and bad faith. Moller's entry will, in the meantime, remain suspended.

The decision appealed from is modified.

RAILROAD LANDS—ACT OF MARCH 3, 1887.

KEARCE *v.* LITTLE ET AL.

The privilege of purchase under the act of March 3, 1887, extends only to cases where the right of the settler and bona fide purchaser from the company has been defeated through an erroneous disposition of the land.

A settlement right acquired after December 1, 1882, defeats the claim of a purchaser from the company.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 6, 1892.

The land involved in this controversy is the S. ½ of the SW. ¼, section 31, T. 12 S., R. 1 W., Salina, Kansas, land district. This is an application made by Morte Kearce to purchase the land above described and the SW. ¼ of the SE. ¼ of the same section, township and range; the latter described tract, however, has been patented to the defendant, George R. Little, and therefore has passed beyond the jurisdiction of this Department. The application is dated December 28, 1888, and alleges, in substance, that the applicant is a citizen of the United States; that on the 28th day of April, 1875, one Wm. Frost purchased from the Kansas Pacific Railway Company, the above described lands; that on the 9th day of October, 1887, the applicant purchased from Wm. Frost the said land for the consideration of $700, which he actually paid; that he has never assigned or conveyed the land, or his legal or equitable title thereto; that in order to protect his right to said land he made preemption declaratory statement for the same February 28, 1881; that he has made valuable improvements on the said land and has, for a long period of years, resided thereon and was so residing thereon "on or

about the 31st day of December, 1887, when he was dispossessed under process from the district court of Ottawa county, Kansas;" that he claims the right to purchase under the provisions of the act of Congress of March 3, 1887, for the reasons that the "land is situate in an odd numbered section, lying within the limits of the grant to the Kansas Pacific Railway company and was excepted out of the grant to said railway company by reason of the existence of a valid subsisting adverse claim to said land;" "that this affiant was an actual *bona fide* purchaser thereof for a valuable consideration;" that he "was at the date of the passage of said act, and long prior thereto, an actual *bona fide* resident upon said land owning and possessing valuable improvements thereupon; that he has never assigned, transferred, or in any way alienated his right to said land, or his legal and equitable rights therein."

The local officers rejected the application for the reason that it "is in conflict with the homestesd entry of Benammi Edmon No. 23319 and cash entry No. 4875, of George R. Little;" whereupon applicant appealed.

This is the fourth time this Department has been called upon to pass upon the questions in dispute between the parties to this action concerning this particular tract of land, and with one exception every decision that has been rendered from the local officers to this Department, has been against the applicant. In addition to this it is shown by the record that their controversy has also been carried through the State courts with a like result, and that he was finally dispossessed by process in the hands of the sheriff. A brief history of this matter is necessary to show the exact status of the case.

November 26, 1881, Kearce submitted his final porof, at which time Little appeared and contested. Edmon applied to make homestead entry for the S. ½ of the SW. ¼, February 26, 1882, and his application was rejected on the ground of the pendency of the proceedings instituted by Little. This case was decided December 10, 1883, against Kearce, his entry was ordered canceled and it was further ordered that the homestead entry of Little be held intact and that Edmon be allowed to enter the land embraced within his homestead application. It seems that Kearce made application for a rehearing and a re-instatement of his declaratory statement which was overruled by your predecessor, but on appeal this Department, by letter of July 5, 1884, reversed that decision and ordered: "for the purposes of a rehearing, the filing of Kearce is re-instated and you will direct a further hearing having in view especially the importance of ascertaining the actual relations of these parties to the land in controversy." A motion for review of this decision was overruled, but it being alleged that Kearce was not a qualified pre-emptor, it was ordered that that question be also investigated at the hearing. As the result thereof, the local officers and your predecessor decided against the entry of Kearce and held that he was not a qualified pre-emptor at the time he filed his dec-

laratory statement. This decision was affirmed by letter of November 23, 1887.

It is shown that Edmon made his homestead entry, as directed, and upon January 3, 1889, made final proof. The plaintiff appeared and protested against the same but on what ground, I am not able to state, inasmuch as the affidavit of the protest does not seem to be with the files. A mass of testimony was taken at this time and as a result thereof, the local officers held that the applicant, Edmon, had not resided on the land for five years as required by law, but recommended that he be allowed to make new proof within the lifetime of his entry showing full compliance with the law. Kearce appealed from this decision.

You by letter of May 26, 1890, sustained the local officers in their action rejecting the application to purchase under the act of March 3, 1887, and closed your opinion by saying: "But the sufficiency of Edmon's showing of settlement and occupancy will be considered in a future communication." The applicant appealed from your decision rejecting his application to enter the said land under said act for the following grounds of error, to wit:

First. For that the said decision is contrary to law, and

Second. For that the said decision is contrary to the facts as presented in plaintiff's application of purchase as aforesaid.

It will be noticed that there is no appeal taken from your conclusion to consider Edmon's showing of settlement and occupancy in a future communication, so the only question presented here is upon Kearce's right to purchase under the act of Congress above cited.

The record shows that this land was originally excepted from the grant to the railway company, by reason of prior settlement; that said company selected it February 15, 1881, but its selection was canceled December 8, 1881; it also shows that the purchase money paid by Frost to the company was returned to him, with accrued interest; also that Frost returned to Kearce the purchase money paid, together with five years' interest thereon. This Department has decided that the appellant's original pre-emption filing should be canceled for the reason that he had not complied with the law in regard to residence, and again after a further hearing this decision was affirmed and it was further found that he was not a qualified pre-emptor; the land has never been certified or patented to the railway company, and that a settlement was made on the land subsequent to December 1, 1882, by Edmon, the defendant, under the settlement laws of the United States.

It is very clear to my mind that Mr. Kearce does not bring himself within the provisions of said act. Wright *v.* Coble, 9 L. D., 199. The Attorney General discussing this question, says:

The whole scope of the law from the second to the sixth section inclusive is remedial. Its intent is to relieve from loss settlers and *bona fide* purchasers who, through the erroneous or wrongful disposition of the land in the grants, by the officers of the government, or by the railroads, have lost their rights or acquired equities, which in justice should be recognized.

Attorney General, 6 L. D., 272. Again it is said in the instructions of Secretary Lamar, November 22, 1887 (id., 276),

> This section (3) does not embrace any lands that have been certified or patented to the company, but has reference solely to lands, their right and claim to which has heretofore been adjudicated in favor of the company as against the right of a settler upon said lands, etc.

I find no error in your ruling; your decision is, therefore, affirmed; the application will be rejected.

TIMBER CULTURE—FINAL PROOF—SPECIAL AGENT.

SYLVANUS P. BARTLETT.

There is no authority for the acceptance of final timber culture proof if submitted prior to the expiration of eight years from the date of the original entry.

A special agent should not examine claims and report thereon at the request of interested parties.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 6, 1892.

I have examined the appeal of Sylvanus P. Bartlett from your decision of October 30, 1890, rejecting final proof on his timber culture entry for NW. ¼ Sec. 2, T. 12 S., R. 23 W., Wa-Keeney land district, Kansas.

He made this entry October 24, 1885, and on September 9, 1890, submitted final proof thereon.

It appears that on November 26, 1883, one Albert W. Smith made timber culture entry of the land in question; that sometime in December, 1883, Bartlett purchased of him his improvements upon the land and paid him the sum of $500 therefor, in consideration of which Smith agreed to relinquish all right and interest to said tract; but on receiving the purchase money he declined to execute said relinquishment; that Bartlett to secure possession of the land instituted contest against Smith's entry and under date of October 17, 1884, said contest was sustained and the entry of Smith cancelled.

It further appears that about eighty acres of said tract had been broken and cultivated by Smith and other parties for three or four years prior to Bartlett's entry; that after making his entry Bartlett continued said cultivation; that in April, 1885, he planted two and a half acres with trees and in the following November set out nine acres more.

The evidence as to the planting of a sufficient number of trees and the care and cultivation of the same, for a period of nearly six years appears satisfactory, but as the final proof of Bartlett was presented within six years from date of entry the local officers rejected the same, from which action he appealed and under date of October 30, 1890, you affirmed the judgment below, whereupon he again appealed.

The act of June 14, 1878 (20 Stat., 113), provides: That any 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 shall have filed his declaration of intention to become such, "who shall plant, protect, and keep in a healthy growing condition for eight years ten acres of timber, on any quarter section of any of the public lands of the United States," shall be entitled to a patent for the whole of said quarter section "at the expiration of said eight years on making proof of such fact by not less than two credible witnesses."

Section two provides:

> That no final certificate shall be given, or patent issued for the land so entered, until the expiration of eight years from the date of such entry.

Thus it will be seen that the law is clear and specific in the requirement that a timber-culture entryman shall not only plant and cultivate ten acres of trees, for a period of eight years from date of entry, but that final proof on such entry, cannot be accepted until after the expiration of the period named, and no certificate, or patent shall issue in such cases until after the expiration of eight years from date of entry.

Counsel for the appellant claims that the law has been fully complied with, furthermore cites several departmental decisions to sustain his argument that the party is entitled to credit for the time the breaking and cultivation were made prior to date of entry and therefore that final certificate should issue in the case.

Counsel, however, overlooks the important fact that the credit allowed in said decisions refers solely to the acts of the entryman within the eight years, and that there is nothing in said citations that in any manner authorizes final proof to be made and final certificate to be issued in a less period than eight years.

This question was fully gone over in the case of John N. Lindback, 9 L. D., 284, more than a year prior to the time that the register and receiver passed upon the proof in this case, and there it is held:

> A proper construction of the timber-culture act requires that the period of cultivation should be computed from the time when the requisite acreage is planted.
>
> A departmental construction of a statute, while in force, has all the effect of law, and acts done thereunder must be regarded as legal, and entitled to protection at the hands of the Department.
>
> In timber-culture entries 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.

and such is the settled law of the department.

I note in connection with this case that a special agent of your office, has submitted a report at the "request of the appellant" recommending that his proof be accepted notwithstanding the fact that the local officers had already rejected it as premature. Such action on the part of a special agent, in the face of his instructions and the law, it seems to me is reprehensible. He is supposed to represent the law and the government, and it does not seem that the standard of his service can well be sustained where he assumes the authority to make examination

of claims and reports thereon at the request of interested parties, for the purpose of overruling the decision of the register and receiver. He should be admonished that he has filled the measure of his duty to the government when he faithfully observes and follows his instructions.

Your decision is affirmed.

DESERT LAND ENTRY—FINAL PROOF.

JOHN B. BRANCH.

Final desert proof may be properly rejected, if not made in the manner prescribed by the regulations, and before an officer authorized to act in such matter.

Where the statutory period for the submission of final proof has expired, and opportunity is given to submit the same within a specified time, if not presented within such time, it should be rejected, in the absence of due cause shown for delay.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 8, 1892.

The land involved in this appeal is the W. ½ of the NW. ¼ and NW. ¼ of SW. ¼, and lots 2, 4, 12 and 13, Sec. 26, T. 33 N., R. 76 W., as appears by the survey approved November 22, 1887, Cheyenne, Wyoming, land district.

The record shows that John B. Branch made desert land entry April 7, 1884, of the E. ½ of Sec. 27, and the W. ½ of Sec. 26, T. 33 N., R. 76 W. Per instructions by your predecessor of September 14, 1885, the entryman amended his location March 17, 1886, as follows: E. ½ of Sec. 27, and lots 1, 2, 3, 4, 5 and 6, of Sec. 26, same township and range.

On November 21, 1887, the local officers furnished you with a list of the desert land entrymen who had been notified by registered mail under date of August 8, 1887, of the expiration of the time allowed for making proof and payment, and in the list appears the name of Branch. By letter of January 27, 1888, you directed the local officers to cancel his entry. Thereafter a petition and corroborative affidavits were presented to you by the entryman, asking that his entry be re-instated and that he be allowed to make final proof. The showing was sufficient to warrant you in so doing. You therefore, April 27, 1889, instructed the register and receiver to "advise Mr. Branch that, if he is now prepared, he will be allowed sixty days from notice hereof within to present proof." Notice of this decision was served on the attorney of record of the entryman on May 1, 1889. On April 26, 1890, Branch presented his final proof describing the land as the W. ½ of the NW. ¼, NW. ¼ of SW. ¼, and lots 2, 4, 12 and 13, of the section, township and range above given. Said proof was rejected by the local officers "because more than sixty days have transpired since Commissioner directed the acceptance of the proof;" whereupon Branch appealed.

You, by letter of August 30, 1890, sustained the decision of the local officers on the ground that Branch did not present his final proof within the period required and that one year thereafter he presented "on a small portion of his amended entry the two lots not included therein," and that good faith on the part of the entryman is not apparent from the facts set forth. He appealed from your decision, assigning as error your action affirming the decision of the register and receiver; in rejecting final proof, and in holding that Branch should not be permitted to submit final proof upon his entry.

This appeal might be dismissed for the reason that the specification of errors is not in conformity with the rules of practice—Rule 88—but inasmuch as the record is before me I will pass upon it on its merits.

The records of your office show that the amended application was probably required by reason of the fact of the re-survey of the land in that neighborhood, made for the purpose of defining the boundaries of the Fort Fetterman hay reservation, which was approved May 29, 1884. The lots claimed in the amended application include all the land in the W. ½ of Sec. 26, that had not been reserved. A later survey was made and approved November 22, 1887, and the description given in the final proof of the applicant contains all the ground in said W. ½ of 26, that has not been reserved, and the land is correctly described. It will be noticed that he has made no showing whatever which entitles him to make final proof at this time, and the proof comes in such an irregular shape that the local officers were fully justified in rejecting it on other grounds as well as that mentioned. It seems that the applicant is a resident of Providence, Rhode Island, and an examination of his final proof elicits the fact that he knows but very little, of anything, about the condition of the land. His deposition was taken in Providence, Rhode Island, April 28, 1890, and he closes it with this statement:

> I desire to state that my answers to the foregoing questions so far as they relate to the land in my entry and its irrigation and reclamation, are made from information and belief.

This is too indefinite and uncertain to be permitted in final proof. The depositions of his witnesses were taken before the clerk of the circuit court in Cheyenne, April 10, 1890, in the same town wherein the land office for that district is located. The law and the rules of practice do not permit of such a procedure. Rule 7, of the circular of June 27, 1887, (5 L. D., 708), is as follows:

> The declaration and corroborating affidavits may be made before either the register or receiver of the land district in which the lands are situated, or before the judge or clerk of a court of record of the county in which the lands are situated, and if the lands are in an unorganized county then the affidavit may be made in an adjacent county. The depositions of applicant and witnesses in making final proof must be taken in the same manner; and the authority of any practice or regulation permitting original or final desert land affidavits to be executed before any other officers than those named above, is hereby revoked. The affidavits of applicant and witnesses must in every instance, either of orignal application or final proof, be made at the same time and place and before the same officer.

An examination of the map shows that the land is not located in the county in which the final proof was made.

There is no excuse whatever offered by the applicant for his delay in complying with your order of April 27, 1889, and in the absence of any such showing, together with the irregular way in which the proof has been taken, and the lack of interest the entryman seems to have in perfecting his right to the land, his proof was properly rejected. Your decision is therefore affirmed.

CERTIORARI—APPEAL—PROTESTANT—CONTESTANT.

MITCHELL *v.* WILES.

Where the right of appeal is denied on the ground that the applicant therefor is a protestant without interest, and a writ of certiorari is asked, setting up the right to be heard as a contestant, it is incumbent upon the applicant to show affirmatively by what proceedings he secured the status of a contestant.

Secretary Noble to the Commissioner of the General Land Office, January 9, 1892.

This is a petition, filed by James W. Mitchell, for an order directing you to certify to the Department the record in the above stated case.

It appears from the record and the exhibits attached thereto that Frank W. Wiles filed declaratory statement for the SW. ¼ of Sec. 29, T. 2 S., R. 45 E., La Grande, Oregon, and made proof for the same May 11, 1889, when James W. Mitchell appeared and filed a protest against the allowance of said proof, alleging that he (Mitchell) was the owner in fee of the land above described; that Wiles had no personal interest in the land; that it was entered for the benefit of F. D. McCully, and that Wiles had wholly failed to cultivate the land as required by law.

The local officers accepted said proof and dismissed the protest, and your office, upon appeal therefrom, dismissed the appeal of Mitchell, upon the ground that he was a mere protestant showing no claim to the land that is recognized by law. You further held that the allegations of the protestant were not sustained, and that the final proof shows a substantial compliance with the law in the matter of residence, cultivation, and improvement. It was therefore accepted and you directed that final certificate should issue. You also denied the protestant the right of appeal.

So far as it appears from this petition, Mitchell was a mere protestant, and while he alleges that by due course of law and practice he had become a contestant of the claim of Wiles, and was therefore entitled to the preference right of entry, he does not affirmatively show what acts he performed in fulfillment of the requirements of the law that entitled him to the rights of a contestant.

Besides, it is not shown that Wiles had not complied with the law as to residence, cultivation, and improvement of the tract, or that it was

error to accept and approve said proof, and direct the issuance of final certificate.

With reference to the alleged right of Mitchell, it appears that he claims under a conveyance from one Matthew Johnson, who formerly filed for the land under the pre-emption law, which was contested by Wiles, who procured the cancellation of it May 21, 1888.

The application is denied.

MINING CLAIM—ENTRY—PAYMENT—RELOCATION.

FERGUSON *v.* THE BELVOIR MILL AND MINING CO.

A mineral entry cannot be perfected if the requisite payment is not made on application for patent, though the proof may show due compliance with law in other respects; and, if the statutory requirement in the matter of annual work and expenditure is not subsequently observed, the claim becomes subject to re-location.

Secretary Noble to the Commissioner of the General Land Office, January 12, 1892.

On the 12th of June, 1884, the Belvoir Mill and Mining Company, a corporation, filed in the local land office at Sacramento, California, its application for patent for the Belvoir lode and mill-site, lots 61 A and B in T. 12 N., R. 8 E., being mineral application No. 1410, and furnished all the evidence necessary to entitle it to make final entry.

On the 2d of April, 1889, Luke Ferguson, the plaintiff in this case, filed with the recorder of Placer county, California, the county in which the claim is situated, a notice of location of the Boulder lode claim, which, in effect, is a relocation of the Belvoir lode claim.

On the 21st of May, 1889, he applied to the local office for a hearing to determine the truth of his allegations that the company had abandoned its claim, and had failed to do the required assessment work thereon for over two years, and he asked for the cancellation of its application for patent. The local officers thereupon ordered a hearing, to determine whether or not said company, by failure to comply with the law, had abandoned its claim under its application for patent, and whether Ferguson was entitled to make entry as a relocator.

After the taking of considerable testimony at the hearing and after the contestant had closed his case, the company made a verified application for a continuance, and for a commission to take the testimony of certain absent and material witnesses. The continuance was granted, but not the commission, and from the refusal of the local officers to grant the commission the company sought to appeal to your office. The local officers held that their order denying the commission was interlocutory, and no appeal could be taken therefrom, but consented to forward the application for a commission, and the attempted appeal from their decision thereon, to your office for consideration.

When the date to which the case was continued arrived, the contestant appeared with additional witnesses. The company protested against the allowance of any additional testimony, during the pendency of its appeal to your office, from the decision of the local officers refusing its application for a commission. The local officers overruled such protest, heard the testimony offered by the contestant, and on the 10th of December, 1889, united in a decision holding that mineral application 1410 should be canceled.

From this decision an appeal was taken to your office, and the record in the case was received by you on the 13th of February, 1890. After examining it, you decided that the local officers erred in denying the company's application for a commission, and without considering the case upon its merits, you returned the record to the local office on the 28th of March, 1890, with instructions to those officers to issue a commission to some competent and suitable person in San Francisco to take the depositions of the witnesses named, and to render their decision upon the completed record, and report to you as required by the regulations.

These instructions were complied with, and on the 9th of June, 1890, the register and receiver rendered their second decision in the case, in which they reached the same conclusion as in their first, and held "that mineral application 1410 be canceled." From that decision an appeal was taken to your office, and on the 18th of October, 1890, you affirmed the same. A further appeal brings the case to this Department for consideration.

The evidence in this case presents several peculiar and unusual features. A company which had expended between twenty and forty thousand dollars in developing its mine and carrying on its business, failed to make the payment of $65, which should have accompanied its application for a patent. When it was discovered that this payment had not been made, the amount was tendered to the local officers who declined to accept it on account of an intervening adverse claim. Under the belief that its entry had been completed, the company suspended its underground mining operations in December, 1886, and shut down its mill in February, 1887, for the reason that it was not capable of doing the heavy work required.

Numerous experiments satisfied the company that to work the mine profitably, a more powerful mill was necessary, and it decided upon the removal of the old, and the erection of a new one. During this time, the work and expenditure upon the mine required by section 2324, Revised Statutes, was not performed and made, and in accordance with the provisions of that section, the mine became open to relocation. Of this circumstance Ferguson took advantage, and made his relocation on the 2d of April, 1889.

It was not until this relocation that the company became aware that its entry was defective, on account of the non-payment of the $65, already mentioned. This payment is one of the requirements enumer-

ated in section 2325, Revised Statutes, to be complied with before a patent can be obtained.

From the evidence in the case you find that the company did not *intend* to abandon its claim, but that its failure to perform the labor and make the expenditure each year required by section 2324 of the statutes, resulted in an abandonment, and rendered the mine open to relocation. I am compelled to concur in that conclusion. The facts are clear, that from the early spring of 1887, to the time of the relocation, in April, 1889, the company neglected to perform any labor or work, or make any improvements on said claim. It did not even remove the old mill, preparatory to building a new one, but sold it, and the purchaser did the removing. This neglect on its part was in the belief that its entry was complete, and that it could safely discontinue its operations, but this was a mistaken belief, growing out of the neglect of its own officers.

Upon the facts in the case the local officers found against the company, and you concurred in their judgment. In the case of Creswell Mining Company *v.* Johnson (8 L. D., 440), it was held that "concurring decisions of the local officers and General Land Office on questions of fact, will not be disturbed by the Department unless clearly against the weight of evidence." I find no such situation in the case at bar, and the decision appealed from is therefore affirmed.

MINING CLAIMS—MISDESCRIPTION—PUBLICATION.

HOFFMAN ET AL. *v.* VENARD ET AL.

An application for a mineral patent can not be allowed, where the description of the claim in the published notice of application is not in accordance with the official field notes of survey.

Secretary Noble to the Commissioner of the General Land Office, January 12, 1892.

I have considered the appeal of Frank Hoffman, Henry Denhalter and Jacob Ruthi, from your decision of October 4, 1890, dismissing their protest against the issuing of patent to Thomas Venard *et al.*, for the Sanders Lode claim, Salt Lake City, Utah, land district.

In the application for a patent made by Venard May 5, 1888, it is recited that the description of said claim is "more particularly set forth and described in the official field notes of survey thereof, hereto attached, approved the 19th day of April, 1888, and in the official plat of said survey now posted conspicuously upon said mining claim or premises, a copy of which is filed herewith."

Section 2325 Revised Statutes, provides that an applicant for a patent for a mining claim shall file in the proper land office an application for a patent, under oath, showing such compliance together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately

the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground and shall post the same on the claim, etc., and further, upon the filing of said application, plat, field notes, notices, and affidavits, the register shall publish a notice of such application for a period of sixty days.

It is simply repeating a truism to assert that so far, at least, as the public and adverse claimants are concerned, the only true and correct foundation for an application for a patent to a lode claim is the approved official field notes and plat prepared by the deputy surveyor; the application must conform to these and no argument is necessary to show that the letter and the spirit of the law require that the published notice must be in strict conformity with the foundation of the application for a patent. It was clearly the intention of Congress that notice of a claim should be given to adverse claimants and to the public by means of the published notice; hence if said notice is defective or erroneous, neither the letter nor the intention of the law is carried out In a word, there must be a strict compliance with the law before the land department can obtain jurisdiction to issue a patent. The question to be determined is, has there been such a compliance with the law in the case at bar?

In the published notice of application for patent, as a part of the description of the location of the claim the following appears:

> From post No. 2, U. S. M. M. No. 1, bears N. 62 degrees E. 532 feet distant. . . . . The nearest known locations being the "Black Hawk" and "Beeby" lodes.

These statements are not founded upon the approved field notes of the deputy surveyor, as in said field notes he states:

> From Post No. 2 of the claim U. S. mineral monument No. 1 bears N. 6 degrees E. 532 feet actual measurement. There were no practicable bearing objects, and the original boundary posts had been swept away by snow slides. . . . . The nearest known claims are the Highland lot 164, and the Buckeye on the North lot 88.

The published notice was not in conformity with the law, it was erroneous and misleading, and failed to carry out the intention of the law, as it failed to give the correct location of the claim, hence a patent can not be issued upon the same. I do not deem it essential to discuss other points which might be raised in the case. It is sufficient that the Department has not, as yet, obtained jurisdiction to issue a patent. Your decision is therefore reversed, and before a patent can issue the law must be complied with.

In your decision the Acting Commissioner says:

> The printed notice of application for patent attached to the publisher's affidavit of publication appears to have been mutilated so that the actual course of the connection line of the survey as printed cannot be ascertained. The same mutilation occurs in the printed copy attached to the register's certification of posting in the land office. You will require the filing of another affidavit by the publisher with a perfect copy of the printed notice of the Sanders' application attached.

I would advise that in such cases, action by you be suspended until the new proof has been furnished.

Overruled 20 L. D. 204

PLACER PATENT—KNOWN LODE—MINERAL ENTRY.

PIKE'S PEAK LODE.

A placer patent for land including a known lode, not specifically described and excluded, operates to convey title to all of said land, and terminate the jurisdiction of the Department over the land covered thereby.

An entry of a lode claim in conflict with a patented placer need not be canceled, but may be properly suspended with due opportunity given for the institution of proceedings looking toward the vacation of the placer patent as to the land in conflict.

In the exercise of its proper supervision over the disposition of the public lands the Department may waive questions affecting the regularity of proceedings below, and render such judgment as shall seem just and proper in the case.

Secretary Noble to the Commissioner of the General Land Office, January 13, 1892.

This appeal is taken by Patrick A. Largey from the action of your office rejecting his application for a patent to the Pike's Peak lode claim, lot No. 174, T. 3 N., R. 8 W., Helena, Montana.

It appears that said claim lies wholly within the limits of the Upton *et al.* placer claim; that application to enter said placer claim was made July 18, 1879, and that the same containing 153.49 acres was patented April 15, 1881; that Largey made mineral entry for the said lode claim July 14, 1881; that April 9, 1883, your office returned the plat and field notes of the Pike's Peak survey and directed the same to be amended under the ruling in the Shonbar lode (1 L. D., 551; same 3 L. D., 388;) so as to be reduced to twenty-five feet on each side of the vein (section 2333 R. S.); that no action was taken with reference to said order; that November 25, 1889, Largey filed in your office said application for patent to the full extent of said lode claim; that January 8, 1890, you denied the same; that January 22, 1890, Largey filed a motion to review said decision; that by letter of January 30, 1890, you submitted the case to this Department for instructions; which were given by letter dated February 21, 1890, (10 L. D., 200); that thereupon you, on March 5, 1890, denied said motion and held Largey's entry "for cancellation as a whole" and that the pending appeal was then taken.

The Pike's Peak claim is based upon a relocation of the Excelsis lode claim. The Excelsis lode was located by William Reagan, October 15, 1875, for fifteen hundred linear feet on the lode and one hundred and twenty-five feet on each side thereof, and filed with the county recorder November 8, 1875. Said lode was relocated as the Pike's Peak November 10, 1879, by Morgan Connell and recorded in like manner November 12, 1879. Largey claims through conveyance from Connell.

In the Shonbar case, *supra*, it was held that claimants to a previously located lode within the limits named in a placer patent, who failed to adverse the placer application, were restricted by the statute, section

2333, to their lode "and twenty-five feet of surface on each side thereof." Section 2333, *supra*, provides:

> Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings, and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.

In the pending application counsel insist that by reason of its prior location the Pike's Peak lode was "known" and therefore under said section excepted from the placer patent, and that the claimants consequently were not required to adverse the placer application.

This is stated to be sustained by the decision of the supreme court in the case of Noyes *v.* Mantle (127 U. S., 348), that (page 354)

> 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, we think 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 of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode.

In your decision of January 8, 1890, you say, "deeming the decisions of the Department in the Shonbar case the precedents which this office must follow in this class of cases until another and different course of procedure is laid down by the Hon. Secretary" declined to "take notice of the decision of the supreme court in the case of Noyes *v.* Mantle, *supra*, except in so far as it affects the particular case therein considered," and denied said application.

By said letter of March 5, 1890, denying appellant's motion for review, you found under the departmental instructions of February 21, 1890, *supra*, "that no appeal having been taken from the decision of April 9, 1883, aforesaid, ordering the amended survey that the same is final."

In its said instructions this Department found it unnecessary to discuss the conflict between the decision in Noyes *v.* Mantle and the Shonbar case, *supra*, for the reason that "in this particular case your office would not have jurisdiction to review the decision of your predecessor rendered on April 9, 1883, which has become final there being no appeal."

The appellant, however, alleges that the said order of April 9, 1883, was not a final action in the case and consequently not appealable.

Without passing upon this contention and waiving the question of your authority to reverse a final decision by your predecessor involving the same matter, it is sufficient to say that the question being now here this Department by virtue of the "just supervision" that the law vests in the Secretary of the Interior over "all proceedings instituted to acquire portions of the public lands" has jurisdiction to consider the case and render such decision as in his opinion shall be meet and proper under the circumstances. McDonogh School Fund (8 L. D., 463); Charles W. Filkins (5 L. D., 49).

Concerning its merits, the appellant's case proceeds upon the theory that his said lode claim, having been known to exist at the date of said placer application, and not having been included therein, was by the terms of section 2333, *supra*, excepted from the placer patent and that the title to said lode claim thus remaining in the government, this Department has jurisdiction to consider his application and issue to him a patent for the said lode.

By its patent issued to the placer claimants, the government conveyed (subject to certain exceptions not affecting the Pike's Peak lode claim) the tracts described in their application. The said patent contained the general proviso that "should any vein or lode . . . . . be claimed or known to exist within the above described premises at the date hereof the same is expressly excepted and excluded from these presents," but contained no specific reservation of the Pike's Peak lode claim.

In the said letter of instructions (10 L. D., 200), the question whether or not the issue of patent to the placer claimants for land including the lode claim here in question, operated to pass the government's title to said lode claim, was discussed at length. It was then held in effect that a placer patent for land including a known lode not specifically described and excluded, conveyed all said land and formed no exception to the general rule 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."

This ruling was followed in the recent and analogous case of the Pacific Slope lode (12 L. D., 686), where a known lode claim based on a record location was embraced in a townsite patent which contained the proviso that "no title shall be hereby acquired to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws of Congress." In the case just referred to, it was held that although the lode claim was known to exist at the date of the townsite entry, and notwithstanding the said provision, the issue of the townsite patent terminated the departmental authority over the ground embraced in the lode claim. It is true that section 2333, *supra*,

was not involved in the Pacific Slope case, *supra*. But the conditions of the patent considered in that case being substantially the same as those contained in the patent involved in the case at bar, I am of the opinion that the ruling in said case is in line with the doctrine announced in the said letter of instructions, *supra*.

It is accordingly held that the title to the ground embraced in the Pike's Peak lode claim passed out of the United States with the issue of patent to the Upton placer claimants and that the pending application for patent for such lode claim must accordingly be denied for want of jurisdiction. I cannot, however, concur in your conclusion that the Pike's Peak entry should at this time, be canceled. It is quite possible that by proper judicial proceedings such claim would be sustained under the decision in the case of Noyes *v.* Mantle, *supra*, and the provisions of section 2333, *supra*, and that the Upton placer patent would be vacated to the extent of its conflict therewith.

I am therefore of the opinion that said entry should be suspended for such period as would afford the applicant an opportunity to institute such proceedings or to apply for a recommendation by this Department of a suit to re-invest in the United States the title to the lode claim in question. The appellant's claim, as heretofore shown, being relegated to the courts, it will be unnecessary for me to discuss the effect of your said letter of April 9, 1883, or the merits of the decision in the Shonbar case therein cited.

The decision appealed from is modified in accordance with the views hereinbefore outlined.

INADVERTENT NOTATION—SURRENDER OF PATENT.

EDDY *v.* UNIVERSITY OF ILLINOIS.

A tract of land is not segregated from the public domain by an inadvertent notation of its disposition on the tract book and plat in the local office.

An informal application to surrender a patent, and take certain other land, in order to correct an error of the Land Department and avoid litigation, may properly be held to reserve the land, thus applied for, from other disposition.

A patent may be surrendered and other land taken in satisfaction thereof, where, by such action, litigation to correct an error of the Land Department is avoided.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 13, 1892.

On August 7, 1867, the following location of agricultural college scrip (No. 1491) was made at the land office at St. Cloud, Minn.:

I, Illinois Industrial University, of Champaign county, State of Illinois, hereby apply to locate and do locate the SE. quarter of section No. 24, in township No. 124, of range No. 36, in the district of lands subject to sale at the land office at St. Cloud,

containing one hundred and sixty acres, in satisfaction of the attached scrip numbered 1491, State of Illinois, issued under the act of July 2, 1862.

Witness my hand this 7th day of August, A. D., 1867.

ILLINOIS INDUSTRIAL UNIVERSITY.
M. C. GOLTRA, *Trustee.*

Attest:
H. C. WAIT, *Register.*
H. C. BURBANK, *Receiver.*

The following certificate was attached thereto:

LAND OFFICE, ST. CLOUD, MINN.,
August 7, 1867.

We hereby certify that the above location is correct, being in accordance with law and instructions.

H. C. BURBANK, *Receiver.*
H. C. WAIT, *Register.*

A patent was issued to said University for said south-east quarter March 1, 1872.

The local officers by mistake and inadvertence noted and marked said location on their tract book and plat as made on the south-west quarter of said section.

As said south-east quarter, by reason of said erroneous marking, appeared on the books of the local officers to be vacant land, they allowed the same to be again located on October 14, 1867, by Calvin F. How, in satisfaction of agricultural college scrip (No. 1000), State of Massachusetts, and a patent was issued on this location July 20, 1869, in the name of William L. Fuller, as assignee of said How.

On June 25, 1890, Frank M. Eddy made application at the land office at Marshall, Minn., to enter said south-west quarter under the provisions of the timber culture act of June 14, 1878 (20 Stat., 113), which application was rejected by the local officers because, according to their records, said land had been located by said University. An appeal was taken and said opinion was affirmed by you October 4, 1890, on the ground that,—

> Applications are now pending before this office in behalf of the parties interested for a correction of the locations and patents issued thereon, which withdraws from appropriation the said south-west quarter.

An appeal now brings the case before me.

Although both the local officers and yourself concur in rejecting Eddy's application, these decisions are based upon non-concurring grounds.

The finding of the local officers was based upon the ground that the said University had located the said south-west quarter, but this was an error: the said University had made no such location. The said south-west quarter had never been located or disposed of to any one. The noting upon the book and plat of the local office that it had been located did not alter the fact of its non-location. Such marking was an

inadvertence which did not change the status of the land. It did not segregate it from the public domain.

In the case of McAndrew *v.* Chicago, M. & St. P. Ry. Co. (5 L. D., 202), it was held that,—

> The mere inadvertent marking on the books of the local office could in no sense be regarded as a disposal of the land. No one was seeking its ownership, consequently there was no one to whom disposal could be made. It could not be construed as a reservation within the meaning of the law (Cole *v.* Markley, 2 L. D. 847), for this would imply a purpose, while inadvertence denotes the absence of purpose, or that a thing is done contrary to purpose and intention.

The finding of the local officers therefore, being based upon an erroneous record, cannot be sustained.

Your decision is based upon the fact that the parties interested in the said south-east quarter, under the two patents issued for the same, have made application for a correction of their locations and patents.

For some reason the first patent was issued for How's location, which was second in time and illegal in its inception. But that patent conveyed the legal title. The court say, in Moore *v.* Robbins (96 U. S., 530, 533),—

> With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy.

In United States *v.* Stone (2 Wallace 525, 535), the court says,—

> A patent is the highest evidence of title, and is conclusive as against the government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy.
>
> Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.

Under these circumstances two courses were open to the University. It could have brought proceedings before a court of competent jurisdiction to set aside the patent issued to said Fuller, on the ground that the University location preceded the How location, and upon proving this priority of such initiatory step the Fuller patent would have been set aside.

> The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Shepley *et al v.* Cowan *et al* (91 U. S., 330, 337); United States *v.* Missouri Railway (141 U. S., 358, 381).

Or, the University might, "to save litigation, expense and vexation" have surrendered its patent and equitable title to the government. (See Juniata Lode, 13, L. D., 715, 717.) Upon such surrender it could apply to locate its scrip on any other public land, and, if it was the first legal applicant, such application could be allowed, and a new location of its scrip could be made.

This, in effect, is what the University proposed to do several years ago, as the correspondence transmitted with the papers shows. The name of the University was changed to "The University of Illinois" by act of the Illinois legislature, approved June 19, 1885.

Selim H. Peabody, Regent of the University, on October 25, 1886, wrote to the Commissioner of the General Land Office as follows:

> In view of all the circumstances the University is disposed to accept a settlement of the case which shall give to it a clear title to the south-west quarter of the section. If the Land Office is of the same opinion as was indicated by the officers to me last spring, I should be glad if they will indicate the precise steps to be taken to accomplish this result.

At a meeting of the board of trustees of the University held November 9, 1886, the said Regent and Mr. Chas. Bennett were appointed a committee "with full power to act for the University and to protect its interests in said Minnesota lands."

Acting under the power so conferred, said committee on April 20, 1887, made application for said south-west quarter as follows:

> As the SE ¼ has been several times transferred in good faith, and is now claimed by a person who has made actual improvements upon the land; and as the removal of the cloud of title to said land in behalf of the University is liable to cause much trouble, litigation and expense, the undersigned respectfully *petition* the Commissioner of the General Land Office that he will cause proper steps to be taken to allow the University of Illinois to relinquish all claim to the south-east quarter of section 24, Tp. 124, R. 36, and to receive in lieu thereof a clear title to the south-west quarter of the same section.

This application was filed in the General Land Office more than a year before Eddy's application was tendered at the local office, and thus the University was the first legal applicant for said south-west quarter. It further appears that it has not transferred its equitable title to said south-east quarter.

It is contended by counsel for Eddy that this application does not comply with the rule that requires amendments of applications and entries to be filed with the local officers. (General Land Office Circular 1889, p. 51.) But this is not an application to amend the entry, for the original location was proper and legal; the mistake was made by the local officers in erroneously recording the location upon their books, for which the University is not in any wise responsible. This is therefore an exceptional case, not provided for in the rules and regulations of the Department, and can properly be disposed of upon equitable principles in the exercise of "the directory and supervisory powers" conferred by law upon the Secretary of the Interior, by wav-

ing any informality or irregularity in said application, and considering it as sufficient to segregate from the public domain the said south-west quarter.

Upon the surrender of the patent issued to said University, with a relinquishment indorsed thereon, together with a quit-claim deed from said University to the United States, recorded in the office for the record of deeds in the county where said land lies, with a certificate from the proper recording officer of said county, that said University has not transferred or encumbered the title acquired by said patent, said location of college scrip (No. 1491) may be canceled, and said scrip may be located upon said south-west quarter, and patent may issue immediately thereupon to said University.

Your judgment is affirmed.

RULE 14 OF PRACTICE—TIMBER AND STONE ENTRIES.

(Circular.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 7, 1892.

REGISTERS AND RECEIVERS:

Heretofore, rule 14 of practice has been construed to apply to proceedings by the government against all classes of entries. Said rule is hereby modified as to timber and stone entries in so far as it requires a copy of the notice to be posted on the land. Hereafter, when proceedings are commenced by the government against this class of entries, and it becomes necessary to serve notice by publication, the posting of notices upon the land will not be required.

THOS. H. CARTER
Commissioner.

Approved
JOHN W. NOBLE.
January 18, 1892.

MINERAL LAND—SURVEYOR GENERAL'S RETURN—SETTLEMENT.

WALTON *v.* BATTEN ET AL.

Where a mineral entry has been allowed on land returned as agricultural the presumption, as to the character of the land, created by the return, no longer exists, and the burden of proof will thereafter lie with one who alleges that the land is in fact agricultural.

In an issue joined between a claimant under the mineral law, and an agricultural claimant, the matter to be determined is whether, as a present fact, the land is more valuable for mineral than for agricultural.

Settlement and improvement constructively extend to all parts of the quarter section claimed by the settler.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 14, 1892.

I have considered the case of William Walton *v.* John Batten, *et al.*, on appeal by the former from your decision of January 3, 1891, dismissing his protest against the mineral entry of the latter for the SW¼ of SW¼, Sec. 15, T. 6 S., R. 3 W., Helena, Montana, land district.

It appears of record that on September 13, 1883, John Batten, William Marr, Julien McKnight, and Lawrence A. Fenner made application to enter this tract, together with certain other parcels and tracts in the vicinity. On June 22, 1886, after due notice and posting, final certificate was issued for the land embraced in the application.

On October 24, 1888, Walton protested against the issuance of patent for this tract in controversy, alleging in his protest, substantially, that it was non-mineral; (2) that he was a *bona fide* resident of the land, having been upon the SW¼ of Sec. 15 since 1873 when the land was embraced in the grant to the Northern Pacific Railroad Company, and that he had a contract of purchase from said company dated October 9, 1884; (3) that after the claimants had filed for the land he made an agreement with Fenner who acted for them to the effect that he (Walton) would not assert an adverse claim or protest, and Fenner was to deed him the tract in controversy, except a small piece, about an acre, that extended into Alder gulch, and that relying upon the "word of honor" of Fenner, he did not assert his claim or protest their application, and that upon receiving the final receipt, Fenner had refused to fulfill his promise or give him any written contract or bond for a deed. He asked a hearing that he might prove the truth of his allegations, which was granted by your office October 12, 1888. Hearing was regularly held, and on May 31, 1890, the local officers passed upon the case, and held that:

> From a review of the same (the testimony) it is clearly apparent that so far as the testimony shows it is non-mineral land and only held for its prospective value, as the claimants have not demonstrated by actual working and results any mineral character whatever. We are therefore of opinion that the entry should be canceled.

From this action the claimants appealed.

Your office, on January 3, 1891, considered the case. You say:

> The land in controversy herein was surveyed in 1870 and returned by the surveyor general as agricultural land.

You further say, substantially, that if the contest was against an agricultural claim the burden of proof would be upon the mineral claimants, but as the mineral claimants have a filing of record, the burden shifts, and that the *onus probandi* is upon the agricultural claimant. You found that the protestant had not furnished sufficient evidence to show that the land was non-mineral, and you reversed the local officers, dismissing the protest and leaving the mineral entry intact. From this decision Walton appealed.

It is claimed by counsel that you erred on the rule of law as to the burden of proof. The return of the surveyor-general that the land is agricultural raises the legal presumption that it is of that character and it may be sold as such without any further proof. Bouvier, in his law dictionary, gives the rule thus: "In general wherever the law presumes the affirmative, it lies on the party who denies the fact, to prove the negative." This was done in the case at bar, and the local officers, on considering the evidence offered by the mineral claimants, held that the surveyor-general's return was erroneous, and entered the land of record as mineral.

In Mulligan *v.* Hanson (10 L. D., 311) cited by counsel, the affidavit of protest was filed before the officers passed upon the case, and it was there said, substantially, that the affidavit of protest offset the non-mineral affidavit of the agricultural claimant thus leaving the legal presumption arising from the surveyor general's return to be overcome by evidence. The cases are thus distinguished, and in the case at bar, the burden is upon Walton to show that the land is non-mineral.

The matter of the alleged agreement between Walton and Fenner is not a material matter in this case. Walton had a contract of purchase with the railroad company for the SW¼ of Sec. 15, and claims also that he made a homestead entry for the land, but these matters are not before me. The matter to be determined is whether the tract in question is mineral land or otherwise.

In Peirano *et al. v.* Pendola (10 L. D., 536) it was said, after a full discussion of the subject, that the matter to be determined is whether "as a present fact," (the land) "is more valuable for mineral than for agriculture."

In the case at bar, it is claimed that Walton has no improvements on this particular "forty acre" tract, and it is shown that his house, barn, root-house and other improvements are on the adjoining "forty," but close to the line. This is immaterial as his *settlement* and improvement are constructively on the quarter section claimed, no matter what part of the tract they are upon.

To sum up the evidence tending to show that the land is mineral, we have many words and but little proof. There is no plat of the ground, or topographical map furnished, and it is somewhat difficult to clearly understand the "lay of the land," but it appears that the main body of the tract in controversy is rolling "bench" land lying north-east of Alder creek which runs north-west out of section 22 across the corner of section 21 into section 16, passing within a few rods of the south-west corner of section 15; that the south-west corner of the tract in controversy slopes toward the creek. A public road running on the north side of the creek, and about parallel with it, cuts off a triangular piece of this land, containing about one acre.

Taking the testimony generally, I find that by an old miner's law of this (Montana) mining district, each miner was allowed to occupy a

strip of ground one hundred feet wide from the center of Alder creek back to the foothills or mountains. From the creek back to the first "rim-rock" on either side was called a "gulch" claim. From the first to second "rim-rock" was called a "bar" claim. This was to give each miner a water front or privilege, and he could mine as far back as he wished. The gold was in fine particles found in sand and gravel deposited on what the witnesses call a "bed rock," but it was simply what is known as a "water bearing strata"—a firm deposit that water would not cut away. In this case what they call "bed-rock" was usually a *clay* deposit, but in places farther back toward the foot hills the clay was wanting, and the gravel and sand bearing gold was deposited on rock. The general formation is volcanic. Mining operations have been carried on in "Alder Gulch" since 1863. It appears that the richest deposit is near the center of the gulch, and its extent on either side depends upon the undulation of the "bed-rock" on which the gravel and sand bearing gold is deposited. In some places paying dirt is found farther from the center than in others, that is, the out-crop of the "rim-rock" comes closer to the stream in some places than in others. Fenner says the "rim-rock" on the side next to the land in controversy "passes along very near the section corner" (SW. cor. of 15). When asked how close, and on which side, he said he never saw it exposed within twenty feet of the corner, and he cannot tell exactly.

It appears that in all the mining that has been done along this gulch no gold has ever been discovered upon this tract. When Fenner was asked if he had ever seen any gold taken from the land in controversy, he said his two boys aged ten and twelve years, respectively, took some gold with a "rocker," about a year ago, from the south-west corner. He thinks about ten cents worth, but didn't weigh it; did not see them working; he only knows what they told him as to where they got it, but he suspects they were "working a piece of 'rim-rock' that had been cleaned."

It appears that after the hearing was ordered by your office, Walton dug five holes on the tract, from one hundred to three hundred feet apart, and called some five or six expert miners to test the gravel and sand at the bottom of these test holes. Some of the men went to the land and tested the deposit at the bottom of two holes, but refused to pan any dirt from the bottom of the others because they were not satisfied that they could say on oath that the holes were down to bed-rock. They returned about a week later and found the holes dug down to what they were satisfied was "bed-rock." One was down to the granite rock. They then "panned" each one pan of sand and gravel from some of the holes, and from some two pans. The men were not all there at one time, but each man tested each hole, and each says upon his oath he made a fair test and found no color. Fenner and some four or five miners went to these holes and made an examination of them, and took some measurements, and Fenner says he took some levels, and

they say they are satisfied that the holes did not reach bed-rock by from twenty to fifty feet.

None of the witnesses, as expert miners, will say the tract is mineral. One witness for claimants, (Fisher) when asked as an expert miner familiar with the "gulch," if it was mineral land said he could not say. He says the holes were not down to the kind of bed-rock he had worked on, either in the "gulch" or on the "bar." He never knew any mining on the side of the road on which this land lies, except a pit in Junction district, near the mouth of Granite, a couple of miles below the land in controversy, maybe more. Granite Creek empties into Alder Creek." One witness says "it ought to bear mineral," but this seems to be upon the theory that it was worthless for anything else.

Mr. Fenner, who appears to be an intelligent man, and the principal of the company, when asked if he had ever prospected the land, answered

> I had left that to the future, when in the progress of systematic mining I could work out the gold which I am certain this tract contains, without going to the useless expense of prospecting.

Much was said about the places on the tract where these test holes were sunk, but it appears that Walton some years before with several men had prospected in the lower parts of the tract without any success, and the men whom he called, who seem to be fair men, say that the holes were as favorably located to test the land as they could have been.

The entire testimony fails to show that any part of this tract in controversy is mineral, or that the surveyor general was in error when he returned it as agricultural land. The witnesses introduced by Walton, expert miners, who know the land, say it is non-mineral. The land cannot be sold as mineral land. "As a present fact" there is no gold in it. Mr. Fenner seems to prefer a theory to a condition, and has carefully avoided showing the conditions necessary to its sale as mineral land.

The burden being upon Walton to show that this land is, in fact, non-mineral, I do not hesitate to say that he has done so by the best evidence attainable to prove a negative. In fact, considering all the evidence offered by both parties, it remains that for more than twenty years explorers, prospectors, and miners have been "digging and panning" all over the country, and no one has ever found "color," much less "paying dirt" within the boundary of this tract, and no witness can be found who will say that the land is mineral. The strong presumption arising upon the facts proven cannot be overcome by a mere supposition that there is gold in the land. It certainly has not been found.

Your decision is reversed, and the entry of Batten *et al.* is canceled.

MINERAL LAND—SURVEYOR GENERAL'S RETURN—SURVEY.

WINTERS ET AL. *v.* BLISS.

The burden of proof is with one who alleges the mineral character of land that is returned as agricultural.

The present existence of mineral in such quantity as to render the land more valuable for mining than agriculture must be shown to defeat an agricultural entry.

In case of alleged conflict between an agricultural entry and a prior placer claim, the actual extent of said claim should be shown by a survey thereof in accordance with the mining regulations.

Secretary Noble to the Commissioner of the General Land Office, January 14, 1892.

I have considered the appeal in the case of William H. Winters *et al.* *v.* David F. Bliss from your office decision of June 28, 1890, involving the validity of the latter's entry under the homestead law for N½ of NW¼, SE¼ of NW¼ and lot 2, Sec. 17, T. 6 S., R. 13 E., Hailey land district, Idaho.

It appears that Bliss made entry of the above described tract October 21, 1882, and that on February 8, 1888, he published notice of his intention to present proof before the local officers in support of his claim.

On April 2, 1888, the day set for making proof, the homesteader, with his witnesses, appeared at the local office and at the same time and place appeared W. H. Winters *et al.* and filed protest against the entry alleging that the land was valuable for mineral.

A hearing was had, both parties being present with counsel and their witnesses. From the evidence submitted, the local officers decided that the protest against the homestead should be dismissed and so recommended. The protestants appealed, and your office, under date of June 28, 1890, sustained the protest and held the entry for cancellation to the extent of the conflict with the Trumpet, Banner, Jumbo, Eureka, Ontario, New York Bar, and Old Smith and Justice placer mining claims. From this decision the defendant appeals.

From the testimony submitted in this case, appear three questions for consideration:

1st. Do the placer claims above mentioned conflict with the homestead entry of Bliss.

2nd Have the placer claims been exhausted by long working.

3d Are said claims so far as they conflict with the Bliss homestead of more value for mining than for agricultural purposes.

It is shown in this case that the Eureka was located as a placer claim some ten years prior to this contest. The Ontario, some two years after the Eureka; the New York Bar, about the same time, and the Smith and Justice, shortly after the Eureka. Therefore, these claims were

located prior to the filing of the Bliss entry, and in point of time take precedence thereto.

These claims have practically been worked from the date of location up to the present time.

Mr. Woodworth, former owner of the Eureka, testifies that he took out of said placer claim from $75 to $240 per month; that in 1887, five years after Bliss made his homestead, he leased said claim for $100 per month, and then in the same year sold the claim to the present owner, Winters, for $2500, fifty per cent of the output of the mine to be applied to the payment thereof, but the record shows that at the date of contest only $146 had been received in accordance with said agreement. Woodworth also testifies that he took out of the Ontario the second year after location about $7000 in gold, and in 1885, sold the claim to Hunt for $200. Hunt testifies that when the claim was well worked, he would receive about $150 per month; that the land was worth from $100 to $125 per acre; that he leased the Ontario and other claims and received on them all something like $500, or about $40 on the Ontario. Hunt admitted that the product of mining on the Ontario had not been what he anticipated. Winters and Burdell leased the Ontario and New York Bar and commenced work in September, 1887, ditching and working on the same, and are still working the claims, they having expended about $1500, but there is no satisfactory evidence that the claims have paid expenses. It is claimed, however, that they were only getting ready to mine gold, and only cleaned up what was taken from the ditches. Hunt testifies that he did not try to mine for profit but only to keep the place in condition for sale.

Connor testified that he worked the New York Bar and another claim south of that, presumably the Smith and Justice, for two years, expended between $1200 and $1300, and only took out about $150, furthermore, that the Ontario lay idle for about two years, and that, in his judgment, the mineral is about exhausted. Justice testifies that he has mined in that section eight years; that at one time, he owned one-half of the New York Bar and worked it in 1880 and 1881; that the Ontario and Eureka do not more than pay expenses, and that he believes that the improvements placed upon these worked out claims are for speculative purposes, as he has been asked to join them in the enterprise. The ground is worthless after sluicing and taking out the gold.

In relation to the conflict between said claims and the Bliss homestead, the evidence is conflicting, and it is evident that the boundaries of said claims are not well known or identified.

Witnesses for the contestant testify that the Bliss homestead covers some fifteen acres of the Eureka and a considerable portion of the other claims, while the witnesses for the defense who have any knowledge of the matter say that there is no conflict with the Eureka, New York Bar and Smith and Justice claims, but that the Ontario conflicts to a small extent with said homestead.

The evidence adduced in relation to the Trumpet, Banner and Jumbo claims shows that the locations are of recent date and that they are comparatively new claims. There is no evidence showing that said claims are being mined, have ever been mined, or that gold or other valuable minerals exist therein in sufficient quantities to make them more valuable for mining than for agriculture.

It is generally conceded by both parties to this contest that these claims lie partly within the limits of the Bliss homestead.

It is shown that the soil of the land in controversy is good for raising fruits and for agricultural purposes; that good crops of hay and other farm products have been raised on the land; that some six acres of it have been set out in fruit trees a number of years and are now beginning to bear; that there are between fifty and sixty acres under cultivation, forty acres of which in meadow.

It is further shown that Bliss has resided on his entry since 1879; that he has a good frame house and about fifteen hundred small fruit trees and eleven hundred grape vines, besides his bearing orchard; also a large number of small fruits such as currants, gooseberries, strawberries, etc.; that his meadow produces about eighty tons of hay annually, worth from $9 to $12 per ton; that he has sold since living on his homestead about $1500 worth of horses and $3000 worth of cattle, and that he now owns one hundred and ten horses and about $2000 worth of hogs.

The homestead appears to be in a good state of cultivation, fenced and well cared for, and a number of witnesses testify that it, with its valuable orchard and other improvements is worth from $10,000 to $12,000.

The lands embraced in said entry were returned by the surveyor general as agricultural lands, and therefore the burden of proof rests upon the contestants. Magalia Gold Mining Co. *v.* Ferguson (3 L. D., 234); Savage *et al. v.* Boynton (12 L. D., 612).

The contestants insist that the evidence submitted is sufficient to warrant a finding that the land is mineral in character, and in this, your office arrives at the same conclusion.

The real question to be determined in this case is whether the land is more valuable for mining than for agricultural purposes. Cutting *v.* Reininghaus *et al.* (7 L. D., 265); Creswell Mining Co. *v.* Johnson (8 L. D., 440); Peirano *et al. v.* Pendola (10 L. D., 536).

In this connection, the language of the court in the case of United States *v.* Reid and another (28 Federal Reporter, 482) seems peculiarly applicable. In the case cited, the court 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.

Rulings to the same effect are found in the decisions of this Department for many years. They are that mineral patents should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a present fact.

"If mineral patents will not be issued unless the mineral exist in sufficient quantity to render the land more valuable for mining than for other purposes, which can only be known by development or exploration, it should follow that the land may be patented for other purposes if that fact does not appear." Davis's Admnr. *v.* Weibbold (139 U. S., 507), and citations therein. This Department has uniformly held that if the land is worth more for agriculture than mining, it is not mineral land, although it may contain some measure of gold or silver. In United States *v.* Reed (12 Sawyer, 99), circuit court for the district of Oregon, Judge Deady, in disposing of the case said,

> In my judgment this is the only practicable rule of decision that can be applied to the subject. Nor can account be taken in the application of this rule, of profits that would or might result from mining under other and more favorable conditions and circumstances than those which actually exist or may be produced or expected in the ordinary course of such pursuit or adventure on the land in question.

The evidence is undisputed to the effect that mining operations have been carried on in the Euraka, Ontario, New York Bar and Smith and Justice placer claims for a number of years at considerable profit, and furthermore that mining is still carried on upon said claims although the output is much more limited than formerly.

The evidence as to the present value of these claims is very conflicting, yet after a careful review of the testimony on this point, I am of the opinion that said claims are of more value for mining than for agricultural purposes, but in the case of the Trumpet, Banner and Jumbo claims, there is no evidence showing that the land is actually mineral land.

It has been attempted to prove in this case that the last mentioned claims by reason of lying on the same plane and possessing soil of a like character and also lying adjoining the Eureka, Ontario and New York Bar placer claims must necessarily be gold bearing and valuable for mining purposes. While this may be presumptively so, yet it is not established as a fact. These lands were returned by the surveyor-general as agricultural, hence the burden of proof is upon the contestant to show their mineral character, not that adjoining lands are mineral in character or that the lands in dispute may hereafter develop minerals, but that as a present fact, they are valuable mineral lands. Hooper *v.* Ferguson (2 L. D., 712), Roberts *v.* Jepson (4 L. D., 60).

The evidence in this case, covering several hundred pages, fails to establish the mineral character of the Trumpet, Banner and Jumbo placer claims, while by a preponderance of testimony, it is shown that the homestead entry is much more valuable for agricultural purposes.

The record in this case shows that no portion of the N. ½ of NW. ¼ and SE. ¼ of NW. ¼ embraced by the Bliss homestead has ever been used for mining gold by the mining claimants.

It appears, however, that the greater portion of the alleged conflict on the part of the Eureka, Ontario, New York Bar, and Smith and Justice claims falls within the limits of lot 2 of said homestead, therefore the mineral claimants should be required within sixty days after notice of this decision to have the last mentioned mineral claims surveyed so as to mark the boundaries, distances and courses of the same as required by the mining laws, instead of having a segregation survey of the homestead made at the expense of the homestead party. Creswell Mining Co. *v.* Johnson (*supra*).

In view of the evidence submitted showing the agricultural value of the land in question, I am of the opinion that the homestead entry should be allowed to stand to the extent of the N. ½ of NW. ¼ and SE. ¼ of NW. ¼, and also that portion of lot 2, which by the survey does not conflict with said last mentioned placer claims.

Your decision is modified accordingly.

DESERT LAND ENTRY—OWNERSHIP OF WATER.

GEORGE M. JEWELL.

Proof as to ownership of water requisite to reclamation is sufficient where due compliance with existing local regulations is shown.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 14, 1892.

The land involved in this appeal is SE. ¼, SW. ¼ of NE. ¼ and W. ½ of Sec. 15, T. 25 N., R. 74 W., Cheyenne, Wyoming, land district.

The record shows that George M. Jewell made desert entry of said land July 9, 1887. On July 16, 1890, he made final proof before the clerk of the district court of Albany county, and on the 18th the local officers rejected it, "because no title to water is shown as required by Sec. 11, page 120, Session laws (Wyoming), 1888, and no certificate is furnished as to number of shares owned in ditch." Claimant appealed, and by you letter of September 4, 1890, affirmed said decision, whereupon claimant prosecutes this appeal, assigning as error that your decision is contrary to law, and calls special attention to the statute referred to by the local officers.

The final proof shows that the claimant and two others, filed for record a statement dated July 26, 1887, such as required by section 1343 Revised Statutes of Wyoming, 1887, of a contemplated ditch. This "statement of claim for proposed irrigating ditch," is in conformity with the statute above quoted, and its course, as therein described, is over the land in controversy. In answer to question sixteen of final proof affi-

davit he says that he owns a one-third interest in the ditch and each of the other two, owns the same. In answer to question eight, as to the capacity of his ditch, he says:

> One main ditch, the Cattarugus ditch; length four and a half miles; width on top eight feet; width on bottom five feet; eighteen inches deep; grade four feet to the mile, about thirty cubic feet per second of time. There are six laterals running from the main ditch an average width of one foot wide, and eight inches deep and average one-third mile long, carrying about three cubic feet per second of time.

It is further shown that sufficient water was furnished to and that he did irrigate the land in 1889 and 1890, and it is shown that the water was conveyed by the ditch claimed as above constructed. The source of water supply is the North Laramie river. A crude plat of the section showing the main and lateral ditches is made a part of the final proof.

It does not appear that you or the local officers found the supply of water insufficient, or questioned the actual construction of the main and lateral ditches, or doubted their capacity to irrigate and thus reclaim the land, but you seem to have accepted the proposition announced by the local officers that no title to water had been shown as required by the laws of 1888, *supra*, as stated by them and that the certified copy of the statement filed was only for a "proposed" ditch.

Section 1343, *supra*, provided that "every person . . . . constructing any ditch . . . . and intending to use or appropriate any water . . . . shall file . . . . before commencement of the construction . . . . a statement" etc. There can be but one construction placed on this language, that is that this statement must be filed before the construction of the ditch. If there were any doubt about this interpretation, the second proviso of the section would settle it, for it provides that the person "shall, within sixty days next ensuing the filing of such statement, begin the actual construction of said ditch." There was no other means of acquiring a water right except by this statute at that time—July, 1887—and as far as my investigation has gone, I can find no way in which that right can be proved, except by the statement, or a certified copy thereof, and in this case a certified copy of the statement is made a part of the final proof.

Now the law of 1888, referred to by the local officers, in terms repealed the section above referred to, and enacted a new one in lieu thereof, the principal change being that the statement required should be filed within ninety days *after* the commencement of the ditch. But this law did not obtain at the date of the filing of claimant's statement, hence it does not control, and the legislature, by section 17, page 122, specially provided that

> Nothing in this act contained shall in any wise interfere with any prior right to the use of said water; neither shall the owner or owners of any such ditch, canal or reservoir, who have heretofore complied with the laws relating thereto enacted by the ninth legislative assembly of Wyoming, be required to file any additional statement of claim under the provisions of this act.

I am convinced that claimant has fully shown a valid right to water and of sufficient quantity to reclaim the land.

Your decision is therefore reversed, and you will direct the local officers to receive the final proof offered and on payment for the land issue final receipt.

TIMBER CULTURE CONTEST—APPLICATION TO ENTER DURESS.

THOMPSON *v.* OGDEN.

An application to enter filed with a timber culture contest entitles the heirs of a deceased contestant to the right of entry on the successful termination of the contest.

When threats of personal violence are set up as an excuse for non-compliance with law it must satisfactorily appear that there was reasonable ground to fear personal injury.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 14, 1892.

I have considered the appeal of Mahala Thompson from your decision of August 23, 1890, holding for cancellation the homestead entry of Mrs. Thompson, for the NW. ¼ of Sec. 1, T. 14 N., R. 19 W., Grand Rapids, Nebraska, and allowing the timber culture entry of Mrs. Cora M. Ogden to remain intact.

It appears from the record that Rufus M. Ogden, while in life, filed a contest against the timber-culture entry of William Kingdon for said tract, and filed with said contest an application to enter the land. This contest resulted in the cancellation of said entry, but final action was not taken thereon until April 11, 1887, after the death of said Rufus M. Ogden. Notice of said decision was given the attorney of Ogden April 18, 1887.

On April 19, 1887, Mahala Thompson made homestead entry of the land, and on May 18, 1887, Cora M. Ogden, guardian of the minor children of Rufus M. Ogden, was allowed to make timber culture entry of the tract.

On May 28, 1888, Mrs. Thompson initiated contest against the entry of Mrs. Ogden, guardian, alleging that she had failed to comply with the law in that she did not break five acres during the first year of her entry.

Upon the hearing it was shown that Mrs. Ogden failed to break the five acres during the first year of her entry, but in her testimony she offers in extenuation of such default that she was deterred from doing any work upon the land from fear of personal injury to herself, or any agent that she might employ to do the breaking.

The local officers decided that Mrs. Ogden's entry was erroneously allowed, for the reason that the preference right of entry did not sur-

vive to the heirs, and upon this ground they recommended that her timber culture entry be canceled. You reversed said decision, holding that Rufus M. Ogden having filed with his contest an application to enter the land, that the preference right of entry survived to his heirs, "and in view thereof, as well as the uncontradicted evidence showing that Mrs. Ogden was threatened with injury, and thereby prevented from complying with the law," the decision of the local officers holding her entry for cancellation was reversed, and the homestead entry of Mrs. Thompson was therefore held for cancellation.

From this decision Mrs. Thompson appealed.

As an application to enter filed with a timber-culture contest entitles the heirs of a deceased contestant to the right of entry on the successful termination of the contest, there was no error in your decision holding that Mrs. Ogden was entitled to the preference right to make entry of said tract in favor of the heirs of Rufus M. Ogden. Rosenberg *v.* Hale's Heirs, 9 L. D., 161; O'Connor *v.* Hall et al., 13 L. D., 34.

While it is not denied that Mrs. Ogden failed to break the five acres during the first year of her entry, she testified that she was afraid that personal injury would be done to her or her agents by Mrs. Thompson, who had made threats to injure her or her agents if they attempted to do the plowing. She testified that she tried to get her father, her brother, and James Miller to do the plowing and they were afraid to do it on account of the threats of Mrs. Thompson. Silas Winch (father of Mrs. Ogden) testified that the reason why he did not do the breaking was because Mrs. Thompson had said that "she would kill the man who put a plow into the land, or kill my stock, if I caused it to be plowed."

The testimony does not show what the threats were, to whom they were made, or how they were communicated to Mrs. Ogden, nor does it appear that Mrs. Thompson ever attempted to put into execution any threats or to do anything deterring or preventing Mrs. Ogden or her agents from breaking the land.

The testimony is not sufficient to enable me to arrive at a satisfactory conclusion that Mrs. Ogden or her agents were prevented from breaking the land because of the conduct of Mrs. Thompson, or that there was reasonable ground of fear of personal injury at her hands. In view of this fact, and as the local officers, by reason of their decision holding that Mrs. Ogden was not entitled to the preference right of entry, do not appear to have passed upon this question, I direct that a further hearing be had upon the contest of Mahala Thompson, for the purpose of determining the rights of the respective parties.

Your decision is modified accordingly.

REHEARING—APPEAL—CERTIORARI.

WHITEFORD *v.* JOHNSON.

A motion for rehearing, filed within the time prescribed therefor, suspends the running of time allowed for appeal, until the motion has been disposed of, and due notice given of the decision theron; but if said motion is filed out of time it will not thus affect the time allowed for appeal.

On application for certiorari the Commissioner's action will not be disturbed, unless it is shown that the decision complained of is erroneous, although the Commissioner may have erred in declining to transmit the appeal.

Secretary Noble to the Commissioner of the General Land Office, January 15, 1892.

With your letter of September 11, 1891, you transmitted the application of Edward Whiteford for an order directing you to certify to the Department the record in the above stated case.

It appears from the application that a decision was rendered by your office on November 15, 1890, adversely to Whiteford, in the case of Edward Whiteford *v.* Frank Johnson, involving the claim of the said parties to the NE. ¼ of the SE. ¼, Sec. 14, T. 33 S., R. 64 W., Pueblo, Colorado, and that notice of said decision was personally served on the attorney of Whiteford, November 20, 1890, and on January 17, 1891, he filed an application for a rehearing, which was denied March 9, 1891, for the reason that it was not filed until after the expiration of the thirty days allowed by the rules, and notice of this decision was mailed by registered letter from the local office March 16, 1891. On March 23, 1891, he filed his appeal from your decision of November 15, 1890, which you declined to transmit, for the reason that it was not filed within the time prescribed by the rules.

A motion for a rehearing when filed within the time prescribed by the rules suspends the running of time allowed for appeal until the motion has been disposed of, and due notice given of the decision thereon; but, after the time allowed for filing a motion for review has expired, the filing of such a motion will not suspend the running of the time allowed for appeal, which must in such cases be filed within sixty days from the notice of the decision complained of, allowing the usual time for transmission by mail prescribed by the rules.

In this case the time allowed for appeal commenced to run November 20, 1890, when notice of the decision was personally served on the attorney. The notice not having been sent through the local office, the appellant was not entitled to the five days allowed by the rules for transmission of the appeal; and, hence, the case is not controlled by the ruling in the case of Boggs *v.* West Las Animas Townsite, 5 L. D., 475, relied upon by counsel in support of this application.

This appeal was not filed until March 23, 1891, and not being within the time required by the rules, the application should be denied.

Besides, I am unable to determine from this petition that any error was committed by the Commissioner in his decision, or that substantial justice has not been done in this case, and, unless it is shown by the petitioner that the decision complained of was erroneous, his action will not be controlled upon an application for certiorari, although the Commissioner might have erred in declining to transmit an appeal.

The application is denied.

MINING CLAIM—PROTEST—APPEAL—HEARING.

WEINSTEIN ET AL. *v.* GRANITE MOUNTAIN MINING CO.

The right to be heard on appeal from the Commissioner's decision may be properly accorded a protestant against a mining claim who alleges an adverse interest, and non-compliance with law, and whose application for a hearing on said charge has been denied.

Secretary Noble to the Commissioner of the General Land Office, January 16, 1892.

I am in receipt of your letter of the 2d instant transmitting the motion of defendant to dismiss the appeals in the case of William Weinstein and Roland T. Rombauer *v.* The Granite Mountain Mining Company, involving the Huachuca lode claim, survey 1672, lot No. 198, Flint Creek mining district, Helena, Montana, land district.

I have duly considered the motion, and find that it is not well taken. It is based upon the following grounds, to wit: That the refusal of your office to order a hearing on the protest of plaintiff was within the discretion of the Commissioner, and that appeal will not lie from it; that the *only* interest asserted by protestants is under an alleged location called the "Lightning Striker" claimed by them to have been made years before the publication of notice of the "Huachuca" application for patent; that having failed to file adverse claim within the statutory time they waived their rights, etc.; that their failure to file adverse claim within the time fixed by statute bars their right to assert any *title* or *interest* whatever as against the claimants, and that they are therefore mere strangers to the record. This is substantially the motion, and it appears to be directed against both protests and appeals by Weinstein and Rombauer, whereas they each protested and each appealed. But for the purposes of this motion, I will consider the protests as consolidated, and the appeals as one.

The allegations of the protests are substantially as follows: Weinstein, whose protest is verified and corroborated by two witnesses, alleges, among other things:

That no discovery of any vein or lode of quartz or other rock in place bearing gold, silver or any precious metals was ever made by said company or its grantors within the limits of said Huachuca lode mining claim.

That the said Huachuca lode mining claimants did not expend the sum of five hundred dollars or any other sum of money mining, working and developing said claim before making said entry or at any time.

That the proof of a mineral discovery and five hundred dollars of expenditure thereon is wholly false and fraudulent.

He then charges the Granite Mining Company with seeking by fraud to obtain title to the land for other than mining purposes.

The protest of Rombauer taken as part of this protest is sworn to but not corroborated, except by exhibits. He appears as administrator of his late wife, Caroline E. Rombauer, deceased. He states, in substance, that his late wife had an interest in the "Lightning Striker Quartz Lode" mining claim, situate on Granite Mountain, Flint Creek district, etc.; that said company was duly incorporated, etc. He says that the Huachuca location is substantially laid upon the "Lightning Striker" claim covering the same ground. He shows that the Granite Mining Company procured the interest of one Vallely in the "Lightning Striker" Company, and became thereby a stockholder in the company—co-owner with himself and Weinstein, and it—the "Lightning Striker" Company complied with the law each year—1885 to 1888 inclusive, he and Weinstein paying their shares fully; that the proper affidavits to this effect are of record in Deer Lodge county, Montana, the county in which the land is located; that on January 10, 1887, C. H. Windsor and others, without color of title, and as trespassers, went upon the land and posted notices on the claim calling it the "Huachuca Lode;" that the superintendent and attorney in fact of said Granite Mountain Mining Company knew of this trespass and its purpose; that afterward, for a nominal consideration, said company, intending and contriving to defraud these protestants, pretended to purchase said "Huachuca Lode claim," and it ostensibly sold its stock in the "Lightning Striker" lode to one Dodds, its employé and assistant superintendent. He further states that Dodds and these protestants had the "Lightning Striker" fully represented for the year 1889, they paying to Dodds their share of the cost, for which he holds Dodd's receipt. He alleges, substantially, that the said Granite Mining Company, co-owner through Dodds, whom he says was its employé in the matter, took advantage of this protestant's absence and the fact that he was snow-bound, and it advertised in an obscure newspaper, and that for these reasons he had no notice of the offering of proof; that the entire transaction is fraudulent. He says he is informed and believes that the said Granite Mountain Company have run a cross-cut from its No. 5 level for three hundred feet within the side line of this claim, and is despoiling it. Upon this showing by the protestants, you refused them a hearing, and they appealed. I find by reference to your decision that you considered *ex parte* affidavits offered by the claimant, and really passed upon the merits of the case, refusing to allow protestants to be heard therein.

This motion to dismiss the appeal goes to the jurisdiction of your office and the Department. Where there is no charge that the claim-

ant has failed to comply with the terms of the mining laws, but an adverse claimant simply asserts a prior or superior right to the land as against the claimant, he must file his adverse claim "during the period of publication," and having done this "It shall be the duty of the adverse claimant within thirty days after filing to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession" (Sec. 2326, Revised Statutes). Congress thus removed from the jurisdiction of the Land Department, the determination of this question of mere right between individuals, but it did not take away the jurisdiction to try and determine whether the mining laws have been complied with. The last clause of section 2325 Revised Statutes especially excepts this. It says:

> Thereafter no objection from third parties to the issuance of patent shall be heard, *except* it be shown that the applicant has failed to comply with the terms of this chapter.

In the protests before me I find specific charges of failure to make any discovery of rock in place bearing mineral—a specific denial of the expenditure of any money in development and improvement, and a charge that the testimony offered and upon which the entry was allowed was false and fraudulent, and a further charge that the land is not being entered for mining, but for other purposes, and for the purposes of this case—no hearing having been allowed, these charges stand uncontradicted. These allegations, if true, should cancel the entry.

In Bodie Tunnel and Mining Co. *v.* Bechtel Consolidated Mining Co., *et al.* (1 L. D., 584–590) it was said, substantially, that where third parties present evidence by affidavits, etc. to show failure to comply with the mining statutes, if the evidence is such as to entitle it to credit, and the allegations are such, if proven, as would show that the law has not been complied with, and that patent ought not to issue, or that you have no jurisdiction to issue patent, "then it is your duty to order an investigation between the government and the applicant" as in agricultural entries. Following this principle in Bright *et al. v.* Elkhorn Mining Co. (8 L. D., 122–126) it was held that where the parties allege an interest adverse to the mining claimant, and at the same time failure to comply with the mining laws "a protestant of this character is entitled to the right of appeal." The motion to dismiss the appeal will therefore be overruled, and the case will be disposed of in due course of business.

The motion to dismiss will remain with the papers in the case on file in the Department.

HOMESTEAD ENTRY—ACT OF OCTOBER 3, 1879.

GEORGE S. BUSH.

A homestead entry under the act of March 3, 1879, may embrace one hundred and sixty acres of land in an odd-numbered section within railroad limits where such land is excepted from the grant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 16, 1892.

George S. Bush has appealed from your decision of September 5, 1889, affirming the action of the register and receiver, rejecting his application, made July 15, 1889, for lots 13, 14, and 16, of Sec. 27, T. 20 N., R. 4 E., and lots 16 and 17, Sec. 26, in same township, Seattle, Washington.

The application was rejected because the tracts were embraced in the homestead applications of Frank Spinning and Ira S. Davidson, who made simultaneous applications (April 18, 1887). At the time Bush's application was made, the question of priority of settlement between Spinning and Davidson was pending before the local office, under hearing ordered by your office September 12, 1887.

It is insisted that both Spinning's and Davidson's applications are "prima facie illegal and void," because made for more than eighty acres of double minimum land situated in an odd numbered section within the limits of the grant to the Northern Pacific Railroad Company.

The act of March 3, 1879 (20 Stat., 472), provided that "the even sections within the limits of any grant of public lands to any railroad company . . . . . shall be open to settlers under the homestead laws, to the extent of one hundred and sixty acres to each settler."

In this class of entries the distinction between ordinary minimum and double-minimum lands, which before that time had existed under section 2289 of the Revised Statutes, was done away with.

The act further provided that:

> Any person who has under existing laws taken a homestead on any even section within the limits of any railroad . . . . . and who by existing laws shall have been restricted to eighty acres, may enter under the homestead laws an additional eighty acres adjoining the land embraced in his original entry . . . . . or, if such person so elect, he may surrender to the United States for cancellation, and thereupon be entitled to enter lands under the homestead laws the same as if the surrendered entry had not been made.

The distinction between the minimum and the double-minimum lands in that class of entries having been done away with, it follows that all lands within railroad limits excluded from the grant are subject to entry as other public lands.

The act does not in terms provide for an additional entry of eighty acres in an odd numbered section; but it does provide that the settler "may enter an additional eighty acres *adjoining the land embraced in his*

original entry;" and so in the case of Northern Pacific Railroad Company *v.* Ambers (12 L. D., 395,) an additional homestead entry of eighty acres in an odd numbered section was permitted under the act of March 3, 1879 (*supra*), because, as there said: "the law had been passed granting settlers within railroad limits the right to make additional entry, when such settler had been restricted to an entry of eighty acres."

The land in question being public land of the United States within railroad limits, and excepted from the grant, and the clear intendment of Congress being that such land might be entered in quantities not exceeding one hundred and sixty acres, the same was subject to the first legal applicant having the superior right, which, in this instance, appears to have been Frank R. Spinning, to whom your office on February 14, 1890, awarded the land—Davidson having relinquished all right and claim to the land, and filed his waiver of the right of appeal.

The decision appealed from is affirmed.

SCHOOL INDEMNITY SELECTION—APPLICATION TO ENTER.

TRONSEN *v* STATE OF OREGON.

An application to select school indemnity reserves the land covered thereby until final action thereon, and if accepted takes effect as of the date when presented.

An application to enter, presented after an application to select the land as school indemnity, but prior to the allowance thereof, may be noted of record, and take effect as of the date presented, if the application of the State fails.

Secretary Noble to the Commissioner of the General Land Office, January 16, 1892.

On the 22d of November, 1888, Frederick Tronsen made homestead entry for the NE ¼ of Sec. 14, T. 7 N., R. 7 W., at the land office in Oregon City, Oregon, and on the 24th of December, 1889, after due notice by publication, commuted his entry, made final proof and full payment, and received final certificate and receipt.

Prior to the date of his entry, to wit, on the 16th of October, 1888, the State of Oregon, by her land commissioner, presented at the land office in Oregon City, indemnity school list No. 57, embracing, among other tracts, the east half of the section above mentioned. That list was not accepted and filed in the local office until the 23d of November, 1889, after a decision by your office, that the State was entitled to indemnity for losses sustained by reason of the Grande Ronde Indian reservation, which took from the State the north half of section 16, T. 6 S., R. 8 W.

At the time indemnity school list No. 57 was presented at the local land office, the land embraced therein was free from all claims of any kind whatsoever, and open to entry by any qualified claimant under the law. This was also true at the time the homestead entry in question

was made, so far as the record in the office showed. The entry was made thirty-six days after the selection was presented.

When the final certificate of Tronsen came before you for approval and patent, you held his homestead entry for cancellation on account of its conflict with the selection by the State of Oregon of the same tract as lieu school lands, embraced in indemnity list No. 57, which was offered October 16, 1888, and accepted November 23, 1889, in accordance with your decision of September 24, of that year.

From such decision by you, made on the 9th of August, 1890, an appeal was taken by Tronsen, which brings the case to the Department for consideration.

The presentation, by the State of Oregon, of indemnity school list No. 57, at the local land office, did not vest title to the land in the State. The effect of the presentation of such lists is to remove the land from the public domain to such an extent as to render it no longer subject to filings and entries. The title does not vest in the State until the list is accepted, but when accepted it takes effect as of the date when presented. Between the time of the presentation and acceptance of the list, applications to enter may be presented, and noted, and in case the application of the State should fail, the entry would then be made as of the date of its presentation.

In the case at bar the selection was approved, and such approval vested the title to the land embraced therein in the State of Oregon, and disposed of the claim of the entryman.

The selection by the State was made prior to the entry by Tronsen, and in the case of Alice C. Whetstone (10 L. D., 263), it was held that if there was no prior or superior claim existing at date of selection, the land was subject to selection by the Territory.

The rule which prevails in railroad indemnity cases, seems applicable to cases of this character, and in Rudolph Nemitz (7 L. D., 80) it was said:

> An entry should not be allowed of land embraced within a pending railroad selection; but if so allowed it will not be cancelled, but treated as an application to enter and held subject to the company's claim under its selection.

The rule as to applications to make filings or entries for lands covered by unapproved selections, is stated in 6 L. D., at page 91, in the case of the Atlantic and Pacific Railroad Company, which case commences at page 84 of that volume. It is there said that such applications should be received, noted, and held subject to the claim of the company. This case is cited in Southern Pacific Railroad Company *v.* Meyer (9 L. D., 250), where it is held that "a filing for land included within a prior indemnity selection, should not be recorded until final disposition of said selection." This doctrine was repeated in the case of Darland *v.* Northern Pacific Railroad Company (12 L. D., 195), where it was said:

> A pre-emption claim can not be perfected for land covered by a prior pending indemnity selection, but may remain of record subject to the final disposition of the selection.

In the case at bar the selection was finally disposed of on the 23d of November, 1889, when indemnity list No. 57 was accepted.

More than a month after the title to the land in question had vested in the State of Oregon, to wit, on the 24th of December, 1889, the register and receiver in the land office at Oregon City, allowed Tronsen to make final proof for the land covered by his entry, to make cash payment of $200, and to receive from them final receipt and certificate. This was error on their part. It follows, therefore, that your decision, holding for cancellation the homestead entry of Tronsen, was correct. It is accordingly affirmed.

DESERT LAND ENTRY—PRICE OF LAND.

INSTRUCTIONS.

The price of desert land entered under the act of March 3, 1877, as amended by the act of March 3, 1891, is one dollar and twenty five cents per acre, without regard to the situation of the land with relation to the limits of railroad grants.

Secretary Noble to the Commissioner of the General Land Office, January 13, 1892.

By letter of May 23, 1891, you ask to be instructed and advised as to "whether or not in allowing entries of desert land under the amended law (March 3, 1891) the parties should be required to pay $2.50 per acre for lands coming within the terms of the proviso to section 2357, Rev. Stat."

It has been heretofore held that, under the act of March 3, 1853 (10 Stat., 244) and the proviso to section 2357 Revised Statutes, desert lands within the limits of railroad grants must be paid for at the rate of $2.50 per acre. This ruling was upon the basis that there was in the desert land law (act of March 3, 1877, 19 Stat., 377) fixing the price of lands falling within its provisions at $1.25 per acre, no clause of repeal, and that there was no such repugnancy and inconsistency between the provisions of that act and the act of 1853 that the two could not stand together and be given effect in their respective spheres. Daniel G. Tilton (8 L. D., 368); Annie Knaggs (9 L. D., 49); Hugh Reese (10 L. D., 541).

The act of 1877 was, by section two of the act of March 3, 1891 (26 Stat., 1095), amended by adding thereto four new sections numbered four to eight inclusive. The desert land law, as now amended requires in express terms the payment of twenty-five cents per acre at the time of filing the declaration provided for (Sec. 1) and the payment of one dollar per acre at the date of final proof (Sec. 7.) In section six, we find an express repealing clause in the following words: "All acts and parts of acts in conflict with this act are hereby repealed."

It is true that such clauses are usually found at the end of an act, but I do not think the fact that it is found in some other position is sufficient to justify the conclusion that it is therefore less effective or that

its scope is thereby limited. The language used in this repealing clause is broad and comprehensive enough to include all acts in conflict with the one in which it is found whether that conflict be found in the provisions fixing the price of lands or in any other provisions. Looking at the letter of the law alone, it seems to clearly justify the conclusion that it was not intended that the act of 1853 and section 2357 of the Revised Statutes should apply in those cases where title is sought to be acquired under the act of 1877 as amended by that of 1891. I deem it proper to mention in this connection the fact that from the date of said act of 1877 up to the date of the circular of June 27, 1887 (5 L. D., 708) it was uniformly held that lands entered under that act should be paid for at the rate of $1.25 per acre without regard to railroad limits (6 L. D., 145). The contemporaneous departmental construction of the original act should certainly be given consideration in the discussion of the amended act.

It may be said that Congress must be presumed to have considered the existing construction placed upon the former law by the Executive Department charged with the execution of the law, and in the absence of an affirmative showing to the contrary, must be presumed to have intended that the same construction should be given the similar provisions of the amended law. This line of reasoning has great strength, and would be conclusive were there nothing in the act or its surroundings tending to weaken and controvert it. An examination of the decisions of this Department shows that the conclusion reached was, to a great extent, upon the fact that the law of 1877 contained no clause of repeal, and it seems but fair to presume that the general repealing clause hereinbefore quoted was inserted in the amended act for the express purpose of meeting that argument. It must be remembered too that this act of 1891 was the first legislative action had touching the price of these lands after the change of ruling made by this Department. It seems but reasonable to conclude that Congress did legislate with a view to the then existing ruling of the Department and inserted the repeal clause for the purpose of removing the grounds upon which that ruling was based.

The act of March 3, 1891 provides, by section one, that any person who had theretofore made timber culture entry for any of the public lands might, upon the conditions therein prescribed, and the payment of one dollar and twenty-five cents per acre, acquire title to such land. Upon consideration of this provision of said act, it was held that the price to be paid was the sum specified in said act without regard to the location of the land in relation to the limits of railroad grants. (98 L. & R. 288). The same rule ought to apply in both cases, and I have found no sufficient reason for holding that the conclusion reached at the time the provisions as to timber culture entries was under consideration was wrong.

In section six of said act of March 3, 1891, we find provision is made

for the commutation of homestead entries by paying the minimum price for the land entered. It is quite clear that Congress had in mind the price of public lands as fixed by section 2357, Revised Statutes. We find this same expression "minimum price" in the pre-emption law (Sec. 2259, R. S.), in section 2286 giving the right of pre-emption to counties and parishes, and its equivalent i. e. "government price" in section two of the act of June 15, 1880 (21 Stat., 237). This expression had come to be well understood both by legislative and departmental usage, and it is but fair and reasonable and in accord with the recognized rules of construction to hold that if it had been intended that lands lying within railroad limits entered under the timber culture law or the desert land law were to be paid for at the enhanced price, this same expression which had been so frequently used before under similar conditions would have been used. The fact that Congress in this act of 1891 used one expression in regard to the price to be paid in commuting homestead entries, and another in regard to the price under timber culture and desert land entries, indicates a different intention. "As the same expression is presumed to be used in the same sense throughout an act, or a series of cognate acts, so a difference of language may be prima facie regarded as indicative of a difference of meaning." (Endlich on the Interpretation of Statutes, Sec. 382.)

After a careful consideration of this matter, I have concluded that the amount of money to be paid in acquiring title to desert lands under said act of March 3, 1877 as amended by the act of March 3, 1891 is one dollar and twenty-five cents per acre without regard to the situation of the land in relation to the limits of railroad grants.

FORT RIPLEY MILITARY RESERVATION—ACT OF JULY 5, 1884.

JOHN H. RHODES.

Lands within an abandoned military reservation, transferred to the Interior Department and appraised in accordance with a special act, but remaining undisposed of at the date of the act of July 5, 1884, may be again appraised under said act, and offered at public sale.

Secretary Noble to the Commissioner of the General Land Office, January 13, 1892.

Referring to your letter of September 26, 1891, returning letter of John H. Rhodes referred to this Department by the Honorable Secretary of War, in relation to the abandoned Fort Ripley military reservation, Minnesota, I have to state that it appears that said reservation was relinquished July 2, 1880, by authority of act of Congress approved April 1, 1880 (21 Stat., 69), and turned over to this Department for disposal as prescribed by said act; that 465.54 acres were disposed of leaving 174.47 acres containing the government buildings, which were appraised and offered for sale.

In your letter to this Department, dated November 21, 1889, you state that the register and receiver at St. Cloud, Minnesota, under date of May 18, 1885, reported that the buildings had deteriorated to such an extent since the reservation had been abandoned, that no purchaser could be found to take the land and buildings at the appraised value of $4,406.10.

June 2, 1885, the matter was referred to this Department, and under date of June 13, following, Acting Secretary of the Interior, Mr. Muldrow, held that there was no law authorizing a second appraisal of the property or any provision for the expense of such appraisal.

You now call attention to your letter of October 3, 1890, wherein it is stated that it seems necessary that a re-appraisal of the unsold portion of Fort Ripley reservation should be made and asking "whether any of the funds now available for the appraisal of abandoned military reservations can be applied to such purpose," and also you now request to be advised what steps should be taken toward the disposal of said reservation.

The act of April 1, 1880 (*supra*) provided specifically for the appraisement and sale of said reservation, but it appears that Congress did not anticipate any such circumstances as have arisen in this case, and therefore made no provisions for the exigency.

Under date of July 5, 1884 (23 Stats., 103), Congress passed an act to provide for the disposal of abandoned and useless military reservations. Section one provides:

> That whenever, in the opinion of the President of the United States, the lands, or any portion of them, included within the limits of any military reservation heretofore or hereafter declared, have become or shall become useless for military purposes, he shall cause the same or so much thereof as he may designate, to be placed under the control of the Secretary of the Interior for disposition as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice thereof.

Section 2, provides for the appraisement of such reservations as are turned over to the Interior Department, also

> if such appraisement be disapproved the Secretary of the Interior shall again cause the said lands to be appraised as before provided: and when the appraisement has been approved he shall cause said lands, subdivisions and lots to be sold at public sale to the highest bidder for cash, at not less than the appraised value thereof.

The appraisement of the Fort Ripley military reservation under the act of April 1, 1880, (*supra*) was undoubtedly, excessive and therefore only a portion of said reservation was sold; furthermore, as before stated, there is no provision made in said act for a re-appraisement of the remainder of the reservation.

It will be observed, however, that while the act of 1880, is a special one, passed for the express purpose of restoring to market the Fort Ripley reservation and for disposing of the same at public sale, the act of 1884, is general in character and includes all military reservations that, in the opinion of the President, had prior to the act become or shall subsequent thereto, become useless for military purposes: further-

more, said act authorizes that said useless reservations or so much thereof as the President may designate, be placed under the control of the Secretary of the Interior for disposition.

The reservation in question had been placed under the control of this Department at the date of the passage of the general act and a portion thereof disposed of, hence the question arises, does, under the circumstances, the Fort Ripley military reservation fall within the purview of the general act, and if so, does such act authorize a re-appraisement and sale of the property.

It is a well settled principle that in construing a statute and for the purpose of arriving at the legislative intent, all acts on the same subject-matter are to be taken together and examined to arrive at the true result. "Statutes are *in pari materia*, which relate to the same person or thing, or to the same class of persons and things." (Sedgwick on Construction of Statutory law, 210.)

The acts of 1880 and 1884, embracing the same subject-matter are therefore *in pari materia*, and the fact that the act of 1880 is a special enactment and that of 1884 of a general character, does not alter the status of the same in this respect, as for instance, the legislature of Indiana passed an act fixing the salary of an auditor in a particular county, and also another fixing the salaries of auditors generally, the supreme court of Indiana in the case of Board Commissioners *v.* Cutler (6 Ind., 354), says:

> The rule of construction is well settled. It becomes the duty of the court to regard these enactments *in pari materia*, to consider them as one statute, and give them such an exposition as will sustain what appears to have been the main intent of the law makers.

Congress made ample provision, as they supposed, in the act of 1880, for the appraisement and sale of the Fort Ripley reservation and therefore they did not anticipate or foresee the difficulty that has arisen in this case.

In the act of 1884, however, Congress seems to have anticipated any exigency that may arise in the appraisement and disposal of useless military reservations, and it is presumed that the committees in Congress having charge of the preparation of the bill before its passage, were cognizant of the act of 1880, as well as all other former legislation on the subject of abandoned military reservations and therefore the law was framed, broad and comprehensive, with the probable intent to cover not only the Fort Ripley military reservation but all other reservations of a like character.

The third section of the act of 1884, provides:

> That the Secretary of the Interior shall cause any improvements, buildings, building materials, and other property, which may be situate upon any such lands, subdivisions or lots not heretofore sold, by the United States authorities, to be appraised in the same manner, as hereinbefore provided for the appraisement of such lands, subdivisions and lots, and shall cause the same, together with the tract or lot upon which they are situate to be sold at public sale, to the highest bidder for cash at not less than the appraised value of such land and improvements.

Said section further provides:

That if the land and improvements are not sold for want of bidders then the Secretary of the Interior may, in his discretion, cause the same to be re-offered at sale, at any subsequent time, in the same manner as above provided.

Thus it will be seen that the last mentioned section empowers the Secretary of the Interior to appraise any buildings or other property, not heretofore sold by the United States, situate upon any military reservation transferred to this Department for disposal, and sell the same, together with the land upon which such improvements are situate, to the highest bidder. The Fort Ripley reservation had been turned over to this Department for disposal at the date of said act and the buildings and other property, pertaining to said Fort, with the ground occupied thereby, still remains undisposed of. therefore the reservation in question, falls within the purview of said section and may be again appraised and offered at public sale.

The act approved March 3, 1885, (23 Stat., 446–449), provides as follows:

For necessary expenses of survey, appraisement, and sale of abandoned military reservations, transferred to the control of the Secretary of the Interior under the provisions of an act of Congress approved July 5, 1884, $20,000: provided that all appropriations herein under public lands shall be expended under the direction of the Secretary of the Interior.

There still remains of this appropriation an unexpended balance of over $10,000 subject to the control of the Secretary of the Interior for the purposes named in the act from which any necessary expenses incurred in the appraisement and sale of the Fort Ripley reservation, may be paid, and therefore you are directed to proceed in the usual manner as is customary in such cases, to have said reservation and improvements thereon again appraised and disposed of at public sale in accordance with law.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT RIGHT.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. ET AL. *v.* IVERSON.

Land embraced within a subsisting pre-emption filing, or homestead entry, is excepted from the operation of a withdrawal for indemnity purposes.

Land lying within common indemnity limits, but excepted from the orders of withdrawal, is open to settlement and entry by any qualified person, or selection by either company.

An application to make homestead entry of land embraced within a pending rejected indemnity selection may be allowed where the record discloses a prima facie case of a prior settlement right, and the company declines to furnish the requisite showing for a hearing. The conflict thus arising may remain for determination either under the selection, or on offer of final proof.

Secretary Noble to the Commissioner of the General Land Office, January 18, 1892.

I have considered the case of the St. Paul, Minneapolis and Manitoba Railway Company and the Northern Pacific Railroad Company *v.* Carl

Iverson, involving the N. ½ of the SW. ¼, Sec. 11, T. 128 N., R. 34 W., St. Cloud land district, Minnesota, on appeal by said companies from your decision of April 21, 1890, holding that Iverson should be permitted to make entry of the same.

This controversy arose upon an application by Iverson to make homestead entry of the N. ½ of the SW. ¼, the SW. ¼ of the NE. ¼, and the SE. ¼ of the NW. ¼ of said section 11, which application was presented at the local office November 21, 1885, accompanied by an allegation of settlement in April, 1883, and the same was rejected, from which action Iverson appealed.

This land is within the common indemnity limits of the grants for the two roads, the withdrawals for which became effective in this vicinity as follows: Northern Pacific Railroad Company, January 6, 1872; St. Paul, Minneapolis and Manitoba Railway Company, February 12, 1872.

The SW. ¼ of the NE. ¼, the SE. ¼ of the NW. ¼, and the NE. ¼ of the SW. ¼ of said section were embraced in homestead entry No. 4884, made April 25, 1868, by John Clark, which entry was canceled February 29, 1872.

William H. Selby filed declaratory statement No. 3200, covering the NW. ¼ of the SW. ¼ of said section, on October 23, alleging settlement October 11, 1871.

Under the uniform rulings of this Department, said filing and entry, being subsisting claims at the dates said withdrawals became effective, served to except the land embraced therein from the operation of such withdrawals, and the same was thereafter subject to settlement and entry by any qualified person, or selection by either of the companies in the manner prescribed in the regulations governing such selections.

On November 5, 1883, the Northern Pacific Railroad Company applied to select all of the tracts applied for by Iverson, and appealed from the refusal of the local officers to accept the same.

In a case arising upon an application by one Swan P. Thornquist to enter the SE. ¼ of the NW. ¼ and the SW. ¼ of the NE. ¼ of said section 11, your decision of February 7, 1884, rejected the claims of both companies thereto, from which only the Manitoba Company appealed, it thereby becoming final as to the Northern Pacific Railroad Company.

Said appeal by the Manitoba Company was considered by this Department October 31, 1885, and your decision was affirmed.

This disposed of the interest of both companies to the tract therein involved upon the record as then made, and leaves for present consideration the N. ½ of the SW. ¼ of said section 11.

On April 3, 1884, the Manitoba Company selected said N. ½ of the SW. ¼, which selection is now of record.

In view of the allegation of settlement made by Iverson, which antedated the selections by both companies, and for other reasons bearing upon a conflict with the entry by one William Gutchers, which are unnecessary here to recite, a hearing was directed by your letter of December 8, 1886.

No notice of this hearing was ever served upon the Northern Pacific Railroad Company, but the testimony taken at such hearing shows that Iverson settled upon the land in December, 1882; that he established actual residence upon the land in April, 1883, and thereafter resided continuously upon the land.

Your decision upon this record finds that Iverson's rights to the land applied for are superior to that of either company, and it is stated that the privilege of a further hearing will be accorded the Northern Pacific Company, "upon application for such hearing, supported by sworn statement containing allegations making a *prima facie* case in its favor."

The Northern Pacific Railroad Company requested a hearing, but refused to make the showing required, which you continue to insist upon.

Both companies therefore appeal from your decision in favor of Iverson.

As to the Manitoba Company the record is complete, and it shows that Iverson was occupying and claiming the land long prior to its selection of 1884. Such selection is therefore no bar to his entry, and and the same will be canceled and the entry allowed.

The claim of the Northern Pacific Railroad Company rests upon a rejected application to select, pending before your office on appeal. The legality of this selection has not been passed upon, and even should it be held to be valid, the record as made shows the claim of Iverson to be superior thereto. I do not think this company can be held to be bound by said record, but from all the circumstances, I deem a further hearing unnecessary at this time.

The record is sufficient to warrant the allowance of the entry as applied for, and any rights the Northern Pacific Railroad Company may have under its attempted selection are not divested thereby.

When Iverson offers proof it can appear, as any other party, and show a superior claim. Prior to this time the company's appeal may be determined, and should it be against the company, the conflict would thus be disposed of without considering the rights of Iverson under his alleged prior settlement.

Iverson's application was not presented under the circular of September 6, 1887, providing for the restoration of indemnity lands, and the action here taken can not be construed to be in conflict therewith. Your decision is accordingly modified.

AUGUST W. HENDRICKSON.

Motion for review of departmental decision rendered August 15, 1891, 13 L. D., 169, denied by Secretary Noble, January 18, 1892.

RELINQUISHMENT—FINAL TIMBER CULTURE ENTRY.

HARLAN P. ALLEN.

The relinquishment of a final entry may be accepted without requiring the entryman to show that he has not transferred the land, where no interest of a transferee is asserted, and the record discloses no fraudulent intent.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 18, 1892.

I have considered the appeal by Harlan P. Allen from your decision of August 18, 1890, holding for cancellation his timber-culture entry No. 2234 (Marshall series), covering the S. ½ of the NE. ¼ and the N. ½ of the SE. ¼, Sec. 4, T. 118 N., R. 45 W., Minnesota, for conflict with the prior entry by Elwin Jenks for the same land.

It appears that on April 1, 1878, Jenks made timber-culture entry No. 1077 (Benson series), for this land, upon which he made proof and final certificate No. 101 (Benson series) issued January 15, 1887. Jenks's relinquishment, of all his right, title, and interest in and to this land, was filed in the local office on December 2, 1889, and thereupon the local officers canceled his entry and permitted the entry to be made by Allen, now in question.

On January 15, 1890, you refused to accept the relinquishment by Jenks, because not accompanied by a showing that he had not encumbered the land, following the case of Addison W. Hastie, 8 L. D., 618. In that case it appeared that the entryman was seeking to relinquish and secure a cancellation of the entry for the purpose of defeating the collection of a mortgage which had been executed by him upon the land to secure the payment of the sum of $250 and interest, and the department held that under such circumstances it would not allow the entryman to relinquish his entry and thereby secure a cancellation of the same on the ground that it would be an unconscionable wrong, and this same rule was announced in the case of Patrick H. McDonald, 13 L. D., 37. There the entryman attempted to secure a cancellation of his entry for the purpose of depriving his wife and seven children of their home, as well as defeating the rights of the mortgagee and the department held that he should not be permitted to do so under such circumstances, but neither of these cases is applicable to the facts in this. Here, no question is raised that the entryman is attempting by this relinquishment to defraud any party to whom he has conveyed or attempted to convey, an interest in the land. It was free from fraud so far as the record discloses and I can see no reason why the relinquishment, as offered, may not be accepted. In fact, it strikes me as being eminently proper that on account of Allen's entry it should be accepted. Your directing the local officers to reinstate Jenks' entry brings it into direct conflict with that made by Allen and to re-instate it might work serious wrong to him.

Section 1, of the act of May 14, 1880, 21 Stat., 140, seems to recognize the right of this entryman to relinquish his claim to this tract of land if he sees fit so to do and there being no evidence of fraud upon Mr. Jenks' part, and the relinquishment being presumably made in good faith, and Mr. Allen's entry being of record, I can see no objection to allowing the relinquishment and the cancellation of Jenks' entry. It is so ordered. This will leave Mr. Allen's entry to stand subject to future compliance with the timber culture act.

HARRINGTON *v.* WILSON.

Motion for review of departmental decision rendered July 6, 1891, 13 L. D., 19, denied by Secretary Noble, January 20, 1892.

CONTEST—PROCEEDINGS BY THE GOVERNMENT.

FARGHER ET AL. *v.* PARKER.

An application to contest an entry filed during the pendency of proceedings by the government confers no right upon the contestant, but may be received and held subject to the final disposition of said proceedings.

Where notice to show cause why an entry should not be canceled for failure to submit proof within the statutory period has been issued, an affidavit of contest subsequently filed will not defeat equitable confirmation of the entry if the showing made is satisfactory.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 20, 1892.

The appeal of T. C. Fargher from your decision of March 26, 1890, sustaining the action of the local officers in rejecting his application to contest the homestead entry of Erastus L. Parker, for N. ½ of NE. ¼, SE. ¼ of NE. ¼, and NE. ¼ of SE. ¼, Sec. 18, T. 2, R. 14 E., The Dalles, Oregon, has been considered.

It appears that Parker made said homestead entry November 18, 1881; that on May 28, 1889, the entry having expired by limitation of statute, the local officers so notified the claimant by registered letter, calling on him to show cause why his entry should not be canceled for failure to make final proof within seven years from date of entry.

June 12, 1889, Fargher filed affidavit of contest against said entry, alleging that Parker was dead and that his heirs had abandoned the land in question for the last three years. A hearing in the case was set for August 12, 1889, but neither party appeared for trial and therefore the contest was dismissed.

August 13, 1889, O. M. Bourland entered contest against the same entry, making the same allegations made by Fargher, and on the following day, Fargher filed application to re-open his contest by setting

aside the judgment of default, alleging that he depended on his attorney to give him notice of the day of hearing, but that he never received such notice.

The local officers denied this application on account of the pending application of Bourland, whereupon Fargher appealed and you affirmed the decision below.

Fargher again appeals.

The appellant sets forth by affidavit that since filing his application to contest said entry, he has placed improvements upon said tract by inclosing under a good fence a large portion of the land in controversy with a view of making entry thereof as soon as the land became subject thereto and that Bourland who made the second application to contest knew of his intention to make entry and that he had improvements upon the land.

When the government takes any steps or initiates any proceeding whatever looking to the cancellation of an entry or to enforce the forfeiture of the same no rights can be acquired under an affidavit of contest filed during the pendency of such proceedings against the entry. Drury *v.* Shetterly (9 L. D., 211); Louis *v.* Taylor (11 L. D., 193); Dean *v.* Peterson (id., 102); Canning *v.* Fail (10 L. D., 657).

An application to contest an entry filed pending proceedings against the same by the government should be received and held subject to the result of said proceedings and if said proceedings fail, the contestant is then entitled to proceed against said entry as of the date when his application was filed. Farrell *v.* McDonnell (13 L. D., 105).

In the case under consideration the entry of Parker had expired by limitation of statute and the government had initiated the usual proceedings looking towards a cancellation of the entry, hence, under the circumstances, the local officers erred in taking any steps in the application of Fargher to contest the entry in question, but in accordance with the rule laid down in Farrell *v.* McDonnell (*supra*) said application should have been received and held pending the result of the government proceeding.

A second contest filed during the pendency of a prior suit, should be received and held in abeyance subject to the final disposition of the prior contest. Conley *v.* Price (9 L. D., 490); Eddy *v.* England (6 L. D., 530).

The fact that the party was deceased at the date the government gave out the notice to show cause, does not in my opinion affect the case, so far as the government is concerned. In the case of the decease of a claimant, a contestant desiring to procure the cancellation of the entry, is required to give notice of contest to the heirs of such deceased claimant, but it does not follow that the government stands in the same relation to the claimant as a contestant.

The presumption is, that a claimant, or if deceased, his heirs, were cognizant of the date when the entry expired by limitation, hence the

notice is simply a preliminary step on the part of the government looking toward the cancellation of the entry and should it subsequently appear that the claimant or the claimant and his heirs have complied with the law the entry may be submitted to the board of equitable adjudication.

In view of the foregoing you will direct the local officers to hold said applications, of Fargher and Bourland in abeyance subject to the result of the pending proceedings by the government.

Your decision is modified accordingly.

RE-INSTATEMENT—TRANSFEREE—SECTION 7, ACT OF MARCH 3, 1891.

MCLEOD *v.* BRUCE ET AL.

A transferee is entitled to an order of re-instatement where the entry is canceled on contest proceedings instituted in collusion with the entryman, and where said transferee has had no opportunity to show compliance with law on the part of the entryman.

A transferee is bound to know the status of a tract at the date of purchase, and where, at such time, the records of the local office show the cancellation of the entry, he is not entitled to invoke the confirmatory provisions of section 7, act of March 3, 1891.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 21, 1892.

On February 24, 1883, Angus Bruce filed a pre-emption declaratory statement for the NE. ¼ SW. ¼, S. ½ NW. ¼, Sec. 10 and SE. ¼ NE. ¼ of Sec. 9, T. 20 N., R. 3 E., Helena, Montana.

On September 29, 1883, he made final proof thereon, and on October 17, 1883, following, paid for the land and received a final receipt therefor. On October 20, 1883, he transferred the tract by warranty deed to Timothy E. Collins, who, on January 2, 1884, transferred the same to Paris Gibson and Robert Vaughn.

On October 26, 1886, Vaughn transferred his interest therein to James J. Hill, and on February 23, 1887, Gibson transferred his interest therein to said Hill. On July 9, 1887, Hill transferred the tract in question to the Great Falls Water-power and Townsite Company.

On April 23, 1884, while the tract was owned by Gibson and Vaughn, your office, in passing on the sufficiency of Bruce's final proof, called upon him to furnish additional proof. He refused to do so unless the owners of the tract would pay him $1,500 for doing so. This they refused to do, and he did not furnish the proof.

On September 7, 1886, the contest affidavit of Roderick McLeod, a cousin of Bruce, was transmitted to your office by the local officers. This affidavit was corroborated by William Bruce, a brother of the entryman and a cousin of McLeod. On October 5, 1886, a hearing was ordered by your office on the charge made by McLeod.

On October 26, 1886, Bruce filed a relinquishment of his entry, whereupon said entry was canceled, and Roderick McLeod was allowed to make homestead entry therefor. On December 29, 1886, the cancellation of Bruce's entry was noted, and the contest case of McLeod *v.* Bruce was closed.

On March 11, 1887, the transferees filed a motion in your office to re-instate said cash entry made by Bruce on the ground that the contest of McLeod and the relinquishment of Bruce were collusive and in fraud of the vested rights of said transferees.

This application was accompanied by affidavits setting out the facts relied upon to sustain the charges of collusion. On March 26, 1887, this motion was denied by your office, but on appeal to this Department, a hearing was ordered October 18, 1888, "to determine the truth or falsity of the allegations upon which the motion for re-instatement of said cash entry was based." A trial was had on January 14, 1889.

On June 11, 1889, after considering the evidence submitted at said trial, the register and receiver rendered a finding that the relinquishment of Bruce and the making of the entry of McLeod were collusive and intended to defraud the transferees of Bruce. Accordingly, they recommended that Bruce's entry be re-instated and the entry of McLeod canceled.

McLeod appealed from this finding to your office where, on April 17, 1890, the finding of the local officers was reversed in so far as it recommended the re-instatement of Bruce's entry, and it was held that "McLeod having made his homestead entry in the interest of Bruce, the same is accordingly held for cancellation," and appeals were taken from your decision to this Department by both McLeod and the transferees, and were pending here at the date of the passage of the act of March 3, 1891 (26 Stat., 1095).

Since the passage of this act, the Great Falls Water-power and Townsite Company has filed a motion under the rule of April 8, 1891, asking that a patent issue on the entry of Bruce under and by virtue of the provisions of section seven of said act. Said company has furnished affidavits and a certified abstract of title showing

1st. That the land in controversy was sold to and became the property of the Great Falls Water-power and Townsite Company—the present owner—prior to March 1, 1888, and long after final entry.

2nd That no adverse claim originated prior to the date of final entry nor until after the acquisition of the tract by the present owner.

3rd That the purchase was, on the part of the purchasers for a valuable consideration and bona fide in all respects.

4th That no fraud has been found on the part of the purchaser, nor knowledge of fraud on the part of others, and that the land has not been reconveyed to the entryman.

It is apparent from the facts in this case, showing as they do that the entry was canceled on December 29, 1886, that the motion for confirmation must be denied unless it shall appear from the record as it stood

before the confirmatory act was passed that the transferees were entitled to have said entry re-instated.

The judgment canceling said entry has not been allowed to become final, but has been kept open by the appeal taken from your office decision refusing re-instatement. If said judgment had become final before the act was passed, no rights could be acquired by the motion because no entry existed. James Ross (12 L. D., 446).

Before considering the motion, it therefore becomes necessary to pass upon the merits of the case as brought here by the appeals from your decision of April 17, 1890.

The hearing ordered on the showing made by the transferees was held for the purpose of determining the truth or falsity of the allegations made in support of the motion for re-instatement and after an examination of the evidence, it seems clear that the charges made were sustained, in fact, in your office decision you find that the proof showed that the contest of McLeod and the relinquishment of Bruce were collusive and were intended to defraud the transferees. Bruce hoped to get the land through McLeod's contest and entry for the reason that through the efforts and expenditures of the transferees, it had become valuable, besides when your office called upon him to supply certain missing proof and the transferees had refused to pay him a large sum of money to furnish said proof, he declared that he would prevent them from acquiring title to said land. Under such circumstances and especially when he had sworn in his final proof that his entry was made in good faith for his own use, I think his testimony should be considered with caution.

Prior to the passage of the act of March 3, 1891, the transferees were held to have no greater rights or equities than the entryman from whom they purchased, but they were always allowed to appear and show that said entryman had complied with the law. Traveler's Insurance Co. (9 L. D., 316).

In this case it is shown that the letter of your office, directed to the register and receiver calling on Bruce to submit better evidence of citizenship or to file a new declaration of intention and to furnish a new pre-emption affidavit (the one indorsed upon his final proof papers having omitted to state what particular subdivisions were included, though showing the township and range) was dated April 13, 1886. After allowing for the time between this date and the date when this order must have been served upon Bruce, (The date of service is not shown) it is probable that it was a month or two later before he was asked to make the proof. Then after the transferees learned that new proof was required more time had elapsed. They then began to urge Bruce to furnish this proof and offered to pay all expenses and pay for his time. The proof called for was technical and did not indicate that in the matter of residence and improvement there had been any failure,

and while he was attempting to extort money from the transferees, they evidently yet thought he would furnish said proof in time.

The contest of Mc Leod brought by Bruce's procurement quickly followed by the relinquishment of the entry and the allowance of the entry of contestant, was the first intimation that the transferees received that their title to the land was seriously questioned. I think that the evidence shows that they had not been given a "day in court" to show that their grantor had complied with the law, especially is this so when this grantor and entryman has shown himself so hostile. The entry of Mc Leod will therefore be canceled, and the entry of Bruce be re-instated. This re-instatement, of course, will place the entry on record of the date when it was wrongfully canceled. In contemplation of law it has been an existing entry all the time, and was an existing entry on March 3, 1891, when the act heretofore cited was passed.

Do the provisions of the seventh section of said act confirm this entry?

At the hearing had on the application for re-instatement of this entry, the question of the bona fides of the purchasers was not in issue. The question to be determined under the order was whether or not the charges made by those claiming under the Bruce entry, that the contest against it and the relinquishment thereof were collusive, were false or true.

The present owner of the tract, the Great Falls Water-power and Townsite Company, alleges that it is a purchaser in good faith for a valuable consideration and without notice of any kind that the entry of Bruce was not made in good faith.

While the question of the bona fides of the present holder of this land was not in issue, and while those claiming under the Bruce entry only asked to have the entry reinstated so that they might be enabled to show that the entryman complied with the law, still on the trial of said cause some facts were sworn to showing that Gibson, one of the purchasers of the tract, and Vaughn, another purchaser, had contracted with Bruce to make the entry in question for their benefit, and your office held,

> I am fully satisfied that Bruce filed upon and made cash entry of the land in controversy, in pursuance of said contract and in the interest of Vaughn, Gibson, *et al.*, who now constitute the stockholders of what is known as the Great Falls Water-power and Townsite Company.

It is strenuously denied that any of the first transferees, who are charged with bad faith in your decision, have any stock in said company except Gibson. It is also denied that he or Vaughn or any one else procured Bruce to make the entry.

From the evidence in the record, I do not think your finding of fraud is sustained. The local officers who saw the witnesses and observed their manner of testifying did not find any fraud on the part of any of the transferees, or that the entry was made in the interest of any of

them. Your judgment seems to have been formed from the testimony of Bruce and the failure of Vaughn to give evidence.

Bruce, judged in the light of his statements, is not guided by that motive which carries conviction as to the integrity of his evidence and the neglect of Vaughn to give testimony is now explained in a way which partially, at least, explains his neglect.

It is shown by the record that at the date when the present owner, the Great Falls Water-power and Townsite Company (July 9, 1887), purchased the tract, the entry had been canceled and another entry allowed therefor. The records of the local land office disclosed these facts. The transferee is bound to know the status of the land at the date of its purchase, and although a final certificate may have been issued at the time of the transfer, yet the entry having in fact been canceled at that date, it would not be confirmed. Roberts *v.* Tobias *et al.*, 13 L. D., 556. In this case the Department said:

> He is bound to know the status of the land at the date of the sale or mortgage. If the final proof has not been made and the certificate has not issued, or, if having been issued it is duly canceled on the records of the local office, can the vendee or mortgagee shut his eyes, pay out or loan his money on the faith of the certificate issued perhaps many years before, when the entry has already been canceled, and claim to be an innocent purchaser? I think not. The law never intended that a man should wilfully shut his eyes to the condition of the land as shown by the record, at the very time the purchase or loan was made.

For these reasons the motion for confirmation must be and is hereby rejected.

You will cancel the entry of Mc Leod and reinstate the entry of Bruce, after which the transferees will be allowed an opportunity to furnish additional proof of the citizenship of Bruce. This proof should consist of the best obtainable evidence. They will also be allowed to amend the pre-emption affidavit of Bruce so that it will describe the tract perfectly.

Since the appeal was taken in this case from your judgment, Mc Leod has filed a motion asking that a re-hearing be ordered, alleged that he has discovered new evidence which he could not have produced before, by which it can be shown that there was no collusion between him and Bruce. He has filed his own affidavit and that of John H. Mc Leod, tending to show that there was no collusion. These affidavits have been examined, and it is found that even assuming that the witnesses named in the motion will swear to the facts alleged, still it would not be sufficient to overcome the positive and unmistakeable evidence in the record that there was collusion between Mc Leod and Bruce. Mc Leod knew at the time his contest was initiated and at the time Bruce filed his alleged relinquishment that all interest Bruce had ever had in the land had been by him transferred to others for a valuable consideration. Bruce lived with Mc Leod, who was his kinsman, and Mc Leod filed his contest immediately after Bruce had declared that he would beat the

transferees out of the land, if they refused to pay him $1,500 for completing the evidence.

Altogether it is apparent that there was collusion, and the evidence now proposed to be furnished does not materially differ from that introduced by Mc Leod at the trial.

The motion for a re-hearing is denied.

Your judgment is reversed, in so far as it refused to reinstate the entry of Bruce.

SETTLEMENT RIGHTS—PRACTICE—REVIEW.

STONE *v.* COWLES (ON REVIEW).

A settlement on land covered by the entry of another confers no right as against the entryman or the government, but as between parties who have thus settled, the settlement first made in point of time is entitled to the highest consideration.

A settlement right is not acquired by the purchase of the prior possessory right of another.

A motion for review will be denied where no new question of law or fact is presented for the consideration of the Department.

Secretary Noble to the Commissioner of the General Land Office, January 22, 1892.

This is a motion by the attorney for Alfred E. Cowles asking for a review of the departmental decision dated August 24, 1891, (13 L. D., 192) in the case of Joseph C. Stone *v.* Alfred E. Cowles, involving the NW. ¼ of the NE. ¼ and the NE. ¼ of the NW. ¼ of Sec. 13, T. 14 S., R. 2 W., Los Angeles, California.

Three errors are assigned in this motion as follows:

1. That said decision is based upon an error of fact in holding that said Stone was a legal settler upon the land with any declared intention of claiming it as public land at any time prior to the entry of said Cowles.

2. That it is based upon an error and mistake of fact and law in not holding that said Stone moved on three acres of the land as a tenant, and solely by permission of Cambron who claimed title to three acres only, which had been set aside for a grave yard.

3. That as such tenant of Cambron, Stone could acquire no settlement right to the land.

4. That as a trespasser in violation of law Stone could not acquire any legal right under the act of May 14, 1880, or any other act, based upon an illegal settlement.

Each of these grounds of error was substantially covered by the appeal, and was fully considered by the Department in passing upon the case. Notwithstanding this it is claimed that in some manner Cowles acquired a superior right by reason of the possession of French, for it is urged in argument that French had been in the undisputed possession of the tract for fifteen years seeking to obtain title to it. Assuming this to be true, French's possession could not avail anything for Cowles. It appears that French had relinquished all his rights to the land. Cowles could not acquire any right to the land by virtue of his pur-

chase from French. "The only things he can buy are the improvements of a prior settler. His *own* right as a settler must date from the time he made *actual personal* settlement." Wiley *v.* Raymond (6 L. D., 246). French is not a party to the controvery, he voluntarily relinquished his rights, and after that was done then the question became one of settlement between Stone and Cowles, neither of whom could base any claim to the tract upon anything that French had done thereon. As against French, so long as his entry remained of record, or as against the United States, neither Cowles nor Stone could acquire any right by virtue of their settlements upon the land covered by French's entry, yet as between the parties who have thus settled, the settlement first made in point of time is entitled to the highest consideration. Kruger *v.* Dumbolton (7 L. D., 212).

This doctrine was clearly announced in the decision sought to be reviewed, and there is nothing new presented in the argument of counsel for Cowles upon this point.

Counsel for the motion assert, "that there is not any evidence showing that Stone pretended to claim as a settler until March 2, 1888, but that prior to that date he was claiming the three acres only under the Cambron deed, and that up to that date he was a tenant under Cambron." This assumption is not borne out by the evidence. The finding of the Department on this point was as follows:

> It is clear from the evidence that he (Stone) all along, from August, 1887, laid claim to the whole eighty acres. Laying no stress upon his offer to make entry of the whole eighty, August 17, 1887, it clearly appears that when he made settlement and took up his residence on the three acres, which had been sold to Cambron, he did so with the expressed intention of claiming the whole subdivision in dispute. This is shown by his own and Cambron's testimony, in fact, Cowles must have understood this, for he admits that he notified Stone "to leave and quit the premises."

A careful examination of the evidence shows these findings to be abundantly supported by it, and the authorities cited by counsel are not applicable to such a state of facts.

No new question, either of law or fact, is presented by the motion under consideration, therefore, I discover no reason for disturbing the decision heretofore made in the case. The motion is denied.

PRACTICE—MOTION TO DISMISS CONTEST—NOTICE.

JOHNSON *v.* JACKSON.

An order of the local office dismissing a contest can not be held to be *sua sponte*, where such action is not taken until after a motion, asking for said order, has been filed.

A motion to dismiss filed after the day set for hearing should not be acted upon without due notice to the opposite party.

A motion to dismiss a contest on the ground that the contestant, in proceedings before a commissioner, has not paid for taking the testimony, as required by the rules of practice, should not be sustained, where, prior to action thereon, the requisite fees have been paid and the evidence transmitted to the local office.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 22, 1892.

Your office, by letter of May 24, 1888, directed that a hearing be had in the case of John A. Johnson *v.* E. A. Jackson, involving the homestead entry made by the latter February 26, 1888, for the W ½ of the SE ¼ of Sec. 17, T. 21 S., R. 28 E., Gainesville land district, Florida.

A commission duly issued directed that testimony be taken before T. J. Shine, clerk of the court of Orange county, Florida, at 10 o'clock A. M. of April 6, 1889; and April 16, 1889, was set for the examination of the testimony by the local officers.

The defendant and his attorney were present at the time and place appointed for the taking of testimony, but the contestant failed to appear. The case was postponed until two o'clock in the afternoon of the same day, when the contestant appeared, and on his motion and accompanying affidavit the case was continued on account of an absent witness until April 9, 1889, at 12 o'clock M. On that date, testimony was taken—the jurats and certificate being signed "T. J. Shine, Clerk, by J. N. Bradshaw, D. C."

The testimony was not transmitted to the local officers in time for them to render a decision on the day set therefor (April 16, 1889, *supra*). A letter dated June 24, 1889, signed "D. S. Shine, D. C." is on file with the papers, advising the receiver that the testimony is retained in the office of the clerk appointed to take the testimony, on account of nonpayment of fees; that the contestant had been notified but had not paid them.

On June 29, 1889, counsel for defendant filed a motion to dismiss the case, because the contestant had failed to pay the fees, as required by Rule 54 of Practice. This motion was not acted upon at the time, partly on account of the illness of the receiver, and partly because of the press of other business.

On August 16, 1889, the testimony was received at the local office—the contestant having by this time paid the fees.

On September 29, 1889, the receiver dismissed the contest because of the contestant's laches in matter of fees—in which action the register refused to join.

On October 26, 1889, the contestant appealed from the judgment of the receiver, contending that the contest ought not to have been dismissed without service upon contestant of the motion to dismiss; and that his laches had been cured by the payment of the fees before action was taken upon said motion.

On September 2, 1890, you rendered decision holding that upon the contestant's failure to have the testimony in the local office for examination on April 16, 1889 (the day set), he was in default; and such default being caused by his neglect to comply with Rule 54 of Practice, and he having failed to explain his non-compliance with the rule after an opportunity had been afforded him to do so, it was the duty of the

local officers to dismiss the case on their own motion (irrespective of the motion of defendant's counsel.)

From your decision the contestant appeals to the Department, on the ground, substantially, that you were in error in holding that the receiver dismissed the contest *sua sponte;* in holding that he had authority to so dismiss it; in holding that the report of non-payment of fees was officially communicated to the local officers; and in holding that contestant was not entitled to notice of the motion to dismiss his contest.

I think it was within the authority of the local officers on the day set for considering the testimony to have held and announced, *sua sponte*, that the contestant was in default, and to have dismissed the contest, for failure to be present with the evidence in the case on said day leaving to him the burden of showing, if he could do so, sufficient reason why such default should be set aside. But having omitted to act until the motion to dismiss was filed, in my opinion, the action had in the case thereafter must be regarded as having been taken upon said motion.

Had such motion been made on the day set for considering the testimony, it would not have been necessary to serve notice of the same upon the defendant. A motion to dismiss made at a later day ought, in my opinion, to have been served upon him, in accordance with Rule 99 of Practice. It was therefore error to dismiss the contest without such service.

Had the motion to dismiss (properly served upon the defendant) been granted prior to the payment of the fees and the reception of the testimony, in my opinion, such action would have been proper; but inasmuch as the fees had been paid and the testimony sent to the local officers before action was taken upon the motion, in my opinion, the laches ought to be considered as having been cured.

Your decision sustaining the action of the receiver in dismissing the contest is therefore reversed. You will direct the local officers to consider the testimony taken, and adjudicate the case.

PRACTICE—APPLICATION FOR REHEARING.

TUCKER *v.* NELSON.

An application for a rehearing, though once denied, may be properly allowed, where, on further showing, it is made to apppear that the decision in question was procured through fraud and deceit practiced upon the Department.

Secretary Noble to the Commissioner of the General Land Office, January 22, 1892.

Peter B. Nelson made a timber-culture entry on January 30, 1885, for the NW ¼ section 14, T. 3, N., R. 48 W., Valentine, Nebraska, now Chadron, Nebraska.

Wm. H. Tucker initiated a contest against it on February 8, 1886. A trial was had, and the register and receiver decided against the entryman, who thereupon appealed to you. After considering the case you reversed the finding of the local land officers and dismissed the contest. An appeal was taken to this Department by Tucker, and on October 26, 1889, your decision was reversed. Nelson applied for a rehearing, and on March 16, 1891, after considering said application, the Department denied the same. (12 L. D., 233).

It was stated in said last named decision that,—

> In opposition to the application, an affidavit has been filed, signed by the sheriff, county treasurer, school superintendent, and clerk of Dawes county, a former register of the land office, also, six farmers, who swear that they are well acquainted with the tract in dispute, and to their personal knowledge there are from sixteen to twenty acres of thrifty growing timber in the section, a portion of which has been cleared off since the initiation of the contest for the purpose of raising a crop, also that the claimant Jones (Nelson) is a wealthy man, while the contestant, Tucker, is a poor man. These statements are corroborated by the county judge of Dawes county.

In April, 1891, Nelson filed the affidavits of a number of the parties whose names appeared as affiants in behalf of Tucker, as above, showing that they never made any such affidavits, and alleged that contestant and Judge Ballard, his father-in-law and attorney, had not acted in good faith, but were attempting to defraud him out of his land and to impose upon the Department.

After this application was considered it was decided that while these affidavits

> alone would not be sufficient to warrant the Department in revoking said decision of March 16, 1891, but, as it is apparent that one of the parties to said contest is trying to impose upon the Department by fraud and perjury . . . . it will be necessary to make further inquiry.

A special agent was directed to investigate the facts concerning the signing of said conflicting affidavits, the character of the land, and any other facts tending to show the good faith of the parties to this controversy.

On November 10 to 14, 1891, inclusive, an investigation was made by Special Agent J. H. Wagner, and on December 7, 1891, his report was filed showing substantially that the greater number of the affidavits furnished by Tucker were procured by his father-in-law, Judge Ballard, through fraudulent representations, and as a matter of fact they were never sworn to.

The report shows a thorough investigation and, among other things, in the opinion of the special agent, who examined the land carefully, that it is practically devoid of timber, and hence subject to timber-culture entry; furthermore, the report corroborates the showing made by Nelson in his application for a review of the decision of March 16, 1891 (12 L. D., 233).

The judgment of the Department on the original hearing between the parties (9 L. D., 520), was in favor of contestant, and the judgment of March 16, 1891, *supra*, denied the motion for review. However, on a re-application May 9, 1891, these two judgments were suspended because of the fraud alleged, and while a new trial could not be allowed under the rules of practice because of cumulative evidence, and, technically speaking, a motion to review a review will not be allowed; still, under the supervisory authority of the Department in a case like this, where an effort has been made to deceive the Department, and where it has been deceived by the furnishing of manufactured testimony, it is the duty of the Department to investigate thoroughly all the matters in issue, in order to determine the rights of the parties in interest.

Accordingly, you will order a hearing between the parties to settle the questions brought in issue by the contest of Tucker, and you will give due notice to Tucker and Nelson of the time and place of said hearing. After this hearing has been had, the register and receiver will consider the evidence submitted and will forward the same to you, together with their opinion thereon, and if either party feel aggrieved at the finding of the local officers he may appeal therefrom. Upon receipt of the record you will re-adjudicate the case.

HOMESTEAD ENTRY—ESTABLISHMENT OF RESIDENCE.

SYLVESTER GEHR. See 8 L.O.314

Section 3, act of March 2, 1889, permits, under certain circumstances, a leave of absence after settlement, but does not authorize an extension of time for the establishment of residence.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 22, 1892.

Sylvester Gehr, on February 15, 1890, made entry under the second section of the act of March 2, 1889 (25 Stat., 854), of the NE¼ of the SE¼ of Sec. 14, T. 13 S., R. 16 W., Wa Keeny land district, Kansas.

On August 2, 1890, he filed in the local office application for an extension of time in which to establish residence on the tract, for the reasons, in substance, that (at the date of such application) he was living two hundred miles from the tract last entered; that having a drought, his crops were in part a failure, so he was too poor to make a trip to the tract and live there; that it required his personal supervision to take care of what crop he had; that three of his horses had died; that his wife declined to go on to the tract and live there; and for other reasons it would cause inconvenience and loss to him to be compelled to take up his residence on the tract.

The local officers, and on appeal, your office, rejected the application. He now appeals to the Department.

The appeal might very properly be dismissed because of containing no specifications of error in your decision; it simply reiterates the inconvenience and expense that would result from being compelled to remove to the land, and "respectfully requests the Secretary of the Interior to grant the appellant an extension of time in which to make settlement upon said homestead."

It may be added that the applicant fails to refer to any law authorizing the local officers, or your office, or this Department, to extend the time within which he must establish residence on the tract. Sec. 3 of the act of March 2, 1889 (*supra*), authorizes the local officers (under such regulations as the Secretary of the Interior may prescribe) to grant leave of absence for one year to any person who *has settled* upon a tract, and finds himself "unable by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, to secure a support for himself, herself, or those dependent upon him or her, *upon the lands settled upon.*" As the applicant in the case at bar had not, at the date of his application, settled upon the tract, he does not come within the provisions of said section.

Your decision is affirmed.

TIMBER CUTTING—DEPARTMENTAL REGULATIONS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 13th, 1892.

The Honorable The SECRETARY OF THE INTERIOR.

SIR: Referring to our conversation of the 12th instant in relation to the granting of permits to cut timber from the public lands, upon applications presented in accordance with the rules and regulations prescribed by circular of May 5, 1891, 12 L., 456, I have the honor to transmit herewith for your consideration, a form of letter embodying your verbal suggestions, which I will prepare and forward to each applicant should the same meet your approval.

Very respectfully,

THOS. H. CARTER,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 13th, 1892.

Messrs. REED AND KEPNER,
Helena, Montana.

GENTLEMEN: Referring to office letter of the 4th instant, informing you that your application to cut timber from certain public land described therein had been submitted to the Hon. Secretary of the Interior for his consideration, I now have the honor to advise you that the Hon. Secretary has decided not to grant any permits to

exist for a longer period of time than for one year from date thereof; that not to exceed fifty per cent of the merchantable timber on the area of land embraced in a permit shall be cut within the year; and that no permit shall cover a larger area of public lands containing timber than is absolutely required to supply the actual necessities of the people in the community during the life of the permit.

Your application covers an area of public land largely in excess of what is required for the purposes named and must be modified to correspond with the instructions of the Hon. Secretary of the Interior as above set forth.

You will please advise this office at once as to which of the particular sections or tracts of land covered by your advertisement and application you desire to have embraced in a permit to cut timber, in accordance with above mentioned requirements.

Should no reply be received by you within sixty days from date hereof it will be considered that you have abandoned your application and the papers relating thereto will be filed without action.

Very respectfully,

THOS. H. CARTER,
Commissioner.

January 26, 1892.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: I have examined the form of letter bearing date of January 13, 1892, prepared by you to be used in the matter of application for permits to cut timber from the public lands. The restrictions and limitations therein prescribed are, in my opinion, just and reasonable, and said form is therefore hereby approved, and is herewith returned.

Very respectfully,

JOHN W. NOBLE,
Secretary.

PRIVATE CLAIM—SECTION 15, ACT OF MARCH 3, 1891.

SAN IGNACIO DEL BABACOMORI.

The repeal of section 8, act of July 22, 1854, and "all acts amendatory, or in extension thereof or supplementary thereto," deprives the Department of authority to declare further reservations of land under said acts.

Secretary Noble to the Commissioner of the General Land Office, January 23, 1892.

I have considered the appeal from your decision of October 4, 1890, in behalf of the parties asserting ownership to the private land claim known as "San Ignacio del Babacomori" situated in Pima and Cochise counties, Arizona Territory, and, believing the conclusion arrived at by you to be correct, your judgment is hereby affirmed.

It appears that the claimants for this grant duly presented their application to the surveyor-general of Arizona to investigate and report upon the same in accordance with the provisions of section 8 of the act of July 22, 1854 (10 Stat., 308), and of the appropriation act of July 15, 1870 (16 Stat., 291, 304); that the surveyor-general did examine and report favorably upon said grant, which report was duly for-

warded to Congress, but has not been finally acted upon; that a preliminary survey of the exterior limits of said grant was made, and approved in January 16, 1880, by the surveyor-general, and that the lands embraced in said survey, containing an area of 34,722.03 acres, or about eight square leagues, have been in reservation since that time.

The present appeal is from your decision, declining to increase the area of said reservation to the extent of 132,000 acres, or more than thirty square leagues of land. The reasons given for this refusal are entirely satisfactory as set forth by you, and need not be repeated herein.

But, in addition to the reasons assigned, it is to be observed that since the date of your decision the act of March 3, 1891 (26 Stat., 854),—"to establish a court of private land claims", etc., has been passed, by section 15 of which are repealed section 8 of the act of July 22, 1854, *supra*, "and all acts amendatory or in extension thereof, or supplementary thereto." By this repeal it is considered that the officers of the Land Department are without authority to declare further reservations under said acts.

TIMBER CULTURE ENTRY—PLANTING—PROTECTION OF TREES.

DAVIS *v.* CHAUVIN.

Sowing tree seeds broadcast on the land is not a proper "planting" within the meaning of the timber culture act.

It is incumbent upon the entryman to make adequate provision for the protection of the trees planted on the claim.

A review will not be granted when the motion rests upon the proposition that a re-examination of the evidence before presented may bring about a different result.

Secretary Noble to the Commissioner of the General Land Office, January 23, 1892.

This is a motion for a review of the departmental decision of July 16, 1891, in the above entitled case, involving the SW ¼, section 14, T. 25, R. 25, and directing that the timber culture entry (No. 794) made January 21, 1884, by Emile Chauvin, jr., at Visalia, California, be canceled.

The motion alleges fifteen specifications of error.

The first six specifications relate to the broad-cast sowing of the timber seeds, and are in effect that there was error in holding that such sowing was not authorized by law.

The timber-culture act (20 Stat., 113), section 1, provides that the entryman "shall plant, protect, and keep in a healthy, growing condition," the required number of acres of timber, and sowing seeds broadcast is not a proper "planting" within the meaning of said section, and prevents the "cultivation" required by section second of said act.

Such has been the ruling of the Department. Hunter *v.* Orr, (5 L. D., 8); Severson *v.* White (6 L. D., 716).

The eighth specification alleges error in holding that the land should be fenced when there is a State law in force which dispenses with fences.

In the opinion it is held "that the law is not complied with unless the necessary growth of timber is secured," and recites the fact that in 1887 "these seeds came up, but were nearly all destroyed about May of that year by the sheep, and the rest were destroyed by the bugs and rabbits."

It is made the duty of the entryman to "protect and keep in a healthy, growing condition" the timber, as already recited. The mode of protection is immaterial so long as it is effectual. If fencing is the only mode practicable, it is no excuse for not fencing that the State law does not require it. Such a law cannot repeal the law of the United States, or release the entryman from its requirements.

The ninth specification alleges error "in holding that claimant was responsible for the destruction of his young timber sprouts or trees." He can properly be held responsible for the part of the destruction which was wrought by sheep, because it could have been prevented by a suitable fence, the erection of which was a matter under his control. His failure, therefore, to secure the necessary growth of trees cannot be excused, but must be attributed to negligence.

The other specifications of error are either based upon mistaken assumptions of what was decided, or raise no new questions for consideration.

Review will not be allowed when the motion rests upon the proposition that a re-examination of the evidence before presented may bring about a different result.

Nor will such motion be granted upon the ground that the decision is not supported by the evidence, if fair minds might reasonably differ as to the conclusion to be drawn from the evidence. Chas. W. McKallor (9 L. D., 580).

The motion is denied.

PRIVATE ENTRY—EQUITABLE ACTION.

HENRY MILNE.

A private cash entry, including land embraced within a prior timber culture entry, may be equitably confirmed, in the absence of an adverse claim, where the said timber culture entry has been canceled, and good faith is apparent.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 23, 1892.

On October 17, 1885, James R. Cunningham made a timber-culture entry No. 448, for SE. ¼ of SW. ¼, S. ½ of SE. ¼ and NE. ¼ of SE. ¼ of section 14, T. 10 S., R. 24 E., Roswell, New Mexico.

It appears however that no record of this entry was made in the office of the register and receiver.

On August 20, 1870, before the above entry was made, the land in question was offered at public sale in accordance with an executive proclamation.

On December 18, 1885, two months after the entry of Cunningham, Henry Milne made cash entry for the E. ½ of NW. ¼, E. ½ of SW. ¼ and the E.½ of section 14, T. 10 S., R. 24 E., which entry included the tract theretofore entered by Cunningham. The record shows that the timber-culture entryman made no improvement on the tract whatever, and in fact never went into possession thereof, nor planted any trees, and his entry was relinquished on February 23, 1889.

On June 24, 1890, you held that that part of the cash entry of Milne conflicting with the prior entry of Cunningham is "illegal and cannot be confirmed by this office, unless he makes an affidavit stating that he was ignorant of the true status of this land at the date of his entry."

Milne has appealed from your judgment to this Department, and has filed his own affidavit and a certificate of the register and receiver of the land office; his affidavit showing that he purchased in good faith, and that the records of the local land office did not disclose the fact that a prior entry had been allowed for any part of the land included in his cash entry, and the statement of the register and receiver corroborating his affidavit as to what the records of their office show.

The cancellation of the entry of Cunningham removes all adverse claims to the land, and leaves the settlement of the matter between the government and Milne.

It is quite evident that the entry of Cunningham segregated the tract covered by it from the public domain, so long as it remained uncanceled. However, since the timber-culture entry has been canceled, and as no adverse claims exist, the case may properly be referred to the board of equitable adjudication for confirmation.

Rule 19, of the rules for the government of this board, provides that—"All entries made upon land appropriated by entry or selection but which entry or selection was subsequently canceled for illegality," may be referred, etc.

In the absence of an adverse claim the entry of Milne, though partly included within the prior timber-culture entry of Cunningham, may be submitted to said board, inasmuch as the timber-culture entry is shown to have been canceled upon the abandonment and relinquishment of the entryman, and the good faith of Milne is shown. Frank V. Holston (7 L. D., 218); Delbridge *v.* Florida Railway and Navigation Company (8 L. D., 410); Edward Riley (9 L. D., 232); St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Listoe (9 L. D., 534).

Your decision is modified accordingly.

REPAYMENT—TRANSFEREE—ACT OF JUNE 16, 1880.

ADOLPH EMERT.

The only person qualified to apply for repayment under section 2, act of June 16, 1880, is the one in whom the title to the land is vested at the date of the cancellation of the entry, or the heirs of such party.

Secretary Noble to First Comptroller Matthews, January 25, 1892.

I am in receipt of your letter of January 2, 1892, calling my attention to the application of Adolph Emert final grantee of Jane Hamilton, for the repayment of the fees and commissions ($14) paid by said Hamilton on her homestead entry, together with the purchase money (200) paid on the said commuted homestead cash entry, at Huron, South Dakota.

These entries were canceled July 17, 1885, for insufficiency of residence and improvement. Two years thereafter on July 26, 1887, Hamilton transferred her interest in the land by quit claim deed to Hans Griebling for $200, subject to a mortgage of $225, given by Hamilton soon after making her cash entry. On August 25, 1888, Griebling transferred his interest by warranty deed to Basil J. Templeton, consideration $100, and on September 8, 1891, Templeton transferred his interest to the applicant Emert by quit claim deed, consideration $200.

In the meantime, viz., on July 22, 1890, one Robert M. Snyder made cash entry and payment, $200, for the land. You call attention to the fact that Hamilton transferred her interest in the land after the date of cancellation of her entry, and say,

> Could Jane Hamilton sell, assign or transfer any interest in, or title to, this land, after her entry was canceled by the United States? Is not such a sale or assignment of a claim prohibited by section 3477, Revised Statutes, U. S.? Does not section 2 of the act of June 16, 1880 (21 Stat., 287), mean that repayment shall be made to the entryman, his heirs or legal assigns, who have the legal title to and possession of, the land at the time the original entry is canceled.

Section two of the act of June 16, 1880, provides,

> In all cases where homestead or timber culture or desert land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money and excees paid upon the same.

I think it was clearly the intention of Congress that money paid on entries of public lands should be returned in the absence of fraud, where said entries were erroneously allowed and can not be confirmed, and the entry in question appears to be of that class. The government has resold the land and received the purchase price provided by law, and it can not be presumed that it desires to retain double that amount. The important question to be determined is, who is entitled to receive the money returned by the government?

It is clear that after the cancellation of the entry, the entryman has no right to the land that he can sell or dispose of. It is equally clear that on the cancellation of an entry under the conditions prescribed in the statute, a claim against the government for the repayment of the purchase money and fees and commissions is created, and the statute declares that said payment shall be made to the entryman or his heirs or assigns but it is clear that the statute contemplated as assigns only those who became such while the entryman had an interest in the land, or in other words assigns prior to the date of the cancellation of the entry. In the case under consideration there had been no sale of the land prior to the date of cancellation and the title at that date was in Hamilton, and as a consequence she was and is the holder of the claim against the government for the repayment of the purchase money. Under the provisions of section 3477, Revised Statutes, this claim in its present condition, could not be transferred.

In the case now before me, I am satisfied, upon further consideration, that repayment should not be made to the present applicant, but that the only party qualified under the statute to make the application is the one in whom the title was vested at the date of the cancellation of the entry, or her heirs.

I would request that you return the case to this Department in order that proper disposition of the same may be made.

RIGHT OF WAY—STATION GROUNDS.

BUSK TUNNEL RAILWAY CO.

A plat of station grounds will not be approved where said grounds are so located as to exclude access to public lands not included therein.

Secretary Noble to the Commissioner of the General Land Office, January 28, 1892.

I have at hand the letter of the 19th instant from the Acting Commissioner of the General Land Office, submitting, and recommending the approval of, a plat filed by the Busk Tunnel Railway Company under the provisions of the right of way act of March 3, 1875, showing a tract of twenty acres of land in Colorado selected for station purposes.

The line of the road of this company, where the tract in question is located, runs in close proximity to that of the Colorado Midland Railway Company. It also runs to and along the shore of Lake Ivanhoe. The selection is so made that in connection with the lake shore, the right of way of the Colorado Midland Railway Company and its own right of way the company inclose several tracts of public land. Access to these tracts can be gained only by crossing right of way already granted or by water communication.

The approval of this plat would, therefore, practically secure to the

company the use of lands additional to the proposed station grounds without authority of law and by the quasi countenance of the Department. It would virtually place an obstruction in the way of the acquisition of these tracts of public lands, by those so inclined, neither contemplated nor permissible under the right of way act nor under the general land laws.

I do not deem it proper to contribute to such results and return the plat herewith unapproved.

My present action is in harmony with that taken on the plat filed by the Continental Railway and Telegraph Company and returned to you without approval with letter of July 31, 1891, 13 L. D. 111.

RAILROAD GRANT—RELINQUISHMENT—ACT OF JUNE 15, 1880.

FLORIDA CENTRAL AND PENINSULAR R. R. CO. *v.* CARTER.

The relinquishment of June 25, 1881, filed by the grantee under the act of May 17, 1856, was for the benefit of bona fide settlers, and an entryman who in fact never effected a settlement is not entitled to invoke the protection of said relinquishment.

The right of purchase under section 2, act of June 15, 1880, extends only to entries of land "properly subject to such entry," and does not include an entry of land previously withdrawn in aid of a railroad grant.

Secretary Noble to the Commissioner of the General Land Office, January 27, 1892.

I have considered the appeal by the Florida Central and Peninsular Railroad Company from your decision of April 28, 1890, rejecting its claim to lots 11 and 12, Sec. 7, T. 12 S., R. 23 E., Gainesville land district, Florida.

The facts in the present case are as follows:

On October 23, 1876, Stephen D. Carter made homestead entry No. 4225, for the above described tract, which entry was canceled November 21, 1885, for failure to make proof within the time limited by law.

On December 4, 1885, he was permitted, however, to purchase the land under the second section of the act of June 15, 1880 (21 Stat., 237), and cash certificate No. 10,831 was issued upon such purchase.

Your decision appealed from holds as follows:

Said company's relinquishment "in favor of all actual *bona fide* settlers who made improvements prior to the 16th day of March, 1881," protects the homestead entry of Mr. Carter, inasmuch as it appears to have been properly allowed and was of record and *prima facie* valid at the date of such relinquishment.

This tract is within the primary limits of the grant to the State of Florida under the act of May 17, 1856 (11 Stat., 15), to aid in the construction of a railroad "from Amelia Island, on the Atlantic, to the waters of Tampa Bay, with a branch to Cedar Key, on the Gulf of Mexico," under which the appellant lays claim to this land.

On December 14, 1860, a map showing the location of this road was filed in your office, which map was returned for the purpose of procuring and attaching thereto the certificate of the governor of Florida, as evidence that it was filed by authority of the State.

This map was never re-filed, but a duplicate map was approved by Mr. Secretary Schurz, by his decision of January 28, 1881, and the order of withdrawal, directed in the same decision, was made March 16, 1881, and received at the local office the 26th of that month.

The question as to the effect of the filing of the map of 1860 was considered by Mr. Secretary Teller (2 L. D., 561), where it was held that said map "was valid and sufficient to fix and locate definitely the line of the road, and to bring home to the Interior Department notice of such location," and "that a legislative withdrawal followed the filing of that map. Van Wyck *v.* Knevals, 106 U. S., 360."

It will therefore be seen that this tract was withdrawn from entry on December 14, 1860, and as the grant was never forfeited, it could not thereafter be entered without permission or license from the company.

It is unnecessary to here recite all the facts and circumstances leading to the execution of certain general relinquishments, in favor of actual settlers, by the railroad companies claiming this grant through the State; suffice it to say that two such relinquishments have been filed. The first, dated April 1, 1876, was of such lands "as may be found by the general land department at Washington to be occupied by actual settlers who may be entitled to equitable relief up to December 13, 1875." The second, dated June 25, 1881, is as follows:

> In due consideration of all the circumstances, the company has decided to extend the relinquishment or waiver heretofore made to actual *bona fide* settlers who made improvements prior to the 16th day of March, 1881, upon which day your instructions were issued to the local land office. The Department can accordingly apply this waiver or relinquishment in its action upon the cases of all such actual settlers who shall have entitled themselves to patents.

From the above it is apparent that Carter was not included in the first relinquishment; hence, at the date of his entry, October 23, 1876, there was no authority for the allowance of the same, and the mere fact that, at this time, the rights of the company under its location of 1860 were disregarded, does not affect the position above stated.

The second section of the act of June 15, 1880 (*supra*), provides:

> That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry . . . . . may entitle themselves to said lands by paying the government price therefor.

The condition upon which this privilege is given is, that the lands at the date of the entry were "properly subject to such entry."

This was not the condition here, and I am therefore of the opinion that the allowance of the purchase under said act was error, and that the same should be canceled.

As to the effect of the relinquishment, executed by the company in

1881, upon its claim to this land, I am of the opinion that had Carter been a *bona fide* settler, the same would have been effective in his favor; but, from his own statement, he did not live upon the land, merely having it cultivated for one year, and with the cancellation of his entry any claim, as against the grant, was at an end. In other words, the relinquishment of 1881 did not include Carter's entry.

This is not in conflict with the holding in the case of the Northern Pacific Railroad Company *v.* Munsell (9 L. D., 237), wherein it was held that a relinquishment under the act of June 22, 1874 (18 Stat., 194), relieves the land included therein from all claim on the part of the railroad company.

In that case but one tract was described, and by such description the relinquishment became absolute, as it was made by the company with a knowledge of the status of the land therein described.

Here the relinquishment, or waiver, is general, and the character of the claims included is clearly described. It must therefore first be shown that the condition exists, before it can be held that the relinquishment applies.

The statement by Carter, before referred to, relative to his settlement upon this tract was made in response to a call from your office for a corroborated affidavit by Carter showing date of settlement, duration of residence, nature and extent of improvements and cultivation, and entire connection with the land. As against Carter, I am of the opinion that he would be bound thereby, but it is not my intention to make such an award of this land, as will preclude any other person, claiming an interest therein, from showing by competent evidence that Carter's claim was such as would be protected by the relinquishment of the company.

Your decision is accordingly reversed.

MINING CLAIM—NOTICE—RIGHT OF WAY ACT.

EUGENE MCCARTHY.

The published notice of application is sufficiently definite, in the matter of showing the connection of a mining claim with the public survey, where it identifies said claim by connecting the same with a corner of a patented townsite, which is also the corner of a patented placer claim, both of which are connected with a United States mineral monument.

A mining claim in conflict with a prior grant to a railroad company for station purposes may pass to patent subject, however, to the right of occupancy by the company as to the part in conflict.

Secretary Noble to the Commissioner of the General Land Office, January 27, 1892.

On October 27, 1885, Eugene McCarthy and Knut. Benson located the Kendall Mountain Placer Claim on unsurveyed land in Animas mining district, San Juan county, Colorado, containing 27.96 acres,

which was recorded November 2, 1885, in book D 1. page 375, of the records of said county. On February 13, 1886, said Benson conveyed his interest in said claim to said McCarthy.

On March 30, 1886, said McCarthy made application at the Durango land office for a patent for said claim.

The register ordered the following notice of said application to be published in a weekly newspaper for ten consecutive weeks, beginning April 3, 1886, and ending June 5, 1886, which was so published in the "Silverton Democrat"—

Mining application, No. 587.

UNITED STATES LAND OFFICE,
Durango, Colo., March 30, 1886.

Notice is hereby given that Eugene McCarthy, whose post-office address is Silverton, San Juan county, Colorado, has this day filed his application for a patent for the Kendall Mountain Placer claim, situated in Animas mining district, San Juan county, Colorado, and known and designated by the field notes and official plat on file in this office as Lot No. 2468 on the unsurveyed domain, and being more particularly described as follows, to wit:

Beginning at Cor. No. 1 a post marked 1x2468, whence Kendall mountain bears S 34° 12′ E, Bear mountain bears S 73° 40′ W, Red peak bears N 33° 40′ W., cor. No. 11 townsite of Silverton, which is also cor. No. 6, survey No. 601 Clemmons, *et al.* placer bears S 39° 5′ W. 352 ft. Thence—Var. 14° 35′ E.—S 39° 5′ W. 1100 feet to cor. No. 2, a post marked 2x2468. Thence S 58° 20′ E. 1010 ft. to cor. No. 3, a post marked 3x2468. Thence N 34° 6′ E, 1460 ft. to cor. No. 4, a post marked 4x2468. Thence N 79° 55′ W, 1000 ft. to place of beginning.

Area—containing 27.96 acres.

Said Kendall Mountain Placer claim is recorded in Book D. 1 page 375 of the records of San Juan county, Colorado.

Adjoining claims, Silverton townsite and survey No. 601 Clemmons *et al.* placer, Charles C. Clemmons, *et al.*, claimants.

D. L. SHEETS, *Register.*

First publication, April 3, 1886.
Last publication, June 5, 1886.

No adverse claim was filed and said placer claim was entered July 14, 1886 (mineral entry No. 513), and final receipt and certificate were issued to said McCarthy for said claim, designated as lot No. 2468.

On July 23, 1886, the Denver and Rio Grande Railroad Company filed a protest against the issuance of a patent to said applicant for so much of said placer claim "bounded and described in United States survey No. 2468 as is included within the following limits, to wit":

Beginning at corner No. 2 of the Kendall Mountain Placer (U. S. Survey No. 2468) near Silverton; thence S 58° 20′ E. along the southerly side of said placer a distance of 165 feet, more or less, to an intersection with the easterly line of the Denver and Rio Grande Railroad depot grounds; thence northeasterly along said line of depot grounds a distance of 715 feet, more or less, to an oak post at the northeast corner of said depot grounds; thence northwesterly 164.59 feet to the northeast corner of Silverton townsite, said corner being on the line between corners No. 1 and No. 2 of aforesaid Kendall Mountain Placer, and 352 feet southwesterly from corner No. 1 thereof; thence S 39° 05′ W. along said line between corners No. 1 and No. 2 a distance of 748 feet, more or less, to the place of beginning; containing 2.72 acres, more or less.

Said protest is based upon the ground that said company is the owner and possessor of said 2.72 acres, as part of twenty acres claimed by said company for station and depot purposes, under the act of Congress of June 8, 1872 (17 Stat., 339), granting to said company a "right of way over the public domain," together with such public lands adjacent thereto as might be needed for station purposes, "not exceeding twenty acres at any one station."

The papers were transmitted to your office.

By your letter of December 27, 1888, to the local officers, you hold that as the plat and field notes of the survey of said placer claim describe the claim as being connected with the United States Silverton locating monument, by a line from a corner of said claim, which is omitted from said published notice, the latter is insufficient to put parties on their guard who might desire to file adverse claims, and you directed a republication and posting of an amended notice. You also held that "as said placer claim was not located until October 27, 1885, more than two years after the copy of the station plat was received at your office, the land was clearly subject to the right of occupation for station purposes." You also directed that claimant be notified of his right of appeal.

An appeal was filed in the local office April 22, 1890, by C. M. Frazier, as attorney for the claimant.

The specifications of error allege that said decision is erroneous, among other reasons, because,—

1st—That said Kendall Mountain Placer claim is tied to corner No. 11, townsite of Silverton, and

2nd—It is tied to corner No. 6 of the Clemmons *et al.* placer claim; both of which are patented and tied to the U. S. government monument, for this reason, the claim is connected with certain corners of the townsite of Silverton, Colo., and the Clemmons *et al.* placer, which corners are themselves connected by course and distance to U. S. mineral monument.

By your letter of May 5, 1890, you declined to entertain said appeal, and held said entry for cancellation. An appeal from this decision was duly taken and the case is now brought before me, and all questions arising upon the whole record can now be determined upon their merits.

The principal question in the case is whether or not the published notice sufficiently described the placer claim to comply with the law and regulations. Section 2325, Revised Statutes of the United States, requires the claimant of a mining claim to file with the register a certificate of the surveyor-general "that the plat is correct, with such further description by such reference to natural objects, or permanent monuments, as shall identify the claim, and furnish an accurate description to be incorporated in the patent," and the register is directed to "publish a notice that such application has been made."

The object of publishing a notice is to afford all parties claiming adversely an opportunity to present their claims, and therefore the notice should sufficiently "identify" the claim for that purpose.

With this end in view the regulations of the Department (Mining Circular 1889, page 22, Sec. 43) require the surveyor-general to

> describe the *locus* of the claim with reference to the lines of public surveys by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a remote distance from such public corner, in which latter case the reference by course and distance to permanent objects in the neighborhood will be a sufficient designation by which to fix the *locus* until the public surveys shall have been closed upon its boundaries.

In this case the claim was connected to a corner of a townsite, which was also a corner of a placer claim, both of which were patented and connected with a United States mineral monument. Was such a connection sufficient to "identify" the claim?

In Alta Mill Site (8 L. D., 195), it was held that the survey of the mill site need not be connected with a mineral monument, or corner of the public surveys, if connection be shown with the lode claimed in conjunction therewith. Such secondary connection of the mill-site through the survey of the mining claim was held sufficient in law.

It appears by the report of the deputy surveyor-general on file in the papers of this case, that "The natural center of trade is the town of Silverton, a place of fifteen hundred inhabitants, which adjoins this claim on the west."

In case of the Emperor Wilhelm Lode (5 L. D., 685), the survey of the claim was connected with a corner of the George M. Tibbets lode, and bounded by the Wyoming lode southwesterly, and it was said—"It does not appear that the Wyoming lode ever went to entry, and the George M. Tibbets lode was not patented until March 6, 1884," or after the notice which was given December 26, 1882. Here the implication is that if the Tibbets lode had been patented when the notice was given it would have been sufficient.

Surveys of townsites and mining claims are made under public authority by virtue of acts of Congress, and are therefore official surveys of the United States, and certainly when they are patented, such surveys are an official part of the patents and may then be said to be public surveys of the United States, within the contemplation of the law requiring the survey of mining claims to be connected with such "public surveys."

A survey of a mining claim is "incorporated" in the patent by law. It is then finally and permanently fixed and determined beyond possibility of alteration. The patent is a quit-claim deed from the United States, and is recorded upon its public records, and is notice to the world of all it contains. The same is true of a patent of a townsite.

In this case the protestant recognizes the survey of this placer claim as a legal survey, and bases the survey of said 2.72 acres upon it, and there is no pretense that any one was misled by the notice, or prejudiced by the omission of the notice to refer to the Silverton monument. The notice refers to Kendall mountain and Bear mountain, which are natural monuments, and states that the claim adjoins the Silverton

townsite and the Clemmons placer, and connects the survey to a corner of both which would naturally be a well-known corner in that neighborhood. The omission, if there was one, was technical rather than material, and was that of the register, for which the claimant is not responsible, and as his good faith is apparent, and he has complied with the law, he should not be put to the expense and delay of a new publication and posting of an amended notice.

The grant to the railroad company referred to in the protest was a grant *in presenti*, subject to the limitations mentioned in said act. The supreme court held in Railroad Company *v.* Baldwin (103 U. S., 426, 430), in relation to a similar grant, as follows:

> We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road.

The question arises what is the extent of the right of way granted in this case? It is alleged in the protest that the railroad company "is the legal owner" of the 2.72 acres in dispute. But there is no foundation for this contention. On the contrary, the mineral claimant "is the legal owner" of the fee of the land, subject only to the easement in favor of the company for the particular use and occupation specified in the grant. The language of the act is,

> That the right of way over the public domain, one hundred feet in width on each side of the tract, together with such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes, and for yard room and side tracks, not exceeding twenty acres at any one station . . . . be, and the same are hereby, granted and confirmed unto the Denver and Rio Grande Railway Company.

It is evident that this is a grant of a right of way to said Company over so much of the twenty acres "as may be needed" for the purposes specified. The company, under these limitations in its grant, is not authorized to use the twenty acres for any other business or purpose than as above specified, and this use is to be measured by its "need." If the land in dispute is not "needed" by the Company for the specified purposes, then the mineral claimant can mine the soil and take therefrom the minerals which belong to him, without infringing upon the grant to the company. If the company does not actually *use* the land in dispute for station purposes, then it will be presumed not to "need" it, and so long as this non-user continues the mineral claimant can use it for any purpose he pleases, provided he does not thereby interfere with any present or prospective use that may be needed by the company. If the company should at any time abandon the occupancy of the land, or should its right of way be lost or destroyed, the title of the mineral claimant thereto would become free and unrestricted.

In the Kansas Central Railway Company *v.* Allen (22 Kansas, 285, 293), it is said that the proprietor of the soil, over which the railroad company has an easement, "retains the fee of the land, and his right to

the land for every purpose not incompatible with the rights of the railroad company. Upon the discontinuance or abandonment of the right of way, the entire and exclusive property and right of enjoyment revest in the proprietor of the soil." Upon page 295 it is further said,—

> It is our opinion that it is a question of fact, not of law, whether the necessities of the railroad demand exclusive occupancy for its purposes, and what use of the property by the owner is a detriment to, or inteference with, the rights of the road.

And this question of fact, if it should ever arise, would have to be determined by the courts.

The protest alleges that

> at the time the said land was located upon and selected by said Denver and Rio Grande Railway Company, and approved and set apart by the United States for said company by the Honorable Secretary of the Interior, the same was not known to be valuable for minerals.

This allegation is substantially found to be true in your letter of December 27, 1888, in which you say,

> As said placer claim was not located until October 27, 1885, more than two years after the copy of the station plat was received at your office, the land was clearly subject to the right of occupation for station purposes.

It is said, in Railway Company *v.* Alling (99 U. S. 463, 475),

> The intention of Congress was to grant to the company a beneficial easement in the particular way over which the designated routes lay, capable, however, of enjoyment only when the way granted was actually located, and in good faith appropriated for purposes contemplated by the charter of the company, and the act of Congress. When such location and appropriation were made, the title, which was previously imperfect, acquired precision, and by relation took effect as of the date of the grant.

The mineral claimant must therefore take the land in dispute (2.72 acres) subject to the right of occupation by said company for station purposes. It was held in Dakota Central Railroad Company *v.* Downey (8 L. D., 115, 120), that any patent granted "which should include a portion of this grant to the railroad company, must therefore be subject to that grant, because the grant is already perfect and complete."

Patent may issue to said McCarthy therefore for said placer claim, but subject, as to that part in conflict, to the right of occupation by said company for station purposes.

Your judgment is modified accordingly.

RAILROAD GRANT—INDEMNITY-SELECTION—FINAL PROOF.

SOUTHERN PACIFIC R. R. CO. *v.* STILLMAN.

A timber culture entry of land withdrawn for indemnity purposes is no bar to the company's right of selection if exercised before the revocation of the withdrawal becomes effective.

An entry should not be allowed of land while a case involving the right thereto is pending on appeal.

Special notice of intention to submit final proof should be given a railroad company where the land is embraced within a pending indemnity selection.

An entry, though irregularly allowed, should not be canceled without giving the entryman an opportunity to be heard in its defense.

Secretary Noble to the Commissioner of the General Land Office, January 28, 1892.

I have considered the case of the Southern Pacific Railroad Company *v.* Edith A. Stillman on appeal by the former from your decision of April 22, 1890 rejecting its application to select as indemnity the SW ¼ of Sec. 5, T. 17 S., R. 16 E., M. D. M., Visalia, California, land district.

This tract is within the indemnity limits of the grant of July 27, 1866 (14 Stat., 292) to the Southern Pacific Railroad Company, and is within the limits of the withdrawal of March 19, 1867.

On March 24, 1887, while said order of withdrawal was still in force, one George Herring was allowed to make timber culture entry for said tract of land. The order of withdrawal was revoked by order of August 15, 1887 (6 L. D., 92) it being said:

> The order of revocation herein directed shall take effect as soon as issued, but filings and entries of the lands embraced therein shall not be received until after giving notice of the same by public advertisement for a period of thirty days, it being the intention of this order that, as against actual settlement hereafter made, the orders of the Department withdrawing said lands shall no longer be an obstacle. Rights heretofore attaching both of the company and of settlers, will be decided according to the facts in each case.

Notice was given under this order fixing November 16, 1887, as the day on which filings and entries might be made for lands within the limits of such withdrawal.

In the meantime, on October 4, the railroad company had presented its application to make selection of the tract here in question as indemnity. This application was rejected by the local officers, on the ground that the existence of Herring's entry prevented such selection, from which action the company appealed. While this appeal was pending undetermined in your office, Herring's entry was, on March 2, 1888, canceled, but whether on voluntary relinquishment or for other reason is not shown by the papers now before me, and on the same day Edith A. Stillman was allowed to make homestead entry for the land. Afterwards, and while the case was still pending in your office, she was allowed to submit final commutation proof without giving special notice

to the railroad company, and said proof was accepted and final certificate issued thereon under date of November 9, 1888. On April 23, 1889, the railroad company filed formal protest against the allowance of Stillman's commutation entry.

In your office it was held that Herring's entry, by the order of revocation, was relieved from conflict with the railroad claim, and being of record at the date of the company's application to select, served to defeat it.

It is clear that Herring's entry was improperly allowed, and that it could not serve to defeat an indemnity selection made by the company prior to the time the order of revocation became effective. While said order became effective for the protection of actual settlers as of the date it was issued, it did not become effective as to the allowance of filings and entries until the expiration of the prescribed period of notice. The language of the order above quoted clearly shows this. That order did not, in any way, abridge the right of the company to make selections, but it simply removed the bar that had prevailed against others acquiring rights to said lands. The railroad company had a right to make indemnity selections at the time this one was presented, but the allowance of entries or filings was prohibited at that date. No right depending alone upon an entry could be acquired during the time the reception of such an entry was prohibited. Herring asserted no right as an actual settler, but his rights depended entirely upon his entry. He acquired no right as against the company's right of selection at the time he made his entry, and as from that date up until after the company's selection there never was a time when such an entry could properly have been received, it necessarily follows that he did not acquire any rights to said tract of land as against the said company. The indemnity selection should have been approved unless there was something other than Herring's entry to prevent such action. Stillman's original entry and also her commuted entry were improperly allowed while a case involving the right to said land was pending in your office, and her final proof was submitted without proper notice to the adverse claimant. Inasmuch, however, as said entry was allowed and entered on the record, it should not be canceled without an opportunity being afforded the entryman to be heard in its defence. In this connection, it may be said that the record before me does not show that any action was ever taken on the company's protest against this entry.

For the reasons herein given, your decision rejecting the company's indemnity selection is reversed, and the case is returned to your office with instructions to give Stillman notice that she will be allowed thirty days from the receipt thereof within which to show cause why her entry should not be canceled, or why the railroad company's selection should not be approved. You will thereafter take such steps in the matter as circumstances may require.

COAL LAND—CHARACTER OF PROOF.

RUCKER ET AL. *v.* KNISLEY.

In determining the character of land alleged to be chiefly valuable for coal, the extent of the deposit may be shown by the testimony of geological experts, and practical miners, taken in connection with the actual production of coal.

Secretary Noble to the Commissioner of the General Land Office, January 28, 1892.

On March 30, 1889, Atterson W. Rucker filed coal declaratory statement (No. 1911), for the S ½ of NW ¼ and S ½ of NE ¼ of section 17, T. 27 S., R. 67 W., alleging possession February 20, 1889, at Pueblo, Colorado.

On April 10, 1889, Jefferson Knisley made homestead entry (No. 5858), for the S ½ of NE ¼ and the N ½ of SE ¼ of same section.

On April 19, 1889, Clifton Marshall tendered coal declaratory statement for the N ½ of SW ¼, and N ½ of SE ¼ of said section, but the same was rejected for conflict with Knisley's entry.

On August 29, 1889, Knisley applied to make commutation proof, and October 28, 1889, was set for taking said proof.

On October 4, 1889, Milo H. Slater, as agent for said Rucker and Marshall and other coal claimants, for certain described lands in that vicinity, including that in dispute, filed affidavit of protest against the allowance of said proof, alleging that said lands "are chiefly valuable for coal," and that certain parties were "fraudulently seeking to obtain a title to the greater portion of said described lands under the homestead laws," and applying "for a hearing to determine the character of said lands." A hearing was ordered for October 22, 1889, to determine the character of said lands, when the parties appeared and the evidence was begun. A large amount of testimony was taken showing the character of the land in dispute, and of other lands adjoining, under an agreement of counsel that eight other cases were to be decided by the result in this case, so far as the character of the land is concerned. Knisley made final proof October 28, 1889, but did not appear as a witness on the trial as to the character of the land.

The nine coal claimants filed or offered to file on nine separate quarter sections, but lying in one contiguous tract in sections 17, 18, 19 and 20, in said township, and containing 1440 acres in the aggregate.

Under these circumstances testimony was introduced and allowed as to the general character of the whole tract, as well as of that particularly in dispute.

It was shown that a coal ravine ("Arroyo Carbon") runs through the north-west corner of section seventeen, the middle of section eighteen, and the westerly portion of section nineteen, and that there are outcroppings of coal through these sections along the course of said ravine, showing veins of coal from four to six feet in thickness. That there is

another ravine through section twenty, in the southerly portion of said tract, and in section sixteen on the west, in which shafts have been sunk, apparently striking the same veins of coal at a depth of some seventy feet. That said section sixteen is owned by the Pinon Fuel Company, in connection with other coal lands adjoining, where coal mining operations are carried on. That a shaft was sunk in the center of section twenty, and coal was struck at a depth of sixty-five feet, and another shaft was sunk on the line between sections seventeen and eighteen, which struck a vein of good coal six feet in thickness. That a drill hole was bored on the south line of Knisley's claim, and struck a vein of coal at a depth of fifty feet, and penetrated into it three and one-half feet without going through it.

Prof. Arthur Lakes, Professor of Geology in the State School of Mines, after an examination of the tract, testified that the land in dispute was "certainly and absolutely" coal land, and that the entire vein "certainly" underlies the whole one hundred and sixty acres.

On the other hand the land lies on the divide between the Huerfano and Cucharas rivers, and is the highest point in the township but one; is dry and arid, and, owing to its altitude, is difficult to irrigate; that it can only be utilized for grazing, and will bear no crops without irrigation; that it affords no water for even domestic purposes, and is of very slight value for agricultural purposes and even for grazing.

Testimony was also introduced of admissions of several of the homestead contestees, that they were hired at $50 per month to enter these lands as homesteads, make commutation proof at the end of six months, and when title was thus acquired to the lands, to transfer them to Harry A. Gross and H. De Witt Brown, to be afterwards utilized as coal lands; and that the defendant Knisley was one of those hired in this manner.

On March 18, 1890, the local officers rendered their joint opinion that said land was mineral (coal) in character, and recommended the cancellation of Knisley's entry, reviewing the testimony at length, and expressing the opinion that some of the witnesses for the defendants were unworthy of credit.

An appeal was taken from said decision, which was reversed by you by letter dated October 11, 1890. An appeal now brings the case before me.

The pre-emption act (section 2258 Rev. Stats.) exempts from entry "lands on which are situated any known salines or mines."

The supreme court, in the case of the Colorado Coal Company *v.* United States (123 U. S., 307, 328), in which they construe this provision, with reference to coal mines, say:

> We hold, therefore, that to constitute the exemption contemplated by the pre-emption act, under the head of "known mines," there should be upon the land ascertained coal deposits of such extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes.

In Dughi *v.* Harkins (2 L. D., 721), it is said that the land must appear as mineral in character "as a present fact," and "from actual production of mineral." And this rule is approved in Davis' Admr. *v.* Weibbold (139 U. S., 507, 522).

Applying these tests to the evidence in this case, I am satisfied that the land in dispute is coal land within a fair interpretation of the statute. Coal has actually been produced as a present fact to a sufficient extent to indicate the character of the land. It is shown that a vein of coal underlies the tract at a depth of fifty feet, and at the most remote point from the coal ravine, where it outcrops near the surface to a thickness of six feet. The testimony of the geological expert, and that of the practical miner, coincide in the conclusion that this coal vein extends under the whole tract. It is a matter of theory, derived from well established indications and conclusions of both geological science and practical mining, and wherever the land is tapped by shaft or drill the theory is reduced to fact, and the coal is found. This evidence, while circumstantial, cannot be rejected without disregarding the results of science and of experience, and, taken in connection with the actual production of coal at one point, leaves no doubt in the mind that the land is coal land, and much more valuable for coal than for agricultural purposes. While the actual production of coal as a present fact has not been so abundant and satisfactory on this particular quarter section as would be expected ordinarily, it is reasonably sufficient, in view of the limited time in which these various coal developments had to be made, and of the acts of force and obstruction resorted to by the homestead claimants; in the filling in of the drill hole and the carrying away of mining tools and appliances, and of similar acts elsewhere on the whole tract. It does not lie in the mouth of the defendant to complain of any deficiency in this respect, whether occasioned by himself or his coadjutors.

Your judgment is reversed.

ISLAND—SURVEY—RIPARIAN PROPRIETOR.

BENJAMIN E. PETERMAN.

Under the law of Oregon the title of the riparian proprietor on navigable streams and lakes extends only to the water's edge. The right which remains to the proprietor beyond the water's edge is only an easement which can not be conveyed.

An application for the survey of an island should be allowed where it appears that said island was omitted from the survey of the adjacent land, and has not been disposed of by the government.

Secretary Noble to the Commissioner of the General Land Office, January 28, 1892.

With your letter of August 3, 1891, you transmit the application of Benjamin E. Peterman, of Linkville, Oregon, for the survey of Bear Island, situated in Big or Upper Klamath Lake, in sections 19 and 24, township 36 south, ranges 7 and 8 east, W. M., Oregon.

It is shown that the island contains about one hundred and forty acres of land; that the width of the channel between the island and the main shore is one and a quarter miles on the west side, and more than three miles on the east side; that the depth of the waters is about one hundred feet, and the island is about three hundred feet above high water and fit for agricultural purposes.

It appears that part of the land bordering on the east side of the lake has never been surveyed—it is now known as the Klamath Indian Reservation; a small tongue of land extends up into the lake on the south side, the northern end of which is represented as opposite the island, and about one and a quarter miles distant therefrom. This tongue of land was surveyed and subdivided into lots, and, on July 28, 1866, was selected by the State for the purpose of internal improvement, under the act of September 4, 1841, and the selection was approved February 20, 1867 (list 3).

In the case of Parker *v.* West Coast Packing Co., 17 Oregon, 514, it is said:

> The land below high-water mark upon a navigable river and which constitutes a part of its bed belongs to the state in its sovereign capacity, subject to the riparian rights of the owner of the land above and adjacent thereto. The state, however, can not sell it nor can the state control its use, except to increase the facilities for navigation and commerce. Nor can the riparian proprietor grant such land or any right thereto, except such right as he himself is entitled to enjoy.

It would seem from the above quotation that by the law of Oregon the title of the riparian proprietor on navigable streams or lakes extends only to the water's edge. The right which remains to the proprietor beyond the water's edge is only an easement—an incorporeal hereditament—which can not be conveyed. Nor can the State sell or control its use, except to increase its facilities for navigation.

In this regard the law of Oregon is similar in many respects to the law of Massachusetts, Maine, and New Hampshire, where the common law as to riparian rights has been disregarded; it is unlike that of other states, as New York, New Jersey, Ohio, Michigan, Indiana, and Illinois, where the rule of the common law prevails.

I do not think the island in question belongs to the state.

The official plat showing fractional sections 24 and 25, in township 36, range 7 east, indicates no island thereon in the locality represented upon the diagram sent with the application. But, from the description given, it is evident that the island existed at the time the survey of the aforesaid tongue of land was made, and that it was omitted therefrom.

As said in the case of Webber *v.* The Pere Marquette Boom Company, 62 Mich., 626.

> To give the Commissioner jurisdiction to act, two facts must exist:
>
> 1. There must have been an island which was omitted from the survey when the adjacent territory was surveyed.
>
> 2. The land must not have been previously conveyed by the United States.

Both these reasons appear to exist in favor of the survey, as applied for.

Since no riparian rights are involved, the question of service upon the proprietors bordering the lake need not be discussed.

Your recommendation for the survey of the island is accordingly approved.

RIGHT OF WAY—STATION GROUNDS.

GRAND ISLAND AND NORTHERN WYOMING R. R. CO.

A selection for railroad purposes, under the act of March 3, 1875, of a tract exceeding twenty acres in area cannot be approved.

The right of selection for station purposes is limited to lands adjoining the company's right of way theretofore acquired.

Secretary Noble to the Commissioner of the General Land Office, January 29, 1892.

I have before me your letter of the 18th instant, enclosing a plat filed by the Grand Island and Northern Wyoming Railroad Company under the provisions of the right of way act of March 3, 1875, which shows a tract selected by the company for the purpose of a ballast pit, side tracks and other railroad uses.

You recommend that the plat be not approved because it is not on the main line of the road, that it is but about seven miles east of a station, the plat of which has been heretofore approved, and that it contains more than twenty acres of land.

This plat has been examined and the tract involved is found to be one-fourth of a mile south of the line of the company's road, and, as shown, the company contemplates reaching the tract by what is designated as a proposed track.

In reply I have to state that the excess in area of the tract above the legal limit of twenty acres, is, in itself, a sufficient reason for acting in accordance with your recommendation. Yet, should its area be modified to come within the law, the plat would still be subject to objection by reason of the tract being separated from the company's right of way.

The words of the act granting grounds for station purposes are: "also ground adjacent to such right of way for station buildings" etc. The scope of the word "adjacent" in this act as used in connection with the appropriation of material for construction purposes, in the absence of any decision of court thereon, is held to be confined to "the tier of sections through which the right of way extends . . . and perhaps an additional tier of sections on either side" as set forth in departmental decision of January 10, 1889, in the case of the Denver and Rio Grande Railroad Company, 8 L. D. 41.

There is however a marked distinction between the case above cited

and the one under consideration. The right to take material from the public lands does not involve permanent occupancy or appropriation of the grounds thus made use of. The right of selection for station purposes does involve such occupancy or appropriation, and carries with it, by necessity, for the uses designated in the act, connection by rail between the line of the road of the company filing the plat and the grounds so selected. This being the fact it follows that such grounds must so adjoin the right of way as to enable them to be reached, by means of rail communication without traversing public lands, and thus utilized as contemplated. To determine otherwise, in view of the fact that right of way extends but one hundred feet on each side of the central line of road, would secure to the company applying, a tract of land it could not reach by rail, because the law does not authorize the construction of railroads on the public lands beyond the line of the right of way secured by the approval of a map of definite location.

It must, therefore, be held, in order that the provision of the right of way act relating to station buildings etc. may be of use to the beneficiaries under the act, that such grounds be so selected that they can be rendered available without transgressing the right of way theretofore acquired. The plat is returned herewith unapproved.

RIGHT OF WAY—STATION GROUNDS.

RIO GRANDE GUNNISON RY. CO.

An application to select station grounds should not be submitted until the company has secured the approval of its right of way.

A plat showing proposed station grounds extending one mile and a half along both sides of the line of road, and seventy-five feet in width, will not be approved.

Secretary Noble to the Commissioner of the General Land Office, February 2, 1892.

I have received your letter of the 18th ultimo, transmitting a plat filed by the Rio Grande Gunnison Railway Company under the provisions of the right of way act of March 3, 1875 (18 Stat., 482), and showing a tract of twenty acres of land in Colorado selected by the company for station buildings, etc.

You state that the company has not filed a map of definite location of its line of road through the township in which the selection is situated, and call attention to the fact that the tract represented on the plat is more than one mile in length. By reason of these objections you recommend that the plat be not approved and it is so returned herewith.

It is held by the Department that station grounds are required by the act to adjoin right of way previously secured by approval of maps of definite location. See letter of the 29th ultimo in case of the Grand

Island and Northern Wyoming Railroad Company. This company has not secured such right of way hence its plat is submitted prematurely and without warrant. Again these proposed station grounds extend one and one half miles on both sides of the line of road laid down on the plat, and are but seventy-five feet in width on either side thereof. In my view a selection of such length is not required for the necessary uses contemplated under the right of way act, and if without other objection it would not receive favorable action at the hands of the Department.

SURVEY—MEANDERED LAKE.

INSTRUCTIONS.

If none of the lands or lots contiguous to a former non-navigable meandered lake or pond have been patented, or applied for under the general land laws, the land, previously covered by the water of such lake or pond, may be surveyed and disposed of as government land, if it has become dry and fit for agricultural use.

Secretary Noble to the Commissioner of the General Land Office, January 12, 1892.

I am in receipt of your letter of July 24, 1891, transmitting a copy of a letter from the United States surveyor-general of South Dakota, dated July 11, 1891, addressed to you, asking instructions as to the survey of islands and beds of meandered lakes, applications therefor, contracts and compensation, surveys in general, etc. You ask specifically for instructions as to how to proceed in the future as to the survey of lands within meandered lakes, should such applications continue to be allowed on the principle announced in the case of James Popple *et al.* (12 L. D., 433.)

The Popple case (*supra*) was overruled in the case of John P. Hoel (13 L. D., 588). The latter case was based on the case of Hardin *v.* Jordan (140 U. S., 371), decided May 11, 1891, twelve days after the Popple case was decided.

The practice of denying such applications, in force before the Popple case was decided, will, in general, be continued. If, however, it should appear that none of the lands or lots contiguous to a former non-navigable meandered lake or pond have been patented, or applied for under the general land laws, I see no reason why the lake—if it has become dry and fit for agricultural purposes—should not be surveyed and disposed of as government lands.

PRE-EMPTION—TRANSMUTATION—NOTICE.

RUMALDO MESTAS.

The transmutation of a pre-emption filing to a homestead entry should not be allowed without notice to adverse claimants.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 29, 1892.

Rumaldo Mestas has appealed from your decision of June 30, 1890, holding in effect that he must give notice to the adverse homestead claimant (one Jose Nuanes) before he can be allowed to transmute into a homestead entry his pre-emption filing for the SE. ¼ of the NW. ¼, the SW. ¼ of the NE. ¼, the NE. ¼ of the SW. ¼, and the NW. ¼ of the SE. ¼, of Sec. 23, T. 30 S., R. 65 W., Pueblo land district, Colorado.

The rule of the land department in cases where a pre-emptor desires to transmute his filing into a homestead entry is set forth in Wolf *v.* Struble (1 L. D., 449):

> In cases where pre-emption claimants apply to transmute their filings, they will be required to give notice to subsequent homestead claimants, who will be allowed to contest the application to transmute. If the validity of the pre-emptor's claim is not impeached, the adverse homestead entry will be canceled and the transmutation allowed.

The appellant presents no reason why he should not be required to give notice to the adverse homestead claimant in accordance with the ruling above quoted. Your decision is therefore affirmed.

PRE-EMPTION ENTRY—SECTION 7, ACT OF MARCH 3, 1891.

ALONZO W. CHILDERS.

Where an entry is susceptible of confirmation in the interest of a transferee under the body of section 7, act of March 3, 1891, and is also within the confirmatory provisions of the proviso to the same, it should be adjudicated under the proviso, but this rule should not be enlarged by construction.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 3, 1892.

Alonzo W. Childers, on June 16, 1883, made pre-emption cash entry of the NW¼ of Sec. 4, T. 2 N., R. 29 E., La Grande land district, Oregon.

On February 3, 1887, Special Agent McCormick, of your office, reported:

> That he had made a personal examination of said tract, and found no evidence that claimant had complied with the law in good faith in the matter of residence, cultivation, and improvements; that claimant conveyed the land to James H. Cavanaugh June 18, 1883, in accordance with a contract made before final proof, Cavanaugh furnishing the final proof money and procured the witnesses; that the land is now in the possession and occupancy of Carl Ellner, who has substantial improvements thereon, he having purchased from Cavanaugh August 15, 1883, and assumed and paid the mortgage held by the Oregon Mortgage Company, of Edinburgh, Scotland.

On February 3, 1887, you held the entry for cancellation. Ellmer applied for a hearing, which was had in May, 1888. On December 30, 1890, you held the entry for cancellation. Ellmer appeals to the Department.

Your decision finds that the transfer from Childers to Cavanaugh was fraudulent; but no fraud has been found on the part of the final transferee, Ellmer—who, so far as appears from the record, purchased in good faith and for a valuable consideration. Hence the entry might be confirmed under section 7 of the act of March 3, 1891, "To repeal timber-culture laws, and for other purposes"—notwithstanding the finding of fraud on the part of the entryman and his immediate transferee. (Shepherd *v.* Ekdahl, 13 L. D., 537).

By a comparison of dates it will be seen that no action looking to the cancellation of the entry was taken until more than two years after the date of issuance of the receiver's receipt upon final entry of the tract; and no contest has been filed against it. It therefore comes within the terms of the proviso to section 7, of the act of March 3, 1891 (*supra*).

It is the ruling of the Department that where an entry is susceptible of confirmation in the interest of a transferee under the body of said section 7, and is also within the confirmatory provisions of the proviso to the same, it should be adjudicated under the proviso (Samuel M. Mitchell, 13 L. D., 55; Columbus Harp, ib., 58). This rule is correct, but it should not be enlarged by construction.

Your decision is therefore reversed; and the papers transmitted with your letter of February 7, 1891, are herewith returned, in order that you may adjudicate the case under the proviso to said section 7, in accordance with the instructions to chiefs of divisions (12 L. D., 450).

WAGON ROAD GRANT—ADJUSTMENT.

COOS BAY WAGON ROAD CO.

The necessity for judicial proceedings to recover title where lands in excess of a grant have been certified is not obviated by matters of defense that may be set up as against such action.

Secretary Noble to the Commissioner of the General Land Office, February 1, 1892.

I have considered the adjustment submitted in your letter of January 13, 1888, of the grant made by the act of Congress approved March 3, 1869 (15 Stat., 340), "to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg."

This grant was "to the extent of three sections in width on each side of said road," with the right of indemnity within six miles of the line of the road.

The facts relative to said adjustment, as stated in your letter, are as follows:

The Governor of Oregon, on September 19, 1872, certified to the construction of the completed road from Coos Bay to Roseburg, a distance of 62 miles and 41 chains.

The whole area of the grant, as determined by careful examination, is 99,819.35 acres.

There have been certified and patented under the grant in the three mile limits 59,869.91 acres; and 6,169.34 acres in said limits remain vacant and subject to selection and patent, making 66,039.25 acres apparently subject to the grant within the primary limits.

There have been certified and patented to the company as indemnity lands 44,139.30 acres, making in all 110,178.55 acres, or an apparent excess of 10,359.20 acres over the amount the company is entitled to.

Your letter states that the certifications include 1,099.59 acres outside the limits of the grant; also, 30,044.46 acres within the primary limits of the prior grant for the Oregon and California Railroad Company, under the act of July 25, 1866 (14 Stat., 239).

You state that you do not think the government is called upon to take any action looking to the recovery of the latter class, and with this I agree, but you seem to treat this fact as sufficient to relieve this Department from taking proceedings to recover the excess clearly shown by the adjustment. I do not think this fact should be taken into consideration in the matter of the recovery of the excess shown, for, while it may be held that these 30,000 acres were erroneously certified on account of the wagon road grant, yet a judgment of the court is necessary; further, this is purely a matter of defense and should not be raised by this Department, but left to the company to plead, if relied upon, in defense of the action when brought.

You called upon the company to reconvey only those tracts shown to be without the limits, and it responded that it was unable to do so, as the lands had been sold.

I have therefore to return, herewith, the papers accompanying your letter of January 13, 1888, and direct that the excess be identified by including those tracts farthest from the line of the road. This will include the 1,099.59 acres outside of all limits, and should be separated from the remainder of the excess, so that a judgment may be obtained on either theory.

It is very necessary that this matter be given early attention, as persons have been erroneously permitted by the local officers to enter those tracts embraced in the certifications outside of the limits of the grant, and many inquiries are received at this Department relative to their status.

DESERT LAND—HOMESTEAD ENTRY—RELINQUISHMENT.

HAGGIN *v.* DOHERTY.

By the express terms of the act of August 30, 1890, a homestead entry, made in good faith, of land subject to the arid land act of October 2, 1888, is protected, and may be perfected if not located or selected for a reservoir site.

On the relinquishment of a desert entry the land covered thereby is open to settlement and entry without further action on the part of the General Land Office.

A claimant under an alleged assignment of a desert entry must show the fact of such assignment, and that it was made prior to April 15, 1880.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 2, 1892.

On April 19, 1877, Thomas Chapman made desert land entry (No. 140), embracing the SW ¼ of section 10, T. 29 S., R. 27 E., M. D. base and meridian, at Visalia, California.

On February 5, 1889, George C. Doherty filed his application (No. 7005), to make homestead entry of the same tract, and at the same time filed the relinquishment of said Chapman of his said entry, which was thereupon canceled.

On August 26, 1889, Doherty gave notice of his intention to make final proof to establish his claim to said land at said land office on January 10, 1890.

On said latter date a protest in the name of James B. Haggin by George C. Gorham, jr., his attorney, sworn to by William B. Carr, as agent for said Haggin, who was absent from the State, was filed in the local office, alleging that said Chapman had, prior to his said relinquishment, assigned his desert land entry to said Haggin.

There was also filed at the same date the protest of said Carr, alleging that the land embraced in said homestead entry is desert land, and "lies in such situation that it may be irrigated from storage reservoirs in the Sierra Nevada mountains."

Said final proof was received on January 10, 1889, and thereafter, and a hearing was had on said protests, and both parties were fully heard.

The register ruled that said Doherty should prove, on said hearing, that the land in question was not desert land, and that the protestant might introduce evidence as to the desert character of said land, basing his ruling upon the act of October 2, 1888 (25 Stat., 526), and the instructions of August 5, 1889 (9 L. D., 282).

After a lengthy hearing the local officers, on August 18, 1889, decided that although the land in dispute is desert or arid land, yet as the homestead claimant had "acquired a valid interest in a water right for irrigation purposes under an appropriation made by his grantors prior to the passage of the act of October 2, 1888, his entry is not in conflict with the provisions of the statute, and should be allowed." The protests were dismissed, and the final proof of said Doherty was passed to entry.

No appeal was taken from this decision, but the papers were transmitted to your office.

By your letter of September 6, 1890, you held Doherty's entry for cancellation, as in conflict with Chapman's desert land entry.

An appeal now brings the case before me.

By the act of August 30, 1890 (26 Stat., 371, 391), it is provided that so much of the act of October 2, 1888,

> as provides for the withdrawal of the public lands from entry, occupation, and settlement, is hereby repealed, and all entries made, or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided in said act, until otherwise provided by law.

The former instructions relating to said act of October 2, 1888, were rescinded. See arid land circular (11 L. D., 296).

By the act of March 3, 1891, section 17 (26 Stats., 1095, 1101), it is further provided,

> that reservoir sites located or selected . . . shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs.

As it does not appear that the land in dispute has been "located or selected" for reservoir sites, and as the entry of Doherty was made in good faith, it must, by the express terms of the act of August 30, 1890, above cited, "be recognized and may be perfected in the same manner as if said law (act of October 2, 1888) had not been enacted."

On the relinquishment of Chapman the land covered by his entry was open to entry and settlement by Doherty without further action on the part of the Commissioner. Circular of June 28, 1887 (5 L. D., 708, 712, Sec. 15); Mary Stanton (7 L. D., 227); Zelia J. Fuller (8 L. D., 371); Belliveaux *v.* Morrison (8 L. D., 605); Fraser *v.* Ringgold (3 L. D., 69); Yates *v.* Glafcke (10 L. D., 673).

It was held in the case of S. W. Downey (7 C. L. O., 26), decided April 15, 1880, by Secretary Schurz, that desert land entries were not assignable. This decision was re-affirmed by Secretary Teller December 1, 1884, in the case of David B. Dole (3 L. D., 214).

The burden of proof was upon Haggin to show a valid assignment to him of Chapman's entry, prior to April 15, 1880, in order to defeat Doherty's entry. This he has failed to do. Neither Haggin or Chapman appeared as a witness at the hearing. No assignment of the entry of Chapman was produced, or is recorded upon the records of Kern county, where the land lies, or upon the records of the Visalia land office. It does not appear that the alleged assignment was in writing, or when it was made. It is in evidence that Doherty paid Chapman $1,100. for his improvements and relinquishment, and that he also paid $100. for the relinquishment of Eliza M. Powell, who had applied to make homestead

entry. Doherty has put valuable improvements on the land and made it his continuous residence. His entry should remain intact.

Upon inquiry at your office it is ascertained that your decision of September 6, 1890, was based upon the fact that Chapman's entry still appeared intact upon your records, and that the relinquishment and cancellation of his entry either had not then been transmitted to your office, or, if reported, had not been entered upon your records.

Your judgment is reversed.

TIMBER LAND ENTRY—MARRIED WOMAN.

ELLEN YOUNG.

A married woman is not entitled to purchase timber land under the act of June 3, 1878, except with her separate money, in which her husband has no interest or claim.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 2, 1892.

The land involved in this appeal is the NE. ¼ Sec. 1, T. 18 N., R. 11 W., Seattle, Washington, land district.

It appears from the record that Ellen Young made application to purchase the land in controversy, as timber land, under the act of Congress of June 3, 1878, October 23, 1888. Pursuant to published notice she submitted final proof January 31, 1889. This entry was made the subject of investigation by a special agent of the Department, who, on March 6, 1889, procured an affidavit from the claimant in which she says:

I made this application with my own money, earned by washing and ironing, selling milk and butter and eggs, and from the sale of property owned by my husband in Aberdeen.

May 13, 1890, the register rejected the proof offered "because no money was tendered at the time of final proof; 2nd, did not purchase the land with her separate money." From this decision claimant appealed and you by letter of December 4, 1890, affirmed said rejection, on the ground "that part of the money, at least, was owned jointly by the claimant and her husband," whereupon she prosecutes this appeal, assigning as error, your action in holding that claimant's case fell under the operation of paragraph 5, of the circular of May 21, 1887 (6 L. D., 114).

The circular referred to, among other things pertaining to this class of entries by married women, provides that "she shall make affidavit at the time of entry that she proposes to purchase said land with her separate money, in which her husband has no interest or claim." It is difficult to understand how your decision, under the showing made, could have been otherwise than in affirmance of the action of the local officers.

Your judgment is affirmed.

TIMBER CUTTING—RAILROAD LIMITS.

NORTHERN PACIFIC R. R. CO.

Permits will not be issued under section 8, act of March 3, 1891, to cut timber from the unsurveyed lands within the primary limits of the Northern Pacific grant, in the absence of a showing that the land is mineral in character.

Secretary Noble to the Commissioner of the General Land Office, February 3, 1892.

I have considered the question presented in your letter of January 20, 1892, relative to the granting of permits, under the 8th section of the act of March 3, 1891 (26 Stat., 1093), to cut timber from the unsurveyed lands within the primary limits of the grant for the Northern Pacific Railroad Company.

Your letter states that:

> This office has received a large number of applications for permits to cut timber from unsurveyed public lands in Montana. Forty or more protests against the granting of such applications have been filed by and in the interests of the Northern Pacific Railroad Company. These protests are not only against the particular applications named therein, but generally against the granting of any permit to cut timber from the unsurveyed public lands within the limits of the grant to said railroad company. . . . . .
>
> I have deferred action on any application against which such a protest has been filed, lest complications might arise that would, in the future, involve the government in a controversy with the railroad company as to the rights of the latter, either for indemnity in lands or in money.

I deem it unnecessary to here consider the special claims made by the company in its protest.

Under the acts of Congress making a grant to aid in the construction of this road, which is a grant *in presenti*, the title passes to all lands of the character described therein, free from claims or rights at the date of the definite location of the road, whether surveyed or unsurveyed.

The road has long ago been located and constructed through the State of Montana, in which the tracts specially referred to in your letter lie.

Until surveyed, it can not, with any degree of certainty, be held that any particular piece of land will, upon survey, form a part of an even numbered section, and in the absence of a showing that the land is mineral in character, no disposition should be made of any of the lands within the limits of said grant, nor any permit issued to remove timber from the same prior to the survey by the United States.

MOTION FOR REVIEW—NOTICE—TRANSFEREE.

CHARLES C. FERRY.

It is incumbent upon a transferee who alleges on motion for review, that a decision has not become final as to him for want of notice, to affirmatively show that a statement of his interest was on file in the local office.

Secretary Noble to the Commissioner of the General Land Office, January 29, 1892.

Charles F. Fisher, transferee of Charles C. Ferry, has filed a motion for review and reconsideration of departmental decision of May 25, 1888, holding for cancellation Ferry's pre-emption cash entry for the SE. ¼ of Sec. 33, T. 113, R. 65, Huron land district, Dakota, with a view to having the same confirmed under the 7th section of the act of March 3, 1891 (26 Stat., 1095).

The entry was finally cancelled by your office, in pursuance of said departmental decision, on June 13, 1888.

The transferee contends, however, that inasmuch as he received no notice of said decision until informed thereof by register's letter of May 16, 1891, the decision had not become final as to him, and that his motion for review, filed ten days later (May 26), saved his rights in the premises; hence that the entry should be confirmed to him under Sec. 7 of the act above cited.

If the transferee had on file in the local office a statement showing his interest in the entry, he was entitled to notice of its cancellation; otherwise he is estopped from calling in question the validity of the proceedings against it. See Cyrus H. Hill, 5 L. D., 276; A. A. Joline, ib., 589; American Investment Company, ib., 603; Van Brunt *v.* Hammon, et al., 9 L. D., 561; John J. Dean, 10 L. D., 446; Otto Soldan, 11 L. D., 194; Robinson *v.* Knowles, 12 L. D., 462.

Moreover, it devolves upon the applicant to show that he had filed in the local office a statement of his interest (Robinson *v.* Knowles, *supra*). I find nothing in his motion, nor elsewhere in the record transmitted, to show that he had done so.

As no sufficient ground for the review and reconsideration prayed for is shown, the motion is denied.

TIMBER CULTURE ENTRY—PRELIMINARY AFFIDAVIT.

HOLMES *v.* HOCKETT.

An entry should not be allowed on an application and preliminary affidavit executed while the land is not legally liable to disposal.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 3, 1892.

On February 5, 1890, Asa R. Hockett presented at the land office at Garden City, Kansas, his application to make timber culture entry of the NW ¼ section 9, T. 34 S., R. 36 W., also $14 as fees. This application was accompanied by the usual timber-culture affidavit sworn to January 31, 1890. On said February 5, 1890, these papers and money were returned by the register, as appears by his letter of that date, for

the reason that the affidavit was not signed by Hockett's name in full. No entry was made of this transaction on the books of the local office.

At this date the land was embraced in the timber-culture entry of William McCullough, which was contested by Robert F. Holmes.

On February 21, 1890, the entry of McCullough was canceled by your order of February 18, 1890. On said February 21, 1890, Hockett again filed his application dated January 31, 1890, to make timber-culture entry for said tract, accompanied with said former affidavit properly signed, but of even date with the application, and with the usual fee, subject to the preference right of said Robert F. Holmes.

On March 20, 1890, James J. Holmes presented his own application to make timber-culture entry of said tract, with the proper fees, also accompanied with a waiver of his preference right made by said Robert F. Holmes.

The local office rejected the application of James J. Holmes because said land was already appropriated by the application of said Hockett, and thereupon the former appealed.

By letter of July 21, 1890, you affirmed their decision.

An appeal now brings the case before me.

One of the specifications of error is that,—

> On Jan'y 31, 1890, and Feby. 5, 1890, the tract applied for by Hockett was covered by the uncanceled entry of one William McCullough, and was not subject to entry.

The second section of the act of June 14, 1878 (20 Stat., 113), provides,

> That the person applying for the benefits of this act shall, upon application to the register of the land district in which he or she is about to make such entry, make affidavit, before the register or receiver, or the clerk of some court of record, or officer authorized to administer oaths in the district where the land is situated, etc.

In this case the affidavit was made before a notary public in La Fayette, within the Garden City land district.

In the case of Hiram Campbell (5 C. L. O., 21), it was held that—

> Where the party pursues this course, a sound discretion must be exercised by the local officers, and a reasonable time allowed for the transmission of the affidavit to the local land office. But in no case can an affidavit made while the land is appropriated, under the provision of law, be received. To allow such a course would be an encouragement to the sale of claims on the part of settlers, a practice not recognized by law, or sanctioned by this Department.

In consequence of this decision, rendered December 22, 1877, the circular of January 8, 1878 (4 C. L. O., 167), was issued, in which the local officers were

> instructed not to take or hold in your possession such papers, nor recognize them when presented by attorneys, where you know them to have been actually made by the applicant at a date prior to the time when the land applied for was legally liable to disposal by you.

This doctrine was applied in the case of Johnson Barker (1 L. D., 164); and of Staab *v.* Smith (3 L. D., 320).

Hockett's first application and affidavit, both dated and made January 31, 1890, and tendered at the local office on February 5, 1890, should have been rejected on the ground that the land was not then subject to disposal because embraced in McCullough's entry, which was still uncanceled.

His application and affidavit tendered February 21, 1890, should have been rejected because both were the identical papers tendered February 5, 1890, which were made January 31, 1890, when the land was not "legally liable to disposal," and therefore were within the express inhibition of the circular and decisions above cited.

Your judgment is reversed.

RAILROAD GRANT—ADJUSTMENT—DEMAND FOR RECONVEYANCE.

UNITED STATES *v.* ALABAMA STATE LAND CO.

The grant to the State of Alabama by section 1, act of June 3, 1856, in aid of the Wills Valley railroad, and by section 6, of said act, in aid of the Northeast and Southwestern railroad, were distinct and separate grants, and, in the adjustment thereof, there is no authority for the certification of lands within the limits of one road to satisfy losses on account of the other.

The Department has full authority to institute proceedings for the recovery of title to lands erroneously certified on account of a railroad grant, whether such lands are in the possession of the original grantee or have passed to third parties.

The preliminary demand for reconveyance in the institution of such proceedings may be properly made upon the present holders of the land, and parties appearing to have an interest therein, where it is made to appear that the original company has ceased to exist and has parted with its title to said land.

Secretary Noble to the Commissioner of the General Land Office, February 3, 1892.

On June 3, 1856 (11 Stats., 17), Congress granted to the State of Alabama, to aid in the construction of a railroad "from Gadsden to connect with the Georgia and Tennessee line of railroads through Chattooga, Wills and Lookout Valleys;" also a railroad "from near Gadsden to some point on the Alabama and Mississippi State line, in the direction of the Mobile and Ohio Railroad, with a view to connect with said Mobile and Ohio Railroad".

On January 20, 1858, the legislature of Alabama conferred the right received from Congress to aid in the construction of a railroad from Gadsden through Wills and Lookout valleys upon the Wills Valley Railroad Company.

The grant from near Gadsden, to a point on the Alabama and Mississippi State line, in the direction of the Mobile and Ohio Railroad, was conferred by said State upon the Northeast and Southwestern Railroad Company.

These two companies filed their respective maps of definite location, October 11, 1858.

By virtue of an act of the legislature of the State of Alabama, approved November 17, 1868, entitled "An act relating to the Wills valley Railroad Company and Northeast and Southwestern Alabama Railroad Company," the Wills Valley Railroad Company was authorized to purchase the railroad and franchises of the Northeast and Southwestern Alabama Railroad Company, and after doing so to change its own name to that of the Alabama and Chattanooga Railroad Company.

The road was built on the lines designated in the maps of definite location filed in your office by the two original companies. Under the act of the State legislature of Alabama above referred to, the Wills Valley railroad became the owner of the rights of the Northeast and Southwestern Railroad Company, and was subsequently known as the Alabama and Chattanooga Railroad Company. The road thus known formed a continuous line from the Mississippi State line near Meridian to Wauhatchie, Tennessee, a distance of two hundred and seventy-two miles.

It seems that in the adjustment of these two grants to aid in the building of railroads east and west from Gadsden, during a part of the time prior to 1887, they were erroneously treated as one grant, and lands were certified to the Alabama and Chattanooga railroad opposite the Wills Valley railroad for lands lost within the granted limits of the Northeast and Southwestern Railroad Company. These two grants to the State of Alabama to aid in the construction of the above railroads, were separate and distinct grants. One of them was made by the first section of the act of June 3, 1856, *supra*, and the other by the sixth section of said act. There is no conflict between the grants; neither do they run parallel with each other. Each began at Gadsden, in said State, and extended in opposite directions so that when the two roads were constructed, together they would constitute a continuous line through said State. This fact, however, does not authorize the certification of lands within the limits of one road to satisfy losses on account of the other, and it was manifestly erroneous for your office to have treated the two grants as an entirety.

For various reasons there appears to have been a deficit in the amount of lands, to which the Northeast and Southwestern Railroad Company was entitled, within the limits of the grant for that road, but as to such amount the grant was a barren right. This was unfortunate for the company, but was a risk assumed when it accepted the terms of the grant. By reason of this deficit the Alabama and Chattanooga Railroad Company, as successor to said road and grant, could not be allowed to acquire surplus lands within the indemnity limits of the Wills Valley Railroad Company to indemnify this loss. It being the successor in interest by purchase of the two roads mentioned, did not give it authority to consolidate the land grants made to aid in their construction.

Since the passage of the adjustment act of March 3, 1887 (24 Stat., 556), your office, in adjusting these grants, has correctly treated them as separate grants. In your report, dated December 19, 1888, you state that these grants have been finally adjusted and that the Alabama and Chattanooga Railroad Company has received, under the grant conferred upon the Wills Valley Railroad Company, 72,054.28 acres of land in excess of the quantity to which the company was entitled thereunder.

The list of the erroneously-certified lands, marked "A" has been examined; also your letter dated February 27, 1890, giving a statement of the final adjustment of the two grants. The lands included in the list marked "A" were certified to the State of Alabama for the benefit of the Wills Valley Railroad Company and the Alabama and Chattanooga Railroad Company as its successor. These certifications were made on different dates, as is shown in said list.

It appears that after the State of Alabama had accepted the two grants heretofore mentioned, and had conferred the same upon the Wills Valley Railroad Company and the Northeast and Southwestern Railroad Company, nothing was done towards building either of said roads, and when the Alabama and Chattanooga Railroad Company succeeded to their rights, in order to secure the construction of the road the legislature of the State of Alabama passed a law authorizing the State to indorse the bonds of the company. The total liability of the State became about $7,200,000 by reason of its indorsement of the company's bonds. To secure herself against any possible loss, the State took a mortgage on the railroad and all the granted lands of said company. The road was built in 1871, and soon after became unable to pay the interest on its bonds. The State paid the interest and assumed the principal. The property of said road was sold in pursuance to a decree of the district court of the United States for the middle district of Alabama, and the company was declared bankrupt. The State became the owner, by purchase, of all the lands granted by Congress to aid in the construction of these railroads. Wallace *v.* Loomis (97 U. S., 146). On February 8, 1877, the State transferred the lands to John A. Billups of Pickens county, Alabama, trustee appointed by the governor under authority of the act of the general assembly of said State, dated February 23, 1876, and John Swann of London, England, a trustee appointed by the bondholders. The deed was executed to these trustees and their successors, and the lands were sold by them, "The Alabama State Land Company becoming the purchasers thereof. It is asserted that John Swann is dead, and that Frank Y. Anderson has succeeded him as the trustee for the bondholders.

The railroad built by the Alabama and Chattanooga Railroad Company was sold under a decree of the United States court for the southern district of Alabama, on the 22nd day of January, 1877, and was purchased by parties who now have no interest in the lands, and the road is now known as the "Alabama Great Southern Railroad Com-

pany," and is controlled by the "Cincinnati, New Orleans and Texas Pacific Railway Company."

It is claimed that the Alabama and Chattanooga Railroad Company is not now in existence and has left no assets behind it, and no one is now authorized to represent it. The lands included in list "A" heretofore erroneously certified for the benefit of said railroad company, are now the property of the Alabama State Land Company, a corporation organized for the purpose of holding real estate and for other purposes, under the laws of the State of Alabama. On January 7, 1890, this company, by its attorney, M. D. Brainard, filed a paper in this Department which purports to be an appearance of said company, and sets out a number of reasons why the government cannot recover the lands in question, and contends that as this company is an innocent purchaser of these lands for value, the only course left the government is a suit against the Alabama and Chattanooga Railroad Company for the value of the lands; and, as that company is not in existence and has no assets, such a suit would be useless.

The second section of the adjustment act (*supra*), provides:

> That if it shall appear, upon the completion of such adjustments respectfully (respectively), or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States.

It will be seen from an examination of the above section that no new authority is given the Department in the matter of the restoration of lands erroneously certified or patented to or for the benefit of any railroad company, but that which before was discretionary is now made mandatory.

In this case the certificates were issued for the use of the Alabama and Chattanooga Railroad Company, as successor in interest to the two grants above mentioned, and, as far as the government is concerned, it matters not whether the tracts thus erroneously certified are found in the possession of the original grantee, or in the possession of a second or third grantee. Its duty, under the commands of the adjustment act, is to take steps to compel the restoration thereof. The State of Alabama became the purchaser of these lands, through judicial sale, from the Alabama and Chattanooga Railroad Company, and, in turn, sold and conveyed them to the Alabama State Land Company.

It would seem that the provision in the second section of the adjust-

ment act, providing that a demand must be made for reconveyance, warrants the making of such a demand upon the present holders of the land, if it be true that the original company has ceased to exist, as alleged.

Although it is claimed that no one is now authorized to represent the Alabama and Chattanooga Railroad Company, the records of your office show that certain selections were made May 13, 1885, in the name of said company by Frank Y. Anderson, who swears "that I am the general land agent of the Alabama and Chattanooga Railroad, formerly called the Northeastern and Southwestern and Wills Valley Railroad, and am also agent of the State of Alabama for the selection of public lands."

It is apparent that lands have been conveyed on account of this grant without authority of law, being in excess of that granted by Congress.

A suit may be brought by the United States in any court of competent jurisdiction to set aside, cancel, or annul a patent for land issued in its name, on the ground that it was obtained by fraud or mistake. United States *v.* San Jacinto Tin Company (125 U. S., 273).

As before stated, this right to bring such a suit exists independently of the act of March 3, 1887 (*supra*), and, in view of the facts in this case, showing as they do that the lands described in list marked "A," amounting in all to 72,051.57 acres were erroneously certified to the Alabama and Chattanooga Railroad Company, you are directed to demand a reconveyance thereof from the grantees of said company—to wit: the State of Alabama and the Alabama State Land Company, also upon Frank Y. Anderson, as agent for said Alabama and Chattanooga Railroad Company, and upon the trustees who received deeds from the State, or their successors, within ninety days from the date of the service of notice of said demand; at the end of which period, if reconveyance is refused, you will forward a complete record in the case to this Department, with a view of its transmittal to the Attorney-General, for the institution of proper proceedings to vacate said patent.

RELINQUISHMENT—VACANCY IN LOCAL OFFICE.

ARMSTRONG *v.* MIRANDA.

A relinquishment, executed by the entryman while so intoxicated as to not comprehend the character of the instrument, is ineffective.

A vacancy in the office of either the register or the receiver, disqualifies the remaining incumbent for the performance of the duties of his own office, during the period of such vacancy.

A relinquishment sent to the local office during a vacancy in the office of the register is not filed in contemplation of law, and if returned to the entryman before said vacancy is filled, no action can be subsequently taken thereon by the register and receiver.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 4, 1892.

The land in controversy in this case is the SW ¼ of Sec. 13, T. 1 N., R. 4 E., in the Tucson land district, Arizona, for which Jesus Miranda filed pre-emption declaratory statement on the 14th of September, 1885, alleging settlement in August, 1878. He changed his pre-emption filing to homestead entry, on the 23d of November, 1885.

On the 6th of May, 1887, he filed in the local office notice of his intention to make final proof for the tract, before the clerk of the United States district court at Phœnix, Arizona, on the 17th of June, of that year. This notice was published in the Salt River Valley News, the first insertion being on the 14th of May, 1887, and the last on the 18th of June. The affidavit of the publisher makes the last insertion on the 18th of "May", but it is apparent on the face of the paper that it should have been June, as the paper was published weekly, and the affidavit would make the first and last publications within four days of each other, whereas there would be an opportunity for six insertions if the first was on the 14th of May, and the last on the 18th of June.

The date mentioned in the notice for making proof was June 17, at which time such notice had not been published six weeks. He, therefore, asked for a continuance until the following day, which was granted. The proof was made before the clerk of the court on the 18th of June, at which time Armstrong filed an affidavit of contest, alleging that Miranda had sold his right in said tract to said Armstrong, and had relinquished his interest therein to the United States, and also that the proof was advertised to be made on the 17th of June, and "on that day publication had not been made six weeks as required by law."

This affidavit was forwarded to the local office with the final proof, and hearing was ordered to determine the questions raised thereby. It took place on the 18th of October, 1887, and resulted in a decision by the local officers on the 21st of May, 1888, in which they found in favor of the contestant, and recommended the cancellation of the entry of Miranda.

From that decision an appeal was taken to your office. After numerous motions, decisions, and appeals, to which it is unnecessary for me to allude, the appeal from the decision of the local officers of May 21, 1888, was decided by you, and their judgment affirmed September 23, 1890. An appeal from such decision by you, brings the case to the Department for consideration.

In the record before me is a sheet of legal cap paper, upon which the following is written:

In the United States Land Office, Tucson, Arizona.

Personally appeared before me, D. H. Wallace, a notary public in and for the county of Maricopa, Territory of Arizona, Jesus Miranda, who being duly sworn deposes and says that he is the identical Jesus Miranda, who made pre-emption D. S. No. 1584, of SW ¼ of Sec. 13, T. 1 N., R. 4 E., on the 14th day of September 1885, and

changed said tract to H'd. entry No. 544, on the 23d day of November 1885. That his receipt for his homestead entry No. 544 has been lost or mislaid, and is not now in his possession and cannot be found. That he now relinquishes to the government of the United States all his right, title and interest in and to the above described tract this 13th day of May 1887, and that he has not heretofore relinquished said entry.

his
JESUS X MIRANDA.
mark.

Witness:
O. Y. PORTERIE.

Subscribed and sworn to before me this 13th day of May 1887, and I hereby certify the deponent is the identical person he represents himself to be.

D. H. WALLACE,
Notary Public.

In reference to this paper, the evidence of Armstrong and his witnesses is, that it was signed by the parties whose names it bears, on the day it is dated, and that it was the result of certain prior negotiations. That Armstrong desired to become possessed of the land occupied by Miranda, but as he could not talk or understand the Spanish language, and as Miranda could not talk or understand any other, he employed one Brown, who could talk and understand both languages, to institute and conduct negotiations, with a view of bringing about the desired result. These negotiations resulted in the execution of the paper above set forth, the consideration for which from Armstrong to Miranda, was to be the sum of $1,300, seventy-five of which was paid the day the paper was executed, and the balance was to be paid when Armstrong should receive his receipt from the local land office for a timber-culture entry which he desired to make for the land. The relinquishment, together with the necessary papers for a timber-culture entry, and the fees therefor, were immediately sent by Armstrong to Tucson, and were delivered to Fred W. Smith, the receiver of the local land office, at his residence, about midnight of May 14, 1887. These papers Smith took with him to the office the next morning, and handed them to C. E. Dailey, the clerk who had charge of the register's office.

At this time, the office of register was vacant at the Tucson land district, in consequence of the expiration of the term of the former register, and the Senate having closed its session without confirming the President's appointee for the position.

On the part of Miranda, the evidence in reference to the relinquishment in question is that he was in the habit of having periodical "drunken sprees," which usually continued about two weeks. That he went on one of these sprees the first weeek in May, 1887, and continued under the influence of liquor, and unfit for the transaction of business, until after the middle of that month. That he was not sober enough to understand the nature of a transaction which resulted in the relinquishment, and supposed he was simply signing an agreement to sell Armstrong the land after he made final proof, and received final certificate. That he had no idea or intention of relinquishing the land

at all, or of selling it without consulting his wife and daughters, but that he entered into the agreement to sell to Armstrong to obtain money with which to continue his spree. That he did not become sober until his wife heard that he had signed a relinquishment, which was the first time that he became aware that the paper signed by him was of that character.

Armstrong and his witnesses deny that Miranda was drunk when he signed the paper, and Porterie, who read it to him in Spanish, is quite certain that he was sober and understood the nature of the paper, as he said "all right" at the conclusion of the reading. The testimony of this witness is somewhat weakened, however, by his statement that Miranda was to give him twenty-five dollars for interpreting the paper to him. He says this was Miranda's "own proposition." A sober man, who was intelligent enough to comprehend the nature of a paper which was written in a language which he could neither speak nor read would not be likely to make such a proposition.

When Miranda was told by his wife that she had been informed that he had relinquished the land, the interview which followed between them had the effect to sober him up, and resulted in an affidavit by her, in which the circumstances under which the paper was executed were set forth. This affidavit was forwarded to the local land office, and on the 10th of June, 1887, the clerk in charge of the register's office, wrote her attorney, among other things, saying:

> I have to advise you that on May 14, 1887, a paper purporting to be a relinquishment, executed May 13, 1887, by Jesus Miranda, before D. H. Wallace, notary public, accompanied by a timber-culture application of John S. Armstrong for SW. ¼ of Sec. 13, T. 1 N., R. 4 E., was received in this office.
>
> Said relinquishment and application have not been acted on by reason of the office of register being vacant, during which time no filings or entries can be made.
>
> If the facts are as stated by the wife of Miranda, he was *non compos mentis* at the time of executing said relinquishment, and incapable of doing any act legally to deprive either himself or his family of what rightfully belongs to them under the law.

Miranda thereupon made an affidavit, in which he detailed the facts and circumstances connected with the transaction, which was forwarded to the local land office, accompanied with a demand for the return of the relinquishment to him.

Under date of June 17, 1887, the clerk in charge of the register's office, addressed a letter to Miranda, in which he said:

> SIR: In answer to a letter of the 16th inst., from your attorney, requesting the return of your relinquishment of homestead entry No. 544, executed before D. H. Wallace on May 13, 1887, I herewith return said relinquishment, leaving your homestead entry outstanding and intact on the records of this office.
>
> Very respectfully
>
> C. E. DAILEY,
> *Register's Office.*

That relinquishment forms part of the record before me. Across the face of it is written the word "void." It was introduced upon the trial, to show that it had never been filed as required by law, and that there

was no mark of any kind or character upon it, to indicate that it had ever been in the land office at Tucson. It was identified by receiver Smith, by a pin hole, which he said was made by him in pinning the relinquishment and Armstrong's timber-culture application together. Upon the trial it was stated by Miranda that he was ready and willing to pay back to Armstrong the $75 which he had received from him. It was also in evidence that on the 17th of May, 1887, the day final proof was advertised to be made, an agreement was made between Armstrong and Miranda's attorney, by which Armstrong was to be paid $150 for the $75 which he paid Miranda, and for his expenses in connection with the relinquishment and his proposed contest, and he was to withdraw all objection to the final proof, and all claims to the land. The next day Miranda's attorney tendered Armstrong $100 in gold, and promised to pay the balance in four days, which was according to their agreement. Armstrong declined to carry out his agreement of the day before, and hence the contest.

As to the value of the property, Armstrong and his witnesses placed it at from twelve to fifteen hundred dollars, and Miranda at $3000. He had lived upon the tract continuously for eleven years, having purchased the improvements of a former occupant for $300. He had cleared and ditched the land, built a house of four rooms, erected other buildings, dug a well, planted peach and pomegranate orchards, and several hundred trees for timber, and had cultivated to crop from forty to eighty acres each year. This constitutes and concludes a condensed history of the case.

It is well settled that a relinquishment, to be effective, must be the voluntary act of the entryman. O'Brien *v.* Richtarik (8 L. D., 192). From the evidence and circumstances of the case at bar, it is clear to my mind that Miranda did not voluntarily and knowingly execute a relinquishment of the land in question. I have given the substance of the evidence connected with its execution, and need not refer to it again.

In the case of Wiley *v.* Raymond (6 L. D., 246), it was held that the purchaser of a relinquishment can acquire no rights to the land by virtue of his purchase, and his rights as a settler must date from the time when he made actual personal settlement. The same case also held that "a relinquishment amounts to nothing, so far as releasing the land is concerned, until it is filed." In the case at bar, Armstrong has never made actual personal settlement upon the land, neither has the relinquishment ever been filed. It was sent to the land office with other papers, on the 14th of May, 1887. At that time the office of register at the Tucson land district was vacant, such vacancy having occurred on the 4th of March, 1887, and continued until the 5th of July of that year.

A vacancy in the office of either the register or the receiver, disqualifies the remaining incumbent for the performance of the duties of his own office, during the period of such vacancy. Graham *v.* Carpenter

(9 L. D., 365). In commenting upon the case of Graham *v.* Carpenter, and of the situation of affairs in the Tucson land district during the vacancy in the office of register, the Department, in the case of Williams *v.* Loew (12 L. D., 297) said:

> When a vacancy occurs in the office of register or receiver, the machinery of the office stops from that moment, and cannot be put in motion again until the vacancy is filled, and any act of the survivor during the vacancy, unless he is acting *de facto*, is an absolute nullity. But when the vacancy is filled, the machinery of the office resumes its work, and the register and receiver, in the exercise of official duty, proceed to adjudicate all cases on file and pending in their office.

As already stated, the relinquishment in question was received at the local land office while the vacancy in the office of register existed, and while the machinery of the office was stopped, and it was therefore never filed therein. Before the vacancy was filled, it was returned to Miranda, so that when the office resumed its work, there was nothing connected with such relinquishment for the register and receiver to adjudicate. The entry of Miranda has never been canceled, but is still "outstanding and intact on the records of the office," according to the statement of Mr. Dailey, of the register's office. Mr. Armstrong has never paid any part of the amount which he claims was agreed upon between himself and Miranda, as the consideration for the relinquishment or for the land, except the $75 mentioned, which Miranda has offered to return, together with compensation for any costs or expenses incurred by Armstrong up to the time the contest was initiated. He also continued to reside upon and cultivate the land, up to the time of his death, and his widow and children have ever since resided upon and cultivated the tract.

From all the facts and circumstances of the case, and in view of the decisions of the Department, applicable thereto, and herein cited, my conclusion is, that the decision appealed from should be reversed, and that the homestead entry of Miranda should remain intact. It is so ordered.

Questions relating to the final proof of Miranda, are not before the Department for determination, not having been passed upon by you. The record of the case, including such proof, is therefore returned for your action thereon.

MINING CLAIM—PUBLICATION OF NOTICE.

CONDON ET AL. *v.* MAMMOTH MINING CO.

The notice of application for mineral patent must be published in the newspaper nearest to the claim.

Secretary Noble to the Commissioner of the General Land Office, February 5, 1892.

On September 6, 1886, the Mammoth Mining Company filed its application for a patent for the Bradley lode claim in Tintic mining district, Juab county, Utah.

Notice of said application was published for sixty days in the Territorial Enquirer of Provo City, Utah. No adverse claim was filed, and on December 19, 1887, an entry was allowed.

On August 22, 1889, Pat. and Matt. Condon filed a protest against the issuance of a patent on said entry, claiming to be the owners of a greater portion of the land by reason of prior discoveries and locations, and asserting that,—

the notice of application for the patent was published in an alleged newspaper known as the Territorial Enquirer. That the same is published in Provo City, Utah county, a distance of one hundred and twenty-five miles from the claim known as the Bradley claim, and from the mining district in which all of the claims in controversy are situated; that at the date of said publication, there was a newspaper published in the same county in which the Bradley claim and Tintic mining district are situated, The Ensign, published in Nephi, the county seat of Juab county, in which the said mining claim is situated, and a distance of twenty-five miles from the claim.

On October 30, 1889, you directed a hearing to be had

to determine whether the publication of the notice of application for patent for said Bradley lode claim was made in the newspaper nearest the claim, in accordance with the law and regulations thereunder.

The trial was had on December 26, 1889, and after considering the evidence submitted thereat, on April 19, 1890, the register and receiver found that,—

The protest was well taken, and that the notice was not published according to law, and recommend that the Mammoth company be required to commence anew all proceedings concerning the publication of their application for patent for the Bradley lode mining claim.

The Mammoth Mining Company appealed from said finding to your office, and on October 25, 1890, after considering the case, you affirmed the finding of the register and receiver and held the mineral entry for cancellation.

An appeal has been taken from your judgment to this Department.

The only question in issue is as to whether or not the notice of the application for patent of the Mammoth Mining Company was published according to law. If it was, under the provisions of Section 2325 of the Mining Laws, Revised Statutes of the United States, the protestants in this case can not now assert an adverse claim.

A statute providing for the service of notice by publication should be strictly followed in order to give jurisdiction.

I have considered the evidence in the record, and am of the opinion that your judgment, from which an appeal has been taken, is sustained by the facts shown in the record. The case cannot be properly referred to the board of equitable adjudication for settlement, because no legal notice having been given of the application for patent, no opportunity has been given protestants to assert their rights, if they have any.

You will suspend the entry made by the Mammoth Mining Company, and a new notice should be published.

Your judgment is accordingly modified.

REPAYMENT—PURCHASER AFTER CANCELLATION.

ALBERT G. CRAVEN.

A purchaser of land at an administrator's sale, subsequent to the cancellation of the entry, acquires no right to a repayment of the purchase money paid by the original entryman.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 4, 1892.

I am in receipt of your letter of December 17, 1891, transmitting for my action thereon the application of Albert G. Cravens, for repayment of the purchase money paid by James Montgomery for the NE ¼ of NE ¼ of section 10, and the SE ¼ of section 3, T. 19 N., R. 15 W., Batesville land district, Arkansas, entered by him on August 27, 1840, under the pre-emption act of June 1, 1840 (5 Stat., 382), supplemental to the act of June 22, 1838 (idem 251), which entry was canceled by you on June 19, 1841, "because the law did not allow entries of quarter quarter sections unless they are residuary ones created by the previous operation of the act of April 5, 1832 (idem 503)." You state that said Craven made application for repayment in 1878, and filed his affidavit alleging that he is the holder of said land under a direct claim or title from said Montgomery, and he was required to furnish the original or certified copies of the deeds of conveyance, or an abstract of title to prove his assertion; that in July, 1879, the attorney for said Craven advised your office that the records of the county had been burned during the war and he could not comply with the requirement; that thereupon you advised him that the best thing for him to do was to go to a court of chancery "and have his claim of title decreed in him;" that it appears from the accompanying affidavit of H. Fee that "all of the above described lands was decreed to the said A. G. Cravens by the chancery court of Marion county, Arkansas, at the spring term of the court in the year 1873," in a suit between A. G. Cravens, plaintiff, and John Coy, administrator of the estate of Thomas G. McClure, deceased, defendant, and that all of the records of said court have been destroyed by fire; that in lieu of the record Mr. Cravens has filed a bond to save the United States harmless from loss on account of any other person claiming title to said land. You also state that it appears that Mr. Cravens "is entitled to the relief applied for." From the papers before me I am unable to concur in your recommendation. Mr. Craven purchased his claim at an administrator's sale long after the entry of said land by Montgomery was canceled upon the records of the Land Department. Under the law as it existed at the date of said cancellation, Mr. Montgomery could not have received repayment for the land. 4 Op. Atty-Gen., 227–253.)

At the time of the alleged sale by the administrator, the land in question was a part of the public domain, and no State court can make

a valid decree of title to parties of any part of the public lands, so long as the title remains in the United States. This doctrine is fundamental and needs no citation of authority in support thereof. Mr. Cravens has acquired title to this land through purchase from a subsequent entryman who entered the lands shown on the records of your office to be a part of the public domain. His purchase at an administrator's sale long subsequent to the cancellation of said entry gives him no claim against the United States which would warrant this Department in directing a repayment of the purchase money paid by Mr. Montgomery, the original entryman. Ozra M. Woodward (2 L. D., 688).

Said application must be, and it is hereby, rejected.

HOMESTEAD ENTRY—ABANDONMENT—DEATH OF ENTRYMAN.

BROWN *v.* NAYLOR.

A contest against the entry of a deceased homesteader, charging abandonment on the part of the entryman and his heirs, must fail, where it appears that said entryman died prior to the expiration of six months from date of entry, and his heir subsequently complied with the law in the matter of cultivation.

A contest should be dismissed where the default charged is cured in good faith before the local office acquires jurisdiction in the case.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 5, 1892.

I have considered the case arising upon the appeal of John C. Brown from your decision of March 7, 1890, dismissing his contest against the homestead entry of E. M. Naylor (deceased), for the SW. ¼ of Sec. 10, T. 7 S., R. 36 W., Oberlin land district, Kansas.

Naylor made homestead entry of said tract March 25, 1885. On September 4, 1885, he died.

On December 17, 1885, Brown filed affidavit of contest, alleging that neither E. M. Naylor nor his legal heirs and representatives had settled or made any improvements upon the tract.

On February 18, 1886, the local office entered judgment for default, against the entryman.

On July 9, 1887, Samuel Naylor filed application for rehearing, stating under oath that he was the father of said E. M. Naylor, and his only heir; that no notice of said contest had ever been served upon him; and setting forth other reasons why a rehearing should be granted.

The application was transmitted to your office; and you, on March 20, 1888, ordered a rehearing, in case an amended affidavit of contest should be filed. The affidavit was amended so as to read as follows:

That the said E. M. Naylor, or his legal representatives, have never settled upon or made any improvements on said land, but that said land has been wholly abandoned by both the entryman, and his heirs and legal representatives, from March 25, 1885, up to and including December 17, 1885; and that he and they had failed to reside upon, improve, and cultivate said land.

Hearing was had November 22, 1888. After considering the testimony, the local officers recommended the cancellation of the entry. Naylor appealed to your office, which decided in his favor. Thereupon the contestant appealed to the Department.

The testimony shows that the entryman was an unmarried man; that after a long sickness with typhoid fever he died, on September 4, 1885; that his only heir at law was his father, Samuel Naylor; that the latter, in May and June, 1886, caused ten acres of the land to be broken and planted to corn—and that this was the first cultivation of the land; that in 1887 said ten acres were sown to millet, and five acres more were broken; and that in 1888 the fifteen acres previously broken were planted to millet, corn, and cane, and five acres more were broken.

Your decision held that, as the entryman had died before the expiration of the first six months after his entry, no cause of action would lie against him on the ground of abandonment; that no contest should have been prosecuted against the entry until notice had been served upon his legal representatives; "jurisdiction over the parties in interest must therefore date from the time service of notice was had upon the heir and legal representative of the entryman"—which was on October 4, 1888; that the heir caused the tract to be cultivated every year after the death of the entryman to the time of the contest; that the law does not require the heir of a deceased entryman to reside upon his homestead claim, provided he cultivates the same; and you therefore dismissed the contest.

I concur in the conclusion reached by you in all respects, except as to your holding that, under the circumstances of this case, jurisdiction must date from the time when service of notice was had upon the heir and legal representative of the entryman.

When said heir and legal representative, on July 9, 1887, filed application for a rehearing, he made himself a party in the case, and must be considered as having notice from that date. (See Smith *v.* Washburn, 12 L. D., 14; Anderson *v.* Rey, ib., 620).

Your error in this respect, however, in no way invalidates the conclusion reached by you that the contest should be dismissed. More than a year prior to the date last named he had proceeded in good faith to cultivate the tract; and if he can be considered as having at any time been in *laches*, such laches was cured before the date when the local office acquired jurisdiction.

Your decision dismissing the contest is therefore affirmed.

UNIVERSITY LANDS—EVIDENCE OF TITLE.

STATE OF MONTANA.

University selections located and approved under the act of February 18, 1881, prior to the admission of the Territory as a State in the Union, required no further act to complete title thereto except the admission of the Territory, and the certification of such lands to the governor of the Territory is sufficient evidence of title.

Secretary Noble to the Commissioner of the General Land Office, February 6, 1892.

I am in receipt of your communication of January 16, 1892, transmitting a list of selections made for the Territory of Montana, under the provisions of the act of February 18, 1881 (21 Stat., 326), granting to the Territories of Dakota, Montana, Arizona, Idaho, and Wyoming seventy-two sections of land for university purposes. Said list of selections was approved by the President, March 18, 1889, and the lands embraced in said list were withdrawn for the purposes indicated in said grant.

You submit the question, as to whether the certification of said list of selections by your office, on April 8, 1889, to the governor of Montana, conveyed the legal title to said land.

The act of February 18, 1881, granted to each of the territories named therein seventy-two sections of unappropriated public lands, for the use and support of a university in each of said territories when they shall be admitted as states into the Union, to be selected and withdrawn from sale and located under the direction of the Secretary of the Interior and with the approval of the President.

The lands embraced in list No. 1, transmitted with your letter, were selected by a duly authorized agent of the Department, and withdrawn from sale and located, with the approval of the President, on March 18, 1889, in full compliance with the provisions of the act of February 18, 1881. No further action was necessary to perfect and complete the title to these lands under the grant, except the admission of the territory as a state in the Union, and the selection and location of said tracts in part satisfaction of the grant to said territory being intact November 8, 1889, when the admission of said state into the Union became complete under the enabling act of February 22, 1889 (25 Stat., 676), the title of the state to said lands became complete and related back to the date of the selection and location of the same, and the certification of said list by your office to the governor of Montana was sufficient evidence of the title of the state to such land, without further action on the part of the government.

Besides, the 14th section of the act of February 22, 1889, provides that the lands granted to Dakota and Montana by the act of February 18, 1881,

> are hereby vested in the states of South Dakota, North Dakota, and Montana, respectively, if such states are admitted into the Union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said states, and any portion of said lands that may not have been selected by either of said territories of Dakota or Montana, may be selected by the respective states aforesaid.

It is apparent that it was intended that the absolute title to the specific tracts selected and located, in compliance with the requirements of the grant of February 18, 1881, should, upon its admission, immediately vest in the state, as it required no further action on the part of

the government to give the grant precision as to those tracts, and as to any portion of said lands that had not been selected provision was made for the selection of such lands by the state authorities.

I see no reason for any other action of the Department upon said list, there being no statutory provision requiring the issuance of patent, and said list is therefore herewith returned.

RELINQUISHMENT—APPLICATION TO ENTER—CONTEST.

GILTNER *v.* HUESTIS ET AL.

A relinquishment, accompanied with an application to enter, filed simultaneously with an affidavit of contest defeats the right of the contestant to proceed against the entry thus vacated.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 5, 1892.

This record presents the appeal of Charles E. Giltner from your judgment affirming the action of the local officers rejecting his affidavit of contest against the timber-culture entry of Henry M. Huestis for the W. ½ NE. ¼, Sec. 5, T. 6 N., R. 38 W., McCook, Nebraska, and canceling said entry upon relinquishment presented by Henrie F. Hole and allowing the latter to make homestead entry for said land.

Huestis made his timber-culture entry for the entire NE. ¼ of said Sec. 5, May 6, 1885. Said entry was canceled by relinquishment as to the E. ½ of said quarter February 19, 1887.

On February 27, 1889, Huestis executed a relinquishment of the remainder of his entry, to wit, the "eighty" here in question.

On the morning of March 1, 1889, upon the opening of the local office Giltner presented his contest-affidavit and Hole presented with said last relinquishment his homestead application for the land. The local office rejected Giltner's affidavit and allowed Hole's entry. Giltner appealed. By letter dated September 23, 1889, you directed a hearing to determine the rights of the parties. Such hearing, at which parties appeared with counsel, was commenced at the local office December 6, and proceeded with upon different days until December 9, 1889, when it was concluded. The local officers rendered their joint opinion that Hole's entry should remain intact and that Giltner's contest should be dismissed. Giltner appealed from this ruling, whereupon by decision dated July 3, 1890, you affirmed the ruling below. On July 31, 1890, Giltner filed a motion to review said decision.

On October 13, 1890, you denied this motion, whereupon Giltner filed the pending appeal.

It appears that for a consideration of $900 Hole bought Huestis's improvements on the land; that February 27, 1889, Huestis delivered to him his said relinquishment; that Giltner hearing of said

transaction, started same day overland to the local office to contest the Huestis entry; that the following day Hole proceeded by rail to the local office to present said relinquishment and make application to enter the land; that Giltner arrived in McCook about 11 p. m., February 28, and Hole about 4 a. m., March 1, 1889; that both parties were at the local office at 9 a. m., March 1, 1889, when it was opened for business and that they entered the office together. Giltner then presented his contest affidavit, alleging the Huestis entry to be speculative, to a clerk who endorsed it "filed at 9 a. m., sharp, March 1, 1889."

In the meantime Hole inquired of another clerk for the tract book and after examining it, presented with Huestis' relinquishment his said homestead application.

Hole's application was then received and endorsed "filed March 1, 1889, at 9 o'clock and 4 minutes."

Shortly thereafter the receiver declined to ratify the said endorsements, finding that Giltner's affidavit and Hole's application were presented simultaneously. Giltner's affidavit was accordingly endorsed: "Affidavit of contest and application rejected for the reason that Henrie P. Hole made homestead application with relinquishment and was in the office at the same time being the first party to look up said claim on the plat record both being filed at or about the same time."

The local officers and yourself both find that Giltner's affidavit was filed a few minutes before Hole's application, but concur in the conclusion that the rights of Hole are the better. This conclusion is reached upon the theory that Giltner's contest was initiated with knowledge of Hole's purchase of Huestis' improvements and that the latter's relinquishment was not induced by said contest.

It is urged on appeal that Giltner's contest affidavit being presented before Hole's application, the latter's rights are inferior. It is true that a contestant's rights attach with the filing of his affidavit and are prior to those of a subsequent applicant who presents a relinquishment. Webb *v.* Loughrey *et al.* (10 L. D., 302). But it is also true that the filing of a relinquishment accompanied by a pre-emption declaratory statement defeats a simultaneous application to contest the entry thus vacated. Lee *v.* Goodmanson (4 L. D., 363).

Giltner's contest affidavit was, it appears, handed over the counter at the local office a few moments before Hole's application. But this was done while the latter was examining the tract books to ascertain the status of the land. Such examination being manifestly a proper preliminary to Hole's application and being immediately followed by the same, constituted the initial act in making it. Consequently his rights as applicant began with his inspection of the tract book.

Hole's application with Huestis' relinquishment may thus be considered as simultaneous with Giltner's application to contest. Under the doctrine announced in the case of Lee *v.* Goodmanson, *supra*, the Huestis entry, by reason of said relinquishment (section 1, act May 14, 1880,

21 Stat., 140), "expired simultaneously" with the filing of Giltner's affidavit which, consequently, "found no entry to contest." It follows, I think, that Giltner's contest has been properly rejected for conflict with Hole's application to enter.

Your judgment is affirmed.

OKLAHOMA LANDS—HOMESTEAD—TOWNSITE.

DAVIS *v.* FOREMAN.

An application of a homesteader to purchase, for townsite purposes, under section 22, act of May 2, 1890, lands embraced within his homestead entry, can not be allowed except on due showing that the applicant is entitled to perfect entry under the homestead law, and this question must be determined without reference to the fact that the land is occupied and required for townsite purposes.

A homesteader who has voluntarily ceased to exercise control over the greater part of his land, and entered into a lease of such part, to a townsite company, by the terms of which he agrees to convey title to such part of the land, when his claim thereto is perfected, is disqualified to perfect title as a homesteader, and hence can not purchase under section 22 of said act.

Secretary Noble to the Commissioner of the General Land Office, February 6, 1892.

On April 23, 1889, John A. Foreman filed soldiers' declaratory statement at the Kingfisher, Oklahoma, land office, for the NW. ¼ of Sec. 9, T. 12, R. 7, and on the 11th day of May, 1889, he made homestead entry for the same. On August 9, 1890, he made application to purchase said tract under the second proviso to section 22 of the act of May 2, 1890, 26 Stat., 81, alleging that said land was occupied for townsite purposes, and he filed plats of said land as a part of the townsite of El Reno, which plats was approved by me.

On December 16, 1890, he submitted final proof in support of said application. At the hearing, Anson A. Davis appeared as a protestant, and cross examined the claimant and his witnesses, and afterwards, viz., on December 17, 1890, filed a duly corroborated affidavit of contest as provided by section seven of the circular of instructions under the proviso above mentioned (11 L. D., 68).

In this affidavit Davis charges on information and belief, that said homestead entry was illegal and void, for the following reasons:

First, That said entryman, John A. Foreman, did enter upon and occupy a portion of the lands open to settlement under the act of Congress of March 2, 1889, by the President's proclamation of March 23, 1889, prior to the hour of 12 o'clock noon, of the 22d day of April, 1889, and subsequent to the date of said act, and contrary to its provisions;

Second, That said entry was not made for the sole use and benefit of said Foreman, nor was it made for the purposes of cultivation and other agricultural operations, but was made with the view and purpose of locating and establishing a town upon said tract, and with a view and purpose of speculating in the sale of portions of said tract for townsite purposes, and said entry was made in the interest of other

persons composing or subsequently composing, a townsite company or organization, known as the Oklahoma Townsite and Land Company, or some similar designation;

Third, That said entry was made and procured through fraud, in that, to wit, that said entryman, and the individuals composing or subsequently composing said company, did confederate and conspire to procure title to said tract as a townsite by and through said John A. Foreman in the interest of said townsite company, and for the purpose of dealing and speculating in portions of said tract as town lots, for the benefit of said townsite organization, and the individuals composing the same.

That in pursuance of such unlawful collusion, said John A. Foreman and said townsite organization, did at or about the date of said homestead entry proceed to lay off a large portion of said tract into streets, lots, and blocks, and, under a lease given by said Foreman to said townsite company, proceeded to sell interests in lots upon said tract and to deal and speculate in such interests, which said dealings and speculations have continued to date. Affiant further saith that this proceeding is not initiated with a purpose of harassing the claimant and extorting money from him under a compromise, but is made and prosecuted in good faith with the object of securing the cancellation of such fraudulent entry and to prosecute to final determination.

This affidavit is corroborated by William T. Darlington, who swears that he is well acquainted with John A. Foreman and the tract of land mentioned in the foregoing affidavit of Anson A. Davis. "That he has read the foregoing affidavit of Anson A. Davis and that he knows of his personal observation that the matters set forth in the first and second allegations therein are true, and that from common report and from personal observation of what has transpired upon the tract in controversy since the 23d day of April, 1889, he verily believes the matters set up in the third allegation are true. That he knows of his personal observation of the dealing in lots of said townsite company upon this tract during a period from about the middle of May, 1889, to date."

The final proof of Foreman, and the contest of Davis were submitted by the local officers for your consideration as required by the instructions. In their letter of transmittal the local officers say:

The proof certainly shows a condition of affairs which is, to say the least, very questionable on the part of Foreman, and that he was in the territory prior to April 22, 1889, without right seems clear. It seems to us that the evidence taken on final proof is sufficient of itself to warrant you in cancelling said entry, yet another fact is apparent to this office, *i. e.*, that the townsite occupants are all willing and anxious for the proof to be approved and that Foreman be allowed to make said entry and the opposition comes from parties not interested in the townsite occupants or settlers.

Davis has a homestead filing and is living near a rival town, while the others have had trouble with Foreman.

In your decision rendered May 19, 1891, you state that the affidavit of Davis would be sufficient to justify the ordering of a hearing "were sufficient evidence not already before me upon which to determine this case."

You found that Foreman had not entered the Territory of Oklahoma in violation of the law, nor the President's proclamation thereunder, that he had complied with the requirements of the homestead law, and was entitled to make payment for the land and to receive final certifi-

cate therefor, and in accordance with your decision final certificate was issued to him nine days thereafter, viz., on May 28, 1891.

Your decision was based entirely upon the evidence of Foreman and his witnesses, none having been submitted in opposition to his claim.

You denied the right of appeal, and upon Davis' application to this Department, the entire record in the case has been transmitted for my consideration.

Ex parte statements and affidavits containing charges and counter charges of bad faith, etc., should not be allowed to operate to the prejudice of the legal right of an applicant before the Land Department. The question to be determined therefore is, should the hearing be ordered, or should the entry be canceled upon the showing made by the claimant Foreman himself?

The law under which he applies to make entry provides—

> that in case any lands in said Territory of Oklahoma which may be occupied and filed upon as a homestead, under the provisions of the law applicable to said territory, by a person who is entitled to perfect his title thereto under such laws, are required for townsite purposes, etc.

The qualifications of an applicant are thus clearly defined; he must have been one who had made homestead entry for the tract in accordance with the provisions of the homestead law as applied to the Territory of Oklahoma—not only must he have been qualified as to age, citizenship, etc., but he must have complied with the requirements of the proclamation of the President of the United States, in the matter of not entering within the limits of said Territory until after 12 o'clock noon, on April 22, 1889.

Eliminating the first clause in the words describing the qualifications of an applicant, the law will read,

> that in case any lands in said territory of Oklahoma, which may be occupied and filed upon as a homestead by a person who is entitled to perfect his title thereto under such laws, are required for townsite purposes, etc.

Admitting that Foreman made a legal entry, the question that remains to be determined is this: is he entitled to perfect title to the land embraced in said entry, under the homestead laws? and this question must be determined without any reference to the fact that the land is occupied and required for townsite purposes.

The principal evidence submitted by Foreman in support of his application was given by himself, and from this evidence I quote, as follows:

Q. 112. What was the first building or structure placed on the tract of land in controversy?

A. A boarding house.

Q. 113. When was it built?

A. I do not know. It was built in my absence and without my knowledge.

Q. 114. When did you learn of its presence there first?

A. On the 17th day of May, 1889.

Q. 115. When did you last visit the tract in controversy prior to that day?

A. I left on the 14th for the south.

Q. 116. Was that building constructed there during the three days that intervened between the 14th and 17th?

A. It must have been the 13th instead of the 14th that I left. On the 13th I left in charge of my claim in my tent Mr. Isaac Galonick and Mr. Barwise, to remain and take care of matters until my return, giving them special instructions to prevent any parties from coming on the place; as an attempt had been made about the 12th by four wagons loaded with men and effects coming onto the place, and informing me they intended to start a townsite: I gave them to understand that I would not permit it, as long as I could hold my homestead filing. I do not know who they were, but they took the advice and left. There had another party attempted to establish a townsite on the flats on the lowlands or the valley. They also were defeated by the holder of that claim. This caused the instruction to the aforenamed parties to prevent any settlement on or jumping of my claim. I instructed them that if any effort was made to call upon the military. During my absence the parties came and moved on and defied my men to put them off; the military was invoked; they refused to act without the orders of a U. S. marshal; the marshal was invoked, came to the ground and after a consultation with the intruders withdrew without calling on the military to help him. Upon my return from the south to the South Canadian I was informed that I had a town on my place. I asked who the parties were; they could not name them. Next morning I went directly to Fort Reno to find out what had been done and who they were. I there found out that there was a company and that the military could not act without the orders of a U. S. marshal. I then went out to the homestead; I found a group of men actively engaged in surveying and laying off a town. I found a number of tents, a boarding tent with lumber for a floor for a boarding house. They had stopped my plow, which I had contracted plowing for ten acres on the northeast corner of the claim. After waiting a few hours at my own tent to gain full information of all that had transpired and the names of the parties, I sent word to the man that had the contract for plowing to complete his contract of ten acres. I then went over to the tent representing headquarters. I there met one Dr. Rogers who stated they wanted to start a town. I told him that they did not want to start but that they had already done it. A proposition to lease was made. I refused to accept. I asked them to vacate. He commenced to argue the question with me; that he represented a large capital, and that he had already given the marshal $75, to leave the claim, and leave him in possession. He further stated that if I would not agree to lease that he would furnish the money to Dr. Westfall to contest me and he would lease it. I then sent to the Fort to see Mr. Evans, post sutler. Having confidence in him to obtain advice; he advised me to lease a portion of my homestead to the parties as the place was full of lot jumpers and by that means the party might organize a town government to keep peace. I accordingly on the 19th day of May, agreed with them upon a lease.

Q. 117. Have you a copy of that lease in you possession or under your control?

A. No, sir.

Q. 118. What were the terms of the lease? as to payments and as to the time for which it was given?

A. $1.00 per annum till the title would be made to the holders.

Q. 119. Then the lease contemplated the passing of title from you to the lot owners?

A. The lot owners would look to me after perfecting my title for theirs.

Q. 120. What portion of the tract did you lease to this town company?

A. Three forties, retaining one forty for cultivation.

Q. 121. Did you turn over the control of these three forties to the townsite company?

A. Conditional that they put up a school house and maintain a school; put up a hotel platted the grounds, paid all expenses.

Q. 122. Did this company take possession of the lots from these three parties and assume to sell interest or issue leases upon them.

A. The company assumed their rights under the lease to release.

Q. 123. For what length of time did the leases from the company run?

A. No specified time.

Q. 124. Did not some or most of them run for ninety-nine years?

A. I know of none.

Q. 125. Did not these leases contain an agreement on the part of the townsite company to convey title?

A. The titles were to be conveyed as soon as I got them.

Q. 126. You agreed upon receiving title to transfer title to the townsite company did you not?

A. No, sir.

Q. 127. To whom did you agree to transfer title?

A. To the lot owners.

Q. 128. Did not the townsite company in their leases agree to transfer title to the lot holders under those leases?

A. The custom by the property holders invariably was to come and see me and ascertain what I would do in the case and at the time that I received my title, and protect their interest.

Q. 129. Will you answer the question?

A. In pursuance to their lease they had no right to make a title without me.

Q. 130. Is there in the lease from you to the townsite company or from or in the leases from the townsite company to the lot holders any clauses which would give the lot holders recourse on you in event of your not transferring title under the covenants in your lease?

A. I don't know that I ever read any of those leases; I paid little attention to it, holding the power in the final settlement to see justice was done.

Q. 131. If a settler who was not a member of the townsite company wanted to secure lots in the townsite on this tract how would he proceed to secure the lots?

(Objected to as incompetent and immaterial. Objection sustained.)

Q. 132. Did this townsite company after receiving your lease and taking possession of the three forties proceed to sell or lease interests in lots thereon?

A. No, sir.

Q. 133. State what they did?

A. They platted the ground.

Q. 134. What next?

A. When the plat was duly prepared they commenced to sub-lease.

Q. 135. Did they not have an auction sale or auction sales in interest in lots?

A. No, sir.

Q. 136. Did they have auction sales of anything with reference to the lands you leased them?

A. No, sir. There was an attempt made by a party before it was platted and I forbid it.

Q. 137. Did they not about the 21st day of May, 1889, proceed to sub-lease, for a consideration or considerations interests in these three forties?

A. Plats were not completed till about May 26, or 27th, 1889. At that time I was away after my family.

Q. 138. Will you answer the question?

A. I think it was the 27th not the 21st.

Q. 139. Was not this system of sub-leasing in effect a sale of the possessory right of lots?

(Objected to as calling for a conclusion from the witness. Objection sustained.)

Q. 140. Was the possession of lots transferred from the company to the lot holders by this system of leases or sub-leases?

A. By sub-lease.

Q. 141. How many lots were sub-leased or farmed out to the Rock Island Railroad?

(Objected to as incompetent and improper and immaterial. Question withdrawn.)

Q. 142. How many lots were sub-leased or farmed out to the individuals comprising the townsite company?

A. I know of none.

Q. 143. How many lots were set apart to you by the townsite company?

A. I took thirty lots.

Q. 144. When did you take those thirty lots?

A. I designated those lots as a reserve on about the 27th day of May, 1889.

Q. 145. Has not yourself or your wife signed leases or sub-leases on some of those thirty lots reserved by you?

A. I have not. My wife has, but not my lots.

Q. 146. Then it is a fact it is, that within six or seven days from the date of your homestead entry, you transferred for townsite purposes three-fourths of the land embraced therein to a townsite company?

A. No, sir.

Q. 147. When did you state that lease was made?

A. On the 19th day of May.

Q. 148. What was the date of your homestead entry?

A. April 23, 1889, was the first one.

Q. 149. What is the date of homestead entry No. 939, in your name?

A. May 11, 1889.

Q. 150. I will ask you again. Then it is a fact that within eight days from the date of your homestead entry, you transferred the control of three-fourths of the land embraced in that entry to a townsite company?

A. I was forced to agree upon a lease.

Q. 151. What kind of force was used to compel you to sign that lease?

A. A crowd of lot jumpers.

Q. 152. What kind of force did the crowd of lot jumpers use?

A. They were on the land and tried to get possession of it.

Q. 153. When did you first find this crowd of lot jumpers on the land?

A. The 18th of May.

Q. 154. On what day did you sign the lease?

A. On the 19th we agreed upon a lease.

Q. 155. The control of the three forties leased by you has been in the townsite company since the date of the lease has it?

A. In pursuance to the agreement of the lease.

These statements clearly show that immediately after making his entry, and a year before any legislation was enacted looking to the perfecting of title to lands entered as homesteads, but occupied for townsite purposes, Foreman had voluntarily relinquished control of the greater portion of the land entered by him; that he had voluntarily ceased to occupy the tract for homestead purposes, or for the purposes contemplated by the law under which he was claiming. Foreman attempts to convey the impression that the occupation of this land by the townsite company was in opposition to his will and against his wishes. The evidence before me is neither satisfactory nor convincing on this point. He states that on May 12, a party attempted to make townsite settlement on the land but desisted at his request, still notwithstanding this clear intimation that people were contemplating a townsite settlement in that vicinity, he, two days later, left the land, as he states, in

charge of two men, and was absent four days, during which time a company, composed in part at least, of his friends, whom he states he had 'known for years' and in whom "he had implicit confidence" took possession of the tract for town-site purposes. If he was earnestly opposed to the townsite settlement it is difficult to explain his action in the premises in accordance with that theory, but, however this may be, it is clear that he immediately after his return to the tract, voluntarily entered into a lease of the premises to the townsite company, and by the terms of this lease he parted with all control of that portion of his claim, agreeing to transfer complete title when title was perfected in him. The company to whom he had leased and transferred these lands, in turn leased and transferred them to other parties, and all this was done without the shadow of law upon which to base such action.

The homestead law expressly provides that before a patent shall issue for land embraced in a homestead entry, a claimant shall make affidavit that no part of said land has been alienated, except as provided in section 2288, Revised Statutes. Foreman had so disqualified himself that he could not truthfully make such an affidavit, hence he was not entitled to perfect title under the homestead laws.

It is contended that Foreman had not alienated the land thus leased, but I do not so read the homestead law. It is merely repeating a truism, to say that the homestead law was enacted for the benefit of those seeking homes upon the public domain; the theory of the law is, that the land thus entered is to be used and retained as a home, as a place of abode for the entryman and his family, hence said home, said abode can not in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor.

In that provision of the law which requires a claimant to make affidavit that no part of the land has been alienated, it must be assumed that the word "alienated" was used in its ordinary acceptation, and that the intention of Congress was to prevent the transfer of possession of the lands embraced in the entry, to another party, the lands were to be retained in the possession of the entryman for his home and for the support of himself and family. This view is clearly sustained by the provisions of section 2288, Revised Statutes; which permits an entryman to transfer, by warranty against his own acts, any portion of his homestead for church, cemetery or school purposes, and for the right of way of railroads across such homestead and such transfer shall in no way vitiate the right to complete and perfect title to his homestead. In these cases the entryman has not transferred a portion of the land embraced in his homestead, because the fee is not in him and may never be, he has simply transferred his right of possession to that portion of his entry both while the title remains in the government and after it has passed to him; but the law provides that his right of transfer or alienation of possession of a portion of his claim shall cease at this

point, and if he attempts any further transfer or alienation, he shall be prohibited from completing title to the land embraced in his entry.

In view of the statements made by Foreman, I do not think it will be seriously contended that he did not transfer the three forties or one hundred and twenty acres embraced in his entry, and the possession of the same, to the townsite company.

The company had absolute control of the land, it disposed of lots, and valuable improvements were placed upon the same by the purchasers, and it would be absurd to suppose that this was done on any other theory than the one that Foreman had parted with his interest in said land or lots. The contention of Foreman, carried to its logical conclusion, would result in this, that a homestead claimant, immediately after the entry, may transfer possession and relinquish to another, all the land embraced in his entry with a covenant to transfer absolute title as soon as title is perfected in him, and then having been permitted by his grantee, to reside on the land for the required time, he may perfect title upon the theory that there has been no alienation of the land as contemplated by law, as he had no ownership to transfer or alienate. It is sufficient to say that such a construction would be contrary to, and utterly subversive of, all the principles of the homestead law and can not be entertained.

There can be no doubt in my opinion, as to the illegality of the action of Foreman, and that he considered the same illegal. I find in the Congressional Record, dated January 23, 1890, page 740, a record of the following proceedings:

MR. PERKINS. I desire to bring to the attention of the committee a statement which I have received from the city of El Reno. I ask it to be read to the committee, and if there is no objection I will move that the town of El Reno be excluded from the provisions of this bill. I ask the statement be read so the committee may be advised.

The Clerk read as follows:

In replying to a document signed by J. A. MacDonald and others, we the undersigned officials, citizens and homesteaders of El Reno, most respectfully submit to your honorable body the following statement of facts:

The Oklahoma Homestead and Town Company having leased from three homesteaders three 80-acre tracts of land at a rental of $1.00 per acre annually in advance, and having laid said land off for a town site, in lots and blocks, and having subleased the same for a consideration in hand paid and a balance to be paid when a perfect title can be made, and there being the most perfect understanding and absolute satisfaction between the holders of the leased lots, the Oklahoma Homestead and Town Company, and the homesteaders who have leased the aforesaid company their lands, and the Oklahoma Homestead and Town Company having erected and maintained a first-class hotel, built store buildings, office buildings, and school buildings, made roads in and around the town, built bridges and culverts, sunk and equipped public wells, and subsidized stage-lines to the amount of thousands of dollars over and above all moneys received from the lease of lots: Now, therefore, we respectfully ask that our contracts and agreements between all parties connected therewith shall be legalized that they may be fully carried out.

A. A. Farnham, mayor, Jas. B. Scales, councilman.

Alva C. Springs, councilman; J. A. Foreman, homesteader;

Mr. PERKINS. Mr. Chairman, I am not acquainted personally with any of these gentlemen, but I am told that this memorial recites the situation very correctly. Now I do not think it would be right for this committee to attempt in any way to legalize what these gentlemen have done. But I ask unanimous consent to submit an amendment which will provide that this bill shall not apply to the town of El Reno, in Oklahoma.

In my opinion Foreman is clearly disqualified by the plain provisions of the statute from making an entry under the second proviso of section 22 of the act of May 2, 1890, such being the case it is not necessary to discuss the character of the cash entry made, as the law clearly indicates who can, and who can not, make the same.

Neither is it necessary to discuss the question as to whether or not the occupancy of land embraced in a homestead entry by townsite settlers, would prevent the perfecting of title under the homestead law, to said land.

The case before me must be determined in accordance with the law as I find it. Your decision is reversed, and the homestead and cash entry of Foreman must be canceled, and the land may be entered under the provisions of the townsite law, applicable to the Territory of Oklahoma.

PRACTICE—REHEARING—APPEAL—CERTIORARI.

BISHOP *v.* WALDEN.

Rule 79 of practice only applies in cases where the motion for review or rehearing is filed within the time allowed for taking an appeal, and then only suspends the running of time allowed for appeal until the motion is disposed of and due notice is given of the decision thereon.

A writ of certiorari will not be granted where the right of appeal is lost through the failure of the applicant to assert the same within the period prescribed by the rules of practice.

Secretary Noble to the Commissioner of the General Land Office, February 6, 1892.

This is an application filed by Gus. Walden, for an order under Rules of Practice 83 and 84, requiring you to certify the contest proceedings and the record in the case of C. E. Bishop *v.* Gus. Walden, involving the SE. ¼ of Sec. 20, T. 40 S., R. 2 E., Roseberg, Oregon, to the Department for consideration.

It appears that Walden filed pre-emption declaratory statement for the tract in question July 20, alleging settlement thereon July 13, 1888. On November 14, 1888, Bishop made application to purchase the S. ½ of the SE. ¼ and the NE. ¼ of the SE. ¼ of said section, under the act of Congress of June 3, 1878, (20 Stat., 89).

In order to determine the rights of the conflicting claimants a hearing was had before the local officers at which both parties appeared and submitted their testimony. On January 23, 1889, the local officers de-

cided the case against Walden on the ground that he had taken the tract for the purpose of business and trade and not in good faith as a pre-emption. Notice of their decision was served on Walden January 26, 1889, as shown by registry return receipt. On the 7th of March, 1889, Walden filed with the local officers a motion for a rehearing before them based upon alleged newly discovered evidence. This motion the local officers on the 21st of May, 1889, overruled, for the reasons that by the exercise of due diligence Walden might have produced said evidence at the former hearing, and that said evidence was cumulative in character.

On the 19th day of June, 1889, Walden appealed to your office from the decision of the local officers of January 23, on the merits of the case, and also from their decision of May 21, denying his motion for a rehearing. Upon this state of facts you, on the 8th of September, 1891, found that inasmuch as the appeal of Walden, from the decision of the local officers of January 23, 1889, was not served upon Bishop and filed until June 19, 1889, more than thirty days after the same was rendered, that said appeal was not taken in time, and you thereupon considered the case under rule 48, and as between these parties you found no errors in the finding of facts and conclusions of law by the local officers. Thereupon you denied Walden the right of appeal. This application for *certiorari* is based upon your action.

It is claimed in the affidavit of Walden, that in less than thirty days after notice of the decision of the register and receiver, he filed his motion for a rehearing before them, and he claims that because he did this "his appeal should not have been disallowed as it would then comply with rule 79."

Rule 79 is as follows: "The time between the filing of a motion for rehearing or review and the notice of the decision upon such motion shall be excluded in computing the time allowed for appeal."

The record shows that Walden received notice of the local officers' decision on the merits of the case, on the 26th day of January, 1889; the motion for rehearing was not duly served and filed until the 7th day of March, 1889,—forty days after notice of the decision was received by him—a decision was rendered on said motion May 21, and Walden did not serve his appeal from the decision of January 23, upon Bishop until June 19, 1889, twenty-nine days after the decision on the motion for rehearing.

Rule 79 only applies in cases where the motion for review or rehearing is filed within the time allowed for taking an appeal, and then only suspends the running of time allowed for appeal until the motion is disposed of and due notice is given of the decision thereon.

In this case the motion for rehearing was based upon the allegation of newly discovered evidence and therefore, was not required to be filed within the thirty days under Rule 77 of practice, but it was filed after the time for appeal had expired and for this reason said rule 79 has no application to the case.

A writ of certiorari will not be granted where the right of appeal is lost through the failure of the applicant to assert the same within the period prescribed by the rules of practice. Thompson *v.* Shultis (12 L. D., 62).

No reason is shown for the failure of Walden to appeal his case in the time provided by the rules, his right to be heard on appeal was lost through his laches and in such a case the writ of certiorari will not be granted. Frary *v.* Frary *et al.*, 13 L. D., 478.

The petition is therefore denied.

INDIAN LANDS—ALLOTMENT—RIPARIAN RIGHTS.

AMANDA HINES.

The riparian ownership of an allottee, whose lands are adjacent to a meandered non-navigable lake, includes the lands to the middle of said lake.

Secretary Noble to the Commissioner of Indian Affairs, February 8, 1892.

I acknowledge the receipt of your communication of October 16, 1891, and accompanying letter from Mrs. Amanda C. Hines, a member of the Sisseton and Wahpeton bands of Sioux Indians located on the Lake Traverse reservation in South Dakota, in relation to selections of lands for allotments for herself and children which surrounds a meandered lake, now dry; that she made the selections supposing the fact of owning the land around the lake would give title to the same and if not, that her allotments be changed.

In response thereto I transmit herewith copy of an opinion of the 4th instant of the Hon. Assistant Attorney General for this Department, in which I concur, to the effect that Mrs. Hines as owner of the contiguous lots, would be entitled to the lands in front of her lots to the middle of said lake.

OPINION.

Assistant Attorney General Shields to the Secretary of the Interior, February 4, 1892.

It appears from a letter of the Commissioner of Indian Affairs, addressed to you, that Mrs. Amanda Hines, a member of the Sisseton and Wahpeton bands of Sioux Indians, located on the Lake Traverse reservation in South Dakota, has selected, as allotments for herself and children, certain lots in, or fractional parts of, section 11, T. 121 N., R. 53 W., which surround a meandered, non-navigable lake, which is dry during the greater part of the year. In a letter to the Commissioner of Indian Affairs she states that the selections were made under the supposition that owning the lands around the lake would entitle her to those in the lake bed; but that she has since been informed that her right in that respect is very questionable.

The Commissioner requests such a decision respecting the status of the lands in question as will enable him to inform Mrs. Hines as to her rights in the premises; and the matter has been referred to me by the First Assistant Secretary, with request for an opinion upon the questions involved.

As I understand the facts of the case, Mrs. Hines has simply selected the tracts in question as allotments for self and children. It is not said that the selections have been approved; but, on the contrary, it is to be inferred from certain statements made that their approval depends upon the decision you may make as to the rights Mrs. Hines may acquire, if the allotments be approved and the lands patented to her and children.

It is therefore obvious that at present the paramount title to the lands in question is in the United States, subject to the inchoate right of Mrs. Hines to have them alloted to her.

My opinion then is asked, not in relation to an actual, existing condition of facts, but is to be predicated upon the contingency of the approval of the selections to Mrs. Hines, and the subsequent acquisition of a legal title to the lands under the allotment act.

It is the practice of the officers of the Department of Justice to decline to express an opinion upon a supposed case, or a condition of facts which may or may not arise. But in view of the dependent character of the party most interested and her reliance upon the supervisory power, with which you are clothed, for guidance and protection, I think the rule of the Department of Justice may be relaxed in the present instance, so as to give an opinion, treating Mrs. Hines and her children as owners of the lands in question under the United States land laws.

The question presented has been before the supreme court of the United States more than once, and after an exhaustive consideration it has been determined in favor of the riparian owners. See cases of the Railroad Company *v.* Schurmeir (7 Wallace 272, 287), and Hardin *v.* Jordan (140 U. S., 371, 381), et seq. The same question was before this Department in the case of John P. Hoel (13 L. D., 588), where, referring to the last decision of the supreme court, it was said:

> it follows from said decision, that non-navigable inland lakes and ponds, where the public survey shows the same meandered, and the fact appears that the contiguous lands or lots have been disposed of by the government, that the lands covered by such lakes within the meandered lines does not belong to the government, but to the adjoining proprietors, under the common law right of riparian ownership. The government has no jurisdiction over such lands, and, therefore, no power to dispose of them.

In view of these decisions, I advise that Mrs. Hines, as owner of the contiguous lots, would be entitled to the lands in front of her lots to the middle of said lake.

Whilst the lands in question are now within the State of South Dakota, they are also within an Indian reservation, and entirely subject to the disposition of the United States.

The act of February 22, 1889 (25 Stat., 675), dividing the Territory of Dakota, and authorizing the people thereof to form two states out of the same, provides that as a condition of admission into the Union, the people inhabiting the proposed states shall agree and declare that they forever disclaim all right and title to all lands lying within their limits,—

owned or held by any Indian or Indian tribes; and that until the title thereto has been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

This provision of the enabling act is incorporated *verbatim* in Art. XXII of the Constitution of South Dakota, under the title of "Compact with the United States."

In view of the foregoing, I have not deemed it essential to enter upon a discussion as to whether the status of this land is now, or may hereafter be affected, by legislation on the part of the State of South Dakota, in relation to riparian rights; but have considered the question only in respect to the acquisition of rights by Mrs. Hines from the United States.

RAILROAD GRANT—LEGISLATIVE WITHDRAWAL.

SOUTHERN PAC. R. R. CO. *v.* CARTER.

Lands embraced within the legislative withdrawal, which followed on the filing of the map of general route, under the grant of July 27, 1866, are excluded from pre-emption filing and settlement.

Secretary Noble to the Commissioner of the General Land Office, February 8, 1892.

The land involved in this controversy is lot 2 of Sec. 23, T. 14 S., R. 2 E., M. D. M., San Francisco land district, California, and is within the primary limits of the grant of July 27, 1866, (14 Stat., 292), to the Southern Pacific Railroad Company.

Robert M. Carter filed his pre-emption declaratory statement for the lot, on the 30th of June, 1886, alleging settlement on the 28th of that month. After due notice, he submitted final proof, and received final receipt and certificate on the 10th of February, 1887, the Southern Pacific Railroad Company protesting against the proceeding.

The proof and the protest coming before you for action thereon, you rendered a decision on the 9th of June, 1890, holding that Carter's appropriation of the land under the pre-emption laws was proper, and that said entry was held for confirmation, subject to appeal by the company within sixty days. You directed the local officers to so inform the company, and to advise the entryman that should your decision become final his entry will be duly examined for patent. From that decision the company appeals to the Department.

Section 2258 of the Revised Statutes states what lands shall not be subject to the right of pre-emption, and the first class named is "lands included in any reservation by any treaty, law, or proclamation of the President, for any purpose."

Section six of the law of Congress already cited, which granted certain lands to the Southern Pacific Railroad Company, provided that the odd sections of land thereby granted should not be liable to sale or entry, or pre-emption, before or after they were surveyed, except by said company as provided in said act, "after the general route shall be fixed."

The route of said company was designated on its map filed in your office on the 3d of January, 1867, and lands, of which those in question were a part, were withdrawn from pre-emption upon the filing of such map. Buttz *v.* Northern Pacific R. R. Co., 119 U. S., 55.

In your decision you stated that

> the testimony taken in connection with the pre-emption proof made it appear that the land in question was occupied by one Myron Lisk as early as 1857, who used the same as a farm until some time in 1865, when he sold his possessory right thereto to Jose Feliz, who in turn sold it to one Geo. W. Condon. That these several parties were qualified pre-emptors, and their claim, and cultivation of the land from 1857 until long after the date when the right of the company would otherwise have attached, excepted said land from the grant to the company.

I do not find this statement sustained by the evidence. The proof is that Lisk occupied a part of the land from 1857 until sometime in 1865. His residence and improvements were upon land immediately south of this, and not until a survey, was it known that his barn was upon the land in question. There is nothing in the case showing that he ever claimed any interest in this particular tract, or that he ever conveyed or attempted to convey the same to Feliz or to any other person. The testimony also shows that Feliz was a Spaniard, and it does not appear that he was, or ever became an American citizen, although one witness said "my impression is that he was born in California." He worked for Myron Lisk prior to 1867, when he filed for the land, but no witness testifies that Lisk claimed any interest in the land after 1865, or that Feliz claimed any such interest prior to the 6th of August, 1867, at which time he made settlement, according to his declaratory statement filed on the 16th of October of that year. That he first made settlement upon the land in 1867 was also established by the testimony of the witnesses, Andrew P. Potter and G. W. Condon, the latter of whom purchased the land from Feliz in 1871, who conveyed it to Condon by a deed, which described it as being bounded on the south by lands of Myron Lisk, which were the lands which Lisk had occupied and claimed since 1857.

It would seem, therefore, that from "some time in 1865," when Lisk ceased to claim any interest in the land, until August 6, 1867, when Feliz claims to have settled thereon, it was unoccupied, and therefore subject to the legislative withdrawal, which attached upon the

filing of the map of general route—viz: Jan'y 3, 1867; hence, Carter acquired no interest therein by his subsequent settlement and filing.

The decision appealed from is therefore reversed.

In his brief upon this appeal, the counsel for the company states that on the 13th of September, 1888, the company obtained in the circuit court of the United States judgment against Carter for possession of said land; that he then left the same, and on the 8th of November, following, the company sold the land to one Charles Louis, who has ever since been in peaceable possession thereof.

TIMBER LAND ENTRY—ADVERSE CLAIM.

MILLER *v.* MCMILLEN.

The presence of improvements on a tract of land will not exclude the same from disposition under the act of June 3, 1878, where said improvements are not made and maintained under a bona fide occupation of the land.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 8, 1892.

I have considered the case of George T. Miller *v.* Henry McMillen, involving the timber-land entry made by the latter for the SE. ¼ of the SW. ¼ of Sec. 1, T. 10 N., R. 14 W., San Francisco land district, California.

McMillen filed his statement for the land on October 21, 1887, and offered final proof January 12, 1888. He was met by the sworn protest of Miller, filed December 3, 1887, alleging that he had valuable improvements on the land at the date of McMillen's application, and at the same time applied to enter the tract.

Hearing was ordered and had on January 12, 1888. The proceedings thereat and your action thereon are set forth in your decision of October 4, 1890, appealed from, as follows:

> From the record it appears that, at the time McMillen made his sworn statement, there were valuable improvements upon the land, amounting to about one thousand dollars, and that he was cognizant thereof. Said improvements were the property of the plaintiff, Miller.
>
> Prior to McMillen's application, Miller believed his improvements to be upon the SW. ¼ of the NW. ¼ of the same section; but it was found that they were upon the SE. ¼ of the SW. ¼ of the land in question, just over the dividing line between the two sections. As soon as the plaintiff discovered the true location he made application to purchase said land.
>
> The law expressly states that land containing such improvements is not enterable. (See act of June 3, 1878, Par. 6.)
>
> Defendant can not, therefore, base his rights upon his application to enter said land, as against the plaintiff.

The testimony taken at the hearing shows (in addition to the above) that the improvements consisted of three small shanties and a mill for

grinding bark. The mill was a frame, without siding, and was run by water; the shanties served as shelter for men while peeling bark. They had been put up by a man named Porter, five or six years before; and a little more than a year prior to the hearing Miller had purchased them from Porter, but had not taken actual possession—having given the latter a lease. The mill and cabins had not been used for more than a year; McMillen in his sworn statement alleged that they were abandoned; but Miller insists that they were "kept in repair" and ready for use if needed. The bark ground and prepared for shipment at the mill was taken from trees "on this land and other government land adjoining." Miller had a homestead entry and a pre-emption entry adjacent to the mill, and alleges that he supposed the mill and cabins to be on his claim; but on survey they were found to be just over the line, on government land. He contends that the improvements named excluded the tract from entry under the timber-land law, the second section of which provides that

> any person desiring to avail himself of the provisions of this act shall file with the register a written statement . . . . . setting forth that the land . . . . . contains no mining *or other improvements*, except for ditch or canal purposes.

McMillen, on the other hand, claims that the clause above cited should be construed in connection with the first section of the same act, which provides "that nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler." That Miller was not such a settler. On the contrary, he was, so far as this tract is concerned, either knowingly, or wittingly, a trespasser upon government land, and could acquire no rights thereby which would interfere with McMillen's right to purchase the tract under the timber act.

The question as to the construction of the clause of section 2, of the act of June 3, 1878, (20 Stat., 89), excluding land containing "improvements" was discussed by the Department in the case of Porter *v.* Throop (6 L. D., 691), and more fully in the case of Wright *v.* Larson (7 L. D., 555). In the latter case it was held that "the exception in the act of June 3, 1878, is in favor of the *bona fide* settler;" that "a settlement to be *bona fide* must be for the purpose of making the tract a home; this is the test, and a settlement for the purpose of securing the timber on the land, or for any other purpose than establishing a home, is not a *bona fide* settlement within the meaning of the act."

In the case at bar there was no pretense of settlement upon the tract "for the purpose of establishing a home." It was not therefore excepted from entry under the timber-land law because of "improvements" built thereon for the purpose of grinding and preparing for shipment the bark of trees upon that and other government land.

Counsel for the protestant cites the case of Block *v.* Contreras (4 L. D., 380), to sustain his contention that the tract here in controversy is

not subject to entry under the timber-land act. But in that case Contreras alleged that he had settled upon the tract, with a view to entry, prior to the application to purchase; and the department found that said tract was "inhabited, occupied and improved" at the date of the application to enter under the timber-land law. This was by no means a parallel case to the one here under consideration.

I do not believe that the character of improvements found in this case under the circumstances are such as will except the tract from the operation of said act. If such were the case, a trespasser could keep the timber lands out of the market until he had accomplished his purpose of denuding them of their valuable product, on the ground that they were improved, without any intent of lawfully appropriating them.

Your decision is reversed.

NOTICE OF CONTEST—PERSONAL SERVICE—PUBLICATION.

SODERQUIST *v.* MALLON.

Personal service of notice, under rule 9 of Practice, is not secured by reading the same to the wife of defendant and delivering to her a copy thereof at the house and usual place of defendant's residence.

Service of notice by publication is authorized where it is made to appear that personal service can not be secured by persistent and diligent effort.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 8, 1892.

I have considered the case of John P. Soderquist *v.* Michael Mallon, involving the timber-culture entry made by the latter on August 1, 1882, for the NW. ¼ of Sec. 32, T. 105, R. 68, Chamberlain (formerly Mitchell) land district, South Dakota.

The affidavit of contest was filed June 25, 1888, alleging failure to plant and cultivate as required by law.

After several continuances, hearing was had on June 25, 1889. The defendant made default, but the contestant and three witnesses appeared and submitted testimony which in the absence of any showing to the contrary, made a *prima facie* case against the entryman.

The complicated series of transactions that followed before the Mitchell office, and later before the Chamberlain land office (after its establishment) are set forth with substantial correctness in your decision appealed from. It is sufficient to say that the papers in the case were transferred to the Chamberlain office without final action thereon by the register and receiver at Mitchell; and that the local officers at Chamberlain dismissed the contest on the ground that notice thereof had not been legally served upon the defendant.

The contestant appealed to your office, and you held that sufficient showing of effort to find the defendant had been made to warrant serv-

ice of notice by publication; that notice thereunder, service by registered letter, and posting in the local office and on the land, constituted full and legal notice, under which claimant was bound to appear and defend his entry; and that having failed to do so he was properly adjudged to be in default.

The record contains the affidavit of O. O. Stanchfield, sheriff of Davison county, South Dakota, that he, on the 27th day of December, 1888, served notice of said contest upon the therein named claimant, Michael Mallon—

> By reading said notice to Mrs. Michael Mallon, the wife of said Michael Mallon, and by delivering to and leaving in her hand a true and certified copy of said notice of contest, at the house the usual place of residence of said Michael Mallon, in the county of Davison and Territory of Dakota; that said Mrs. Michael Mallon is a member of said Michael Mallon's family, and is over fourteen years of age.

The preceding return is almost literally the same (except as to names and dates) as that of service of notice upon the defendant in the case of Ackerson *v.* Dean (10 L. D., 477–8), which the Department held was not a sufficient compliance with the requirements of Rule 9 of Practice:

> Personal service shall be made in all cases where possible, if the party to be served 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.

The first question to be determined is, whether personal service upon the defendant was possible.

The defendant has on file an affidavit in which he states—

> That on April 13, 1889, when publication was granted on said notice, and for more than thirty days prior to that time, I was personally present on my farm near Mitchell, Davison county, Dakota, and have been living on and working the same all the time above mentioned.

Similar affidavits are on file executed by the defendant's wife and his attorney.

On the other hand, the contestant has affidavits in the record tending to show that he persistently and zealously sought to learn the whereabouts of the defendant, and sets forth in detail the efforts made, by inquiries, by letters of inquiry sent to the postmaster at Mitchell, and in other ways. One of his attorneys makes affidavit that he—

> Has written to the postmaster at Mitchell, Dakota, and to the sheriff of Davison county, Dakota, in which the town of Mitchell is located; that the postmaster there has said that said Mallon was not in said county; that his family were there, but that Mallon himself was in Iowa. At one time he reported said Mallon in Sioux City, Iowa; and another time he said that Mallon was in Storm Lake, Iowa. And the said sheriff has reported, at all times prior to the order to publish being made in the present case, that said Mallon was in Iowa. The said sheriff returned the notice of one hearing with his return that he was unable to find the claimant; in the other case the said sheriff retained the notice to obtain service of the same on said Mallon if he should return to said Davison county . . . . . , that the sheriff was instructed to keep a watch on claimant and report if personal service could be made upon him in said county.

The other member of the firm makes affidavit to the same effect, and adds that contestant "has been unusually diligent and active in seeking said Mallon."

The sheriff's returns referred to, and his letters to contestant's attorneys announcing his failure to find the defendant, are in the record.

Finally, one of the attorneys for the contestant sent a registered letter containing a copy of the notice addressed to Michael Mallon, at Mitchell, Dakota. Said letter was returned, with the postmaster's notation on the envelope, "Refused." The indications are very strong that when defendant found there was in the post-office at Mitchell a letter addressed to him, postmarked at Kimball, and having upon the corner the name of contestant's attorney, he thought he could avoid receipt of any notice that might be contained therein by refusing to receive the letter. But he could not in that way defeat the service of notice (Kelly *v.* McWilliams, 12 L. D. 403).

In the case of Driscoll *v.* Morrison (7 L. D., 274) the contestant alleged—

> That he has endeavored to serve the attached notice upon the contestee James L. Morrison; that after diligent search he is unable to find the said James L. Morrison; that he is well acquainted in the neighborhood, and that he knows that no one by the name of James L. Morrison resides in that locality; that he is not acquainted with the present address of said James L. Morrison; that he has every reason to believe that said Morrison is no longer a resident of the Territory of Wyoming; that it will be impossible to serve the notice of contest upon said Morrison by personal service.

In the above case the Department held that a sufficient affidavit and showing had been made to justify service of notice by publication. In the case at bar a far stronger showing is made of persistent, earnest efforts on the part of the contestant to obtain personal service.

Taking into consideration all the facts disclosed in the record, I concur in your conclusion that service by publication was authorized; and your decision holding the entry for cancellation because of his default, in view of the testimony adduced at the hearing, is affirmed.

RAILROAD GRANT—INDEMNITY SELECTION.

WALLIS *v.* MISSOURI, KANSAS AND TEXAS RY. CO.

The even numbered sections within the primary limits of the grant of March 3, 1863, for the Leavenworth, Lawrence, and Galveston road are reserved to the United States, by the terms of said grant, and therefore excepted from the grant of July 26, 1866, to the Missouri, Kansas and Texas road, and can not be patented for the benefit of the same to supply deficiencies in its place limits.

Secretary Noble to the Commissioner of the General Land Office, February 8, 1892.

I have considered the appeal by Benj. L. Wallis from your decision of June 6, 1890 rejecting his application to make homestead entry of

the W. ½ of SE. ¼, Sec. 10, T. 25 S., R. 19 E., Topeka land district, Kansas, for conflict with the indemnity selection of said tract by the Missouri, Kansas and Texas Railway Company.

Said tract is within the indemnity limits of the grant for said Missouri, Kansas and Texas Railway Company, under the acts of March 3, 1863 (13 Stat., 339), and July 26, 1866 (14 Stat., 289), and was selected by said company June 26, 1879, and again November 1, 1885. It is also within the primary limits of the grant for the Leavenworth, Lawrence and Galveston Railroad Company, under the act of March 3, 1863 (*supra*).

In the case of the United States *v.* Missouri, Kansas and Texas Railway Company (141 U. S., 359), it was held that the even-numbered sections within the primary limits of the grant for the Leavenworth, Lawrence and Galveston Railroad Company were reserved to the United States by the act of 1863 (*supra*), and were therefore excepted from the grant in the act of 1866 (*supra*), and could not be patented to the Missouri, Kansas and Texas Company to supply deficiencies in its place limits.

The selections of the tract in question by the Missouri, Kansas and Texas Railway Company must therefore be canceled, and, if otherwise subject to entry, Wallis's application should be admitted.

Your decision is accordingly reversed.

FINAL PROOF—INTERVENING ADVERSE CLAIM.

JEFFREY *v.* RECORD.

An entry should not be allowed during the pendency of final proof submitted by a prior claimant, and, if so allowed, will not affect the right of such claimant to submit further proof, showing that he had in fact complied with the law prior to the submission of his first proof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 9, 1892.

I have considered the case of Charles H. Jeffrey *v.* Augustine A. Record on appeal by the former from your decision of August 14, 1890 canceling his entry and accepting the final proof of the latter for the NE. ¼, Sec. 18, T. 32 N., R. 49 W., Chadron, Nebraska, land district.

Record made pre-emption filing for this land April 20, 1886 at Valentine land office, and offered final proof thereon on November 23, of same year. The proof was rejected by the local officers, and an appeal was taken to your office. The action of the local office was affirmed on February 1, 1887, and an appeal was then taken to the Department.

On December 29, 1887, Jeffrey was permitted to make homestead entry for the tract. July 24, 1888 (L. and R., Vol. 78, 397), the Department considered the case and modified your decision. The Secretary

concurred in the conclusion reached by you that the proof was unsatisfactory, and said that

> in the absence of an adverse claim, I might be disposed to affirm your allowance of further proof during the life-time of the entry. In view, however, of the stated entry of Jeffrey, you will direct that the claimant be notified that he will be permitted within sixty days from notice, to make new proof in due form, showing that prior to the entry of Jeffrey, he had complied with the law, and in the event of failure to submit such proof within the time named, that his filing be canceled.

Pursuant to this ruling, Record, on December 27, 1888, upon due notice, offered new proof which was protested by Jeffrey. A hearing was thereupon ordered, and had on July 17, 1889. The district having been changed, the land came into Chadron district, and upon the testimony taken at the hearing, the local officers found that Record had resided upon the land more than six months immediately preceding the date of the formerly offered proof, but had not resided upon it since, although he had kept up the cultivation and improvement of the tract, and they recommended the acceptance of his proof, from which Jeffrey appealed. Incidental to this proceeding, Mr. Record, on June 1, 1889, filed a motion in your office for a review of the decision of July, 1888. This was forwarded to the Department with the papers in the case, and was taken up on November 16, 1889, and it was found that it had not been filed within thirty days after notice had been received by Record of the decision, as required by rule 77 of practice, and as it was not based upon newly discovered evidence, it was overruled, and the papers returned to your office that the new proof and the case made by Jeffrey against the entry might be considered, and on August 14, 1890, you sustained the action of the local officers, and held Jeffrey's entry for cancellation, allowing the entry of Record, from which Jeffrey appealed.

I have carefully considered the case. The testimony offered at the hearing is quite conflicting, in fact, contradictory. It was, however, error to allow Jeffrey to make a homestead entry while the final proof of Record was pending on appeal before you, and he made the homestead entry at his peril. If you had reversed the local officers and allowed the final proof of Record, the case would have been at an end, so Jeffrey is not in position to complain. This error of law, however, does not affect the rights of the parties under the finding of facts.

The evidence shows more fully the facts of his residence upon the land prior to the first final proof, and while it is perhaps not so full and complete as it is desirable it should be, yet I find nothing therein that calls for interference with your conclusions which agree with those of the local officers, and the decision appealed from is therefore affirmed.

SIOUX INDIAN LANDS—ACT OF MARCH 2, 1889.

KING *v.* CHICAGO, MILWAUKEE AND ST. PAUL RY. CO.

The right of the Chicago, Milwaukee and St. Paul Ry. Co. to certain lands within the former Crow Creek Indian reservation, for right of way and station purposes, as recognized and provided for in section 16, act of March 2, 1889, is not defeated by a settlement right claimed under section 23 of said act.

Secretary Noble to the Commissioner of the General Land Office, February 9, 1892.

This appeal is filed by Henry J. King from your decision of June 2, 1890, affirming the action of the local officers in rejecting his application to make homestead entry of lots 3 and 4, the SE. ¼ of the SW. ¼ of Sec. 10, and lots 1 and 9, Sec. 15, T. 104 N., R. 71 W., Chamberlain, South Dakota, for the reason that his application conflicted with the claim of the Chicago, Milwaukee and St. Paul Railway Company, under the 16th section of the act of March 2, 1889 (25 Stat., 888).

The land in controversy was formerly embraced in the Crow Creek Indian Reservation, and in 1880, while it was so reserved, the Chicago, Milwaukee and St. Paul Railway Company entered into certain agreements with the several tribes of Sioux Indians, with the approval of the Indian Bureau whereby said tribes of Indians agreed to grant to said railroad company the right to occupy a certain part of said reservation at the western terminus of said railway for right of way, station grounds, etc., through and upon said reservation, in consideration of a certain amount per acre therein agreed upon, to be paid by the railway company to the United States for the benefit and use of said Indians.

On January 3, 1881, the Secretary of the Interior approved said agreement, with the proviso limiting the amount of land to be taken by the railway company under said agreement for passenger and freight depots, machine shops, etc., at the terminus of said road on the eastern bank of the Missouri river, to two hundred acres, and to one hundred and sixty acres for station grounds at points east of said terminus.

On November 25, 1881, the company filed in the Department a plat, showing a selection of one hundred and eighty-eight acres in said reservation on the east bank of the Missouri river, selected under said agreement, for depot grounds, etc., which was approved by the Secretary of the Interior, October 6, 1882, and which embraces the land in controversy, and payment was made by the company in pursuance of the terms of said agreement.

On December 17, 1883, the President transmitted to Congress a communication from the Secretary of the Interior, with an accompanying draft of a bill, "To accept and ratify said agreement with the Sioux Indians and the Chicago, Milwaukee and St. Paul Railway Company,"

but it does not appear that any action was taken upon the matter by Congress. See Ex. Doc. No. 20, 1st Sess., 48th Congress.

On February 27, 1885, President Arthur issued an executive order restoring to the public domain certain lands embraced in the Crow Creek reservation, including the land in controversy, but, on April 17, 1885, President Cleveland issued a proclamation declaring said executive order wholly inoperative and void, for the reason that it was in violation of the treaty with the Sioux Indians of April 29, 1868.

Under the provisions of the act of Congress of March 2, 1889 (25 Stat., 888), a portion of the reservation of the Sioux Nation of Indians in Dakota was divided into separate reservations, and the Indian title to the remainder of said reservation was relinquished and restored to the public domain, under the proclamation of the President, February 10, 1890 (26 Stat., 1554), which included the land in controversy.

On April 14, 1890, Henry J. King filed an application with the local officers to make homestead entry of lots 3 and 4, the SE. ¼ of SW. ¼, Sec. 10, and lots 1 and 9, Sec. 15, T. 104 N., R. 71 W., Chamberlain, South Dakota, under sec. 23 of the act of March 2, 1889, *supra*, which embraced part of the one hundred and eighty-eight acres of land granted to said railway company for freight and passenger depots, etc., by the Sioux Indians, under the agreements heretofore mentioned.

With his said application King filed an affidavit, stating that he made settlement on said land immediately after the executive order of February 27, 1885, and that he has continued to reside upon and improve said tract up to the present date; that on March 2, 1885, he tendered his application and affidavit, with the land office fees, to make homestead entry of said tract, at the local office of the district in which the land was situated, which was refused by the local officers for the reason that they had not then received official notice from the Commissioner that the land had been restored to the public domain, although the executive order of February 27, 1885, had been published.

The local officers at Chamberlain rejected King's application for the reason that it "conflicts with the claim of the Chicago, Milwaukee and St. Paul Railway Company, under section 16, act of March 2, 1889, and the President's proclamation of February 10, 1890."

You affirmed the action of the local officers in rejecting said application, and from your decision King appealed.

The claim of King is predicated upon the theory that the railway company could acquire no right under the agreement with the Indians without ratification by Congress, and that said agreement was not ratified until after appellant's rights had attached to the land as an actual settler, which was protected by the 23d section of the act of March 2, 1889.

He further insists that the action of President Arthur in issuing the executive order of February 27, 1885, was the exercise of a jurisdiction properly conferred upon him to construe and interpret the laws and

treaties, and having construed the treaty of 1868 as not embracing the lands restored by said order, it was not competent for his successor to declare that such construction was erroneous.

The 16th section of the act of March 2, 1889, provided that the acceptance of said act by the Indians shall operate as a release of the Indian title to the lands intended by said act to be restored to the public domain, but that said release should not affect any agreement theretofore made with the Chicago, Milwaukee and St. Paul Railway Company and the Dakota Central Railway Company for right of way through said reservation—

> And said companies shall also, respectively, have the right to take and use for right of way, side-track, depot and station privileges, machine-shop, freight-house, round house, and yard facilities, prior to any white person, and to any corporation or association, so much of the two separate sections of land embraced in said agreements; also, the former company so much of the one hundred and eighty-eight acres, and the latter company so much of the seventy-five acres, on the east side of the Missouri River, likewise embraced in said agreements, as the Secretary of the Interior shall decide to have been agreed upon and paid for by said railroad, and to be reasonably necessary upon each side of said river for approaches to the bridge of each of said companies to be constructed across the river, right of way, side-track, depot and station privileges, machine-shop, freight-house, round-house and yard facilities, and no more:

with the following provisos: (1) That the railway companies shall make the payments for the same, as stipulated in said agreements; (2) That the lands conveyed shall only be used for general railway purposes; (3) That payment shall be made and the conditions performed within six months after the act takes effect; and (4) That said companies shall locate their respective lines of road, including station grounds and terminals, within nine months after the act takes effect, and shall within three years after the act takes effect construct, complete, and put in operation said lines of road, and upon failure to locate, construct, and operate the same within the time required by the act, the lands granted for right of way, station grounds, and other railway purposes, shall be forfeited, and "shall without entry or further action on the part of the United States revert to the United States, and be subject to entry under the other provisions of this act."

On October 31, 1890, within nine months after the date when the act took effect, as declared by the proclamation of the President of February 10, 1890, the Chicago, Milwaukee and St. Paul Railway Company filed its map of definite location, which was approved by the Secretary of the Interior, subject to all the conditions contained in the 16th section of the act of March 2, 1889, and having prior to that date, as heretofore stated, paid the consideration specified in said agreement, its rights under the act became complete, subject only to forfeiture upon failure to construct, complete, and operate the road within three years from February 10, 1890, the date when said act took effect, unless their rights are subject to the claim of King, under the 23d section of the act.

The 23d section provided:

That all persons who, between the twenty-seventh day of February, eighteen hundred and eighty-five, and the seventeenth day of April, eighteen hundred and eighty-five, in good faith, entered upon or made settlements with intent to enter the same under the homestead or pre-emption laws of the United States upon any part of the Great Sioux Reservation lying east of the Missouri River, and known as the Crow Creek and Winnebago Reservation, which, by the President's proclamation of date, February twenty-seventh, eighteen hundred and eighty-five, was declared to be open to settlement, and not included in the new reservation established by section six of this act, and who, being otherwise legally entitled to make such entries, located or attempted to locate thereon homestead, pre-emption, or town site claims, by actual settlement and improvement of any portion of such lands, shall, for a period of ninety days after the proclamation of the President required to be made by this act, have a right to re-enter upon said claims and procure title thereto under the homestead or pre-emption laws of the United States, and complete the same as required therein, and their said claims shall, for such time, have a preference over later entries; and when they shall have in other respects shown themselves entitled and shall have complied with the law regulating such entries, and, as to homesteads, with the special provisions of this act, they shall be entitled to have said lands, and patents therefor shall be issued as in like cases: *Provided*, That pre-emption claimants shall reside on their lands the same length of time before procuring title as homestead claimants under this act. The price to be paid for town-site entries shall be such as is required by law in other cases, and shall be paid into the general fund provided for by this act.

King's claim to priority rests upon the assumption that the executive order of February 27, 1885, restored the land to the public domain, and that it remained subject to settlement and entry until again placed in reservation by the proclamation of April 17, 1885.

This proclamation declared the executive order of February 27 to be inoperative and void, for the reason that it was in violation of the treaty of April 29, 1869, with the Sioux tribes of Indians, and was not made with the consent of said Indians.

If the restoration of said land was not authorized by the treaty of 1869, and was not done with the consent of the Indians, said executive order would not operate to release the land from reservation and restore it to the public domain, and a settlement made thereon would confer no rights upon such settler.

Whether said executive order was or was not made in pursuance of the treaty of 1869 is immaterial for the purpose of this decision, in view of the fact that Congress, in passing the act of March 2, 1889, clearly contemplated that the tract referred to in said executive order constituted a part of the reservations of the Sioux, and should not be released from such reservation until so proclaimed by the President under the authority of said act.

Conceding that the railway company acquired no right under its agreement until ratified by Congress, it does not follow that King had such a right by virtue of his settlement as would deprive Congress of the power of making any disposition of the land after it had been finally released from reservation, even if, at the date of King's settlement, it

was subject thereto, for the reason that settlement upon the public lands confers merely an inchoate right that is not valid against the United States.

The express language of the act, that said company shall "have the right to take and use for . . . . . depot and station privileges, machine shops, freight-house, round-house, and yard facilities, prior to any white person, and to any corporation or association, so much of the two separate sections of land embraced in said agreements," shows that it was intended to ratify and confirm said agreements, and that the rights acquired thereunder should be prior to the claim or right of any other person or corporation, except Indians, who might have taken allotments under the treaty of April 29, 1869, which rights were protected by the 15th section of the act as paramount to the rights and claims of all others.

It is also insisted that the language of the 16th section—that the release of the Indian title shall not affect the agreement made with the railway company, "except as hereinafter provided"—is a limitation to the grant or authority conferred, and that when said exception is considered in connection with the 23d section it is manifest that it was the intention of Congress to specifically provide for the class of settlers therein referred to, and to make the right of the railway company subordinate thereto.

From a reading of the entire section, it is apparent that the words "except as hereinafter provided" have reference solely to the provisos to said section, and that it was the intention of the act to ratify and confirm said agreements as against the right of every white person or corporation, provided the railway company should make payment and location in the manner and time therein prescribed.

The 23d section is a general provision as to all settlers who settled upon said reservation between the dates therein named, while the 16th section is a specific provision, conferring a specific right, limited only by express exceptions contained in the proviso to said section:

> Where a general intention is expressed, and also a particular intention, which is incompatible with the general one, the particular intention shall be considered an exception to the general one. . . . . Hence, if there are two acts, or two provisions in the same act, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general and would, if standing alone, include it also; and if, reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision,—it must be taken that the latter was designed as an exception to the general provisions. Endlich Int. Stat., Sec. 216; Sedgw. Stat. Law, 48.

From a careful consideration of this case, I am satisfied that King has no right to make entry of the tract in controversy by virtue of his settlement, unless the railway company should fail to comply with the terms of the act and a forfeiture should be declared in the manner provided for in the fourth proviso to the 16th section of said act.

Your decision is affirmed.

OSAGE TRUST LANDS—PUBLIC SALE.

INSTRUCTIONS.

Commissioner of the General Land Office to the register and receiver at Garden City, Kansas, February 15, 1892.

Under date of January 9th last, the Hon. Secretary of the Interior, approved a list for sale of lands embraced in entries made upon the Osage trust and diminished reserve lands, in which the claimants failed to pay the second, third and fourth installments of the purchase money.

I inclose herewith a list of said lands, which you will proceed to offer at public auction, (to the highest bidder, at a price not less than that fixed by law and in quantities not exceeding one hundred and sixty acres to any one purchaser), in the order in which they appear on said list, on a day and at an hour which will be specified in a notice thereof, which you will give by advertisement, which will be printed once a week for six consecutive weeks in two weekly newspapers of general circulation in your land district, which you will designate.

You will insert in each notice the earliest date most convenient to you after the expiration of the period of publication. You will, after the offering, make a report of the sale giving the descriptions of the tracts and indicating whether sold or not, if the latter, the reason therefor whether for want of a bid or other cause. You will forward copies of the published notice attached to the several affidavits of the publishers of the newspapers selected, showing the date of the first and last publication, and reciting the fact that the notice appeared in a regular issue of the paper once each week for the specified time. The claimants, mortgagees, or present owners, may at any time before the day fixed for the offering pay the full amount due, together with the accumulated interest, and the pro rata share of the expenses, in which case the particular tract or tracts so paid for will be withdrawn from the offering.

Before proceeding to offer each tract, you will endeavor to ascertain by calling out, if a tax sale purchaser of that tract, or his or her legal representative, is present, if so you will allow such party or parties the privilege of paying the balance of the purchase money which remains unpaid, and accumulated interest, together with the pro rata share of the expenses of the sale. In all such cases last mentioned, the land will not be sold, but you will issue a certificate to the party or parties entitled thereto, in their own name just the same as if he was the original settler upon the tract in question, endorsing across the face of such certificates, in red ink, a reference to the fourth section of the act approved May 28, 1880, as your authority therefor. All certificates and receipts will bear the current number and date for the month in which the sale occurs, and will be reported by you in your abstracts of sales made of the Osage trust and diminished reserve lands.

Each of you will be allowed the same compensation as allowed by law in other cases of sale of public lands. All costs of advertising and

other expenses incident to said sale must be charged to and paid out of the fund arising from said sale. The net proceeds of the sale will be deposited by the receiver, after deducting all expenses, to the credit of the proper Indian fund. See section 5, act of May 28, 1880.

Approved:

JOHN W. NOBLE,
Secretary.

See 32 L. D. 128

MINING CLAIM—MILL SITE—IMPROVEMENTS.

SATISFACTION EXTENSION MILL SITE.

The erection and maintenance in good faith of dwelling houses for the occupancy of workmen employed for purposes in connection with a mill is such a use and occupancy of the land as will justify the allowance of a mill site entry thereof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 11, 1892.

On October 16, 1885, mineral entry No. 247, lots No. 40 A, and 40 B, was made at the Las Cruces land office, New Mexico, for the mining claim known as the "First Extension of the Satisfaction Mine," and the "Satisfaction Extension Mill Site."

The papers were transmitted to your office, and by your letter of June 11, 1887, to the local officers, you said,

> The mill site survey No. 40 B is claimed in connection with the lode survey No. 40 A, but there is nothing in the record showing that the same is used or occupied for mining or milling purposes in connection therewith. Proper evidence showing the use or occupancy of said mill site under section 2337 U. S. Rev. Stats., should be furnished.

Said section 2337 provides that,

> Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode.

In response to your letter the affidavit of the agent was transmitted wherein he states,

> The said mill-site lays between the stamp-mill owned and operated by said applicant and the Mimbres river from which the water supply for running said mill is drawn and conducted, and that for said purpose said applicant has constructed and at said time was maintaining an acequia and ditch leading from said mill to said river, and that said ditch traverses the entire width of said mill site in its only practicable course from said river to said mill, and that the water thus conducted is necessary to the running of said mill, and that said mill is owned and used by said applicant for the purpose of reducing the ore taken from said lode claim: Affiant further says that said applicant has erected and now owns two houses on said mill-site which are used and occupied by employees of said applicant in the keeping up of said ditch and for other purposes in connection with said mill.

By your letter of July 30, 1888, you held that such a use and occupation was not contemplated by said section, and held the entry for cancellation as to the area embraced in the mill-site.

An appeal now brings the case before me.

In the case of Charles Lennig (5 L. D., 190, 192), Secretary Lamar, in construing said section 2337, says,

> The proprietor of a lode undoubtedly 'uses' non-contiguous land "for mining or milling purposes" when he has a quartz mill or reduction works upon it, or when in any other manner he employs it in connection with mining or milling operations. For example, if he uses it for depositing "tailings", or storing ores, or for shops, or *houses for his workmen*, or for collecting water to run his quartz mill, I think it clear that he would be *using* it for mining or milling purposes.

As it appears that the applicant owns two houses on said mill-site occupied by his employees for purposes in connection with said mill, he uses the land for mining or milling purposes within the meaning of the statute as above construed. The erection of dwelling houses on the mill-site is clearly a very substantial use and improvement of the land. They become a part of the realty, and would pass by a conveyance of the real estate, and when such houses are erected for workmen employed in connection with the mill, the land is used for milling purposes.

In Sierra Grande Mining Company *v.* Crawford (11 L. D., 338), it was held that the use of land for the maintenance of pumping works necessary to the operation of a lode mine was such a use as would authorize entry of the land as a mill site. The foregoing citation from the Lennig case is quoted, and it is said,

> Here we find actual occupation of the land, with lasting and valuable improvements. It is true the company consumes only the water, but it occupies and uses the land in connection with its lode mine, and such *use* is necessary to the operating of the mine.

This language applies to the case under consideration.

In the case of the Gold Springs and Denver City Mill Site (13 L. D., 175), a tank, a spring house and a stone cabin had been erected on the mill-site, and such use was held sufficient. It is said, page 177,

> Lasting improvements have been made on the land embraced in the mill site, indicating good faith. There is more than the mere use of water—the mill-site itself is improved and used, as above seen, in connection with the mine.

So in the case at bar it may be said—"there is more than the mere use of water." The mill-site itself is improved and used in connection with the mine by lasting improvements indicating good faith.

Your judgment is reversed.

ROUGEOT *v.* WEIR.

Motion for the review of departmental decision rendered September 5, 1891, 13 L. D., 242, denied by Secretary Noble, February 12, 1892.

SWAMP LAND—REPORT OF SPECIAL AGENT.

STATE OF FLORIDA.

The claim of a State for swamp land should not be rejected on the report of a special agent alone, but such report may be properly made the basis of a further investigation as to the character of the land.

Secretary Noble to the Commissioner of the General Land Office, February 12, 1892.

I have considered the case arising upon the appeal of the State of Florida, from your decision of August 14, 1890, rejecting the claim of the State of Florida to certain lands therein described. It appears that 1155 tracts are involved, aggregating about 150,000 acres.

Counsel for the State alleges, in substance, that you were in error in holding the list for rejection solely on the report of a special agent, without regard to the field-notes, and without any testimony on the part of the State.

Your decision is as follows:

REGISTER AND RECEIVER,
Gainesville, Florida,

SIRS: Under date of the 4th instant, Mr. R. E. Johnston, special agent of this office, made a report of his examination in the field of certain lands in Florida claimed as inuring to the State under the swamp-land grant, which report shows that the tracts hereinafter described are not of the character contemplated by the grant, viz: . . . . . The claim of the State to the tracts of land above described is *therefore* held for rejection, subject to appeal within sixty days.

This language would indicate that the claim was held for rejection solely upon the report of the special agent.

Counsel for the State is correct in his contention that rejection upon this ground was erroneous.

In the case of Cass county, Illinois (10 L. D., 22), the Department held:

The finding and report of the special agent is not conclusive against the State, in the absence of final testimony by the State.

In the case of Champaign county, Illinois (10 L. D., 121), the second allegation of error was:

The report of the United States 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.

In that case the Department said:

The second objection, if supported by the facts in the case, is a valid one and must be sustained . . . . . 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 . . . . . Upon this point the case will be returned to your office for disposition, etc.

The decisions above quoted from are in cases where the State applied for indemnity for land sold by the United States, while in the case at bar the State asks for a certification of the land itself; but the effect of a report of a special agent on the character of the land is the same in the one case as in the other.

In the absence of any evidence on the part of the State, and as it appears that no opportunity has been afforded it to produce such evidence, I can not concur in your conclusion rejecting its claim. This, however, is not to be construed as confirming said claim but simply as refusing to render a decision before being placed in possession of such facts as the regulations require shall be furnished. The papers are, therefore, returned, in order that the State may be afforded an opportunity to support its claim in accordance with departmental regulations, as was done in the cases hereinbefore cited (Cass county, 10 L. D., 22; Champaign county, ib., 121).

CERTIORARI—APPEAL—PROCEEDINGS ON FINAL PROOF.

REAM *v.* LARSON.

An application for certiorari must be accompanied by a copy of the decision denying the right of appeal.

The right of appeal from the Commissioner's decision is lost, where the appeal from the local office does not contain a specification of errors and is dismissed for that reason.

Certiorari will not be granted where the right of appeal is lost through the negligence of the applicant's attorney.

A protest against final proof raises an issue that may be properly tried before the local office, and on appeal therefrom the Commissioner is vested with due jurisdiction over the case.

Proceedings on final proof can not be treated as ex parte, where a protest is filed and evidence furnished in support of the charges therein made.

Secretary Noble to the Commissioner of the General Land Office, February 15, 1892.

On July 23, 1881, Frank Larson made homestead entry No. 358, for the S ½ of the SE ¼, and the S ½ of the SW ¼ of Section 14, T. 14 S., R. 44 E., Blackfoot, Idaho.

He gave notice that he would submit final proof on said entry on the 31st day of July, 1888, before the clerk of the district court at Paris, Idaho. When he appeared before said clerk to submit proof, he was met by William D. Ream, who filed with said clerk the following paper:

BEAR LAKE COUNTY, IDAHO,
Paris July 31, 1888.

In the matter of Final Proof on Homestead Entry of Frank Larson. W. N. B. Shepherd, Deputy Clerk United States Court—

This is to notify you that I, the undersigned, William D. Ream, appear before you to-day in order to protest against the final proof of Frank Larson on his Homestead Entry.

WILLIAM D. REAM.

(Endorsed:) Filed July 31, 1888. A. L. Richardson Clerk of District Court, 3d Judicial District Idaho. By W. N. B. Shepherd, Deputy.

The evidence submitted before the clerk of the court was not considered by the register and receiver, because neither the protestant Ream, nor entryman Larson, would comply with the demand made by said officers upon them to pay the register and receiver the same fees paid the clerk of the court for taking said evidence.

On November 26, 1889, you instructed the register and receiver to examine the evidence submitted and render decision thereon, and on December 10, 1889, those officers recommended that Larson's entry be canceled. He appealed from said finding to you. Said appeal is as follows:

Now comes said defendant and appeals from the decision of the Hon. Register and Receiver in the above entitled cause, on the ground that the decision is not supported by the law or the evidence in said case.

Notice of this appeal was duly served on protestant Ream, who filed the following objection thereto:

The contestant Ream hereby demurs to said appeal being considered, for the reason that there are not any specific points of objection mentioned to the ruling appealed from.

On January 28, 1891, you considered said appeal, and held that—"The demurrer is well taken."

The appeal was dismissed and the right of further appeal denied. Within twenty days thereafter Larson applied to this Department for an order under rules of practice 83 to 85, inclusive, directing that the record in the case be certified up here for consideration.

On November 4, 1891, the application was considered, and denied, because no copy of the decision complained of was furnished by applicant. Smith *v.* Howe (9 L. D., 648); also Missc. Press Copy Book 228, p. 372.

Under date of December 24, 1891, Larson filed a motion for review of the decision of the Department of November 4, 1891, contending that a copy of your decision was unnecessary in determining his right to the writ of certiorari, and that said decision is erroneous. Quite a lengthy argument is filed, attempting to show that said decision is erroneous. This motion is accompanied by a copy of your decision denying the appeal.

If this motion should be considered as an application to review the departmental decision of November 4, 1891, it would have to be denied. The doctrine that one who applies here for a writ of certiorari alleging that your decision denying him an appeal is erroneous, must furnish a copy of said decision, is well settled by the decisions of this Department.

However, as Larson has now furnished said copy, and at the same time re-filed his application for a writ of certiorari, it may properly be treated as a new application. Hoover *v.* Lawton (13 L. D., 635).

If the right of appeal to you from the decision of the register and receiver was lost through the laches of a party or his attorney the writ will not be granted. Thompson *v.* Shultis (12 L. D., 62).

If no proper appeal was taken to you from the decision of the register and receiver, and if for that reason said appeal was dismissed by you, applicant is not now entitled to the right of appeal from your decision, and consequently the writ could only be allowed, if at all, under the supervisory authority of the head of this Department.

The appeal taken by Larson to you, from the decision of the register and receiver, utterly failed to specify the errors complained of, as required by the rules of practice. McLaughlin *v.* Richards (12 L. D., 98).

It was therefore not error for you to have dismissed the same on the motion of protestant.

In the present application, one of the grounds for which redress is sought, is that the attorneys heretofore employed by him, have committed errors or have been unfaithful to his cause. In answer to this claim it may be said, as was said in the case of Nichols *v.* Gillette (12 L. D., 388), that, "The purpose of the writ of certiorari is not the correction of errors resulting from the laches of the party applying therefor." (Tomay, *et. al. v.* Stewart, 1 L. D., 570). And it has been repeatedly held that the writ of certiorari will not be granted where the right of appeal is lost through the attorneys negligence. Ariel C. Harris (6 L. D., 122); Asher *v.* Holmes (8 L. D., 396).

This is true even where the attorney had absconded. Thomas C. Cook (10 L. D., 324).

Of course, as heretofore intimated, if it should be made to appear that the entryman is justly entitled to relief, it may be granted under the supervisory authority. Oscar T. Roberts (8 L. D., 423).

Does the showing made in this case justify the Department in exercising that authority?

The application is made upon the following grounds:

1st; The Honorable Commissioner had no jurisdiction of the said case.

2nd; The Land Office at Blackfoot, Idaho, had no jurisdiction of the said case.

3d; No contest was ever initiated by said contestant, and contestant at the time defendant offered his final proof had no interest in the land embraced in defendant's entry.

4th; The clerk of the district court of the third judicial district, territory of Idaho, had no jurisdiction or authority to take testimony in said case.

5th; The appeal of Larson from the decision of the register and receiver herein dated December 10, 1891, is sufficient and not subject to demurrer or dismissal.

6th; That the Honorable Commissioner should have considered this case as an ordinary final proof and not as a contest upon default and if upon examination he should have deemed the proof insufficient the action should have been to allow the entryman an opportunity to furnish additional proof.

In answer to the first assignment it is sufficient to say that Larson submitted final proof for certain of the public land included in his homestead entry. Ream protested, asserting that Larson had not complied with the law. The register and receiver decided the case, and an appeal was taken to you. It may not be truthfully said that you had no jurisdiction over the case.

In the second, third and fourth assignments, it is contended that the register and receiver, and the clerk of the district court, had no jurisdiction to hear the case, because no sworn contest nor protest was filed by Ream. It is true that at first he did not assume the position of contestant, but rather that of a protestant, but when Larson attempted to make final proof Ream's right to protest it was unquestioned, and the register and receiver, or the clerk of the court designated by them, had authority to hear said protest.

The fifth assignment, contending that the appeal taken from the local office is sufficient under the rules, has already been shown to be clearly deficient.

The sixth and last assignment avers that you should have considered the final proof of Larson as *ex parte*, the protest of Ream being illegal, and if said proof was deemed by you to be insufficient, additional proof should have been required.

The protest of Ream having been decided to be legal, of course you could not have ignored the evidence submitted by him.

The contention of counsel, as embodied in the assignment of errors and argument, accompanying the application, fails to show that error has been committed; at least, such an error as would call for the exercise of the supervisory authority possessed by this Department. The applicant has had his day in court, and if he failed to have you pass upon his case on its merits, the failure was due to his own acts and those of his chosen counsel, in not following the plain rules of procedure of the land department.

The application is denied.

MOSES ET AL. *v.* FICK ET AL.

Motion for review of departmental decision of September 24, 1891, 13 L. D., 333, denied by Secretary Noble, February 15, 1892.

MINING CLAIM—ADVERSE PROCEEDINGS—WAIVER.

NETTIE LODE *v.* TEXAS LODE.

One who files an adverse claim out of time, and subsequently brings suit thereon but not within the statutory period, does not occupy the status of an "adverse claimant" but that of a mere "protestant" without interest.

An adverse claim filed out of time, and subsequent judicial proceedings based thereon but not begun within the period prescribed, do not preclude the allowance of a mineral entry; nor does the pendency of such proceedings bar the issuance of patent on said entry.

The failure of an adverse claimant to prosecute his suit in the courts with reasonable diligence is a waiver of the adverse claim, and warrants the Department in proceeding to final action on the claim of the applicant.

Secretary Noble to the Commissioner of the General Land Office, February 16, 1892.

I have considered the appeal by George H. Kohn, as claimant of the Nettie Lode, from your judgment of September 6, 1890, rejecting his adverse claim filed in the land office at Durango, Colorado, on March 20, 1886, against mineral application No. 684, by John R. Curry, for himself and others, as co-owners of the Texas Lode.

Said Curry filed application for patent January 6, 1886. Publication was made in a weekly newspaper from January 16, 1886, to March 20, 1886, and the following foot-note is appended to the printed notice, to wit:

First pub. Jan. 16, 1886.
" pub. March 20, 1886.

Section 2325 of the Revised Statutes requires the register of the land office, upon the filing of an application for a patent, to publish a notice thereof "for the period of sixty days," and provides that "at the expiration of the sixty days of publication the claimant shall file his affidavit," and if no adverse claim shall have been filed "at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent."

By mining circular of October 31, 1881, section 34, the following instruction is given as to the proper mode of carrying out the above provision as to publication, "In all cases sixty days must intervene between the first and last insertion of the notice in such newspaper. When the notice is published in a weekly newspaper ten consecutive insertions are necessary."

The foot-note in this case is not required by the statute, and is no part of the notice, but is appended for convenient reference as to the first and last insertions of the notice in the newspaper, and it is evident that in all cases of publication in a weekly newspaper the tenth or last insertion must be on the sixty-third day after the first insertion, excluding the first day of publication from the computation, according to the well established rule. Miner *v.* Mariott (2 L. D., 709); Bonesell

v. McNider (13 L. D., 286). Whenever, therefore, the foot-note correctly gives the date of the first and tenth insertion of the notice in a weekly newspaper it is a notice to all whom it may concern that the last insertion just completes the ninth week, and is the sixty-third day of publication in every such case. No one using ordinary care can be misled by such a notice.

In this case the publication was in a weekly newspaper, and the first publication being on January 16, 1886, and the tenth or last on March 20, 1886, this was notice that March 20th, 1886, was the sixty-third day from January 16, 1886, and that March 17th, 1886, was the sixtieth and last day upon which an adverse claim could be filed. The adverse claim was in fact executed on March 19, 1886, and filed in the land office on March 20, 1886, or three days too late. By an oversight the adverse claim was in fact received at the local office and filed without objection, and was not rejected by the local officers till more than a year thereafter.

By section 2326 of the Revised Statutes, it is provided that—

> It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim.

As the adverse claim was filed on March 20, 1886, the thirtieth day thereafter was April 19, 1886, and it appears by the certificate of the clerk of the district court of the county of San Miguel that the required suit was not commenced till April 21, 1886, or on the thirty-second day after the filing of said adverse claim, or two days too late. This failure was a waiver of the adverse claim as provided by the statute above cited, and the suit does not appear to have been prosecuted. So that the adverse claim would have been barred even if filed in time. Upon the facts it seems to have been doubly barred.

Under these circumstances the register of the land office by his letter of November 12, 1887, notified the said Kohn "to appear at this office on or before Thursday December 29, 1887, and show cause, if any you have, why the said Texas Lode is not subject to entry by the said John R. Curry and his co-owners."

Said letter was received by said Kohn on November 14, 1886, as appears by his registry return receipt, but no appearance was made by said Kohn or on behalf of said Nettie Lode, and mineral entry No. 684 was allowed at 4:30 o'clock p. m. on said December 29, 1886, by the land officers, and final certificate and receipt duly issued.

On December 30, 1887, the claimant of the Lettie Lode filed a "protest against the granting of a receiver's receipt for the Texas Lode," for the reason that said adverse claim had been filed and said suit had been instituted, and that negotiations had been entered into towards a settlement of their conflicting interests.

As the adverse claim was already barred, the protestant had no inter-

est, when the protest was filed, that can be recognized, and he must be regarded as a "third party" to all intents and purposes; and therefore can only be heard in accordance with that clause of said section 2325, which provides that "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." But this protest makes no such allegations, and therefore is not brought within the foregoing provision. Bright *v.* Elkhorn Company (8 L. D., 122). Furthermore, the protestant has made his objection and has been heard thereon, and has therefore exhausted the privilege conferred upon him by the statute as a "third party." His objection has been duly considered and has been overruled, and, being without interest, the statute gives him no right of appeal. The protest was also filed one day after the entry was made to which it objected.

On appeal from the decision of the local officers you rejected the adverse claim and dismissed the protest.

On the appeal to this Department, there are assigned substantially three errors:

(1) In deciding that said adverse claim of the "Nettie" was not filed in time.
(2) In dismissing the protest of the "Nettie" claimant.
(3) In holding the allegations of the adverse claim and protest insufficient.

These contentions cannot be sustained for the reasons already given. The adverse claim was rightly rejected because not filed in time. If it had been filed in time it was the duty of the adverse claimant to have had recourse to a court of competent jurisdiction to settle his controversy with the Texas Lode, as provided by section 2326, above cited, and this Department is not the proper forum to determine that controversy. Having failed, both in filing his adverse claim and in bringing his suit within the required time, there was no reason why the entry of the Texas Lode should be longer stayed, and it was properly allowed. It follows that the allegations contained in the adverse claim and protest cannot be considered.

The only remaining question is what judgment should now be rendered? Are the appellants entitled to a judgment that patent issue to them in regular order of business, or should a patent be withheld to await the judgment that may be rendered by the court in which suit appears to be now pending?

The statute (Section 2326) provides in express terms when and under what circumstances this Department is ousted of its jurisdiction, as follows:

> Where an adverse claim is filed during the period of publication, ... all proceedings except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.

Then follows the provision already cited that the adverse claimant must "within thirty days after filing his claim" commence proceedings

in court, and that "a failure so to do shall be a waiver of his adverse claim."

In the case of the Richmond Mining Company *v.* Rose (114 U. S., 576), where there had been delays in the court, and the local officers had decided that such delays constituted a waiver, it was held that the land officers had no power to make such a decision. Justice Miller, in construing this provision, says, page 585,—

> What, then, is meant by the phrase, "all proceeding shall be stayed until the controversy is settled or decided by a court, of competent jurisdiction, or the adverse claim waived?"
>
> We can imagine several ways in which it can be shown that the adverse claim is waived without invading the jurisdiction of the court while the case is still pending. One of these would be the production of an instrument signed by the contestant, and duly authenticated, that he had sold his interest to the other party, or had abandoned his claim and his contest. Or, since the act says that all proceedings shall be stayed in the land office from the *filing of the adverse claim* and not from the commencement of the action in the court, within thirty days, such delay of thirty days is made by the statute conclusive of a waiver. A filing in the records of the court by the plaintiff of a plea that he abandons his case or waives his claim, might authorize the land office to proceed.

As it appears by the certificate of the clerk of the court to which this suit was brought, that it was not commenced till more than thirty days "from the filing of the adverse claim," it follows from the above decision that this Department ought to hold that "the adverse claim is waived," and can so hold "without invading the jurisdiction of the court, while the case is still pending." "Such delay of thirty days is made by the statute conclusive of a waiver." The same must be true of the failure to file an adverse claim "during the period of publication." The statute says that in such case "it *shall be* assumed that the applicant is entitled to a patent," and "that no adverse claim exists." (Section 2325.) This provision is mandatory and conclusive, and this Department has no option in the matter, but is obliged to assume that the defendants are entitled to a patent. I find the decisions of this Department accord with this view. In Brown *v.* Bond (11 L. D., 150), the adverse claim was filed within the sixty days of publication, and a suit was instituted within thirty days thereafter. Entry was allowed after the suit was commenced because the adverse claim was filed by attorneys without filing proper authority, and it was held that such entry was wrongfully allowed, and that a mere irregularity should "not defeat the right of the claimant to have the controversy settled by the appropriate tribunal, if he has complied with the statute." The inference is that if he had *not* complied with the statute, his said right was defeated.

In Meyer *v.* Hyman (7 L. D., 83), the adverse claim was filed within the sixty days of publication, and suit was brought within thirty days thereafter, and there was therefore no waiver of the adverse claim.

The same state of facts existed in the case of Ovens *v.* Stephens (2 L. D., 699), and it is said,—"The only question that can arise upon this

state of facts is whether the adverse claimants have complied with the terms of the statute above mentioned, so as to bring their case within it. In my opinion, the adverse claimants in this case have shown such compliance," that "in the manner pointed out by the statute has been raised an issue or 'controversy' between the contending parties" as to the land in dispute, and that the Department had no jurisdiction over that matter. The implication is that if the claimant had *not* complied with the statute, the Department would not have been ousted of its jurisdiction.

In Reed *v.* Hoyt (1 L. D., 603), the adverse claim was sworn to in Boston, and it is said by the Secretary,—"As it appears however, that suit was commenced on this claim within the required time, and is now pending, I am unwilling upon technical reasons to interpose objections to an adjudication of the claim by the appropriate tribunal." Here, as in all the other cases cited, the test of jurisdiction of the court is made to depend upon the fact that the suit was brought within the required time.

In the case of Bel *v.* Aitkin (Sickel's Mining Decisions, p. 196), Secretary Schurz says (p. 198),—

> I see nothing in the statute that requires an adverse claimant, who seeks to protect his rights in the courts, which have been opened to him, to establish to the satisfaction of this department that he has complied with the requirements of the mining law, to a further extent than of properly asserting his adverse claim.

In the case of Chambers *v.* Pitts (idem, p. 293) Secretary Chandler, after citing the statute above quoted, says (p. 297),

> The only question which can ever arise is whether the adverse claimant has complied with its terms, so as to bring his case within it. He must file his claim during the period of publication, showing its "nature, boundaries, and extent," and bring suit for a recovery of the possession of it within thirty days thereafter, or be deemed to have waived it.

In the case of Wood *v.* Hyde (idem, 189), where a second suit was not commenced within the time allowed, it was held, that "the case will be taken up for final action in its regular order as though no adverse claim had been filed."

In Morse *v.* Streeter (idem, 190), where a second suit was commenced after thirty days, it was decided that "the fact that Morse commenced another suit against the applicants for patent and other parties, long after the thirty days allowed in our decision had expired, will not be considered by this office."

It may be contended that because the local officers in fact received the adverse claim, and suit has actually been brought in court, that this Department has no authority to question its jurisdiction, but if the claim is not filed as required it is not filed at all in legal contemplation, and the wrongful action of the local officers in receiving the claim after the period of publication had expired cannot make the filing legal nor defeat the operation of the statute, or effect a repeal of its provisions,

neither can assent be yielded to the proposition that the jurisdiction of the court in which the suit is commenced cannot be questioned by this Department.

The boundary line between the jurisdiction of this Department and that of the courts under Section 2326 is clearly defined. The Department must decide whether or not "an adverse claim is filed during the period of publication", and if so filed, whether or not the claimant brought suit "within thirty days" thereafter, while it is the jurisdiction of the courts "to determine the question of the right of possession." If the adverse claim is not filed "during the period of publication," or suit not brought as required, the jurisdiction of the courts does not attach. And this Department is bound to presume that the courts will not violate the law and assume jurisdiction in such cases. The law "will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumunter rite et solemniter esse acta, donec probetur in contrarium.*" Bank of U. S *v.* Dandridge (12 Wheat., 64, 70).

If a court, however, should "overturn this presumption," and assume jurisdiction, without authority of law, any judgment it might render upon the merits of the controversy would be also without authority, and null and void.

The principles that would then be applicable are thus enunciated by the supreme court:

> Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decisions be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its orders are regarded as nullities. They are not voidable but simply void, and form no bar to a recovery sought even prior to a reversal in opposition to them. They constitute no justification and all persons concerned in executing such judgments or sentences are considered in law as trespassers. Elliot *v.* Peirsol, (1 Peters, 340).

Upon the request of this Department, a certificate of the clerk of the district court in and for San Miguel county, wherein said suit is pending, dated January 9, 1892, has been transmitted, showing the then status of said suit. It appears that no action has been taken therein since its commencement, April 21, 1886, except to continue the case from term to term,—a period of nearly six years. Such delay on the part of the adverse claimant cannot be regarded as a compliance with that provision of said section 2326, which makes it his duty to "prosecute the same with reasonable diligence," and provides that "a failure to do so shall be a waiver of his adverse claim." He has clearly not complied with the statute in this respect, and cannot comlain if his "failure" be now adjudged "a waiver of his adverse claim," within the contemplation of the statute.

From this review I am in no doubt that it is my duty to assume that "no adverse claim exists," and adjudge that the applicants are legally "entitled to a patent."

Your judgment is affirmed.

MINERAL LAND—TOWNSITE ENTRY—MINING CLAIM.

PEDERSON LODE *v.* BLACK HAWK TOWNSITE, ET AL.

In case of a patented townsite entry of land containing a valuable mineral deposit, known to exist prior to the townsite application, and subsequently entered by a mineral claimant, the Department, to obviate judicial proceedings, may accept a reconveyance of the land erroneously patented, and thus acquire jurisdiction to pass upon the validity of the mineral entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 16, 1892.

On October 8, 1883, Herman Pederson made mineral entry No. 2445, Central City, Colorado. It now appears that a part of the claim is embraced in the townsite entry of Black Hawk, upon which a patent was issued on January 17, 1874, and the balance of the tract included in the mineral entry is embraced in the townsite entry of Central City upon which patent issued July 10, 1876.

The mineral claimant has filed his corroborated affidavit, charging that the tract included in his mineral entry is valuable for its minerals, and that the existence of said valuable mineral deposit in the form of rock in place was known at the dates when the townsites applied for patents and that his mine, the said Pederson Lode, is capable of being profitably worked for its mineral product.

In addition a stipulation was filed signed by the officials of each of the townsites and by mineral claimant, wherein said townsites disclaim any interest in the tract included in the mineral entry, and waived all objections to the issuance of a patent therefor. It was also stipulated that a hearing should be held on April 17, 1889. The hearing was held, and the register and receiver found from the evidence submitted that the allegations of the mineral applicant were true.

On October 7, 1890, you considered the case and very properly held that the issuance of the patents deprived the land department of all jurisdiction over the premises. Inasmuch, however, as the entry was improperly allowed after the land was patented, you held it for cancellation.

An appeal has been taken from your judgment to this Department. Your judgment is correct as far as it goes, but it seems to me that the town authorities of Black Hawk and Central City should be given an opportunity to convey the tract included in the mineral entry to the government, and thus reinvest it with jurisdiction to pass upon the claim of Pederson. This conveyance should be absolute and should be accompanied by abstracts of title showing that the land has not been previously conveyed.

This course will bring about the same result that would probably be attained at the end of tedious litigation. Juniata Lode (13 L. D., 715). You will therefore allow the parties sufficient time within which the

mineral applicant may procure a reconveyance of the tract by the townsites to the United States, together with proper abstract of title showing that the tract has not been previously disposed of by said townsites.

If the conveyance be made you will readjudicate the claim of Pederson; if not, you will transmit the papers to this Department.

From the showing made at the hearing, there can be no doubt but that the mine in this case was known to exist and capable of being profitably worked for its product long before and at the dates upon which the townsites applied for their patents.

Your judgment is accordingly modified.

RAILROAD GRANT—CONFLICTING LIMITS—FORFEITURE.

OREGON AND CALIFORNIA R. R. CO.

The grant of the odd numbered sections within the over-lapping primary limits of the Northern Pacific, and Oregon and California roads, east of Portland, Oregon, was for the benefit of the former company under the act of July 2, 1864, and the forfeiture thereof by the act of September 29, 1890, is to the extent of the withdrawal made under the sixth section of the act of 1864; and under said act of forfeiture no rights of the Oregon and California road are recognized within said conflicting limits.

Secretary Noble to the Commissioner of the General Land Office, February 17, 1892.

I have considered the protest filed on behalf of the Oregon and California Railroad Company, against so much of the instructions issued by your office, under the forfeiture act of September 29, 1890 (26 Stat., 496), as relates to the lands falling within the conflict, or overlap, of the grants for the Northern Pacific and Oregon and California Railroad Companies, east of Portland, Oregon.

By the act of Congress approved July 2, 1864 (13 Stat., 365), a grant was made to the Northern Pacific Railroad Company, to aid in the construction of a railroad from a point on Lake Superior, in the State of Minnesota, or Wisconsin, westwardly by the most eligible route, to be determined by the company, on a line north of the 45th degree of latitude, to some point on Puget Sound, with a branch via the valley of the Columbia river, to some point at or near Portland, in the State of Oregon.

The joint resolution of May 31, 1870 (16 Stat., 378), authorized the company to locate and construct "its main line to some point on Puget Sound via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget Sound."

It will be seen that the effect of said resolution was to change the branch to main line, and *vice versa*, and also to provide for a land grant

for the new line—viz: a connecting piece between Portland, Oregon, and Puget Sound.

The location of the road, as shown upon the map of general route filed and accepted August 13, 1870, follows the Columbia river from Wallula, Washington, to a point on the north side of the river just opposite to Portland, Oregon. Between Wallula, Washington, and Portland, Oregon, the road was not constructed, and, hence, comes within the terms of the first section of the forfeiture act, before referred to, which provides:

> That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and conterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain: *Provided*, That this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted.

The protestant claims under the act of Congress approved July 25, 1866 (14 Stat., 239), which provided for the building of a road from Portland, Oregon, to the south boundary of Oregon to connect with the California and Oregon Railroad, and made a grant of "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad." It further provided:

> and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands designated as aforesaid shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers, as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections.

The Oregon and California Railroad Company filed a map of definite location of its road opposite this land October 29, 1869, which was accepted by this Department January 29, 1870, upon which withdrawal was ordered, and the road was duly built opposite these lands within the time limited by law for the construction of the road.

Under the rulings in force in the administration of land grants, in this Department, prior to 1878, it was held that priority of location gave priority of right to lands within conflicting limits, and a large number of tracts were patented to the Oregon and California Railroad Company, within the conflict now under consideration.

In your instructions to the register and receiver at Oregon City, Oregon, dated January 19, 1891 (not reported), under the forfeiture act, it was held by you that, east of Portland, Oregon, the grant for the Northern Pacific Railroad Company is under the act of July 2, 1864 (*supra*), which being prior to the act making the grant for the Oregon and California Railroad Company, it follows that the lands embraced within the withdrawal under the 6th section of the act of 1864 were excepted

from the later grant, and by the forfeiture act said lands were restored to the public domain.

The principal grounds on which the protest on behalf of the Oregon and California Railroad Company is based are as follows:

> The Northern Pacific received its authority of law to locate its main line to Portland by the joint resolution of 31st May, 1870, and filed a map of general route 13th August, 1870. It never made a definite location opposite this place where the conflict under discussion exists, and though in the general sense of the forfeiture act of 1890 that company had a grant of lands on that general route, that grant not having been definitely located, it could not now be held that it ever took effect by relation as of the date of the grant, whether the date of the grant be July 2, 1864, or May 31, 1870.

It is further claimed that the joint resolution of 1870 was substantially a new grant of lands within limits to the extent mentioned in the charter of the company, and excepted therefrom lands included in grants made subsequent to July 2, 1864, and prior to the definite location of the road.

As stated by the company, "The Northern Pacific Company was thus provided with indemnity therefor, if it lost lands because of the grant to the Oregon and California Company which Congress intended to recognize."

It is first necessary to determine which is the prior grant within the conflict referred to, for within conflicting limits neither priority of location nor priority of construction gives priority of right, but in each case the respective rights are determined as of the dates of the acts making the grants. Missouri, Kansas and Texas Railroad Company *v.* Kansas Pacific Railroad Company, 97 U. S., 491; St. Paul and Sioux City R. R. Co. *v.* Winona and St. Peter R. R. Co., 112 U. S. 720. It is true that in these cases the roads had been definitely located, but it would seem that the reasoning in said cases applies with equal force to the matter under consideration.

It will be remembered that the act of July 2, 1864 (*supra*), provided for the construction, by the Northern Pacific Railroad Company, of a branch line via the valley of the Columbia river to some point at or near Portland, Oregon.

In March, 1865, the president of said company filed in this Department a map of general route of the entire line of the road, showing a location down the Columbia river to a point opposite Portland, and thence north to Puget Sound, and asked that a withdrawal be ordered thereon, which was refused, the same being deemed insufficient.

As held by Attorney General Garland, in his opinion of January 17, 1888 (8 L. D., 14), "the map thus filed accomplished no good purpose for the company, but afforded the public a general knowledge of probable location of the prospective road."

This was the condition of affairs at the date of the passage of the act of 1866, making the grant for the Oregon and California Company.

The act of 1864 made the location of the grant therein provided for,

in this vicinity, reasonably certain, and the location of 1865 imparted additional information upon the subject.

The joint resolution of 1870 merely changed the name of this part of the line, by designating it as the main line, instead of the branch line, but the grant remained under the act of 1864, and the map of general route filed in August, 1870, being accepted by this Department, withdrew the lands under the 6th section of the act of 1864. The section provides:

> That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required in the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act.

It is true that the Northern Pacific Railroad was never definitely located opposite this land, but in view of the requirement in both acts prescribing that the road was to be built *via* the valley of the Columbia river, and of the provision in the sixth section of the act of 1864, that the general route shall be fixed, it would seem that the location of 1870 fixed this grant as against the location upon any other grant subsequent in date to the act of 1864.

In the forfeiture act special provision was made for the disposition of the forfeited lands lying south of the present terminal at Wallula, Washington, and north of what is known as the "Harrison line." When it is remembered that these lands are opposite that portion of the road not definitely located, it is apparent that Congress treated the lands embraced in the withdrawal on general route for this road as "granted lands," within the meaning of the forfeiture act.

As against the holding of your office, that a moiety of the lands within the conflict, or overlap, of the grants for the main and branch lines of the Northern Pacific Railroad, opposite the unconstructed portion of the main line, was forfeited by the act of September 29, 1890 (*supra*), the Northern Pacific Railroad Company urged that the main line had not been definitely located between Wallula and Portland.

In answer to this contention, it was held (11 L. D., 625),

> In the first place, there was a grant along said route, which lacked only action on the part of the company to consummate. Furthermore, a reading of the entire act leaves no room to doubt that a forfeiture along said stretch of the main line was contemplated, and the lands so forfeited are described in the first section of the act as 'granted lands.'

This applies with equal force in the present controversy, and having determined that the grant for the Northern Pacific Railroad Company, east of Portland, Oregon, is under the act of July 2, 1864 (*supra*), the forfeiture declared by the act of September 29, 1890 (*supra*), is to the extent of the withdrawal made under the 6th section of the act of 1864.

It but remains to consider the question as to whether the exception

clause in the act making the Northern Pacific grant included grants to aid in the construction of other roads, made subsequent to the passage of said act and prior to the definite location of the road.

This question was considered by the Supreme Court in the case of the St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (139 U. S., 1), and therein it was held,

> We are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself. Missouri, Kansas and Texas Railway *v.* Kansas Pacific Railway (97 U. S., 491, 498, 499).

It is clear, had the Northern Pacific Railroad been constructed through this conflict, its right would have been superior to that of the Oregon and California Railroad Company; hence, any claim the latter company may assert in and to these lands must rest upon the act declaring the forfeiture.

The 6th section of that act provides:

> That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided.

I can find no provision in the act under which the Oregon and California Railroad Company would be entitled to these lands, but, on the contrary, the 5th section of the act provides:

> That the rights of way and riparian rights heretofore attempted to be conveyed to the city of Portland, in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August eighth, eighteen hundred and eighty-six, and which are described as follows: A strip of land fifty feet in width, being twenty-five feet on each side of the center line of a water-pipe line, as the same is staked out and located, or as it shall be hereafter finally located according to the provisions of an act of the legislative assembly of the State of Oregon approved November twenty-fifth, eighteen hundred and eighty-five, providing for the means to supply the city of Portland with an abundance of good, pure, and wholesome water over and across the following described tracts of land: Sections nineteen and thirty-one in township one south, of range six east; sections twenty-five, thirty-one, thirty-three, and thirty-five, in township one south, of range five east; sections three and five in township two south, of range five east; section one in township two south, of range four east; sections twenty-three, twenty-five, and thirty-five in township one south, of range four east, of the Willamette meridian, in the State of Oregon, forfeited by this act, are hereby confirmed unto the said city of Portland, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore described strip of land, over and across the above-described sections for the purpose of constructing, maintaining, and repairing a water-pipe line aforesaid.

This pipe-line traverses the entire conflict, and had Congress recognized any rights in the Oregon and California Railroad Company, within the conflict, the above provision would not only have been unnecessary, but in conflict with the rights of said company.

From a review of the entire matter, I can see no error in your instructions, and the same will be carried into effect, if heretofore sus-

pended, and as to all lands patented to the Oregon and California Railroad Company, within the conflict, steps should be taken at once looking to their recovery as provided for in the act of March 3, 1887 (24 Stat., 556).

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT RIGHT.

SOUTHERN PACIFIC R. R. CO. *v.* STOCKS.

A settlement right existing at the date when the revocation of an indemnity withdrawal takes effect, excludes the land covered thereby from subsequent selection by the company.

Secretary Noble to the Commissioner of the General Land Office, February 17, 1892.

The lands involved in this controversy are the S½ of the SE¼, and the S½ of the SW¼ of Sec. 23, T. 3 N., R. 20 W., S. B. M., Los Angeles land district, California.

This tract is within the indemnity limits of the grant to the Southern Pacific Railroad Company, by the act of March 3, 1871, and was withdrawn from settlement and entry from and after April 3, 1871 when the map of its route was filed in your office.

On the application of Alexander Stocks to make homestead entry for the land, a hearing was ordered to determine the rights of the railroad company therein, which took place on the 21st of March, 1890, and on the 9th of June, 1890, the register and receiver united in a decision holding that the selection of these lands by the railroad company was invalid. Upon appeal to your office, that decision was affirmed by you on the 29th of July, 1890, and the company's selection of the tract applied for by Stocks was held for cancellation. The company brings the case to the Department, by appealing from your decision.

The withdrawal of these lands from pre-emption and settlement, was revoked on the 15th of August, 1887 (6 L. D., 93), such revocation applying to all lands within the indemnity limits, except such as were covered by company selections. The order of August 15, made the restored lands subject to settlement from its date, but barred a filing or entry until thirty days after restoration to the public domain by advertisement for thirty days. This time expired on the 7th of October, 1887.

On the 3d of October, 1887, the company selected all of section 23, by list number 25. Stocks testifies that he went to the local land office on the 7th of October, 1887, the day named in the notice advertised by the land office at Los Angeles, upon which filings would be received upon land within the indemnity limits of the Southern Pacific Railroad Company, and offered to file a homestead entry for said land, but on account of the great number of people then transacting business there, his application was not acted upon or considered until the 19th of November,

when it was returned to him by the local officers for the reason, as they said in their letter, "that your description is vague and unintelligible, and there is no such legal subdivision as you describe."

On the 30th of November, 1887, he again made application to make entry for the land, and the company was cited to show cause why his application should not be allowed.

At the hearing which followed, he testified that he made settlement upon the land in the summer of 1882, and had resided thereon continuously ever since that time; that his improvements were worth about one thousand dollars; that he was an alien when he settled upon the land, and was not naturalized until the 29th of April, 1886; that he understood it was railroad land when he settled upon it, and that it remained so until the order of withdrawal was revoked, and that he never had applied to the company to buy the land.

The railroad company protested against the allowance of Stocks' application to make homestead entry for the land, on the ground that it was withdrawn from pre-emption or homestead or other entry, on the 3d of April, 1871, and was so withdrawn at the time of his settlement, and that the whole of section 23 was selected by the company on the 3d of October, 1887, as indemnity for the whole of Sec. 35, in T. 1 N., R. 4 W., which was within the limits of its grant, but not vacant public lands on the date that said company filed its map of definite location, having been otherwise disposed of by the United States prior thereto.

In the case of the Atlantic and Pacific R. R. Co. (6 L. D., 84), which was a case to determine the rights of the company to indemnity lands which were withdrawn from pre-emption, and afterwards restored, Secretary Lamar concluded his decision by saying to Commissioner Sparks:

> If any lists of selections have been presented by the company with tender of fees, which have been rejected and not placed on file and noted on the records of the local office, you will, if said lists are in your office or in the local office, cause said selections to be noted on the record immediately; and if such lists are not in your office or the local office, you will advise the attorney of the company that they will be allowed to file in the local office such lists of selections, and the same will be noted on the records as of the date when first presented; provided the same be presented before the lands are opened to filings and entries.

In the case at bar, the list was presented, and the land selected, "before the lands were opened to filings and entries," but such selection was the *first* made by the company for the land, and therefore did not come within the provisions and exceptions mentioned in the foregoing extract from the decision of Secretary Lamar. That applied only to lands for which selections had been presented and *rejected*. In such cases, those lists might again be presented, and they would be placed on file and noted on the records of the office as of the date when first presented, provided such second presentation was made before the lands were opened to filings and entries. In other cases the selection by the

company must be made before the revocation of the order of withdrawal, in order to have precedence over a settlement existing at that date.

At the time Stocks made settlement upon the land in 1882, he was not a qualified pre-emptor, being an alien, neither was the land subject to settlement, having been withdrawn therefrom on the 3d of April, 1871. His settlement at that time, therefore, conferred no rights on him, neither did it interfere with any rights of the company. Titamore *v.* Southern Pacific Railroad Co. (10 L. D., 463). He remained an alien until April 29, 1886, and the land remained withdrawn from settlement until August 15, 1887, and from filing or entry until October 7, of that year. His residence upon the land, however, had been continuous from 1882, until it was restored to the public domain, and opened to settlement on the 15th of August, 1887, and he was a settler and resident thereon when the company made its selection on the 3d of October following.

So far as settlement upon the land was concerned, the order revoking the indemnity withdrawal made for the benefit of the company, took effect as soon as issued, and the Department has repeatedly held that while a settlement made on land included within an indemnity withdrawal is unavailing as against the right of selection on the part of the company, it will be protected as against a selection made by the company subsequent to such revocation and restoration. Central Pacific Railroad Co. *v.* Doll (8 L. D., 355); Lane *v.* Southern Pacific Railroad Co. (10 L. D., 454); Southern Pacific Railroad Co. *v.* Wasgatt (13 L. D., 145).

A new settler might, after August 15, 1887, and before the company made selection of the land, October 3, of that year, have made a settlement thereon, which could have ripened into a title, and the railroad company would acquire no right thereto as against such new settler, by subsequently including the same in a list of selections. Northern Pacific Railroad Co. *v.* Wadon (7 L. D., 182). It cannot be said that Stocks, an actual settler at the time the restoration took effect, could have less right to the land than such new settler. The decision appealed from is affirmed.

DESERT LAND ENTRY—CONTESTANT.

TAYLOR *v.* ROGERS.

Land that has been effectually reclaimed is not subject to desert land entry.

The questions raised by a contest may be properly considered, where the interest of the government is concerned, even though the contestant can acquire no personal benefit by an order of cancellation.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 17, 1892.

On March 13, 1890, Harvey L. Rogers made desert land entry No. 241 for the E. ½ of the SE. ¼, the SW. ¼ of the SE. ¼ and lot 4, section 25, T. 2 N., R. 37 E., Blackfoot, Idaho.

On April 28, 1890, final proof was made, and on May 6 following, upon payment, cash certificate issued.

On May 28, 1890, an affidavit of contest was filed in the local land office by Samuel F. Taylor, alleging—

> That said tract was not at date of entry nor at date of final proof, subject to entry under the desert act, in that a portion of said land had been for several years prior thereto appropriated and occupied by the Bingham County Agricultural Association, they having improvements thereon to the extent of $5,000, a portion of said land having also been reclaimed by said association prior to date of said entry.

A trial was had on the charges made in this affidavit on August 12, 1890, and on September 4, 1890, after considering the evidence submitted the register and receiver found that the land had been reclaimed before the entry of Rogers; they accordingly recommended the same for cancellation.

Rogers appealed from their ruling to you. A motion was made by contestant to dismiss the appeal. You dismissed the same for informality and considering the case, as *ex parte*, on April 10, 1891, you affirmed the finding of the local land officers and denied entryman the right of appeal because no proper appeal had been taken from the decision of the register and receiver.

He applied to this Department for an order under rules of practice 83, 84 and 85, directing you to transmit the record in the case to the Department. Acting upon this application on June 27, 1891, the order was granted, and in pursuance thereof the record is now before me. Taylor *v.* Rogers (12 L. D., 694

The evidence submitted at the trial has been considered. It is shown, I think, that the whole tract was desert in character in its original state. The County Fair Association fenced in what they thought was forty acres of the tract in question, but it now transpires that their enclosure includes only about thirty-eight acres. The tract thus occupied is described as the NE ¼ of the SE ¼ of section 25, T. 2 N., R. 37 E., Blackfoot, Idaho. Before Rogers' entry was made and, in fact, long before he gave notice that he intended to reclaim the land, the forty acres above described had been reclaimed by the Fair Association. It was not therefore subject to entry under the desert land law.

As to the balance of the tract in question, it is shown to have been desert in character, and it is not satisfactorily shown by the evidence that it has been reclaimed by Rogers. It is urged on his part that the contest of Taylor is collusive, and that it really is brought and maintained for the benefit of the Fair Association, whose president he is. The Association could not enter the land as such, even if the entry in question was canceled. The contest affidavit of Taylor merely charges that the land had been reclaimed at the time Rogers applied to reclaim it, and consequently it was not desert land. Whether this affidavit be treated as initiating a protest or a contest, it gives information to the government upon which action should be had. The charge goes to the

character of the land, and the United States has such an interest in the subject matter that it will consider the charges even though the contestant personally could have no interest in it. After the entry shall have been canceled, it is time then to decide under the land laws as to who is entitled to make an entry for it.

You will cancel the entry of Rogers, in so far as it includes the NE ¼ of the SE ¼ of section 25, T. 2 N., R. 37 E., the forty acres reclaimed by the Bingham County Agricultural Association. As to the remaining one hundred and twenty acres included in said entry you will require Rogers to furnish additional proof showing that the land has been reclaimed, the means of reclamation, the source of his water supply, and his ownership thereof. When this evidence is received you will re-adjudicate the case. The evidence thus called for should consist of the affidavits of reliable witnesses in addition to that of the entryman, describing particularly just how the land has been reclaimed and just what its present condition is.

Your judgment is therefore modified as above.

RAILROAD GRANT—MAP OF GENERAL ROUTE.

SIOUX CITY AND PACIFIC R. R. CO.

The filing of a map of general route is not a requirement attached to the grant made for the benefit of the Sioux City and Pacific line by section 17, act of July 2, 1864.

Secretary Noble to the Commissioner of the General Land Office, February 17, 1892.

On March 30, 1883, the register at Neligh, Nebraska, transmitted for the consideration of your office a list of lands, aggregating 2,232.09 acres, "selected" by the agent of the Sioux City and Pacific Railroad Company. This list was, by letter dated May 19, 1884, returned by your office, with instructions to the local officers "to admit or reject . . . . . as you find the lands subject to selection or not." By the same letter the local office was advised that under the decision of the supreme court in Van Wyck *v.* Knevals (106 U. S., 360), the right of the company under its grant did not attach until January 4, 1868, when the map showing the definite location of its line of road had been filed by the company with the Secretary of the Interior and accepted by him, and that "said date will govern in the adjustment of its claims hereafter."

On May 23, 1884, the local officers rejected the company's application to list the following tracts in the said land district, to wit: E. ½ NW. ¼ and W. ½ NE. ¼, Sec. 19, T. 22 N., R. 11 E.; lot 1, Sec. 3, T. 23 N., R. 11 E.; SW. ¼ of Sec. 15, T. 20 N., R. 11 E.; W. ½ SE. ¼ and E. ½ SW. ¼, Sec. 23, T. 19 N., R. 11 E.; W. ½ SW. ¼ and SE. ¼ SW. ¼, Sec. 23, T.

23 N., R. 11 E., the records of their office showing "that at the date that the right of the company attached the several tracts . . . . were covered by valid homestead entries."

On appeal by the company, your office sustained the action below, except so far as it related to Lot 1, Sec. 3, T. 23 N., and the SW. ¼ of Sec. 15, T. 20 N., R. 11 E.

Your office held that, as the homestead entry which had covered the said lot 1 had been canceled before the said definite location, its listing by the company should be allowed. The said SW. ¼ of Sec. 15, being involved in the case of John Cameron *et al. v.* M. L. Harney and Sioux City and Pacific Railroad Company, your office suspended action with regard to the company's said listing of the same.

The company appeals, and submits five specifications of error, which set out substantially that your office erred in holding that its right to lands within its grant attached January 4, 1868, and that its right did not attach to the said E. ½ of NW. ¼ and W. ½ NE. ¼ Sec. 19, T. 22 N., the W. ½ SE. ¼ and E. ½ SW. ¼ Sec. 23, T. 19 N., and the W. ½ SW. ¼ and SE. ¼ SW. ¼ Sec. 23, T. 23 N., R. 11 E. On December 24, 1864, the President designated the Sioux City and Pacific R. R. Co., in pursuance of authority contained in section 17 of the act of Congress approved July 2, 1864 (13 Stat., 356), which provides:

That so much of section fourteen of said act as relates to a branch from Sioux City be, and the same is hereby, amended so as to read as follows: That whenever a line of railroad shall be completed through the States of Iowa, or Minnesota, to Sioux City, such company, now organized or may hereafter be organized under the laws of Iowa, Minnesota, Dakota, or Nebraska, as the President of the United States, by its request, may designate or approve for that purpose, shall construct and operate a line of railroad and telegraph from Sioux City, upon the most direct and practicable route, to such a point on, and so as to connect with, the Iowa branch of the Union Pacific Railroad from Omaha, or the Union Pacific Railroad, as such company may select, and on the same terms and conditions as are provided in this act and the act to which this is an amendment, for the construction of the said Union and Pacific Railroad and telegraph line and branches; and said company shall complete the same at the rate of fifty miles per year: *Provided*, That said Union Pacific Railroad Company shall be, and is hereby, released from the construction of said branch. And said company constructing said branch shall not be entitled to receive in bonds an amount larger than the said Union Pacific Railroad Company would be entitled to receive if it had constructed the branch under this act and the act to which this is an amendment; but said company shall be entitled to receive alternate sections of land for ten miles in width on each side of the same along the whole length of said branch: *And provided, further*, That if a railroad should not be completed to Sioux City, across Iowa or Minnesota, within eighteen months from the date of this act, then said company designated by the President, as aforesaid, may commence, continue, and complete the construction of said branch as contemplated by the provisions of this act: *Provided, however*, That if the said company so designated by the President as aforesaid shall not complete the said branch from Sioux City to the Pacific Railroad within ten years from the passage of this act, then, and in that case, all of the railroad which shall have been constructed by said company shall be forfeited to, and become the property of the United States.

On June 27, 1865, said company filed in this Department a map showing the line of general route of its road, which was referred to your

office for appropriate action. Said map was returned to this Department, with office letter of August 10, 1865, without action.

On January 5, 1868, a map was filed by said company showing the line of definite location of the road, upon which the limits were adjusted and withdrawals ordered.

It is now claimed by the company that it was the duty of the Secretary of the Interior, under the 7th section of the act of July 1, 1862 (12 Stat., 489), to withdraw the lands on the filing of the map of general route by this company, and that thereafter the lands were not subject to the entries made.

It must be remembered that by the 14th section of the act of July 1, 1862 (*supra*), the Union Pacific Railroad Company was required to construct this road, "on the same terms and conditions as provided in this act for the construction of the Union Pacific Railroad."

The third section of that act provides for a grant of—

> Every alternate section of public lands designated by odd numbers to the amount of five alternate sections per mile on each side of said railroad on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of, by the United States, to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed.

Section 7 of the same act contains this provision:

> That within two years after the passage of this act, said company shall designate the general route of said road as near as may be, and shall file a map of the same in the Department of the Interior, whereupon, the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes, to be withdrawn from *pre-emption, private entry and sale;* and when any portion of said route shall be *finally located* the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named.

By section 5 of the act of July 2, 1864 (*supra*), the "time for designating the general route of said railroad and the filing the map of the same" was "extended one year from the time" designated in the act of 1862.

The 17th section of this act released the "said railroad," the Union Pacific Railroad, from building the road under consideration, and authorized the President to designate a company to construct a road from Sioux City on the most direct and practical route, to a point to be selected by said company on the Iowa branch of the Union Pacific Railroad from Omaha, or the Union Pacific Railroad, "whenever a line of railroad shall be completed through the States of Iowa and Minnesota to Sioux City," provided that if such railroad shall not be completed to Sioux City in eighteen months, the company to be named by the President might then commence.

It will be seen that after the passage of the act of 1864 (*supra*), there was no company in existence required to construct this branch, and

that, under the act, more than one year might have elapsed before the President designated a company to build the same.

The condition in the acts of 1862 and 1864 requiring the filing of maps of general route, referred to a particular company—viz: the Union Pacific Railroad Company, which, when released from the building of this branch, removed such condition therefrom.

As more than one year might have elapsed before the President designated the present company to build the road, it would be inconsistent to hold that the condition requiring the filing of a map of general route by said company within a year attached to the grant made for said road. The fact that such a map was filed within the year was merely a coincidence.

The failure on the part of this Department to order a withdrawal upon the filing of said map of general route must be construed as a concurrent construction by this Department that none was authorized, and an examination of the correspondence, relative to the road, fails to disclose any claim on the part of the company at the time for the benefits of such withdrawal.

The company therefore acquiesced in the construction of the Department, and numerous persons have, presumably, received patents for lands, which under a change must be held to have issued in violation of law.

From a careful review of the matter, I am of the opinion that the 17th section of the act of July 2, 1864 (*supra*), made a new grant, upon the same terms and conditions as contained in the grant for the Union Pacific Railroad Company, but that the requirement in the matter of the filing of a map of general route, upon which a withdrawal was to be ordered, was not a condition attached to said grant.

I am further strengthened in the position above taken from the fact that, as the road was short, but 101.77 miles long, and was required to be upon the most direct and practical route, there was no reason for the filing of such map.

I therefore hold that the entries were properly allowed, and being of record uncanceled at the date of the definite location of the road, they served to defeat the grant.

Your decision rejecting the attempted listing of the company is therefore affirmed.

PRE-EMPTION ENTRY—PAYMENT—RECEIVER.

ANDREW J. PRESTON.

The failure of a receiver to properly account for the purchase money can not defeat the right to a patent under the pre-emption law, where final proof is submitted in due form showing actual compliance with law, and full payment is made for the land.

The case of Talkington's Heirs *v.* Hempfling, 2 L. D., 46, overruled.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 18, 1892.

I have before me the appeal of Andrew J. Preston, transferee of John Marshall, from your decision of April 22, 1890, refusing him a hearing upon his petition to have the final proof of Marshall placed on record, and that he be allowed to make entry for the SE. ¼, Sec. 34, T. 115 N., R. 52 W., Watertown, South Dakota, land district.

The record in this case shows that on October 22, 1889, said Preston filed in the local land office at Watertown his petition duly verified, setting forth (1) That he is owner of said SE. ¼ of Sec. 34, and has been such owner since the 22d of March, 1886. (2) That Marshall settled on the said land May 25, 1882, by virtue of the provisions of the pre-emption law. (3) That John Marshall continued to reside upon said land until about January 18, 1883, when he submitted final proof which was accepted by the local officers. (4) That this proof was made upon due notice (setting out the notice in full). (5) He sets out the proof in full, and a copy of the acceptance and copy of the final certificate. (6) He gives a copy of the receiver's receipt in usual form signed by H. R. Pease, Receiver. (7) He represents that he actually paid $200 to the receiver. (8) That he sold and conveyed the land on October 20, 1884, to one J. Keator, and that J. Keator, on November 20, following, sold it to George C. Preston, who, in March, 1886, sold it to Andrew J. Preston. (9) That the proof so made by him is now in the United States land office at Watertown, South Dakota, and has never been entered of record on the books of the office. (10) He recapitulates the above statements. (11) That the $200 has never been returned to John Marshall or to him or to any person for them or either of them, but is still retained by the United States Land Office at Watertown, and he prays that said final proof of Marshall be entered on the records, and that the necessary action be taken by the local officers and your office to secure a patent for said land.

The local officers rejected the final proof, and denied the relief asked, because the present receiver had never received the money for the land, and there was no evidence that it had ever been paid to the government, and to allow the proof without the money being paid to present receiver, Randolph, would render him liable for the amount. They therefore made an order transmitting the entire case to your office for

such action and relief as your office might deem proper to grant. There is no date upon this decision, but the letter of transmittal bears date October 23, 1889.

On November 25, 1889, your office letter "G" to register and receiver at Watertown states that there is nothing in your office of record, showing any filing for the land by Marshall, but that John B. Waters had made homestead entry No. 16390 for the land May 21, 1887, and after recapitulating the matters set forth in the petition and decision of the local officers, it was stated that there was nothing of record in your office to show that final proof had been made or the money paid, and you held that inasmuch as Preston had a right to notice of the decision and of his right to appeal, you returned the case and gave directions that he be notified accordingly. This was done and Preston thereupon filed a motion in your office asking a reconsideration of the letter of November 25, 1889, and that you make an order for a hearing, that Waters be notified and that the petitioner be allowed to show the entire transaction, and that he had actually paid the purchase money, and that Waters had notice and knowledge of the existence in fact of said filing, final proof and final certificate, and that upon such hearing, Waters' entry be canceled, and the entry of Marshall be placed upon record.

On April 22, 1890, your office letter "G" recapitulates the matters herein set forth, and you state that the records of your office show that Marshall filed a declaratory statement for lots 2, 3 and 4 and NE. ¼ of SE. ¼ of said Sec. 34, on May 29, 1882, and that no application for amendment can be found. You refuse a hearing; refuse to modify or change your former letter and ruling, "leaving Marshall the right to contest the entry of Waters under rules 3 and 4 of practice." From this action, Preston appealed. All the papers, original filing, notice of proof, final proof, final certificate and receiver's receipt, are with the papers in the case. It is also set forth in the pleadings that an amendment to the filing was asked before final proof was offered, and it appears to have been made as the order for advertisement describes the land in controversy.

I do not find that the local officers erred in refusing to enter the final proof upon the records, without the money for the land, as it would certainly have created a liability against the receiver for the amount. The rejection of the final proof was a nullity, as it had already been accepted, and it does not appear that they passed upon the sufficiency of the proof, but simply refused to act upon it, and call this a "rejection." It was very properly sent to your office for your action, and taking the entire record of the case and the allegations of the verified petition, I am of opinion that the plaintiff was entitled to a hearing upon the case presented, not only so, but the due administration of the affairs of your office demanded a full inquiry into the entire transaction. To refuse it and relegate the plaintiff to his right to contest the

entry of Waters, is, in effect, a denial of his substantial rights, as it amounted to a dismissal of his petition.

If the facts stated in his petition are true, as therein set forth, the government cannot deny his right to the land. The final proof having been accepted, the final certificate issued, and the money paid, the entryman cannot be held responsible for the neglect or misfeasance of the government's agents. If Waters was shown the register's receipt, as alleged, and notified of the filing of Marshall and the offering of final proof, he, from that moment, acted at his peril.

Whether these things are true or not is a matter to be shown by proof at a hearing.

Your decision is therefore reversed, and you will remand the case to the local officers and direct a hearing to be be had upon due notice to the parties. Inasmuch as ex-receiver Pease is out of office and not a party to the case, he will be notified of the hearing and of the substance of the charge as to the payment of the purchase money, and will be allowed to appear and testify in the case.

Preston will be allowed to offer evidence to prove that Marshall, in fact, paid the purchase money to the receiver; this notwithstanding the rule in the case of Talkington's heirs *v.* Hempfling (2 L. D., 46) in which case it was said:

> It should be observed however that as the United States have not benefited by the former payment, the heirs cannot be credited therewith; it must be regarded as if it had never been made.

I have carefully considered this case in the light of the authorities at hand, including various decisions of the supreme court of the United States, and I am convinced that the said ruling upon this point is wrong.

Where an officer or agent of the government acts strictly within the scope and limit of his authority in pursuance of law and the instructions of his superiors, his act is binding upon the government. If, in the case at bar, all the preliminary steps had been regularly taken up to the payment of the price of the land, and the entryman then paid to the receiver the purchase money, it was within his jurisdiction to receive it, and upon such payment the receiver became the bailee of the government, responsible to it for the money, and any subsequent act of negligence on his part or malfeasance in office could not revoke or annul his prior legal act. If he fail to report the payment, or to pay over the money, the government must look to him and his bondsmen for it, not to the entryman. It seems almost useless to cite authorities on so plain a proposition.

In the case of the United States *v.* Moffat (112 U. S., 24) it was said:

> The government does not guarantee the integrity of its officers nor the validity of their acts. . . . They are but servants of the law and if they depart from its requirements the government is not bound.

This was a case where the register and receiver had fabricated the entire entry papers and secured patents for land in the name of fictitious persons, and by various transfers purely fraudulent they finally transferred the land to Moffat who was an actual person. On a petition to cancel the patents, it was claimed by counsel for Moffat that he was an innocent purchaser and that the government was bound by the acts of the register and receiver, and they cited the case of Polks Lessee *v.* Wendell *et al.* (5 Wheaton, 293) in support of their proposition. The court distinguished between the cases saying in reference to the latter case

> the irregularities were committed by the officers while in the exercise of their admitted jurisdiction, and can have no application to the acts of officers fabricating documents in the names of persons having no real existence.

It was in connection with the unlawful acts of the officers in the latter case that the language in regard to the government guaranteeing the integrity of its officers was used.

In the case of Polks Lessee the court say they

> have never expressed an inclination to let in inquiries into the fraud, irregularities, acts of negligence, or of ignorance, of the officers of the government prior to the issuing of the grant, but on the contrary have expressed the opinion that the government must bear the consequences.

It is claimed that "laches are not imputable to the government," but in the United States *v.* Baker (12 Wall. 359) it was held that where the agent of the government neglected to give notice of the non-payment of certain bills of exchange, the endorsers were discharged, and it is said "the United States had no right to recover, on account of the neglect in giving due notice, after the return of the bills."

It was said in case of McKnight *v.* United States (98 U. S., 179)

> with a few exceptions, growing out of considerations of public policy the rules of law which apply to the government and individuals are the same. There is not one law for the former and another for the latter.

The rule as I have stated it follows the well settled law of agency as between individuals, and I know of nothing in public policy that renders it inapplicable to the government and its agents. The decision in the case of Talkington's heirs *v.* Hempfling *supra* in so far as it is in conflict with the views herein expressed is overruled.

Upon the receipt of the report of the local officers upon the testimony taken at such hearing, your office will re-adjudicate the case.

The papers accompanying your letter of July 19, 1890, are herewith returned.

On November 5, 1891, you transmitted to the Department the papers in a contest case, Keator and Preston *v.* John B. Waters, involving the same land. These are also returned herewith.

REPAYMENT—OSAGE ENTRY.

ARTHUR GORHAM.

There is no authority for the repayment of interest on deferred payments under an Osage entry for a period during which such entry was suspended.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 19, 1892.

By letter dated December 18, 1890, the register at Larned, Kansas, transmitted an application by Arthur Gorham, Osage entryman and transferee of three other Osage entrymen, for the repayment of certain interest on the deferred payments made in completing said entries, under the act May 28, 1880 (21 Stat., 143).

By decision dated January 6, 1891, you denied this application for the reason that there was "no law" for its allowance.

Gorham appeals here.

It is set out in said appeal that the four entries described (which embraced one hundred and sixty acres each, in the Larned district) were made in the fall of 1883; that one-fourth of the purchase price, that is, $50, was then paid by each entryman; that Gorham bought the remaining entries and in 1884 tendered the balance of $150, due upon each; that the local officers refused such tender for the reason that by letter of January 7, 1884, you had suspended said entries; that Gorham was then informed at the local office that said payment could not be made until the entries were relieved of such suspension; that said entries were reinstated by your letter of November 12, 1890; that (in pursuance of your letter of December 10, 1890) Gorham made said payments December 18, 1890, together with interest thereon, and that he then protested against the charge of interest covering the periods during which said entries were suspended.

Gorham, accordingly, asks the return of the interest paid by him for said periods.

Whether or not said interest was properly charged need not be discussed; for conceding that it was erroneously collected, the land department could not repay it without sanction of law. There being, as you have properly found, no statutory provision for such repayment, the pending application must be denied for want of jurisdiction.

Your judgment is affirmed.

AGNEW *v.* MORTON'S HEIRS.

Motion for review of departmental decision rendered September 2, 1891, 13 L. D., 228, overruled February 19, 1892.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIORARI.

SELDEN *v.* MATHEWS ET AL.

The right to make a soldiers' additional homestead entry is personal and not assignable.

An application for certiorari will not be granted, where from the showing made it is apparent that the decision below would be affirmed if before the Department for consideration.

Secretary Noble to the Commissioner of the General Land Office, February 19, 1892.

I am in receipt of your letter of December 1, 1891, transmitting an application for certiorari, in the case of Harvey Selden *v.* A. Mathews and A. N. Edgington, involving lot 3, Sec. 17, T. 53 N., R. 32 W., Marquette land district, Michigan.

This tract is within the indemnity limits of the grant for the Marquette, Houghton and Ontonagon Railroad, and for that reason the application tendered by Abram Mathews, on December 17, 1884, to enter the land in dispute in the name of Edgington, under section 2306 of the Revised Statutes, was refused.

On August 16, 1887, Selden tendered an application to make homestead entry for this land, which was also rejected on account of the withdrawal for railroad purposes.

Upon the restoration of the indemnity lands, Selden tendered a second application, to-wit: on October 10, 1887, and by letter (F) of January 19, 1889, a hearing was ordered to determine the respective rights of the applicants.

I deem it unnecessary to recite the proceedings under the order of January 19, 1889, and subsequent orders; suffice it to say that the case was finally submitted upon an agreed statement of facts.

The local officers found in favor of Selden, and Mathews appealed in the name of Edgington.

In your decision of September 10, 1891 (C. L. O., Vol. 18, p. 134), it is stated:

> The parties submitted an agreed statement of facts in which it is stipulated and Mathews admits that the said Edgington, on July 17, 1882, executed and acknowledged a power of attorney to Mathews, and also another instrument in blank in which he authorized his attorney to sell and transfer any lands acquired under said certificate and "to receive for his own use and benefit any moneys or other property the proceeds of the sale of said lands or any interest therein, or arising from any contract in relation thereto, ... and I hereby release to my said attorney all claim to any of the proceeds of any such sale, ... agreeing that I will,

at any time, without further consideration, execute and deliver, or cause to be executed, acknowledged and delivered, such further issuance of title to said property as said attorney substitutes or assigns may require." Edgington also executed and signed two blank applications, on the usual form as used by the land office, for locating soldier's additional homestead certificate upon the payment to Edgington on said day of a money consideration by the firm of Sweet and Co., of Indianapolis, Indiana. These papers were delivered to said firm with the intention of transferring to them all the interest and claim he might have to any land located upon and entered by said certificate. The certificate and papers came into the hands of Mathews before any attempt was made to locate any lands under said certificate, and he was authorized to fill out said papers, locate the application and insert his name in the power of attorney, which he did. Edgington had no interest in this certificate when the same was filled out and located by Mathews, and has no interest in the entry or land in dispute. All the steps taken in the case have been under and by virtue of said powers of attorney. Said transfer and power of attorney authorized Mathews to prosecute or defend any suit against said land at his own cost.

Upon these facts you find:

That Mathews could only make entry as agent or attorney for the use and benefit of Edgington, and said right to enter an additional homestead being only a personal right, not subject to sale or transfer, Mathews acquired no rights by virtue of the transfer of said certificate to him. And the attempt on the part of Mathews to enter said land for his own use, in the name of Edgington, is without authority of law and cannot be allowed. Mathews cannot as transferee use the name of Edgington to perfect the entry or prosecute this suit for his own benefit, having acquired no property right by reason of his attempted purchase of said certificate and right to enter. Edgington parted with all the interest he had in said certificate and right to enter an additional homestead some time prior to the date Mathews made application to enter the land in dispute, and he has no interest whatever in this litigation. He is, therefore, neither a party in interest nor a proper party to this suit. He has no rights that will be jeopardized or interest that can be affected by any decision rendered in this case and therefore has no right of appeal.

You, however, suspended action under the decision for twenty days after notice, under Rules 83 to 85 of Practice, and upon report from the local officers of no action on the part of Edgington, the case was closed by your letter of October 29, 1891.

October 30, 1891, an appeal was filed from your decision of September 10, 1891, which was returned with your letter of November 6, 1891.

Thereupon the present petition was filed, and is based upon the following grounds:

1. The Hon. Commissioner's action amounts to a denial of the right of appeal, guaranteed by the Rules of Practice, from a final decision of the Hon. Commissioner involving the merits of the contest.

2. The action of the Hon. Commissioner is irregular and unauthorized by the rules of practice, in that it attempts to deny an appeal to the Hon. Secretary before such appeal is filed and while the time prescribed by the rules within which an appeal may be filed has not yet expired.

3. Because said action by the Commissioner is contrary to and unauthorized by any ruling or decision of your Department, and an assumed exercise of his discretion not authorized by the Rules of Practice.

Without discussing the questions of practice raised in this petition, it is sufficient to say that the statement of facts on which the Commis-

sioner's decision is based is not denied in said petition, nor is it urged that the decision is not in harmony with that of the Department based on a like state of facts, but it is the admitted purpose of the petitioner to secure the acceptance of the appeal,

In order that he may have the time which the condition of the docket affords in other cases, in which to present the case with that deliberation which shall bear due respect to the Department, and enable the subject to be treated in such manner and completeness as to justify a reconsideration of any adverse doctrines heretofore announced in other cases.

The facts given by the Commissioner clearly show that the certificate issued to Edgington was assigned, and that the present attempted location was not in his (Edgington's) interest, but for the benefit of the assignee.

The question as to the assignability of the right to make a soldier's additional homestead entry has been thoroughly considered by this Department, and it is held that such right is personal and not assignable. John M. Walker *et al.*, 7 L. D., 565, on review, 10 L. D., 354.

This position has been re-affirmed in numerous cases, and the question can not now be considered an open one; further, this question might have been argued upon the present petition, and sufficient time has already elapsed since the presentation of the petition for that purpose.

Were the case now before the Department, the decision of September 10, 1891, would be sustained, and for this reason the writ of certiorari is denied. Forney *v.* Union Pacific Railway Company (11 L. D., 430).

PRE-EMPTION—FINAL PROOF—LEAVE OF ABSENCE.

CHARLES H. WHITAKER.

A pre-emptor is not entitled to an extension of time within which to submit final proof on showing a failure of crops and applying for leave of absence from the land.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 19, 1892.

On the 17th of February, 1888, Charles H. Whitaker filed his pre-emption declaratory statement for the SW ¼ of Sec. 11, T. 105 N., R. 68 W., Chamberlain land district, South Dakota, alleging settlement three days prior to that date. The thirty-three months within which he must make final proof, would therefore expire on the 14th of November, 1890.

On the 11th of November, 1890, he made it appear to the register and receiver that in consequence of a total or partial failure of crops during that and the preceding year, he was unable to secure a support for himself and those dependent upon him, upon the land settled upon, and he applied for a leave of absence from the claim for one year from that date.

Leave was granted him by the local officers for six months, such term expiring on the 11th of May, 1891. These facts being reported to you, the local officers were informed that their action was without authority, and they were directed to notify Whitaker of the fact, and to inform him that you had revoked their six months leave of absence, and to advise him of his right of appeal from your action. An appeal from your decision in the case brings the subject before me for consideration.

Section 2265 Revised Statutes requires that every claimant under the pre-emption law shall make known his claim in writing to the register of the proper office, within three months from the time of his settlement, giving the designation of the tract and the time of settlement.

Section 2267 of the statutes provides that all claimants of pre-emption rights, under the two preceding sections, shall, when no shorter time is prescribed by law, make the proper proof and payment for the land claimed within thirty months after the date prescribed therein, for filing their declaratory notices has expired.

Under these provisions of the statutes, the time within which Whitaker must make known in writing to the register his claim to the land expired three months after his settlement, to wit, on the 14th of May, 1888, and his time for making proper proof and payment expired thirty months after that date, to wit, on the 14th of November, 1890.

The third section of the act of Congress of March 2, 1889 (25 Stat., 854) provides for granting to settlers a leave of absence from the claim, in the cases in said section mentioned, for a period not exceeding one year at any one time, without the forfeiture of any rights, but also provides that the time of such actual absence shall not be deducted from the actual residence required by law.

The act last cited makes no provisions for extending the time for making final proof, and only provides for temporary absences, as stated. In this respect it differs from the act of July 1, 1879 (21 Stat., 48) which afforded relief to settlers whose crops were injured or destroyed by grasshoppers, where the time for making proof and payment was extended one year, during which no adverse rights should attach, and the settler was allowed to resume and perfect his settlement as though no such absence had occurred. That act also allowed a still further extension of one year, after the expiration of the term of absence first provided for, if the circumstances, in your discretion, were such as to justify it.

The joint resolution of Congress of September 30, 1890 (26 Stat., 684), (11 L. D., 417), provided for extending the time of payment for one year to settlers on the public lands, in cases where there was a failure of crops for which the settler was in no wise responsible, but which rendered him unable to make the payment as required by law. This resolution, however, did not extend the time for making final proof.

Whitaker, in no way, attributes the failure of his crops to the rav-

ages of grasshoppers, and his case, therefore, does not come within the provisions of the act of July 1, 1879, which extended the time for making final proof, as well as the time for payment. His case is governed by the provision of section 2267 of the statutes, already cited, and by not making proof prior to or at the time the period therein mentioned expired, the land became subject to settlement by any other qualified pre-emptor. Under the circumstances of his case, however, he having been misled by the action of the local officers, should he return to the land before any adverse claim should attach, and make satisfactory final proof, his time for making payment might be extended in accordance with the acts and resolutions of Congress. Your instructions to the local officers as to your revocation of his leave of absence, and as to the effect of his remaining away from the land, are hereby approved.

FOREST RESERVATION—WITHDRAWAL—RESTORATION.

INSTRUCTIONS.

Where a reservation of forest lands has been created by the President, under section 24, act of March 3, 1891, no act of Congress is required to restore the land thus reserved to the public domain, but the same may be done by the President.

Secretary Noble to the Commissioner of the General Land Office, February 15, 1892.

I enclose herewith copy of an opinion of the Assistant Attorney-General, which I approve, in regard to the question "whether after the President, under act of March 3rd, 1891, has withdrawn lands from entry and made proclamation, it will require an act of Congress to restore them to the public domain."

OPINION.

Assistant Attorney General Shields to the Secretary of the Interior, February 13, 1892.

I am in receipt of your request for an expression of my opinion on the question "whether after the President under act of March 3, 1891 (26 Stat., 1095), has withdrawn lands from entry and made proclamation, it will require an act of Congress to restore them to the public domain?"

Section 24, of the act above cited, provides:

That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

The principle recognized in this section, and the authority conferred thereby, are simply in accordance with what has been recognized from

an early period in the history of the government; thus in the case of Grisar *v.* McDowell (6 Wallace, 381), the court says:

> It has been the practice of the President to order from time to time, as the exigencies 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 act in question is in the nature of a discretionary statute. The location, the extent and the time of creating the reservations, is left wholly within the discretion of the President. Both the language of the section, and the theory which prompted the legislation, seem to have recognized that said reservation might be temporary or permanent, as, in the discretion of the President, the good of the public service might demand; had it been otherwise, it is but reasonable to assume that Congress would have established the boundaries of tracts to be reserved, as was done in the case of the Yellowstone National Park, and the forest reservations in California, created by the acts of September 25, and October 1, 1890 (26 Stat., 478 and 650). Again this view is sustained by the consideration, that, as the result of erroneous information a tract of land not intended to be included, and the reservation of which would inflict great hardship on the public might be reserved by the President. To await action by Congress for the restoration of the land would result in much loss to the public, hence, in my opinion, Congress intended to recognize the principle that the President has the power to withdraw public lands, and to restore the same to the public domain, as the public good may demand.

It is true that it is held that the President can not restore lands formerly reserved for military purposes to the mass of the public domain, but this results from the act of June 12, 1858 (11 Stat., 336) which provides that lands in abandoned military reservations were not subject to sale or pre-emption under any of the laws of the United States; and this law was in force until July 5, 1884, when by a general act (23 Stat., 103) Congress provided that lands embraced in military reservations, which, in the opinion of the President, have become useless for such purposes, shall be disposed in a certain prescribed manner. In other words, the authority of the President over a certain portion of the public domain is limited by express statute, but does this limitation of his power extend to lands not embraced in the statutes above referred to?

In 1855, Associate Justice McLean rendered a decision in the case of United States *v.* Railroad Bridge Company (6 McLean 517). The decision bears the impress of careful consideration.

Rock Island had been reserved for military purposes in 1825. It was abandoned in 1836. It appears that the Secretary of War in 1838 declined to sell the land under the provisions of the act of March 3, 1819, (3 Stat., 520) which provided

> That the Secretary of War be, and he is hereby authorized, under the direction of the President of the United States, to cause to be sold such military sites, belonging to the United States, as may have been found, or become useless for military purposes.

The court said:

This law, from its language, was not intended to be a general regulation; but authorized the sale of military reserves, which, at that time, had become useless. It changed the settled mode of selling public lands, as it authorized the Secretary to sell for a price agreed on, which precludes, or at least renders unnecessary a sale by public auction, as the general law for the sale of the public lands required. This consideration, as well as the purport of the section, showed that it was not a general regulation, but was intended to operate upon military reservations which then existed and which were unnecessary.

The Attorney-General contends that the frequent interposition of Congress, especially authorizing the sale of military reservations, negatives the idea that they could be sold without statute authority.

When land has been purchased by the United States for military or other purposes, it is admitted the land can not be sold without the special authority of Congress. In such cases the purchase is made for a specific object, and being purchased with the consent of the State, under the federal constitution, there is a cession of juirsdiction as well as of property. Now, to transfer property so acquired and relinquish the jurisdiction, the authority of Congress is indispensable. And this shows the reason why the act of the 28th of April, 1828, was passed. It provides in the first section, "that in all cases where lands have been, or shall hereafter be conveyed to or for the United States, for forts, arsenals, dock yards, light houses, or any like purpose, etc., which shall not be used as necessary for the purpose, for which they were purchased or other authorized purposes, it shall be lawful for the President of the United States, to cause the same to be sold for the best price to be obtained, and to convey the same by grant or otherwise."

Now from this act it does not follow, that where the government reserves its own land from sale, for any public purpose, that a special act of Congress after its abandonment is necessary for the sale of it. The President, under a general power given him by the act of 1809, selected a part of the land on Rock Island for a military site, on which Fort Armstrong was built. And when he finds the place no longer useful as a military post, or for any other public purpose, he has a right to abandon it, and notify the land offices where the reservation was entered. The entry on the books of the land offices within which the reserved site is situated and the occupancy of the place by the government, are the only evidence of the reservation. And when this evidence is withdrawn, and the site is abandoned, the reserve falls back into the mass of the public lands subject to be sold under the general law.

This language is clear and explicit and seems to recognize the power of the President, through his subordinates, to restore *public* land which had been withdrawn for military or other purposes, under the acts of Congress, to the mass of the public domain. This decision was rendered prior to the passage of the act of June 12, 1858, *supra*, which did not embrace lands reserved under law for public purposes, other than military. Attorney General Bates rendered an opinion in 1862 (10 Ops., 359) in which he questioned the correctness of Justice McLean's opinion on the point now under consideration. This opinion was rendered after the passage of the act of June 12, 1858 *supra* which created a different status of the lands from that which existed at the time of the decision of Justice McLean; that is to say, by the act of 1858, Congress fixed by statute what before was an open question, viz., what disposition should be made of lands released from a military reservation, and

in effect, at least, declared that they could only be disposed of by act of Congress.

The power of the President to reserve lands for public purposes is too well established to require any discussion.

In the case of Grisar *v.* McDowell (*supra*) the court, on page 371, in discussing the action of the President, who, on November 5, 1850, made a reservation of certain lands on the bay of San Francisco, and on December 31, 1851, modified the order creating said reservation, used the following language:

> Nor is it of any consequence that the modification was made as asserted, to avoid a possible contest with an adverse claimant to a portion of the original reservation. The reason which may have governed the President can not affect the validity of his action. He possessed the same authority in 1851 to modify the reservation of 1850, by enlarging or reducing it, that he possessed to make the reservation in the first instance.

It logically follows that the authority to reduce the area of a reservation, implied the authority to restore the land thus released to the status it occupied prior to the reservation, unless that power is restricted by statute, as in the case of military reservations.

In the case of Bullard *v.* Des Moines and Fort Dodge Railroad (122 U. S., 167) the court in holding that the joint resolution of the two Houses of Congress of March 2, 1861 relinquishing to the State of Iowa certain lands along the Des Moines River above the mouth of Raccoon Fork, did not operate to terminate the withdrawal of all the lands on that river above Raccoon Fork from entry and pre-emption, which was originally made in 1850, and which was continued in force from that time, and of which renewed notice was given in May, 1860, say

> This is not the way in which a reservation from sale or pre-emption of public land is removed. In almost every instance, in which such a reservation is terminated, there has been a proclamation by the President that the lands are open for entry or sale, and in most instances they have first been offered for sale at public auction.

This language seems to imply that the President has the authority to restore lands which have been reserved by him for public purposes.

Secretary Lamar, in restoring to entry the lands which had been withdrawn as the indemnity limits of the Atlantic and Pacific Railroad Company, used this language

> On a full consideration of the whole subject I conclude that the withdrawal for indemnity purposes if permissible under the law was solely by virtue of executive authority, and may be revoked by the same authority; that such revocation would not be a violation of either law or equity (6 L. D., 91).

This language certainly implies the authority of the President to restore lands withdrawn for public purposes. The reasoning, and the conclusions to be drawn from the reasoning, in the cases I have cited, seem to establish the principle, that in the absence of express statutes limiting his authority, as in the case of military reservations, the President has the same authority to restore lands to the mass of the public domain that he has to reserve them for public uses.

Endlich, in his treatise on the Interpretation of Statutes, section 161, page 223, says:

> It is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right of property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible.

There are no words in the 24th section of the act of March 3, 1891, which can be construed as restricting the President in his control of the public domain, under the laws; on the contrary, the language of said section seems to be in keeping with the general principles which control in the administration of the public land system.

In reply to your inquiry, I would therefore say, that in my opinion, where a reservation has been created by the President, under section 24 of the act of March 3, 1891, no act of Congress is required to restore the land thus reserved to the public domain, but the same may be done by the President.

SCHOOL LAND—SETTLEMENT BEFORE SURVEY.

ROLAND BRAITHWAITE.

> The right of a bona fide settler, prior to survey, on land reserved for school purposes to perfect title thereto is not defeated by failure to establish actual residence on the land for a term of years after settlement and survey, where during such period valuable improvements are made and maintained and due residence established thereafter.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, Febuary 23, 1892.

On May 7, 1888, Roland Braithwaite made homestead entry of the E. ½ of the NW. ¼ and the E. ½ of the SW. ¼ of Sec. 16, T. 18 S., R. 2 E., Utah Territory, and commuted the same to cash (No. 3390) in December, 1888 (receiver's receipt dated January 2, 1888, evidently meant to be January 2, 1889, commutation proof having been made before the clerk of the county court for San Pete county, Utah, December 22, 1888).

On May 17, 1890, you held the entry for cancellation, because claimant "did not remove to the land until more than fifteen years after the survey, which is evidently not a reasonable time." From that judgment claimant brings this appeal.

The record discloses the following facts:

In 1865, he made water ditches on the land, and commenced its cultivation by grubbing and breaking. He thereafter cultivated the land every season, "except one year, about twenty years since, when I was prevented by Indian depredations." In April, 1888, he built a log house, eighteen by twenty feet, valued at $75. He then had two miles of ditching, worth $1000; out-houses, $25; sixty-five acres grubbed and plowed, worth $250—total value of improvements $1,350. He moved

with his family (wife and nine children) to the land in April, 1888, and thereafter continuously resided there.

The proof shows that he had five horses; nine head of cattle, and other stock on the place. He raised wheat, oats, and potatoes on the land every year (except one) since 1865, averaging thirty acres in cultivation each year. Prior to April, 1888, he lived in Manti, Utah, where he followed the shoemaker's trade.

The subdivisional lines of the township were not run until 1872, when, for the first time, he learned his improvements were on a school section. He says:

> The reason why I did not make entry sooner was because I was of the opinion that an entry could not be made on a school section in this territory, unless it was filed within three months from the date of filing the township plat in the local office; but was informed that I could make entry on the ground of occupancy, improving and cultivating the same prior to and at the time the additional survey was made.

The act of September 9, 1850 (9 Stat., 553), establishing a territorial government for Utah, in its 15th section, provides:

> That when the lands in the said Territory shall be surveyed under direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be and the same are hereby reserved for the purpose of being applied to schools in said Territory, and the States and Territories hereafter to be erected out of the same.

The act of February 26, 1859 (11 Stat., 385, now sections 2275 and 2276 of the Revised Statutes, and applicable alike to all the states and territories), provides that:

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

The act above quoted does not grant the sections therein specified, but only reserves them in contemplation of a future grant; the legal title thereto still remains in the United States.

If, prior to the survey in 1872, a settlement was made upon the land in question, "with a view to pre-emption," the land is subject to the claim of such settler, and indemnity therefor may be allowed on the consummation of the grant when the territory is admitted into the Union.

The sole question to be determined is, whether a *bona fide* settlement was made on the land prior to the survey with a view to its acquisition under the public land laws.

In Franklin *v.* Murch (10 L. D., 582), it is said: "An 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."

And in Bowman *v.* Davis (12 L. D., 415), referring to the Franklin-Murch case (*supra*), it is said:

> This definition of a settlement does not in my judgment require that such act should necessarily be done in connection with his residence on the land—such as commencing the erection of a house to reside in—but it may be any visible act tending to disclose a design to appropriate the land under and in accordance with the pre-emption laws. . . . . It is sufficient that some act is done denoting an intention to claim the land under the settlement laws, and, although such act has no immediate or direct relation to preparing or constructing a residence thereon, it will be presumed that it was done in furtherance of an intention to comply with the law—one of the requisites of which is that he shall make his home on the land.

While claimant did not make his actual residence on the land until twenty-three years after he performed his first acts of settlement, yet for about sixteen years of that period he was dissuaded from making his home thereon under a mistaken notion of his legal rights. The fact that he did build a good, comfortable house on the land, and the further fact that he removed his family and all his possessions thereto, and continuously thereafter maintained his residence upon the land, is sufficient to show his intentions in the first instance when he built the expensive ditches and grubbed out and improved the land. There is no protest or contest against this entry.

The school sections in Utah being only reserved from disposal in contemplation of a future grant, the title thereto still remains in the United States, and the matter in controversy is virtually between the United States and appellant. (Jane Hodgert, 1 L. D., 632.) Should the school sections be granted to the territory on its admission into the Union, the usual indemnity will doubtless be allowed the State for such sections or parts thereof as have been settled on prior to survey.

I think patent should issue upon the proof and payment already made. It is so ordered, and the decision appealed from is accordingly reversed.

PRE-EMPTION ENTRY - SECTION 2260 R. S.

NATHAN HALL.

The inhibitory provisions of the first clause of section 2260 R. S., do not extend to the ownership of a trustee.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 24, 1892.

On the 5th of August, 1885, Nathan Hall made pre-emption cash entry for the SW¼ of the SW¼ of Sec. 29, and the NW¼ of the SW¼ and the W½ of the NW¼ of Sec. 32, T. 3 S., R. 17 W., N. M., Las

Cruces land district, New Mexico, paid two hundred dollars, and received final certificate and receipt.

On the 25th of June, 1887, you held his said entry for cancellation, upon the report of a special agent of your office, such report being dated March 19, 1887. Upon his application, a hearing was ordered by you, to enable him to show cause why his said entry should not be canceled. The result of that hearing was a decision by the register, under date of September 27, 1888, in which he found that the charges of the special agent were not sustained by the evidence, that the contest should be dismissed, and patent issue for the land. This decision was concurred in by the receiver.

The case coming before you for consideration, you rendered a decision therein on the 16th of September, 1890, in which you concurred in the opinion of the local officers, that the government failed to establish its allegation of failure to comply with the law in the matter of residence on the land by the entryman, but held that an abstract of title of certain lands in Socorro county, New Mexico, introduced in evidence on the trial by the special agent of your office, showed that Hall and one H. M. Comer were joint owners of eight hundred acres of land in said county, at the date that Hall made proof for the land in question. You, therefore, held that he was within the inhibition of section 2260 of the United States Revised Statutes, reversed the decision of the local officers, and held his entry for cancellation. An appeal from your decision brings the case to the Department for consideration.

The evidence submitted upon the trial and the record before me shows that Hall was the agent for the Nathan Hall Cattle Company, and that he was furnished with money by said company with which to purchase the land in said abstract mentioned and described. Hall testified that he had no individual interest in the land conveyed by said deeds, but that he was simply acting in the transferring of the property as a trustee for a company; that the deeds were made in his absence, and he did not know that his name was inserted in the deeds as a grantee until after they were executed; that he intended to have the deeds made to H. M. Comer, the treasurer of the company, who sent him the money with which to purchase the land; that no part of said money was his own; that he never considered the property in any way belonging to him, and that he and Comer afterwards conveyed this property to the company. An affidavit by Comer is filed with the appeal, in which he says that neither Hall nor himself ever had any interest in the land other than that of trustee for the said Nathan Hall Cattle Company, and that the land had been conveyed by them to said company, it having furnished the money to make the purchases.

The testimony of Hall is much more clear and explicit on this question than is indicated in your decision, and leaves no doubt in my mind but that in the purchase of the eight hundred acres of land referred to, he was simply acting as the agent of the company of which he was a

trustee. In the case of James Aiken (1 L. D., 462), it was held that "a person who owns land in trust for others is not a proprietor of such land within the prohibition of the pre-emption act, and is not thereby disqualified from becoming a pre-emptor."

That doctrine applied to the case at bar clearly removes Hall from the inhibited classes mentioned in section 2260 of the Revised Statutes, and makes him a qualified pre-emptor.

An abstract of title of the land in question is filed with the papers in the case, which shows that the tract was conveyed by quitclaim deed on the 15th of November, 1886, to the Nathan Hall Cattle Company by Nathan Hall, and that the title to said land still remained in said company on the 11th of May, 1891, the date of the certificate attached to said abstract. Such land having been sold prior to the first of March, 1888, and after final entry, and no adverse claim having originated prior to final proof and payment, the counsel for Hall asks that the entry be confirmed under the provisions of section seven of the act of March 3, 1891, (26 Stat., 1095). I see no occasion, however, for invoking the confirmatory provisions of that act in this case, as the evidence clearly shows that the conclusion reached by the register and receiver was correct. The decision appealed from is reversed, and patent will issue for the land.

PRACTICE—APPEAL—SPECIFICATIONS OF ERROR—RULE 82.

HUTCHINS *v.* KOEN.

Rule 82 of Practice does not contemplate notice to the appellant, with opportunity for amendment, where proper specifications of error are not filed.

Amended specification of errors, filed out of time, can not be accepted on the ground that the delay was caused by the necessity of employing new counsel.

Secretary Noble to the Commissioner of the General Land Office, February 26, 1892.

This is a motion, made by the attorney for Charles I. Hutchins, for review of the departmental decision, of November 21, 1891, in the case of said Hutchins *v.* J. H. Koen, dismissing the appeal of said Hutchins from your decision of June 9, 1890, dismissing his protest against the final proof of Koen for the NW. ¼ of Sec. 11, T. 28, R. 44 W., Lamar, Colorado.

The motion sets out at length that the attorney he employed to represent him in the case, removed, while the appeal was pending before you, to a place that was inconvenient to consult and advise with him in the matter; that upon the receipt of your decision he hired another attorney, who knew nothing about the case; that on the motion of Hutchins, you returned the testimony and record in the case to the local officers for examination by the newly employed attorney; that fearing the testimony might not be returned in time, his attorney pre-

pared and filed the appeal which was held by the Department as insufficient,

> intending to amend and file a more definite assignment of errors, when more familiar with the testimony . . . . . That prior to the filing of said amended appeal, said Doughty was served with a copy of a motion to dismiss the original appeal herein, and thereupon changed his amended appeal so as to mention such motion therein, and to claim the benefits of rule of practice number 82. The benefits of said rule are also herein claimed, and counsel herewith asks that said amended appeal be made a part hereof, so far as it relates to said motion to dismiss.

It is claimed that as the appeal was filed in time, although it was defective, the party was entitled to notice and an opportunity to amend, to cure the defect.

Rule 82 provides:

> 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.

In practice it seems to me that this rule is properly applicable to such defects as may arise from the omission to serve notice of the appeal upon the opposite party in the manner required by the rules of practice, rather than to defects in the subject-matter of the appeal, such as relate to the specification of errors. As tending to sustain this view, see Rudolph Wurlitzer (6 L. D., 315).

The record in the case at bar can be fairly used as an illustration. The appeal was taken in time; the appeal proper was sufficient; for it contains all that is necessary to bring the case here on appeal; it was served upon the counsel for the opposite party in the time and manner required. In none of these matters was there any *defect.* Hence, there was no reason for you to consider the appeal defective, nor was there any defect within the contemplation of Rule 82, for you to notify the party to amend. The question as to the sufficiency of the specification was one to be determined by the Department, as well as all other questions arising upon the record, and not by you, while the appeal was pending here.

It may be further said that Rule 82, clearly relates to the *appeal* and under it a defective appeal may be amended within the time named. In no way can said rule be said to relate to the specification of errors. Rule 88 provides for the filing of a specification of errors, limits the time in which they shall be filed and clearly defines their character.

In the case of Stevens *v.* Robinson (4 L. D., 551), a question somewhat similar to the one now presented arose. In that case it was assumed that the appeal was taken in the time required, but at the time it was taken it contained no specification of errors as required, namely, "which shall clearly and concisely designate the errors" complained of. The appeal was taken in February, 1885, and thereafter in the following May a specification was filed; the appellee moved to dis-

miss the appeal, on the ground that the specification of errors was not filed as required by Rule 88. In that case it was further urged that an appeal "without assignment of errors is good unless the Commissioner notifies the party that it is defective." The same claim in effect is made by the motion under consideration in the case at bar. In that case, referring to this claim it was said:

> This position, I think, is untenable. Rule 82 was designed to prevent the transmittal to the Secretary of an appeal which the Commissioner considered defective; but Rule 90 limits both the Commissioner and the Secretary, and, if overlooked by the former, is none the less imperative upon the latter, at least in the presence of a motion to dismiss by the adverse party.

It is claimed that as no notice was given by you to the party that the original appeal was defective, that the amended specification should have been considered. Assuming that the case would come under Rule 88, the fact that the appellant was not notified of his default until too late to cure it, would not affect his status or the rights of the appellee. See Bundy *v.* Fremont Townsite (10 L. D., 595).

The failure of the General Land Office to return, under Rule 82 of practice, an appeal which is defective for want of notice, does not relieve the Department from the necessity of dismissing said appeal on account of such defect, if the time allowed for appeal and notice thereof has expired. Charles A. Parker (11 L. D., 375). Rule 88 limits the time within which a specification of errors shall be filed. There is no claim or pretence that it, or any of the rules of practice makes any provision for extending the time for their filing, or that there is any provision authorizing the filing of an amended specification, or specifying the time of such filing.

The amended specification filed in this case was filed long after the time fixed by Rule 88. It is claimed that the attorney who represented Hutchins at the trial before the local officers, had removed, and that such removal made it necessary for him to employ other counsel, who was not familiar with the facts in the case; that these facts ought to be sufficient to allow his newly employed counsel to file his amended specification of errors out of time. In my judgment they are not sufficient. To concede this claim would be to ignore and override the plain letter as well as the spirit of the rules of practice. As was well said by my predecessor, in the case of Ariel C. Harris, 6 L. D., 122:

> It may be that in some cases the enforcement of these rules will work hardship. But it is better to have an uniform rule on the subject, even though hardship be done in exceptional cases, than to have no rule at all, or, which is worse, to have a rule that is not enforced. Certainty in law is always to be aimed at. And though in particular cases clients may be injured through the laches of their attorneys, yet upon the whole, I am convinced that the best interests of the Department will be subserved by relying upon fixed and well known rules.

It is also claimed that after the filing of the amended appeal, that the attorneys for Koen recognized the same and filed their answer thereto and "by this answer, withdrew or superseded their motion to dismiss."

This is denied by counsel for Koen, and the record sustains the claim of Koen's counsel.

All of the questions presented by the motion were before the Department and considered when the decision was rendered dismissing the appeal. No sufficient reason is presented by the motion for any change or different conclusion than was reached in the decision sought to be reviewed.

The motion is denied.

DESERT LAND—DECLARATORY STATEMENT—LASSEN COUNTY ACT.

WARD *v.* MCCOLM.

A desert land declaratory statement, filed under the Lassen county act, by one who at the same time holds another tract under a previous filing, confers no right as against the subsequent homestead entry of another.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 27, 1892.

On March 13, 1891, you transmitted the appeal and other papers in the case of the protest of Frank G. Ward *v.* James D. McColm from your decision of September 15, 1890, also the protest of C. C. Hutchinson and B. H. Leavitt against the same party, involving the validity of McColm's entry for SE. ¼, Sec. 21, T. 29 N., R. 13 E., Susanville, California.

It appears that McColm made homestead entry of the land in question December 18, 1888, and on October 16, 1889, notice was published that final commutation proof on said entry would be made on November 22, 1889, before the local officers at Susanville.

On the day specified McColm appeared with his witnesses and made proof, as required by law, when at the same time appeared Frank G. Ward and entered protest against the acceptance of said proof on the ground that he was an applicant for said tract with other lands, containing six hundred and forty acres, under the Lassen county desert land act of March 3, 1875 (18 Stat., 497), he having filed his declaratory statement for the same October 13, 1888, about two months prior to the date of the homestead entry.

Also at the same time and place appeared the said Hutchinson and Leavitt and protested against the allowance of said proof on the ground that the land in question was owned, occupied, worked upon and "used for reservoir purposes," and that claimant knew it was so claimed and used at the date of making his homestead entry December 18, 1888.

In the first-mentioned protest the register sustained the protestant, and the receiver recommended that the same be dismissed and homestead proof be accepted; and in the latter protest the local officers join in recommending a dismissal of the same.

Ward appealed and you sustained the decision of the receiver as to the Ward protest, and also that of both local officers as to the reservoir claimants as aforesaid.

Ward again appealed.

In the case of Hutchinson and Leavitt the reservoir protestants, their claim is based upon certain water rights accruing under section 2339 (Revised Statutes) which provides that all patents granted or pre-emptions or homesteads allowed shall be subject to any vested and accrued water rights to ditches and reservoirs acquired under said section, hence, the fact that the land in question has been entered under the homestead law, any and all rights said protestants may have acquired under said section are protected thereby.

It appears that the protest of Ward turns upon the question whether the homestead entry is subject to the desert land filing of Ward, under said act of March 3, 1875. It is conceded that if the desert filing is legal, it, having been made prior to the homestead entry, would be superior to the homestead claim.

The records show that in 1880, Ward made a filing for six hundred and forty acres of desert land, but made no reclamation; that again in 1887 he made a filing for another six hundred and forty acre tract and has shown no reclamation and that on October 13, 1889, he made a third filing covering the tract in controversy.

All of these filings were for different tracts and all were made under the act of 1875, above referred to, known as the Lassen county desert land act.

Said act provided that any person who is a citizen of the United States, or who has declared his intention to become such may "file a declaration" with the proper local officers, "that he intends to reclaim a tract of desert land situate in said county, not exceeding one section, by conducting water upon the same, so as to reclaim all of said land within the period of two years thereafter."

The terms of the act are plain and unmistakable and authorize a person properly qualified to "file a declaration;" it does not mean that such party can file any number *ad libitum;* furthermore, the quantity is restricted to one section and thus the plain reading of the law would be one declaration not to exceed one section of land.

If a party may be allowed to file more than once under said law, then he may file an unlimited number of times and thus encumber the record of large bodies of land to the exclusion of *bona fide* settlers. By allowing parties to make such filings and as many as they choose, a few speculators could keep a large amount of land practically closed against home seekers, which would be, in my opinion, contrary to public policy.

The second filing of a declaratory statement by any pre-emptor who was unqualified at the date of his first filing, is illegal (Sec. 2261, Revised Statutes); Baldwin *v.* Stark (107 U. S., 263); but when the first filing, however, was illegal from any cause not the wilful act of the

party, he has the right to make a second and legal filing. Goist *v.* Bottum (5 L. D., 643).

Thus it will be seen that Congress and also the supreme court of the United States, have both recognized the bad policy of allowing a second declaratory statement where the first was in every respect legal, and I can see no just reason why the same principle should not maintain in the case at bar.

There is no record evidence showing that Ward was in any manner disqualified when he made his first filing in 1880, and therefore had the same principle laid down in pre-emption cases been applied to his case, his second filing would have been illegal.

The second filing expired May 21, 1889, but some seven months prior thereto, he made his third filing, covering the land in controversy, thus we have the fact that he for seven months after the date of his last filing and at the time the homestead entry was made, was holding a claim under the same law for twelve hundred and eighty acres, whereas the law expressly provided for a filing not to exceed one section of land.

Even admitting that under the act of 1875 he had the right to make more than one filing, it cannot in justice be held that he had the right to make a second or a third filing, until the preceding one had expired.

Leaving the first filing entirely out of the question, there is no evidence to show that the second was not a legal filing; this being the case he had no authority to make a third during the life time of the second.

With this view of the case I am of the opinion that the protests should be dismissed. Your decision is accordingly affirmed and the papers returned.

Your attention, however, is directed to the act of October 2, 1888, and subsequent legislation with respect to arid lands, with the view to ascertaining whether this homestead entry is in conflict therewith.

HOMESTEAD ENTRY—APPROXIMATION.

JOSEPH C. HERRICK.

The rule of approximation will not be enforced where it operates to deprive the entryman of his improvements, and the difference between the excess and the deficiency is but slight.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 27, 1892.

Joseph C. Herrick made homestead entry No. 23848 for the E ½ of SW ¼ and E ½ NW ¼ of section 5, T. 104 N., R. 66 W., Mitchell, South Dakota.

He offered final proof and received a final receipt for the purchase money of the land on January 24, 1888.

The tract contains 180.45 acres and covers parts of two quarter-sections.

On November 19, 1888, you required him to approximate his entry to one hundred and sixty acres, and to elect which legal subdivision he would relinquish. Notice of your requirement failed to reach claimant, and on May 14, 1890, the register and receiver were directed to issue a new notice. They issued the new notice, but erroneously addressed it to John instead of Joseph Herrick, and described other land than that in question. This notice was received, but no attention was paid to it because it was believed to be intended for some other party.

On July 10, 1890, his entry was canceled. From this decision he attempted to appeal to this Department, but was not allowed to do so. He applied for a writ of certiorari, which was granted on March 7, 1891.

His entry contains 180.45 acres. Each one of the three subdivisions, numbering from south to north, contains forty acres, and the subdivision immediately north of these contains 60.45 acres. In order to leave the entry in compact form, if he is to comply with your order, he must either relinquish the forty acres on the south end of the tract, or the 60.45 acres on the north end thereof.

The record shows that he, together with his family has lived on the land continuously since 1883, and that he cultivates each year more than seventy acres of it. All of his improvements, except about fifty-two acres of cultivated land, are on the forty acres furthest south. These improvements are worth from $1,200 to $1,600. To require him to relinquish this tract would be a great sacrifice to him, but if done, his entry would contain 140.45 acres, or 19.55 acres less than one hundred and sixty; whereas now he has an excess of 20.45 acres. If he should be forced to relinquish the subdivision furthest north, containing 60.45 acres, his entry would contain 120 acres, or 40 acres less than one hundred and sixty acres.

The rule bearing upon the question involved in this case is found in the case of Henry P. Sayles (2 L. D., 88), wherein it was held,—"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 when the excess is greater than the deficiency."

This doctrine has been followed in the cases of J. B. Burns (7 L. D., 20); Benjamin L. Wilson (10 L. D., 524); James Hanna (12 L. D., 356),

It was held, however, in the case of Vernon B. Matthews (8 L. D., 79), (syllabus) —"Where the difference between the excess, and the deficiency that would be produced by approximation is but slight, the entry may be allowed to stand as made."

In the case at bar the tract is only eighty rods wide, so that, as we have seen, the excess must be taken from either the north or south end. If the subdivision on the north be relinquished, he would only have one hundred and twenty acres left, a deficiency of forty acres, which would be much greater than the present excess. If the subdivision on the

south, upon which E ck has placed more than $1,200 worth of improvements, be relinquished he would have left 140.45 acres, a deficiency of 19.55 acres. 140.45 acres is only a fractional part of one acre nearer one hundred and sixty than the 180.45 now embraced in this entry.

In the case of Vernon B. Matthews (*supra*), the entry embraced 180.27 acres. In that case it was said,

> It will be observed that if one of said forty acres subdivisions be relinquished by claimant, the deficiency in his entry will be 19.73 acres, which is only fifty-four one-hundredths of an acre less than the present excess of area embraced in said entry.

It was further said in that case, that—

> I do not think that the spirit of the rule of approximation, heretofore uniformly applied to entries covering excessive areas, is violated in allowing this entry, as originally made, to stand.

There can be no equity or justice in rigidly applying the rule so as to require the claimant in this case, at this late day, to relinquish the forty acres of his entry upon which his buildings are situated, and thereby suffer great loss, simply because of the difference against him under a strict application of the rule, of only a fractional part of one acre of land.

I therefore reverse your decision, and direct that a patent issue on the entry in question.

RELINQUISHMENT—MORTGAGEE.

HARLAN P. ALLEN.

An entryman will not be permitted, through relinquishment, to defeat the right of a mortgagee.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 1, 1892.

I am in receipt of your letter of February 9, 1892, returning departmental decision of January 18, 1892, 14 L. D., 82, upon the appeal of Harlan P. Allen from your decision of August 18, 1890, holding for cancellation his timber-culture entry No. 2234 (Marshall series), covering the S. ½ of the NE. ¼ and the N. ½ of the SE. ¼, Sec. 4, T. 118 N., R. 45 W., Minnesota, for conflict with the prior entry by Elwin Jenks for the same land.

With your letter are a number of papers and copies of letters written by you, which you state were, through inadvertence, not with the record when before transmitted upon Allen's appeal.

It now appears that on April 1, 1878, Jenks made timber culture entry No. 1077 (Benson series), for this land, upon which he made proof and final certificate No. 101 (Benson series) issued January 15, 1887.

By letter of May 5, 1887, the proof upon which said certificate issued

was rejected, because not accompanied with cross-examination, as required by circulars of December 15, 1885, and September 23, 1886.

On December 2, 1889, Jenks's relinquishment was filed with the local officers, who thereupon canceled his entry, and permitted Allen's entry, as aforesaid.

As said relinquishment was unaccompanied by the duplicate final receipt, or certificate of non-alienation, from the register of deeds for the county in which the land is located, you refused to accept the same, and directed the local officers to re-instate the entry by Jenks upon their records.

In a letter from Messrs. Knuppe and Hartsinck, general agents for the "Netherlands American Land Company," dated December 26, 1889, it was represented that Jenks had mortgaged the land in question with that company on February 1, 1887, after the issue of final certificate, for $1,000; that he refused to complete the proof, unless he was paid $500 therefor by the mortgagees, and it was therefore asked that the proof already made be accepted and that patent issue thereon.

You thereupon advised the local officers, in letter dated January 15, 1890, that under the circumstances the requirement of May 5, 1887, will be dispensed with, and the case will be considered on the proof already submitted.

By your letter of January 20, 1890, the case was suspended "for want of proof of citizenship."

In all this correspondence, due, perhaps, to the delay in posting, no mention is made of the fact that on December 2, 1889, Allen was permitted to make entry of this land, but by letter of August 18, 1890, said entry was considered and held for cancellation for conflict with the entry of Jenks, from which action he appealed, alleging that said entry had been relinquished, and was therefore no bar to his (Allen's) entry.

This appeal was considered in departmental decision of January 18, 1892 (14 L. D., 82), upon an incomplete record, and, as there was no evidence before this Department of fraud on the part of Jenks, it was held: "I can see no objection to allowing the relinquishment and the cancellation of Jenks' entry. It is so ordered. This will leave Mr. Allen's entry to stand subject to future compliance with the timber-culture act."

Upon the facts as now presented, it is apparent that Jenks, by his relinquishment, is seeking to defeat the right of his mortgagee, which, under the ruling in the case of Addison W. Hastie (8 L. D., 618), he will not be permitted to do.

In view thereof, departmental decision of January 18, 1892 (*supra*), is recalled and revoked; your action in reinstating Jenks's entry and also in canceling that by Allen is affirmed, and the record is herewith returned for the adjudication of the mortgagees' rights under Jenks's entry.

SCHOOL LANDS—INDEMNITY SELECTIONS.

OKLAHOMA TERRITORY.

Indemnity selections, in lieu of sections reserved for school purposes in Oklahoma, may be made from any unappropriated, surveyed, non-mineral public lands within said Territory, for losses occasioned by Indian allotments, settlements prior to survey, fractional surveys, or from any natural cause whatever.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 1, 1892.

I am in receipt of your letter "K," of January 21, 1892, in relation to the selection of indemnity school land in the Territory of Oklahoma. You in substance ask to be instructed as to whether such indemnity may be selected in that part of Oklahoma which was formerly a part of the Indian Territory.

Accompanying your letter, is one addressed to the Acting Governor of Oklahoma, which you submit for my approval or modification. In this letter, assuming that the right to thus make selections exists, you say:

> There are three general classes of deficiencies in school lands in Oklahoma, to wit:
> 1. Land allotted to Indians.
> 2. Lands in the public land strip, entered by homesteaders who show actual settlement before survey.
> 3. Where sections sixteen and thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. Such deficiencies may be used as the basis for selection of lands in any land district in the Territory, etc.

In the act of March 2, 1889, providing for the settlement of lands in what is known as old Oklahoma, and in the act of May 2, 1890, creating the present territory of Oklahoma, Congress has been careful to reserve for the benefit of public schools in said Territory, the sixteenth and thirty-sixth sections, the same legal subdivisions of land which have heretofore been reserved for the use of public schools in the territories which have been created out of the public domain.

The lands embraced in the two acts above cited, forming the Territory of Oklahoma, are a part of the public domain, subject to disposal, it is true, under special acts, but still a part of the public domain under the control of Congress, and free from the burden of any trust for the Indians from whom the lands were obtained, and such was their status at the date of the passage of the act of February 28, 1891 (26 Stat., 796), entitled "An act to amend sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes of the United States providing for the selection of lands for educational purposes in lieu of those appropriated for other purposes," which provides in section 2275, that "other lands of equal acreage are also hereby appropriated and granted, and may be selected by said

State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military or other reservation, or are otherwise disposed of by the United States." Section 2276 provides, "that the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur."

Admitting that the lands in Oklahoma are subject to disposal under special laws, it would be illogical and inconsistent to assume that Congress would make the usual grant of school lands in place, out of said lands, but neglect to provide for indemnity when the grant in place should fail. Such a course, on the part of Congress, can not be assumed, in the absence of express words to that effect.

The act of February 28, 1891, *supra*, is general in its terms; there are no words indicating that it was the intention to exclude the Territory of Oklahoma from the benefits of its provisions. An allotment to an Indian of a tract of land is the disposal of the same by the United States, and by the terms of the act of February 28, 1891, other lands are granted in lieu thereof and may be selected from "any unappropriated surveyed public lands, nonmineral in character, within" said Territory of Oklahoma; and like selections may be made in lieu of lands settled upon prior to survey, and also where sections sixteen and thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

You are, therefore, instructed to take the necessary steps to carry into effect the views herein expressed, in the adjustment of the school grant in the Territory of Oklahoma.

BENNETT *v.* CRAVENS.

Motion for review of departmental decision rendered June 22, 1891, 12 L. D., 647, overruled by Secretary Noble, March 4, 1892.

PRACTICE—MOTION FOR REHEARING—LOCAL OFFICE.

GOFF *v.* GIBERT.

An application for rehearing made while the case is before the local office should be duly considered by the register and receiver and decision rendered thereon.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 5, 1892.

I have considered the appeal of Hippolite Gibert, from the decision of your office dated November 19, 1890, in the contest case of Frank S. Goff against said Gibert, upon his homestead entry No. 4173 of the S

½ of the NW ¼, and the NE ¼ of the NW ¼ of Section 13, and the SE ¼ of the NE ¼ of Section 14, T. 4 S., R. 15 E., made June 18, 1884, at the Stockton land office, in the State of California.

The record shows that a hearing was duly ordered by the local officers upon the contest initiated by said Goff, and that both parties appeared in person and by counsel. The plaintiff submitted his testimony, but the defendant declined to submit any evidence, and moved to dismiss the contest on the ground that the plaintiff had failed to make out a case. This motion was denied, and the local officers found that the defendant had not complied with the requirements of the homestead law; that his "actual residence since the date of his entry has been at Merced Falls, ten miles distant from the land," and recommended that said entry should be canceled. Afterwards the defendant filed a motion for rehearing upon the ground, that he is deaf and did not know that his counsel was going to stand upon the evidence submitted by the plaintiff, and that he could, if allowed, prove that he had complied with the requirements of the homestead law.

Instead of returning the case to the register and receiver with the direction that they pass upon the motion which was filed with them and "to save time and useless correspondence," you took up and considered the motion for rehearing, and declined to entertain it on the ground that a mistake in the judgment of an attorney is not a ground for rehearing. While it is the desire of the department to expedite business and not unnecessarily consume the time of the local office, or that of your own, yet it strikes me that where the register and receiver failed to pass upon a question which is submitted for their judgment, and to which the party desiring the same is entitled, they shall not evade the consideration thereof, by forwarding it for your judicial action.

In this case, the claim is, that the attorney for Mr. Gibert exercised bad judgment in submitting the case upon the testimony of the plaintiff, and that if he is given an opportunity to present his testimony, that it will very materially change the status of the parties. While it is true as you suggest, that a party is ordinarily bound by the management of his case by his attorney, yet I take it, that the department will not sacrifice the rights of a party upon an error in the judgment of the attorney, where his client in apt time complains of his conduct and asks an opportunity for a full, fair investigation of the facts in issue. This, as I understand it, is what Mr. Gibert desires, and presented this question at an early date for the consideration of the register and receiver, who, for some reason, failed to pass upon the same. It is quite possible, had they considered the matter, that they might at that time have given Mr. Gibert an opportunity to be heard by the submission of his evidence as to his rights. If he has a claim, it is my judgment that he should not be arbitrarily sacrificed, and while I do not believe that it is good policy to indiscriminately encourage clients to make charges of this character against the judgment of their attorneys, and while it is

possibly true that in this case Mr. Gibert may have no just cause for complaint, yet I think he is entitled to a judicial consideration of the local office upon that question uninfluenced by any judgment of their superior officer, and for that purpose, the record should be returned to them with the order that they pass upon the motion for a rehearing upon its merits, without any reference to the action which may have heretofore been had thereon, and report their action in the premises to you, in order that the case may be regularly adjudicated in accordance with law and the rule of the department. It is so ordered.

SWAMP LANDS—RAILROAD GRANT—CERTIFICATION.

STATE OF ILLINOIS.

The alternate sections within the primary limits of the grant of September 20, 1850, were reserved for the purpose of reimbursing the government for said railroad grant, and did not pass under the swamp grant.

The inadvertent certification of lands excepted from the swamp grant does not deprive the Department of jurisdiction to correct the error.

Acting Secretary Chandler to the Commissioner of the General Land Office, March 7, 1892.

The State of Illinois, by its agent, Hon. Isaac R. Hitt, has appealed from your decision of June 5, 1889, declining to issue patents to the following described tracts of land, claimed to have inured to the State under the act of September 28, 1850 (9 Stat., 519):

SE. ¼ of NW. ¼ of Sec. 13, T. 5 N., R. 1 W., 3d M.;
SW. ¼ of SW. ¼ of Sec. 13, " " " " "
NW. ¼ of NE. ¼ of Sec. 23, " " " " "
NE. ¼ of NW. ¼ of Sec. 19, " 5 N., R. 1 E., "
NE. ¼ of NW. ¼ of Sec. 19, " 9 " " 2 E., "
NE. ¼ of NE. ¼ of Sec. 29, " 4 " " 4 E., "

In the decision appealed from you say:

It appears that said tracts are within the six miles 'granted' limits of the lands granted to the States of Illinois, Mississippi, and Alabama, for railroad purposes, by act of Congress approved September 20, 1850 (9 Stat., 466), being the alternate sections reserved for the purpose of reimbursing the government for said railroad grant, and therefore did not pass to the State of Illinois under the swamp land grant.

I think the cases cited by you clearly sustain your position, that the tracts in question did not pass to the State under the swamp land act. But it is insisted that, because "the tracts in question had been certified to the State and affirmed by the Secretary of the Interior, June 5, 1866," that patent should now issue.

Although these tracts were inadvertently embraced in a list approved by the Secretary of the Interior, yet, as said in the case of the State of Oregon (5 L. D., 34), "such approval and certification, however, will

not conclude the government, if it be shown that it was obtained by fraud or mistake."

The fact that the tracts in question did not pass to the State under the swamp land act, is sufficient to show that their approval to the State was inadvertently made, and, in such case, the certification may be revoked at any time prior to patent.

The reservation of these lands by the act of September 20, 1850, was of such a character as amounted to a disposition for other purposes. State of Michigan, 8 L. D., 308.

The approval of the list containing these tracts being a mere oversight or inadvertence, the Department has not lost its jurisdiction to correct that error.

Finding no sufficient grounds for disturbing the judgment appealed from, the same is affirmed.

PRACTICE—APPEAL—RULE 48—PRE-EMPTION SETTLEMENT.

HAZARD *v.* SWAIN.

In the absence of appeal the decision of the local office is final as to the facts and can not be disturbed by the Commissioner except under the provisions of rule 48 of Practice.

A pre-emption settler on land reserved for railroad purposes is entitled to three months from the date of the restoration of the land to the public domain within which to file declaratory statement and protect his rights as against a subsequent settler.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 8, 1892.

On the 26th of May, 1886, Miss Alice Swain filed her pre-emption declaratory statement in the local land office at San Francisco, California, for the S½ of the SE¼ of Sec. 13, T. 28 S., R. 10 E., M. D. M., alleging settlement on the 14th of November, 1885, and on the 9th of November, 1886, notice was published by the register, that she would make final proof before the superior judge of San Luis Obispo county, California, at San Luis Obispo, on the 23d of December, 1886.

At the time and place named in said notice, she appeared with her witnesses, and Robert D. Hazard also appeared, as an adverse claimant for the land, alleging that he filed his pre-emption declaratory statement for the tract on the 24th of May, 1886, and made settlement thereon on the 12th of April of that year.

Testimony was submitted by both parties in support of their respective claims, and after considering the same, the register and receiver, on the 5th of September, 1888, rendered their joint report and decision in the case, in which they recommended that Miss Swain be allowed to make final entry for the land, and that the declaratory statement of Hazard be canceled.

From this decision no appeal was taken by Hazard, but when the case came before you for consideration, you reversed the same under rule 48 of the Rules of Practice, stating that you did so "for the reason that it is, in my opinion, contrary to the law, and not in consonance with the facts shown by the testimony." Your decision bears date May 23, 1890, and an appeal therefrom brings the case to the Department for consideration.

This Department held in the case of Farris *v.* Mitchell (11 L. D., 300), that "in the absence of an appeal a decision of the local office is final as to the facts, and will not be disturbed by the Commissioner except under the provisiens of rule 48 of practice." Rule 48 of practice reads as follows:

> In case of a failure to appeal from the decision of the local officers, their decision will be considered final as to the facts in the case and will be disturbed by the Commissioner only as follows:
>
> 1. Where fraud or gross irregularity is suggested on the face of the papers.
> 2. Where the decision is contrary to existing laws or regulations.
> 3. In event of disagreeing decisions by the local officers.
> 4. Where it is not shown that the party against whom the decision was rendered was duly notified of the decision and of his right of appeal.

You do not concur with the local officers as to certain *facts* found by them, but the rule quoted, and the decision cited, hold that their decision is "final as to the facts in the case," unless an appeal is taken therefrom. As already stated, no appeal was taken by Hazard from the decision of the local officers against him. The *facts* are therefore settled in favor of Miss Swain.

The case does not come within the first, third, nor fourth paragraphs of rule 48. You were authorized, therefore to disturb the decision of the local officers only under the second paragraph of said rule.

To show that the decision of the local officers "is contrary to existing laws and regulations," you quote section 2265 of the Revised Statutes, which provides that claimants under the pre-emption law, are required to make known their claim to the register of the proper office, within three months from the time of settlement; otherwise their claim will be forfeited, and the tract awarded to the next settler, in the order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law.

In this connection you say:

> Miss Swain allowed more than six months to elapse after the time of her alleged settlement, before offering her claim for record at the local land office; and therefore, as Hazard was the next settler, in the order of time, upon the same tract of land, and gave the required notice, the tract should under the section above quoted, be awarded to him.

I think you erred in applying section 2265 of the statutes to the case. On the 14th of November, 1885, when the local officers found that Miss Swain made settlement upon the land, it was within the reservation for the Atlantic and Pacific railroad company, between San Buenaventura

and San Francisco, and was not restored to the public domain until the 23rd of March, 1886 (4 L. D., 458). By the restoration notice directed by that decision to be published, these lands were restored to settlement and entry on the 24th of May, 1886.

Miss Swain could not, therefore, have filed for the land within three months after her settlement, and can lose no rights by neglecting to do what she could not have done. Neither can Hazard gain any rights by such omission on her part. If her settlement upon the land was prior to that of Hazard, which was one of the facts found by the local officers, she had three months from the 24th of May, 1886, within which to file for the same, and preserve her rights as against him. She filed within two days of her earliest possible time.

As to the priority of the rights of the respective parties to the land, the local officers found the facts in favor of Miss Swain, and my conclusion upon the law applicable to the case is also in her favor. This disposes of the question before me, leaving the final proof of Miss Swain to be passed upon by you. The decision appealed from is set aside, and the case is returned for your determination as to the sufficiency of such final proof.

SCHOOL INDEMNITY—SETTLEMENT CLAIM.

HENRY C. KING.

The selection of school indemnity is a waiver of all claim to the land in place, and to protect a settlement claim on such land the State may take indemnity therefor if it so elects.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 8, 1892.

With your letter of March 28, 1891, you transmit the appeal of Henry C. King from the decision of your office, dated June 5, 1878, holding for cancellation his homestead entry, made August 6, 1875, upon the W. ½ of the NW. ¼, Sec. 16, and the E. ½ of the NE. ¼, Sec. 17, T. 24 S., R. 68 W., Pueblo, Colorado, as to that part of said entry lying in section sixteen.

The facts connected with this entry are stated in the decision appealed from, and in your decision of November 13, 1890, you more elaborately set forth the history and correspondence connected therewith.

It appears that the State selected the S. ½ of the SW. ¼, Sec. 12, T. 21 S., R. 56 W., in list No. 2, filed December 27, 1884, as indemnity for that part of said tract lying in section sixteen.

The State again selected indemnity therefor by amended list No. 2, filed February 24, 1890, which, on November 10, 1890, you returned to the local office for correction.

List No. 2 was approved November 24, 1890, and the land selected as indemnity for the land in question was eliminated therefrom.

In the proviso to the act of February 28, 1891 (26 Stat., 796), amendatory of section 2275 of the Revised Statutes, it is said:

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

The recitals in your office letter of November, 1890, show the action of your office of June 5, 1878, to have been in accordance with the then existing regulations, but, in view of the act of February 28, 1891 (*supra*), and the fact that the State selected indemnity for the tract in section sixteen, I see no reason why the selection so made may not now be approved (provided there are no conflicting interests), and claimant awarded the land in place, upon which his improvements are situated and where he has lived since 1875.

Since the selection made by the State was eliminated from approved list No. 2, by reason of your action in holding the entry for cancellation, to the extent of the tract in section sixteen, the proper authorities of the State should now be advised of their right to indemnity. They should also be requested to elect whether they will adhere to their claim for indemnity, or claim the land in place. If the State refuses to take indemnity, the judgment of cancellation will stand.

MILITARY RESERVATION—ACT OF JULY 5, 1884.

JAMES A. HARDIN.

The act of July 5, 1884, does not authorize the President to restore an abandoned military reservation to the public domain for settlement and entry under the general land laws.

The provisions of said act do not protect a desert land entry made while the land was reserved for military purposes.

Departmental decision of March 14, 1890, 10 L. D., 313, recalled and revoked.

Acting Secretary Chandler to the Commissioner of the General Land Office, March 9, 1892.

I am in receipt of your letter of February 18, 1892, and the papers transmitted therewith, relative to the desert land entry (No. 122), made August 27, 1877, by James A. Hardin, at Carson City land district, Nevada.

It appears that a hay reservation was established at Camp McDermitt, on unsurveyed land, in said land district, by executive order of September 3, 1867, which was extended by orders of October 4, 1870, and November 22, 1878.

On December 14, 1888, by your letter of that date to the local officers, you held said entry for cancellation because the same was made subsequent to the establishment of said reservation.

An appeal was taken to this Department, and your decision was modified by departmental decision of March 14, 1890 (James A. Hardin, 10 L. D., 313).

In that decision it is stated,—"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)." Said decision was mainly based upon this statement, which was taken from your letter of December 14, 1888, and was accepted as literally true, for it is stated in said decision (page 315) that the entry was clearly illegal in its inception because within the limits of a government reservation, and could not be allowed so long as said reservation continued, but as it had been abandoned, the rights and equities of the entryman could be protected.

The first section of the act of July 5, 1884, provides,

> That whenever, in the opinion of the President of the United States, the lands, or any portion of them, included within the limits of any military reservation heretofore or hereafter declared, have become or shall become useless for military purposes, he shall cause the same or so much thereof as he may designate, to be placed under the control of the Secretary of the Interior for disposition as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice thereof.

The second section of said act authorized the survey and disposal of said lands "at public sale," in the manner and under the conditions therein provided. Under the authority of said act the President ordered said reservation to be placed under the control of the Secretary of the Interior for such disposal. (Land Office Report 1887, page 229.)

It will be seen that said act does not authorize the President to restore said reservation to the public domain for settlement and entry under the land laws, and it never has been so restored.

As it does not appear that the applicant is a settler upon said land "for the purpose of securing a home," his rights are not preserved by the proviso to the second section of said act.

Inasmuch as said entry was allowed without authority of law, and upon land not subject to entry, and as Hardin's case does not come within the exceptional classes protected by said act, his entry must be canceled.

On March 14, 1890, when the former departmental decision in this case was rendered (10 L. D., 313), there was also rendered a similar departmental decision in the case of Ebenezer Pell (unreported), in which like principles were involved. This latter decision was revoked and annulled by this Department by a later decision in the case of said Ebenezer Pell, rendered September 29, 1891 (unreported).

Inasmuch as Pell made desert land entry upon the same reservation on December 3, 1877, and the facts and principles involved in his case and the present one, are substantially of the same character, the later

decision in his case had the effect of overruling the former decision in this case.

The departmental decision in this case of March 14, 1890, being based upon an error, is revoked and annulled, and your judgment of December 14, 1888, is affirmed.

OKLAHOMA LANDS—INDIAN ALLOTMENT.

NIELS ESPERSON.

Lands within the ceded territory in Oklahoma are not within the provisions of the allotment act of 1887, but an allotment of such land made for the protection of the Indians' improvements serves to except the land covered thereby from settlement and entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 10, 1892.

I have considered the appeal of Niels Esperson from the decision of your office dated November 14, 1890, affirming the action of the local officers at Kingfisher, Oklahoma Territory, rejecting his homestead application for the SE ¼ of section 4, T. 12 N., R. 7 W., I. M., so far as the same covers the NE ¼ of the SE ¼ of said section, because the same conflicts with an Indian allotment in favor of Johanna Hauser, minor child of Herman Hauser, under the act of Congress approved February 8, 1887 (24 Stat., 388).

The appeal from the local office alleges that at the date of the settlement of said appellant, said Indian allotment was unsurveyed and had no marks of settlement, or occupation thereon; that said land was allotted to said Indian without authority of law, and that said allotment was fraudulent and void because the Indian allotment affidavit made by Herman Hauser falsely stated that he had made settlement upon said NE ¼ of the said SE ¼, when as a matter of fact after 12 o'clock noon of April 22, 1889, the tract was solely occupied by the said appellant.

It appears that said NE ¼ of the SE ¼ of said section was allotted to Johanna Hauser, a minor, under section 4 of said act of February 8, 1887, in compliance with express directions of the Secretary dated April 10 and 15, 1889 (Ind. Div. Record, Vol. 59, pp. 343–376), to the Indian agent at the Cheyenne and Arapahoe agency, and you state that said allotment was made on or before April 22, 1889, prior to which time no valid claims of settlers could attach to the land; that you concur with the view of the Indian Office that the Department undoubtedly contemplated the assignment to each of the Indians referred to in said directions of the Secretary, as settled in Oklahoma several years prior to the opening of the same to settlement, the full quantity of land allowed to Indians under said allotment act; that it is immaterial whether the tract claimed by said minor was actually improved or cultivated or not, as

she was entitled to the amount allotted, and that said tract was selected and officially designated for her in due time, and you held that upon the known facts the application for a hearing upon contest must be denied.

In his appeal from your decision, Mr. Esperson alleges substantially the same errors as in his appeal from the decision of the local officers. It is manifest that the land in question was allotted to said minor under the express direction of the Department, as above set forth, prior to the opening of the land to settlement and entry on April 22, 1889. It is no answer to say, even if it be true, that there were no improvements or residence upon this particular tract, for, under the law, the infant minor child is not required to live upon the land allotted. It is conceded that as a general rule, lands within the ceded territory in Oklahoma cannot be allotted under section 4 of the general allotment act (See 13 L. D., 310), but under the peculiar circumstances, as ascertained by the Office of Indian Affairs, showing that said Hauser entered upon a tract just across the line east from the Cheyenne and Arapahoe Indian Reservation, and improved the same, the Department allowed said allotment to be made, which served to except the land from settlement and entry by any other person.

There does not appear to be any error in your decision, and the same is accordingly affirmed.

REPAYMENT—STATUTORY RESTRICTIONS.

EDWARD A. TOVREA.

Where the receiver fails to account for the purchase-money paid for land, and the entryman pays therefor a second time, there is no statutory authority for the repayment of the money thus wrongfully appropriated.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 11, 1892.

On January 21, 1891, resident counsel for Edward A. Tovrea filed in your office, an affidavit made by said Tovrea setting out that on November 14, 1889, he made final proof under the desert land act for the NW. ¼ and NW. ¼ of SW. ¼, Sec. 27, T. 1 S., R. 5 W., Tucson, Arizona; that he "forwarded said proofs, together with two hundred dollars" to one Smith, the then receiver of public moneys at Tucson; that he received no receipt for said payment; that Smith wrongfully appropriated the same to his own use and that he subsequently to wit, February 17, 1891, paid a like amount ($200) as purchase money for said land.

Along with said affidavit was filed Tovrea's application for the repayment of the two hundred dollars so misappropriated by the said receiver.

By letter dated January 24, 1891, you denied this application.

Counsel moved a review of this action, which motion being denied by your letter of March 5, 1891, an appeal was taken here.

It may be true that the government should be holden to Mr. Tovrea for the two hundred dollars which he had paid to Mr. Smith on the ground that he received the money in his official capacity of receiver of public moneys, as the agent of the government, and it has sued him upon his bond to recover the same. Had Mr. Tovrea refused to pay the second two hundred dollars, he might have been entitled to a patent for his land under the rule laid down in the case of Andrew J. Preston, 14 L. D., 200, yet repayment can not be made him in this proceeding upon the statement of facts here presented.

The Secretary of the Interior is only authorized to repay money when it appears:—

1st, That a tract of land has been erroneously sold by the United States and the sale can not be confirmed. (Section 2362.)

2d, Where entries are canceled for conflict.

3d, Or from any cause the entry has been erroneously allowed and can not be confirmed. (Section 2, of the act of June 16, 1880, 21 Stats., 287.)

The applicant in this case does not bring himself within either of the conditions here laid down, for his entry could be, and has been confirmed, hence this department has no jurisdiction to entertain the application and it must therefore be denied.

RAILROAD GRANT—PRE-EMPTION FILING—ACT OF MARCH 3, 1887.

UNION PACIFIC RY. CO. ET AL. *v.* MCKINLEY.

An unexpired pre-emption filing existing at date of definite location excepts the land covered thereby from the operation of the grant.

The second proviso to section 5, act of March 3, 1887, applies only to lands which at the date of the act, had been settled upon subsequent to December 2, 1882, by parties claiming in good faith a right to enter the same under the settlement laws.

A bona fide purchaser from a railroad company, or one taking under such purchase, who has sold and transferred the land, may perfect title under section 5 of said act, where the claim of the company fails.

Acting Secretary Chandler to the Commissioner of the General Land Office, March 11, 1892.

The SE. ¼ of Sec. 9, T. 7 N., R. 69 W., Denver, Colorado, is within the twenty mile or granted limits of the Union Pacific Railway Company. This company filed its map of definite location August 20, 1869.

This tract was excepted from the grant by the pre-emption filing of John M. Beck, made December 19, 1866.

For some reason not apparent of record, this land was always considered as belonging to the railroad company. In this belief William McKinley, on September 9, 1886, purchased the land in controversy,

with another quarter-section from one Thomas Connelly, for the sum of $4,800, paying $1800 in cash and giving deed of trust to secure the balance due. Connelly had derived his title from the said company. McKinley cultivated the tract described for about a year, and then sold the west half of it to Jerry E. Lamb and the east half to Edward McCabe. Jerry Lamb subsequently sold his half to Henry C. Lamb; the latter and Edward McCabe are now in possession of the same under their titles so derived.

McKinley executed warranty deeds, receiving no cash payment, but deeds of trust from his grantees, providing for payment within twelve years from date of conveyance.

March 9, 1889, Henry Lamb applied to make pre-emption filing for the west half of said tract.

August 29, 1889, McCabe made similar application for the east half.

Both applications were rejected, and both parties appealed.

These applications were rejected because the land was in an odd section, within the limits of the grant to the railroad, and because one Woodworth had before applied to make homestead entry for the same land, which was rejected, and from the rejection of which he had appealed, and his appeal was still pending.

June 7, 1889, McKinley applied to purchase said tract under the 5th section of the act of March 3, 1887 (24 Stat., 556), which provides as follows:

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

Notice was given to all parties in interest that he would submit his proof in support of said application on July 25, 1889. At this hearing Lamb and McCabe appeared and protested. Woodworth and the railway company made default.

The local officers transmitted the evidence and record without recommendation, stating "that inasmuch as we are without information as to whether or not the claim of the railway company to this tract has been

eliminated, we will submit the case to the Department that this question may be determined."

McCabe and Lamb appealed, and you, by your decision of June 7, 1890, rejected the application of McKinley to purchase. You also rejected the application of Woodworth to make homestead entry, and held that the land was excepted from the grant to the company by the filing of Beck, and allowed McCabe and Lamb's applications to make pre-emption filing for the land. Subsequently, on December 27, 1890, by your decision of that date, you modified the decision of June 7, by rejecting the applications of said McCabe and Lamb to make pre-emption filing for the tract in controversy, but held that they, being the present owners and occupants of the land, are primarily entitled to purchase under the act before cited; but, inasmuch as they had refused to avail themselves of this right, the application of McKinley should be allowed. From this decision McCabe, Lamb, and the railroad company have appealed, the latter only from so much of your decision as holds the land to have been excepted from the grant to the company.

In regard to the appeal of the railroad company, it is only necessary to say that this Department has repeatedly held that an unexpired pre-emption filing, existing at date of the definite location of the line of the road, excepts the land covered thereby from the operation of the grant.

The filing of Beck, made December 19, 1866, alleging settlement December 10, of the same year, was upon unoffered land, and had not expired August 20, 1869, when the company filed its map of definite location opposite the land in controversy. The claim of the company must, therefore, be rejected.

No extended discussion is necessary to show that the applications of McCabe and Lamb to claim this land under the pre-emption laws were properly denied.

They were made subsequent to the act of March 3, 1887, and, in the case of the Chicago, St. Paul, Minneapolis and Omaha Railway Company (11 L. D., 607), it was correctly held that the second proviso to said act applies only to "the case of lands which, at the date of the passage of the act, had been settled upon subsequent to December 1, 1882, by parties claiming in good faith a right to enter the same under the settlement laws."

There are no such parties in the record before me. McCabe and Lamb never claimed under any of the settlement laws prior to the passage of the said act. On the contrary, until the filing of their applications, which was subsequent to the date of the act, they were claiming through conveyances from the railway company.

The only remaining question to be determined is, the right of McKinley to the remedy provided by said act.

Section 5 of this act was intended to protect bona fide purchasers

from the railroad company—that is, parties claiming title through the grant to the company. It was a provision through which the title so obtained could be perfected. The right to purchase from the government depended upon a purchase in good faith from the company, and only those who had so purchased could avail themselves of this remedy. Unquestionably, McCabe and Lamb could have purchased under this section, if they had so desired, but they are not here asking that privilege. (11 L. D., 229).

On the contrary, the undisputed evidence at the hearing shows that McKinley, some days prior to his application (on the 14th or 15th of May, 1889,) went to them and endeavored to persuade them to apply under this act, he offering to pay all the expenses and the government price of the land. They declined to do this, but chose rather to attempt to procure title from the government under the pre-emption law. Their purpose is obvious, for, if they should succeed, they could defeat the foreclosure of the deed of trust to McKinley by showing that the note, it was given to secure, was without consideration, McKinley's title to the land having failed.

This Department is now asked to lend its sanction and aid to the accomplishment of this purpose.

I think the statute clearly contemplates that any *bona fide* purchaser may be entitled to the remedy provided, for in terms, it says, that upon a proper showing and payment of the government price for the land, "patents shall issue therefor to the bona fide purchaser, his heirs or *assigns*."

This construction is substantially held in the case of Samuel L. Campbell (8 L. D., 27), where it is said that in such an application it must be shown, *inter alia:* "That it was sold by the company to the applicant, or one under whom he claims, as a part of the grant."

Connelly, from whom McKinley purchased, would have been entitled to this remedy, and title so perfected in him would inure to the benefit of his grantees and those claiming under him. So the granting of the application of McKinley will perfect the title in McCabe and Lamb, and place them just where they would have been had the title been in the railroad company. This is all that the statute was designed to do, and Lamb and McCabe can have no grounds of complaint, for, by his act and at his own expense, McKinley will have secured to his grantees just what they bargained for—namely: a perfect title to the land they purchased, and so fulfill the covenants in his deeds.

The application of McKinley will be allowed, and your decision is accordingly affirmed.

HOMESTEAD ENTRY—RESIDENCE—MARRIED WOMAN.

ORPHIA J. SIMONS.

A married woman can not legally maintain separate residence from her husband, and secure title under the homestead law by virtue of such residence.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 12, 1892.

I have considered the appeal of Mrs. Orphia J. Simons (nee Flouton) from your decision of February 10, 1891 holding for cancellation her homestead entry for lots 1, 2 and 3, Sec. 12, T. 141 N., R. 81 W., Bismarck, North Dakota, land district.

She made said entry April 26, 1883, and pursuant to notice on April 26, 1890, offered her final proof in support thereof. It appears from her affidavit that she was married to Francis R. Simons on June 17, 1883. He had made a homestead entry in December, 1882 on land in Sec. 18, T. 141 N., R. 80 W. Their lands were about a half mile distant from each other. Simons maintained his residence on his tract, and in July, 1889, made final proof and received final certificate. When Mrs. Simons offered her proof it was rejected by the local officers because she could not, in law, maintain a separate residence from her husband, they not being separated, and she not having been deserted by her husband. She appealed from this ruling, and your office, on February 10, 1891, affirmed the same. She again appealed, and evidently prepared the appeal herself. It consists mostly of new statements supplemental to her final proof, is sworn to, and she has procured an attorney to appear for her, who also signs the appeal.

She states in her final proof, and repeats substantially in her appeal that "According to a marriage agreement entered into on the 17th of June, 1883, the day of our marriage, between Francis R. Simons and myself, we were each to maintain a separate residence on our respective homesteads during our natural lives," etc. Each was to control their own land, etc. In her appeal she says they were told by the receiver at Bismarck that they could receive patents if "we each presented proof of continued residence and cultivation for five years." She also claims patent to the land as the "head of a family consisting of my aged parents and myself," and declares she has had no lawful residence on her husband's homestead. She also insists that she have patent for lots 2 and 3 as an additional homestead to her husband's land. She says the river has washed away a portion of their lands, and if lots 2 and 3 were added to her husband's land it would not exceed one hundred and sixty acres. She claims many things in her paper unnecessary to refer to.

After their marriage she lived at her husband's house until September 20, 1883, when she says she "abandoned her husband's residence,"

and moved onto her own land. Thus she lived with her husband from June 17 to September 20, 1883, in disregard of her contract. She had never settled on her homestead while unmarried.

It has been held for many years that a "deserted wife" could make homestead entry. But it was said in Porter *v.* Maxfield (5 L. D., 42) that the fact of marriage being established, and the wife "having set up the plea of desertion, it rests upon her to show such fact affirmatively." This rule has been followed. (See 9 L. D., 186; 10 L. D., 527, and cases there cited.) But a husband and wife cannot enter into an agreement to evade the law, and thereby acquire rights. So far as living separate and apart during their natural lives is concerned, it may be said such a contract would be against public policy, and if it were plead in bar of an action for necessaries furnished the wife, no court would regard it. So far as asking patent for the land as an additional entry to the entry of her husband, it is sufficient to say one person cannot make an additional homestead entirely based upon the homestead of another.

Your decision is affirmed.

TIMBER CULTURE ENTRY—SEGREGATION—PRIVATE ENTRY.

HENRY MILNE.

The segregation of land effected by a timber culture entry is not defeated by the failure of the local officers to note such entry of record; and a private entry of land thus reserved cannot be properly allowed.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 12, 1892.

On December 18, 1885, Henry Milne made private cash entry for the E. ½ of the NW. ¼, the E. ½ of the SW. ¼, and the E. ½, of Sec. 14, T. 10 S., R. 24 E., Boswell land district, New Mexico.

The tract was [apparently] subject to private entry, having been included in a list of lands offered at public sale, in accordance with prior executive proclamation, on August 20, 1870.

Two months prior to Milne's entry, one James R. Cunningham had made timber-culture entry for the SE. ¼ of the SW. ¼, S ½ of the SE. ¼, and the NE. ¼ of the SE. ¼, of said Sec. 14—including one hundred and sixty of the four hundred and eighty acres above referred to as being afterwards entered by said Milne.

On June 24, 1890, you held Milne's entry for cancellation as to the portion of his entry in conflict with that of Cunningham.

He appeals from your action on the ground that his entry was made in good faith, and with the consent and approval of the land officers at Las Cruces; that the records of the local office did not show that Cun-

ningham nor any one else had entered the tract; that the neglect of the local officers to note upon their proper records the adverse claim of Cunningham ought not to be allowed to work to his prejudice; that he has made valuable improvements upon the land, so that much hardship and loss will result from the cancellation of the entry; and furthermore—

That the entry of James R. Cunningham, with which his said entry is alleged to be in conflict, was not and is not a *bona fide* entry, the said Cunningham never having made or in any way attempted to make any improvements on the said tract, or in any way complied or attempted to comply with the law in regard to timber-culture entries.

Corroborating affidavits of two witnesses are filed, stating "that said tract has never been, in whole or in part, broken, plowed, or planted, by James R. Cunningham, or any other person . . . . to the present time."

Winfield S. Cobean, register, and Frank Lesnet, receiver, at the date of the appeal—successors to the register and receiver at the date of Cunningham's entry, and having in charge the books of the office—certify that the official plat on file in the office shows the cash entries of Milne for certain tracts—

But fails to show at this time any record of any kind, other than the entries above noted; nor are there any erasures or other evidences on said plat that would lead to the belief that any other entry had ever been made on said tracts.

That Cunningham made the timber-culture entry, upon the date hereinbefore set forth, is unquestionable, for the original entry papers are on file in the record now before the Department, and the tract-books of your office show the same; and on December 20, 1890, you directed the local officers to post said entry—so that it is *now* a matter of record upon their books.

The first question calling for consideration is, whether Cunningham's entry, although not noted upon the books of the local office on December 18, 1885, had segregated the tract from the public domain, so that Milne's later entry of the same must be regarded as having been improperly allowed.

I fail to find any reported case that is in all respects parallel to the one now under consideration; but there are many which illustrate the principle which should govern therein, and indicate with sufficient clearness the only doctrine that can consistently be maintained.

John C. Irwin (6 L. D., 585,) made timber-culture entry of a certain tract in California, which you held invalid because of being within a section that had, by executive order of January 23, 1866, been reserved and set apart for military purposes. He appealed, on the grounds that no plat or record of the local land office showed the land to be inside of said military reservation; that the register reported that the records of his office showed no such reservation; that the land had never been used as a part of said reservation; that no objection was made by the

local officers to said entry; and that large sums of money had been expended in cultivating and improving said land. The Department held that the tract,

> Having been reserved for public use by competent authority, the fact that such reservation was not shown by the records of the local land office, and in consequence thereof was entered and a large expense incurred thereon by the entryman, can not make such entry legal, nor empower the land department to dispose of such reserved land.

In the case of Linville *v.* Clearwaters (10 L. D., 59), the Department held (to quote from the syllabus):

> 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.

In the case at bar, when the timber-culture entryman, Cunningham, made the requisite preliminary affidavits (showing his own qualifications, the non-mineral character of the tract, &c.), paid the fees and commissions, and received the receiver's receipt, the tract was "reserved by competent authority"—that is, by virtue of the timber-culture law—even though no record of the local office showed it to be so reserved. Milne's private cash entry was "made on land covered by the prior timber-culture of another, not of record, and under which no right of possession was asserted or acts in compliance with law performed," and in accordance with the above ruling his entry would be "good as against any one except the timber-culture entryman."

In my opinion the entry of Cunningham, although not noted on the tract-books of the local office, segregated the tract from the public domain, and hence, Milne's entry was improperly allowed. It was completed so far as Cunningham was concerned, when he made the proper affidavit and paid the fees. When the entryman has done all that the law requires of him, no neglect on the part of the register and receiver to properly note the entry on the tract books should be held to work a forfeiture of his rights.

I see no reason, however, why Mr. Milne might not institute contest against the timber-culture entry; and if the charge of abandonment should be sustained at the hearing, and Milne's good faith shown, his entry might then be confirmed under Rule 19 for the government of the board of equitable adjudication, which provides for the confirmation of "all entries made upon land appropriated by entry or selection, but which entry or selection was subsequently canceled for illegality." (See Frank V. Holston, 7 L. D., 218; Edward Riley, 9 L. D., 232.)

Your decision is modified as above indicated.

PRACTICE—SECOND CONTEST—SPECIAL AGENT.

FERGUSON *v.* DALY ET AL.

A contest should not be allowed on grounds that have been the subject of investigation by the government and the basis of a hearing had therein, and where the parties thereto are in effect the same as in the former proceedings.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 15, 1892.

On the 26th of September, 1884, Isaac S. Daly made cash entry for lot 5, and the NE. ¼ of the NE. ¼ of Sec. 24, T. 50 N., R. 4 W., (Lewiston Series), which land is now in the Cœur d'Alene land district, Idaho, having settled upon the tract on the 12th of December, 1883.

Upon the report of Special Agent Ferguson of your office, you held said entry for cancellation on the 27th of April, 1888. Upon Daly's application a hearing was afterwards ordered, at which time John Powers appeared and claimed an interest in the land on account of a mortgage given him by Daly, for money loaned with which he made final payment, and he was therefore permitted to intervene.

That hearing resulted in a joint decision by the register and receiver, in which they found the charges of the government sustained, and recommended that the entry of Daly be cancelled. Upon appeal you reversed that decision on the 2d of October, 1890, and allowed his entry to stand.

Subsequent to the rendering of this decision, Ferguson, whose official connection with the government had terminated, applied to contest said entry and to make homestead entry for the land. On the 22d of October, 1890, you ordered a hearing upon the charges of Ferguson, but on the 14th of November of that year, upon the *ex parte* application of Daly's counsel, you rescinded your order of October 22.

Ferguson took an appeal from your decision or action of November 14, which you declined to transmit to the Department. He then applied to have the record of the case certified under Rules 83 and 84, which was directed by departmental decision dated March 13, 1891 (12 L. D., 230), and the case is now before me in obedience to the writ.

Of course, Ferguson could have received no relief or benefit by having your decision of October 2, 1890—in which you reversed that of the register and receiver—reviewed or considered by the Department. He was not a party in interest to the proceeding which terminated with that decision, and a reversal thereof could only have resulted in a cancellation of the entry of Daly, with no preference rights to Ferguson. This fact seems to have been overlooked when the departmental decision of March 13, 1891, was rendered, as in that decision a doubt was expressed as to the correctness of your said decision, and the record of the case was therefore directed to be certified to the Department for consideration.

Knowing that Ferguson was not a party to that suit, and that he could not apply for a certiorari therein, you, in response to the direction contained in the said departmental decision, certified the record in the case of Ferguson *v.* Daly, in which he sought to contest the entry upon the same charges, in substance, which you held had been investigated and not sustained in the contest by the government against Daly.

Having by your decision of November 14, 1890, denied Ferguson a hearing upon his charges, you refused to transmit his appeal from such decision, and it is this action on your part which Ferguson asked to have considered by the Department, in his petition for certiorari. The question before me is not, therefore, whether your decision of October 2, 1890 was right or wrong, but whether, under the circumstances of the case, you were justified in refusing Ferguson a hearing upon his charges, and in declining to transmit to the Department his appeal from your decision upon that question.

Your decision of October 2, 1890, allowing Daly's entry to stand, became final in consequence of there being no appeal therefrom, and no application for certiorari in that case. In your decision of November 29, 1890, in which you declined to transmit Ferguson's appeal to the Department, you said:

> I am of the opinion that no right has been denied to Ferguson, for while it is true his allegations constituted a cause of action, nevertheless he is not now in a position to make these allegations, because of the fact that he has already, as an agent for the government attempted to prove their truth and has failed, and I know of no rule of law or equity which would give him the right to have a hearing now, and further harass this defendant.

It can not be denied but that the charges of Ferguson, as a contestant, constituted a cause of action. It is also true that his charges as an agent for the government constituted a cause of action, and that the charges in both instances were substantially the same. His charges as special agent were somewhat more sweeping than his charges as a contestant. In the former, he alleged that Daly conveyed the land to John Powers by warranty deed dated four months before final proof.

As to this charge, it was shown that while the instrument by which the loan made by Powers to Daly was secured, was in form an absolute deed, it was in effect only a mortgage, and the Department has frequently held that such instruments could be made without violation of law, prior to final entry and certificate. Haling *v.* Eddy (9 L. D., 337.) Owing to the fact that this loan and incumbrance was made prior to final entry, as well as prior to the first of March, 1888, the case is not within the confirmatory provisions of the seventh section of the act of March 3, 1891, (26 Stat., 1095).

The charges made by Ferguson, as special agent, were disposed of by your decision of October 2, 1890, and his charges as contestant were presented to you within a very short time thereafter. The issues involved in the second charges were those which Daly had been called upon to defend in the contest where the government was the prosecutor. The

phraseology of the charges was slightly different, but the issues were the same, and in Reeves *v.* Emblen (8 L. D., 444), it was held that a second contest should not be allowed on issues involved in the first. In the case of Samuel J. Bogart (9 L. D., 217), it was said:

> An entryman should not be called upon to defend a second time against the same charges, unless there is reason to believe that there was collusion between the parties at the hearing already had.

At the hearing already had in the case at bar, there is certainly no evidence of collusion between the parties. In effect the parties were the same as they would have been at the second hearing, had one been allowed. The parties being the same in fact, and the charges the same in effect, I think, under the decisions of the Department, you were justified in refusing to compel Daly to establish his rights to the land a second time, and I find no occasion for interfering with the exercise of your discretionary power in the case. Your action in rescinding your order for a hearing in the case, and in declining to transmit to the Department an appeal from such action on your part, is therefore approved.

SWAMP LAND—SURVEYOR GENERAL'S RETURN.

ORLANDO ALEXANDER.

The burden of proof is upon the State where it sets up a claim under the swamp grant to land that is returned as not swamp and overflowed.

The character of land at the date of the swamp grant determines whether it inures to the State thereunder; and proof that land is at present swamp and overflowed is not sufficient to overcome the adverse return of the surveyor general.

Secretary Noble to the Commissioner of the General Land Office, March 15, 1892.

On June 21, 1887, Orlando Alexander filed an application to purchase of the State of California the S ½ of the fractional NE ¼, the S ½ of the NW ¼, and the fractional NE ¼ of the NW ¼ of section 1, T. 15 E., M. D. M., on the ground that said tract is swamp and overflowed land, though not so returned. Said application was forwarded the same day by the State surveyor general to the surveyor general of the United States for California, requesting an investigation to determine the character of said land, and that the same might be withdrawn from disposal at the Visalia land office, California. A hearing was ordered before him November 25, 1889, to determine the character of the land at the date of the passage of the act of September 28, 1850 (9 Stat., 519), granting swamp and overflowed lands to certain States, as therein provided, and due notice thereof was given to all claimants under the United States, and to said applicant. Said hearing was held under the authority of the fifth clause of section 4 of the act of July 23, 1866

(14 Stat., 218), re-enacted in section 2488, Revised Statutes of the United States, which provides that,—

If the authorities of said State shall claim as swamp and overflowed any land not represented as such upon the map, or in the returns of the surveyors, the character of such land at the date of the grant, September 28, 1850, and the right to the same, shall be determined by testimony, to be taken before the surveyor general, who shall decide the same, subject to the approval of the commissioner of the general land office.

On April 28, 1890, the surveyor general of the United States decided, upon the testimony adduced at said hearing, that said land was not swamp and overflowed at the date of said granting act, September 28, 1850. An appeal was taken on the ground that said decision was against the weight of evidence and against law. By your letter of November 14, 1890, you affirmed the decision of said surveyor general and rejected the claim of the State. An appeal now brings the case before me.

The grounds of appeal are specified substantially as follows:

1. That the public surveys in 1853-4 show that the land then had been for a long time swamp and overflowed, when read in the light of the testimony produced in said case.

2. The testimony showed that the land had been swamp and overflowed for ten or fifteen years prior to said hearing, and produced tules and swamp grasses, which is vegetation of the same character that was produced at the time of the surveys, therefore the land must have been swamp and overflowed at the date of the grant, as over ten years time is necessary to produce such vegetation, and only three or four years have elapsed from the date of the grant to the date of the surveys.

This theory does not appear to be borne out by the facts. The field notes of the survey of said section one, made in December, 1853, described the land on the lines as follows:

On the east line, "Land rich, covered with tules;" north line, "Land level, second rate, first quarter mile tules" (Running from the east); west line, "Land first rate, prairie, covered with fine grass and scattering tule;" south line, "Land first rate, prairie, with scattering tule."

This description is scarcely applicable to swamp land. It was returned as dry land, and there is no indication in the field notes that it was wet on any part when surveyed. At the hearing three witnesses testified for the State, neither of whom had any knowledge of the land prior to 1887. C. D. Davis had known the land for two years, lived thirty miles distant, first saw it in June, 1887, prior to that time had never been nearer than ten miles to it. He knew that about 1870 Cole slough was cut through by W. S. Powell, which would have the effect to increase the overflow on the land in dispute to the extent of the cut, though he thought this increase was about balanced by water taken for irrigation.

R. S. Hunsaker testified he had known the land "something over two years," and knew nothing of its character prior to that time.

James T. Stratton testified he had been on the land only three times,

"first in June 1887, again in June 1889, and again the past week," and never knew anything about the land before June 1887.

These witnesses testified that the land was swamp and overflowed in 1887, and so continued to the date of the hearing, but gave no testimony that such was its character in 1850. The burden of proof was upon the State to rebut the *prima facie* case established by the map and returns of the surveyors made in 1853, that the tract was then upland and dry, and not swamp and overflowed.

Testimony that it was swamp in 1887 is insufficient to show that it was so in 1853, in the face of said map and returns, except upon the theory that there could be no change in the character of the land between these two dates, which of course is untenable. In a period of thirty-four years great changes are liable to occur in the character of land, both from natural and artificial causes. The testimony for the claimants under the United States showed that the character of the land had changed in that period and the cause therefor.

B. T. Alvord testified that he lived in the neighborhood of the land from 1871 to 1875, and from 1877 to 1887, and that during the first period he was on the land sometimes two or three times a week; that it was then generally dry land, except in swales. A swale 20 feet wide ran across a corner of the section, and there was not over ten acres of this kind of land in three swales; that a rodeo ground was there where cattle were bunched. When he returned in 1877 he found more water on the west side of the land, "Every year after that the water pushed further out westward up to the present time." He stated the cause of this as follows:

> The sloughs of Fish slough, the branch sloughs, were damned on the northeast side of Fish slough, and caused the water to break out on the west side. I then put in another dam that year, 1878, and opened out some channels on the west side that afterwards washed out to be large sloughs, and caused the main body of the overflow to go west, and it spreads further west every year, and overflowed still further west this year than it did last year.

J. G. James testified that he had lived in California since 1850. He first became acquainted with the land in dispute in July 1857, and lived within three miles of it from 1859 to 1868, and was on it often; that during that period said section one "was government land and not swamp and overflowed. It was dry land except in exceptionally high water." "I think you could have plowed pretty near all of it." As to the change in the character of the land, and the cause of it, he testified as follows:

> Yes, sir, it has changed, to-day it is swamp and overflowed land. I know what caused the change. It was caused by Cole slough, a branch of King's river being cut through at its head, some forty miles above this land, in 1868, which lets a large volume of water come down that swamp and run into the head of Fresno slough. After the cut was made in Cole slough the high waters of that year washed it out, and almost turned the whole of King's river that way, down that swamp, towards this land. This caused the water to come down into Fish slough and spread out

farther on each side of the swamp, and overflowing this land with other lands, that were very nearly on a level with the swamp land bordering on this swamp land.

The cut at the head of Cole slough was made by W. S. Powell with some Indians in the fall of 1867, "in order to let us have more water down in the swamp. It was too dry; the stock were suffering for water."

The testimony of these two witnesses is uncontradicted and sustains and corroborates the returns of the surveyor general that this land was upland, and not swamp, when the survey was made, and as no change is claimed to have occurred between the date of the grant and that of the survey, it was presumably of the same character when the grant took effect.

Your judgment is affirmed.

PRACTICE—FINAL PROOF—RULE 53 AMENDED.

DEPARTMENT OF THE INTERIOR,
General Land Office, Washington, D. C.

Registers and Receivers of the United States District Land Offices.

GENTLEMEN: Rule 53 of the rules of practice, approved August 13, 1885, is hereby amended to read as follows, viz:

The local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the Commissioner.

In all cases, however, where a contest has been brought against any entry or filing on the public lands, and trial has taken place, the entryman may, if he so desires, in accordance with the provisions of the law under which he claims, and the rules of the Department, submit final proof and complete the same, with the exception of the payment of the purchase money or commissions, as the case may be, said final proof will be retained in the local land office and should the entry finally be adjudged valid, said final proof, if satisfactory, will be accepted upon the payment of the purchase money or commissions, and final certificate will issue, without any further action on the part of the entryman, except the furnishing of a non-alienation affidavit by the entryman, or in case of his death, by his legal representatives.

In such cases the party making the proof, at the time of submitting the same, will be required to pay the fees for reducing the testimony to writing.

Any provisions of the rules of practice inconsistent with the above changes and modifications are hereby rescinded.

Very respectfully,

THOS. H. CARTER,
Commissioner.

Approved March 15th, 1892.
GEO. CHANDLER,
Acting Secretary.

PROCEEDINGS ON FINAL PROOF—RAILROAD GRANT.

NORTHERN PACIFIC R. R. CO. *v.* DOW (ON REVIEW).

The failure of a railroad company to respond to a settler's notice of intention to submit final proof is a waiver of the company's right to deny the facts established by said proof.

The case of Northern Pacific R. R. Co. *v.* Randolph, cited and distinguished.

Acting Secretary Chandler to the Commissioner of the General Land Office, March 16, 1892.

This is a motion by the attorney for the Northern Pacific Railroad Company, asking for a review of the departmental decision dated April 2, 1889, in the case of said railroad company *v.* William Dow, (8 L. D., 389), involving the W. ½ of the NE. ¼, and the E. ½ of the NW. ¼ of Sec. 13, T. 134 N., R. 41 W., Fergus Falls, Minnesota.

Counsel for the railroad asked to have this motion considered in connection with the case of said railroad company *v.* Joshua A. Randolph, which was decided on the 26th day of September, 1889 (See 9 L. D., 416). It is also claimed that the questions in the Randolph case and this case, are the same. This claim is not tenable, as clearly appears by reference to the Randolph case, wherein the difference in the cases is clearly pointed out, as follows:

In the case of the Northern Pacific *v.* Dow (8 L. D., 389), the evidence adduced at the hearing shows that Huss, the original pre-emptor, settled upon the land in the fall of 1870, while the railroad's line was definitely located November 21, 1871. "Upon the testimony and the homestead proof made," and not simply because the company made no appearance at the hearing, "the local officers rendered an opinion in favor of Dow." In the present case the record shows nothing whatever tending to except the particular tract involved from the grant to the company.

It was made to appear that Huss had a valid settlement claim to the tract at the time the grant to the Northern Pacific Railroad Company became effective, and this excepted the land from the grant. Northern Pacific R. R. Co. *v.* Edward Miller (11 L. D., 482); Northern Pacific R. R. Co. *v.* Beck (id., 584).

The motion under consideration is based upon the theory that the case was decided wholly upon the ground that the company having failed to appear or answer the regular citation issued upon Dow's notice, was guilty of laches by reason of which it may be held to have waived its right to assert title to the tract in question or to object to the consummation of his claim to the same. This theory is not borne out by the record, as a careful examination of the case in its entirety will show. The facts established by Dow's proof showed the tract to have been excepted from the grant to the railroad company, and the company by its failure to respond to the notice of its intention to submit final proof, waived all right to deny said facts. Randolph *v.* Northern Pacific R. R. Co., *supra;* Florida Ry. and Navigation Co. *v.* Dodd (11 L. D., 91); Northern Pacific R. R. Co. *v.* Harrendrup (11 L. D., 633).

I discover no reason for interfering with the decision. The motion is therefore denied.

PRE-EMPTION CLAIM—TRANSMUTATION—ACT OF MARCH 2, 1889.

WILLIAM R. COTTLE.

A pre-emption claim initiated after the passage of the act of March 2, 1889, cannot be transmuted thereunder by one who has had the benefit of a homestead entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 16, 1892.

William R. Cottle has appealed from your decision of February 14, 1891, sustaining the action of the local officers in rejecting his application to transmute to a homestead entry his pre-emption declaratory statement for the SE. ¼ of Sec. 11, T. 34 N., R. 28 W., Valentine land district, Nebraska.

The ground of the rejection was that he had exhausted his homestead right by a former entry.

The pre-emption filing which he applies to transmute was made May 10, 1889. The act of March 2, 1889, permitting second homestead entries, under certain circumstances, contains the proviso—

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, etc.

The appellant's pre-emption filing, made May 10, 1889 (alleging settlement the same day), does not come within the provisions of the act; I therefore affirm your decision.

CALIFORNIA SCHOOL LANDS—INDEMNITY—ACT OF MARCH 1, 1877.

MARTIN A. BAKER.

A school indemnity selection, made and approved before the final survey of a private grant excluding the basis therefrom, is confirmed by section 2, act of March 1, 1877, and the basis therefor is subject to disposal as other public land.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 16, 1892.

I have considered the appeal of Martin A. Baker, from your decision rejecting his application to make timber-culture entry for the SE. ¼ of Sec. 10, T. 4 S., R. 4 W., S. B. M., Los Angeles, California, on the ground that said tract is school land.

It appears from your statement that other land was selected by the State of California in lieu of said SE. ¼ of section 16, (alleged to be within the limits of a Mexican grant) in 1868 and 1869, and was approved to the State.

You also say:

But it also appears that township 4 S., R. 4 W., S. B. M., was surveyed in 1857, and that the title to section 16, of said township then inured to the State of California, and remains vested in said State, at the time the selections above recited were made.

This statement is partially correct, but not wholly so. An investigation of the record of your office discloses the fact that while a survey of the township was made in 1857, section sixteen of said township was within the claimed limits of a private Mexican grant, and the final survey of the township which segregated the land adjudged to be within the limits of said private grant, from the public land, was not made until 1883, when said section sixteen was found to be public land. We thus have a case where the lieu selection was made and approved to the State before the final survey of the private grant, which excluded the base of such lieu selection, was made, hence said selection was confirmed by the second section of the act of March 1, 1877 (19 Stat., 267), which provides:

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

It follows that your decision holding that said section sixteen was school land is erroneous and the same is reversed. D. C. Powell (6 L. D., 302); State of California (9 L. D., 208).

Vacated, 23 L.D. 230

SWAMP LAND—SECTION 2488 REVISED STATUTES.

STATE OF CALIFORNIA.

Land covered by an apparently permanent body of water at the date of the swamp grant is not of the character contemplated by said grant.

The approval by the surveyor general of a segregation survey of swamp land under section 2488 R. S., is of no legal force where the lands covered thereby were not in existence at the date of the swamp grant.

The Commissioner of the General Land Office may properly require the submission of evidence as to the character of land at the date of the swamp grant before approving a contract for the survey of a township and segregation of the swamp lands therein.

Secretary Noble to the Commissioner of the General Land Office, March 17, 1892.

Under date of November 1, 1890, your predecessor, Commissioner Groff, submitted for my consideration the question involved in the claim of the State of California, under the swamp grant, to certain lands in the vicinity of Tulare Lake, California.

Application was made to him to have the lands embraced in what is known as the Norway survey on the borders of said lake, certified to the State as swamp lands.

In his letter, your predecessor said, "having doubts as to my duty in the premises I most respectfully submit the matter for such instruction as you may deem proper and necessary."

In my reply dated November 22, 1890, it was said that the case in its present stage did not properly call for a decision on the part of this Department, and it was returned for such action as you should deem proper, either to reject the claim of the State with the right of appeal, or to recognize the validity of said claim, but in either event, to give in full your reasons for your action. I am now in receipt of your letter of December 9, 1891, in which you say:

> For these reasons I deem it my duty to comply with the request of the State, and to certify over to her as swamp and overflowed the land embraced in the Norway survey under consideration.

No list of lands is submitted for my approval or rejection, as was contemplated by my letter of November 22, 1890, in case you acquiesced in the claim of the State, but the conclusion reached by you is sufficient to bring the question before me for consideration.

I do not deem it necessary at this time to discuss at length the merits of the Norway survey. It is evident that the survey was not requested by the governor of the State, as contemplated by the statute, also that it failed in the important matter of marking corners, to conform to the requirements of your office in force at the time. I have also grave doubts as to whether the meander lines represented on the plats were in every instance actually run on the ground. In my opinion, however, there are still more important questions involved in this case.

We are met with the historical and geographical fact that Tulare Lake was, prior to the passage of the swamp land grant of 1850, a body of water covering a large tract of land. The first township's surveys of lands adjoining the lake were made in 1853 and 1854, or four years subsequent to the passage of the swamp grant, a meander line of the lake was established, and the lands found to be swamp were patented to the State under the grant. About the year 1873, a permanent recession of the waters commenced, and has been maintained since that time. It is true that from the earliest reported times to the present, the waters of the lake have been subject to rise and fall, but the permanent recession began at the time above mentioned.

In 1880 a survey of lands situate between the meander line of the lake, established by the surveys of 1853, and 4, and the meander line established by the said survey of 1880 was made by Deputy Surveyor Creighton, and the land amounting to 114,000 acres was segregated as swamp, and the plats were approved by the United States surveyor general for the State of California.

Much evidence was submitted by the State to establish the fact that the land in question was actually swamp at the date of the grant, September 28, 1850, and evidence was submitted by the opposing claimant, the Southern Pacific Railroad Company, to establish the fact that the land was not of that character at the date of the grant. After a full consideration, your office and this Department both held that the land in question was swamp at the date of the grant, and the land was certified to the State. The character of the land at the date of the grant,

and not its character at the date of survey, determined its status. State of California (1 L. D., 312 and 320).

The land now under consideration is situate between the meander line of the lake as established by Creighton in 1880 and the meander line as established by Norway in 1884, and amounts to 103,000 acres. The first and most important question to be determined is this, was the land which is designated on the plats by Norway as swamp, of that character at the date of the grant, September 28, 1850, or was it at that time covered with water apparently of a permanent character and therefore not included within the terms of the grant?

Under instructions from you, Special Agent Satterlee made an examination of the lands embraced in the survey. Many witnesses were examined by him in the interest of those who are claiming title under the State as swamp land. After a careful examination he reported as follows:

I find that the lands supposed to be covered by and included in the Norway survey of 1884, on the borders of Tulare Lake were, on or about the 28th day of September, 1850, and for a long time thereafter, habitually covered with water and formed a part of the bed of the said Tulare Lake, there being no evidence to show that they were known to man as land from the date of the earliest exploration by white men until long after said date.

After an examination of the evidence submitted before him, I am of the opinion that the finding of the special agent is justified by the same.

Under date of November 28, 1879, the Commissioner of the General Land Office approved the contract with Deputy Surveyor Creighton for a survey "for the segregation of swamp and overflowed lands from the waters of Lake Tulare," and in his letter approving said contract, he further said:

you will, however, instruct Deputy Creighton to establish permanent township, section, quarter-section and meander corners as prescribed in the manual of surveying instructions, at each and every intersection of the township and section lines with the lines of demarkation between the Tule land and the waters of the lake. Unless this requirement is strictly complied with, the surveys will not be accepted by this office.

In his field notes, Deputy Creighton says:

from the best information I could get I find that in Tulare county there has usually been a series of years (3 to 6) of considerable rainfall, during which period these lands are overflowed and entirely under water. This has usually been followed by a series of years (3 to 6) of comparative drought, during which periods the waters recede and the land becomes dry. Immediately preceding this date (1880) there have been three years of unusual drought and the waters of the lake are as low as they have ever before been.

At the time the question of the approval of the Creighton survey was under consideration, evidence was submitted as to the character of the lands embraced therein. Among the witnesses for the State Charles D. Gibbs testified

that in 1852 and 1854, he surveyed and meandered Tulare Lake in townships 21, 22, 23 and 24 S., ranges 23 and 24 east, for the United States government; that said

meander line was on the east side of the lake, and was made by him on the edge of the water as it then stood; that the water seemed to be at its highest, and from his meander line towards the lake seemed to be very shallow for a long distance, and was so muddy that he had to go in one-half mile or more daily for drinking water, and the water for that distance was not more than knee deep.

It appears that in 1849 prior to the date of the swamp grant and up to 1853 and 4, the water in the lake was as high as it was at the date of the Gibbs' survey.

The meander line of the lake established by Gibbs in 1853 and 4 on the south and east shores of the lake where the great mass of land embraced in the survey now under consideration is situate, is located from two to ten miles outside of the meander line established by Creighton in 1880, and from five to fifteen miles outside the meander line established by Norway in 1884 in the survey now before me.

In his instructions to Deputy Surveyor Norway issued December 3, 1883, the surveyor general of California said:

> All of the above named townships are situated on the borders of Tulare Lake and were surveyed in 1880 by Deputy Surveyor T. Creighton under his contract of September 12, 1879, as far as the shore of said lake as it existed at that time. Since then, however, the waters of the lake have subsided, and exposed considerable land (permanently it is believed) which it is thought necessary to subdivide.

In his field notes, referring to T. 22 S., R. 22 E., Deputy Surveyor Norway says:

> That portion of this township surveyed by me is the level bottom of Tulare Lake left dry by the water having receded and is all liable to again overflow.

From all the evidence in the possession of the Department, I think it is clearly established that at the date of the swamp grant in 1850, the land in question was covered with water apparently of a permanent character, and was in no sense swamp land within the contemplation of the statute. It was not land in the sense of the word land as universally used, to wit, "Earth or the solid matter which constitutes the fixed part of the surface of the globe in distinction from the waters which constitute the fluid or movable part," for at that date there was a body of water, apparently of a permanent character which covered the space now occupied by this land, and under the ruling of this Department the same did not pass to the State under the swamp grant. State of California (1 L. D., 320).

Counsel for the State contend that under the provisions of section 4 of the act of July 23, 1866 (14 Stat., 218) and of section 2488, Revised Statutes, this land must be certified to the State for the reason that the United States surveyor general of California has approved plats of the survey of certain townships upon which the land in question is represented as swamp.

Section 2488, Revised Statutes, which embodies section 4 of the act of July 23, 1866 above cited, is as follows:

> It shall be the duty of the Commissioner of the General Land Office, to certify over to the State of California as swamp and overflowed lands, all the lands represented

as such upon the approved township surveys and plats, whether made before or after the 23d day of July, 1866 under the authority of the United States.

* * * * * * *

In case such State surveys are found not to be in accordance with the system of the United States surveys, and in such other townships as no survey has been made by the United States, the Commissioner shall direct the surveyor General to make segregation surveys, upon application to the surveyor general, by the governor of said State, within one year of such application, of all swamp and overflowed land in such townships, and to report the same to the General Land Office, representing and describing what land *was* swamp and overflowed, *under the grant*, according to the best evidence he can obtain.

On the plats in question the land is represented as swamp and the following endorsement appears "area of swamp and overflowed land unfit for cultivation surveyed in 1884."

There is no intimation that said lands were swamp and overflowed at the date of the grant in 1850. On the contrary, as has been before stated, it is a notorious fact that these lands were not in existence at the date of said grant. It is clear to my mind that while the duty of determining what land was swamp land in the State of California is left to the United States surveyor general for that State, it is equally clear that he must, in making his findings, act within the provisions of the law creating him such a tribunal, in other words, that his finding can only relate to lands that were in actual existence on September 28, 1850, as only lands were granted by the act.

The language of section 2488 is clear on this point. It provides that in townships surveyed subsequent to the date that the Revised Statutes took effect, the surveyor general shall make segregation surveys of swamp and overflowed land in said townships, representing and describing what land *was* swamp and overflowed under the grant according to the best evidence he can obtain.

The only reasonable construction and interpretation that can be put upon these words is that he should report what land was swamp and overflowed at the date of the grant, the same being a grant *in præsenti* which took effect in California at the date of its passage. If it had been the intention that he should report what land was swamp and overflowed at the date of his survey, the statute would have used the words *is* swamp and overflowed. This is, I think, clearly shown by the requirement of the statute that he shall make his report "according to the best evidence he can obtain." The act of 1866 was passed sixteen years subsequent to the date of the swamp grant, and the Revised Statutes went into effect twenty-three thereafter, and Congress seems to have contemplated that more or less difficulty would be experienced by the proper officer in obtaining evidence as to the character of the land years before. If I had any doubt on this point, it would be removed by the clear and explicit language of the supreme court in the case of Wright *v.* Roseberry (121 U. S., 488) in which the court held that the

swamp grant to California was a grant *in præsenti* taking effect at the date of the passage of the act, and the court say:

> The question, therefore, is whether upon the proof then presented of the segregation of the lands in controversy as swamp and overflowed lands by the authorities of the State of California, and their designation as such lands or a plat of the township made by the surveyor general of the United States, and approved by him, and forwarded to the General Land Office, pursuant to the fourth section of the act of 1866, and approved by the Commissioner, as shown by its official use, the plaintiff can maintain an action for the recovery of the lands, they never having been certified over to the State, as required by section 2488, R. S., or patented to her under the act of 1850. According to the decisions we have cited, the holders of the certificates of purchase had a good title to the lands, if, in fact, they were swamp and overflowed lands on the 28th of September, 1850. . . . . For error in holding that the certificate of the Commissioners was necessary to pass the title of the demanded premises to the State, the case must go back for a new trial when the parties will be at liberty to show whether or not the lands in controversy were in fact swamp and overflowed on the day that the swamp land act of 1850 took effect If they are proved to have been such lands at that date, they were not afterwards subject to pre-emption by settlers. They were not afterwards public lands at the disposal of the United States.

The only question before the Department to be determined at this time is, should the lands embraced in this survey be certified to the State of California under the swamp grant by reason of the approval by the surveyor general of plats representing the land to be "swamp and overflowed land unfit for cultivation surveyed in 1884?" You held that such action should be taken, and cite as the basis of your decisions, the decision of this Department in the case of Davis *v.* State of California (13 L. D., 129) in which it was held that land in California represented as swamp and overflowed upon the approved township plats inures to the State irrespective of the actual character of the land.

Admitting this to be true so far as land that was in actual existence at the date of the grant is involved, it does not follow that the finding of the surveyor general is binding when he attempts to establish the character of land that was not in existence at that date.

Such a doctrine carried to its logical conclusion, would force the head of this Department to certify to the State as swamp land, that which was in 1850 and is now, notoriously a portion of the bed of the Pacific Ocean, provided a surveyor general could be found who would approve a plat representing said bed of the ocean to be swamp and overflowed land.

Such an interpretation of the statute would lead to an absurd consequence.

In the United States *v.* Kirby (7 Wallace, 482) the court say:

> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

Applying this principle to the case at bar, it is an additional reason why it must be held that the grant made in 1850 was of land only, as otherwise the statute would place in the hands of a subordinate officer the power to force the Department to do a foolish and an absurd thing, and such an intention can not be imputed to Congress. As the evidence now before this Department satisfactorily shows that the land embraced in the Norway survey was not in existence at the date of the grant, said land can not be approved under the present application, and said survey can not be recognized as of any binding force by the Department. The application of the State must therefore be rejected.

I am not unmindful of the fact that under the decision of the supreme court in the cases of Hardin *v.* Jordan (140 U. S., 371) and Mitchell *v.* Smale (140 U. S., 406) important questions may arise as to the right of the United States to survey, and as to what disposition shall be made of the lands that were formerly the bed of Tulare Lake, but these questions are not involved in the case now before me.

It does not appear that it has been the practice of your office to require the surveyor general to submit the evidence upon which he determines the character of the land segregated. While section 2488 Revised Statutes constitutes that officer the tribunal to determine what lands were swamp at the date of the grant, it does not remove him from the jurisdiction of the officers of this Department. You have the right to instruct him as to the character of the evidence he should seek to obtain, and the manner of obtaining the same, and there may be instances where it should be your duty to require evidence as to the character of the land at the date of the grant to be submitted for your consideration before you approve a contract for the survey of a township for the purpose of segregating the swamp land, and this course should be pursued in all cases where you think the interests of the government require that such action be taken.

PRIVATE CLAIM—CONFIRMATION—SECRECY.

RANCHO BUENA VISTA (ON REVIEW.)

The survey of a private claim, under a decree of confirmation that adopts the act of juridical possession, must be governed by the record of juridical measurement, and not by a conjectural estimate of area set forth in said decree.

Secretary Noble to the Commissioner of the General Land Office, March 17, 1892.

I have considered the motion for review of the decision of this Department dated July 24, 1891, in the matter of the survey of Rancho Buena Vista, located in San Diego county, California, (13 L. D., 84.)

A full history of this case may be found in Vols. I, II, V and VI, Land Decisions, and as the facts connected therewith are very voluminous, only those essential to a proper understanding of the conclusion reached herein will be stated.

The land in question was granted by the Mexican authorities to the

"Indian Felipe" July 8, 1845, and was confirmed by the land commissioners, May 16, 1854, to Jesus Machado, assignee, approved by the United States district court February 1, 1856, but no formal decree was filed until April 15, 1879.

Several surveys of this rancho appear to have been made from time to time, but all of them have been rejected as unsatisfactory.

The last survey was made by Deputy Surveyor Willey and under date of June 12, 1890, you rejected said survey, whereupon the rancho claimants appealed and July 24, 1891, this Department affirmed your decision.

The question is now before this Department on review of said departmental decision.

The principal objections alleged against the above decision of the Department are that it is based upon a mistake of fact holding that the grant was for only one quarter and not for one-half of a square league in extent; that it is based upon an error of law in holding that natural and fixed land marks named as corners of said grant in the decree of confirmation, do not control the courses and distances named and that the new survey ordered to be made by the Department is not in conformity with the terms of the grant, the land marks named as corners, the juridical possession given, the evidence before the land commissioners, nor the decree or confirmation, and that such survey will exclude the house and a portion of the improvements of the confirmee where he resided at date of confirmation.

In view of the fact that this claim has been before your office and this Department so often, and has been fully examined several times, I deem it unnecessary to go over the whole record in detail and consider matters that have been already decided.

The survey of said rancho made by Deputy Surveyor Wheeler was rejected by the Department April 5, 1887, and a new survey ordered with full instructions how such subsequent survey should be made.

The surveyor-general authorized Deputy Surveyor Willey to make the survey in accordance with the boundaries set forth in the *decision* of this Department rejecting the Wheeler survey, but it appears that Deputy Willey assumed the authority to place his own interpretation upon the decree establishing the grant, instead of following his instructions, and as a result his survey was found to very nearly approximate that made by Wheeler rejected by this Department in 1887.

The rancho claimants allege that the grant was for one-half of a square league, whereas the finding of the Department is only one-quarter of a square league.

For a better understanding of this question, let us examine the language of the grant in connection with that of the juridical possession and the decree of affirmation. The language of the grant is:—

> The land hereby granted is one-half league square in extent and is the same which he actually occupies. The judge who gives him possession shall cause it to be measured agreeably to ordinance.

It appears that on July 27, 1845, the Indian Felipe appeared before José R. Arguello, alcalde of San Diego and by virtue of his grant prayed that he might be placed in juridical possession of the tract Buena Vista. In compliance therewith said Arguello proceeded to the land in question and there in presence of witnesses caused the following lines and land marks to be established, commencing

at one of the boundaries of the garden of the Indian Felipe, the line was drawn east and there were measured and counted 2500 varas, which terminated at the boundary of Don Lorenzo Soto, where the party interested was ordered to place his land mark. From this place the line was drawn in a south course, there were measured and counted 2500 varas, which ended at a small peak where stand two rocks joined together. Here the party interested was ordered to place his land mark. From this point the line was drawn, course west, and there were measured and counted 2500 varas, which ended at a small red hill, where the party interested was ordered to place his land mark. From this point the line was drawn course north; there were measured and counted 2500 varas, which ended upon a hill, were stands a large rock and the party in interest was ordered to place his land mark.

Here the proceedings ended and the Indian Felipe was informed that he was in secure and peaceful possession of the grant.

The decree of confirmation after setting out that on hearing the proofs and allegations in the Buena Vista grant, the board of land commissioners adjudged the claim as valid and decreed that the same be confirmed, described the tract so confirmed as follows:

Commencing at the northwest corner of the garden of the Indian Felipe, and running east 2500 varas to the boundary line of Lorenzo Soto, thence running south 2500 varas to a small peak where stand two rocks joined together; thence running west 2500 varas to a small red hill; thence running north 2500 varas to the place of beginning on a hill where there is a rock, containing in all one-half of a square league reference for further description to be had to the original grant and to the translations of the records of juridical possession.

The United States appealed from this decision to the district court of California, and on April 15, 1879, said court entered a decree, a part of which is as follows:

And it is further ordered, adjudged and decreed that the claim by the appellee is a good and valid claim and that the said claim be, and the same is hereby, confirmed to the extent of one-half of a square league, a little more or less, being the same land situated in the county of San Diego, known by the name of Buena Vista.

Here followed a verbatim description of the lines and corners as given above in the decree of confirmation by the board of land commissioners. Thus it will be seen that the original grant and the record of juridical possession are made a part not only of the confirmation by the board of land commissioners, but they are also made a part of the decree of the court, and hence must be considered together to arrive at a just conclusion.

It will be observed that the original grant specified therein the amount of land granted as one-half of a league square in extent, and as a league square is 5000 varas on each side, it follows that a half league square must necessarily be one-half of the distance on each

side or 2500 varas. This agrees in every respect with the measurements laid off in the juridical possession, and also with the description given in the confirmation and decree of the court, hence there can be no question as to the distance of the exterior boundary lines of said grant although the rancho claimants hold and claim that the grant is for one-half of a square league, which is equivalent to a tract 5000 varas long by 2500 varas wide, just twice the area of the tract confirmed; furthermore, that the corners or land marks ordered to be placed by the officer giving the juridical possession should control the boundaries of the tract.

The Willey survey now under consideration embraces about 366 acres less than a square league and nearly 3000 acres more than were confirmed to the rancho claimants.

It will be observed that each of the four lines bounding said rancho established by the Willey survey were about 5000 varas in length, or twice the distance given in the juridical possession or decree of the court, and hence contains an area four times greater. This exaggeration of area is sought to be justified under the pretense of obeying the calls and land marks established by the alcalde when the juridical possession was given.

The confirmation of the grant by the land commissioners and the decree of the court, both established, beyond any doubt the initial point where the resurvey of such grant should commence and end, as "the northwest corner of the garden of the Indian Felipe;" but it appears that Deputy Willey entirely disregarded this light as also the instructions of this Department and established his initial corner about one mile farther to the westward, which point Wheeler had previously adopted as his northwest corner.

In this there was manifest error. There is no ambiguity in the language of the decree of affirmation as to the point of beginning and ending, that would justify any such action or conclusion.

It is a singular fact in this case that nearly all the previous surveys established the four corners of this grant at different places, showing conclusively that as each surveyor claimed to have found corners answering to those described in the juridical possession that there is nothing peculiar or unusual about such described points that would particularly distinguish them from others in the neighborhood; furthermore, in the examination of the map of a private survey made by Dexter at the instance of some settlers in that vicinity, I find that points answering in full the description of those in the juridical measurement were found at each corner of his survey approximating 2500 varas from each other and embracing about one-quarter of a league the amount confirmed.

The original grant was for one-half a league in length and one-half in breadth, and the same distances were given in the juridical possession as 2500 varas, describing three calls or corners. The decree gives

the same distances and calls, but doubles the quantity by using the language "one-half of a square league." This is evidently an error in the decree. Even should it be admitted that the language is sufficient to create a doubt as to whether one-quarter or one-half of a league was confirmed, it certainly does not justify a survey increasing the amount to nearly a square league or four times the quantity embraced in the juridical measurement.

It is quite evident by referring to the petition, grant and juridical survey, that these concluding words of the decree, "a half of a square league" were not used by the court to restrict or enlarge the quantity of the grant, but simply to indicate a conjectural estimate of area and was very probably confounded in some manner with the description "half a league square" given in the grant.

In the case of Cheneworth *et al. v.* Haskell *et al.* (3 Pet., 92), the supreme court of the United States lays down the rule that

> If a grant be made which describes the land granted by courses and distance only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given us and must be used.

The case under consideration, however, rests upon a much stronger basis. The initial or starting point of the survey is well established and clearly designated, the distance of each side stated as 2500 varas, equal to about 6875 feet, and the general course of the lines given. This taken in connection with the fact that the original grant prescribes a tract one-half of a league square and that calls answering the description of the land marks given in the juridical measurements can be found at each corner of the Dexter survey, approximating a half league square, I am satisfied that not only did Willey disregard his specific instructions but that he had no just grounds derived from the record of this grant to establish the survey returned by him of the Buena Vista Rancho.

The point of beginning in the new survey ordered is definitely established at the northwest corner of the old garden of the Indian Felipe and the survey starting from this point must follow as near as may be the course of the juridical measurement and embrace a quantity only approximating one-quarter of a square league.

After a careful review and reconsideration of this case in the light of the arguments filed and the cases cited in support of the motion to revoke the decision heretofore rendered and allow a rehearing, I find no sufficient reason for such action. Said motion is therefore denied and the decision mentioned is adhered to.

RAILROAD GRANT—ADJUSTMENT OF LATERAL LIMITS.

SOUTHERN PACIFIC R. R. CO.

The lateral limits of this grant should be adjusted on the line of location, but where the constructed road has been adopted as the basis of such adjustment, the limits thus established will not be changed.

Secretary Noble to the Commissioner of the General Land Office, March 17, 1892.

I am in receipt of your letter of January 23, 1892, containing a statement of facts relative to the adjustment of the limits of the grant for the Southern Pacific Railroad opposite the constructed portions of the road, from which it appears that, as now established, they have been adjusted to the line of constructed road.

In your letter it is stated:

> An examination of said diagram shows that in the last section of road constructed, that from Huron to Alcalde, the line of constructed road departs considerably from the line of location. Notwithstanding this, in accordance with the practice that has been followed in construing this grant, the lateral limits and section terminal at Alcalde were drawn in accordance with such constructed line; and lands falling outside of the limits thus determined, which had been withdrawn in accordance with the line of general route, were restored to the public domain.

I find on investigation that this action was taken by you April 5, 1890, nearly two years ago.

The lines of the adjustment of the grant being thus established, it is to be presumed that settlements have been made on the lands thus restored to entry, and to change the limits thus fixed might to a greater or less extent jeopardize the interests of such settlers.

This question becomes important in determining what lands are to be restored to entry under the act of Congress approved September 29, 1890 (26 Stat., 496), which forfeits all lands "opposite to and coterminous with the portions of any such railroad not now completed, and in operation."

This road was on September 29, 1890, unconstructed northwestward from Alcalde to Tres Pinos; hence, between said points, the forfeiture applies.

In your letter of November 20, 1890, you expressed the opinion that, after the act of June 28, 1870 (16 Stat., 382), ratifying the location made by this company, as shown upon the map filed June 3, 1867, it was beyond the power of the company to change the same, and that to re-adjust the limits (referring to the lateral limits) to the constructed line was error, which opinion was concurred in by me, December 31, 1891. (Press Copy, 231, p. 426)

Notwithstanding this opinion, I agree with you in the view that to change this line of adjustment, where already made, would be productive of harm to settlers and of no particular benefit to the government,

as it would result in practically an exchange of lands, and thereby unsettle rights and titles heretofore acquired, founded upon an adjudication by your office.

The adjustment of the limits heretofore made opposite constructed road will therefore be adhered to, but this action must not be construed as recognizing the correctness of the practice which heretofore prevailed in your office in the matter of the adjustment of the lateral limits of this grant.

Having determined the question as to the lateral limits, by accepting the adjustment to the constructed line, as made, a consideration of any question of a change in terminal from that heretofore established is unnecessary. See 11 L. D., 627, as to terminal of Northern Pacific R. R. at Wallula, Washington.

Recognizing the limits heretofore established opposite constructed road, you will proceed to restore the land without such limits, and between Alcalde and Tres Pinos, to entry under the act of September 29, 1890 (*supra*).

Overruled, 27 L. D. 421.

RIGHT OF WAY—INDIAN RESERVATIONS.

FLORIDA MESA DITCH CO.

Section 18, act of March 3, 1891, does not grant a right of way for canals and ditches through Indian reservations.

Acting Secretary Chandler to the Commissioner of Indian Affairs, March 8, 1892.

I acknowledge the receipt of your communication of November 11th, 1891, in the matter of the application of the Florida Mesa Ditch Company to extend its lines upon the Southern Ute Indian reservation, Colorado, in which you ask the decision of the Department as to whether the act of March 3, 1891, entitled "an act to repeal timber culture laws and for other purposes," (26 Stat., 1095) includes Indian reservations.

In response thereto, I transmit herewith an opinion of the Honorable Assistant Attorney-General for this Department, in which I concur.

Copy of this opinion has this day been forwarded to the Commissioner of the General Land Office, for his information and guidance.

E.F.B. S.V.P. W.E.P. F.L.C. V.B.

OPINION.

Assistant Attorney General Shields to the Secretary of the Interior, February 27, 1892.

I have the honor to acknowledge the receipt by reference of the letter of the Commissioner of Indian Affairs of November 11, 1891 submitting for the decision of the Department the question as to whether the act

of March 3, 1891 (26 Stat., 1095), in so far as it relates to the right of way for ditches and canals, includes Indian reservations, and if so, whether there is any stipulation in the treaties and agreements with the Ute Indians which would prevent the extension of canals into their reservation, together with your request for an opinion upon the question thus presented. Section 18 of the act of March 3, 1891 (26 Stat., 1095) reads as follows:

> That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, That no such right of way shall be so ocated as to interfere with the propergoccupation by the government of any such reservation, and all maps of location shall be subject to the approval of the Department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

In the act of March 3, 1875 (18 Stat., 482) granting to railroads the right of way through the public lands it was specifically stated in section five that said act should not apply "to any lands within the limits of any military, park, or Indian reservation or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed." The question of the right of the United States to authorize an entry upon lands reserved for the use of the Indians could not arise under that act. The right of the United States to exercise the power of eminent domain within Indian reservations and over lands set apart for the exclusive use of the Indians has been recognized by the supreme court. Cherokee Nation *v.* Kansas Railway Co. (135 U. S., 641).

The act of March 3, 1891 so far as it relates to the right of way for canals and ditches does not purport to be the exercise of the power of eminent domain, and hence it is unnecessary to consider whether the construction of such canals and ditches is an undertaking in aid of which that power might be properly exercised.

As to all that country known as "Indian country" the Indians had a right of occupancy. It has been the policy of the government to relieve from this claim or right of occupancy that country as rapidly as possible and in pursuance of that policy the Indians have been persuaded to relinquish such right in consideration of which, among other things, they have been guaranteed the quiet and undisturbed possession and use of certain specified and well defined smaller bodies of land. In almost, if not every instance in which such an agreement has been entered into, it has been stipulated that no one not in the employ of the government should be allowed to go upon such reservation without the

consent of the Indians. The provisions found in the treaties and agreements affecting the reservation in regard to which the question is at this time raised, afford illustrations of this rule. By article two of the treaty of March 2, 1868 (15 Stat., 619) with certain bands of the Ute Indians, lands were set apart for specific purposes and under certain agreements as follows:

> For the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes and individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States now solemnly agree that no persons, except those herein authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon, or reside in the territory described in this article except as herein otherwise provided.

This treaty also provided for the selection by and certification to any Indian desiring to commence farming of a specific tract of land and that no treaty for the cession of any portion of said land should be understood or construed so as to deprive, without his consent any individual member of the tribe of his right to any tract selected by him. Article fourteen of said treaty reads as follows:

> The said confederated bands agree that whenever, in the opinion of the President of the United States, the public interests may require it, that all roads, highways, and railroads authorized by law, shall have the right of way through the reservation herein designated.

By act of April 22, 1874 (18 Stat., 36) an agreement with these Indians was confirmed whereby they relinquished a part of the lands included within the reservation established by the treaty of 1868, article five of which agreement reads as follows:

> All the provisions of the treaty of eighteen hundred and sixty-eight not altered by this agreement shall continue in force; and the following words, from article two of said treaty, viz., 'The United States now solemnly agrees that no persons except those herein authorized to do so, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, except as herein otherwise provided,' are hereby expressly re-affirmed, except so far as they applied to the country herein relinquished.

The agreement with these Indians, ratified and confirmed by act of Congress of June 15, 1880 (21 Stat., 199) provided for the relinquishment of the former reservation, the establishment of new reservations, and that all the provisions of the treaty of 1868 and the agreement of 1874 not altered by the latter agreement should continue in force.

It is clear that to hold that Congress by the act of March 3, 1891 *supra* authorized the entry upon such reservations of one who should desire to locate and construct a ditch or canal through or upon land embraced therein would be to say that Congress had by said act annulled the provisions of treaties and agreements similar to those quoted hereinbefore. This construction should not be given the said law un-

less the intention of Congress to annul in that particular the agreements entered into with the Indians be clearly expressed in fact so clearly and unmistakably set forth that no other conclusion could be reached without doing violence to the language used. In my opinion, the language used in said act of March 3, 1891 does not thus clearly and positively express such an intention. The phrase "public lands" in said section eighteen is evidently used in contradistinction to lands in reservation and hence that term would not include lands within an Indian reservation. The term "reservations" used in the body of said section is defined and limited by the language used in the proviso, as follows: "Provided that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation." This would indicate that the reservations had in view were those actually and directly used by the government. Indian reservations are not so used, but are set apart for the use of the Indians with the ultimate object of providing them permanent homes and of vesting in them full and complete title to so much, at least, as may be necessary for that purpose.

The act in question has full scope for its operation, both as to public lands and reservations outside these Indian reservations, and can thus be given effect without affecting the agreements with the Indians.

For the reasons herein set forth, I am of the opinion that it was not intended by said act of March 3, 1891 to grant the right of way for canals and ditches through Indian reservations.

HOMESTEAD—ADJOINING FARM—ALABAMA LANDS.

WILLIAM J. EARNEST.

Residence upon the original farm does not extend to land claimed under an adjoining farm entry until such entry has been made.

The cultivation of a tract, without residence thereon, is not the compliance with the homestead law contemplated by the act of March 3, 1883.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 17, 1892.

William J. Earnest has appealed from your decision of March 10, 1891, affirming the action of the register and receiver in rejecting his application to enter the SW. ¼ of the NW. ¼ and the E. ½ of the SW. ¼ of Sec. 3, T. 16 S., R. 8 W., Montgomery, Alabama, for the use of an adjoining farm, described as the SE. ¼ of the NW. ¼ of same section.

The affidavit accompanying his application states that—

The land embraced in said application No. — is intended for an adjoining farm homestead, upon which I have a bona fide improvement, consisting of five or six acres cleared and in cultivation; the same I have possessed and cultivated ever since and

prior to March 3, 1883; that I now own and have so owned and resided ever since and prior to March 3, 1883, an original farm containing forty acres and no more; the same comprises the SE. ¼ of the NW. ¼ of Sec. 3 (said township), and is contiguous to the tract this day applied for.

The register and receiver rejected said application, because "it is coal land, and not subject to entry, unless he had been an actual resident on the tract for the period mentioned." You affirm that judgment, for substantially the same reason.

It is insisted that the decision appealed from is contrary to section 2289 of the Revised Statutes, also to the 3d section of the act of May 14, 1880 (21 Stat., 140), which is as follows:

> Any settler who has settled, or who shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to date of settlement the same as if he settled under the pre-emption laws.

It is not claimed that appellant ever resided on the land which he now seeks to enter, and the case of Patrick Lynch (7 L.D., 33,) is cited as authority for the doctrine that credit for residence on the original tract may be allowed under the act of May 14, 1880, *supra*, in the case of an adjoining farm entry.

It may be conceded that the Lynch case bears the construction contended for, but, in the case of John W. Farrell (13 L. D., 713), the several departmental decisions bearing upon the question at issue were discussed, and it was there shown that the act of 1880 was not intended to waive any of the requirements of the homestead law as to residence; and in cases of adjoining farm entries such residence must have been actually upon the land entered, and residence on the original farm is not residence upon the adjoining tract, until the entry is made.

The doctrine contended for was repudiated in the Farrell case, which overruled the Lynch case, in so far as the latter held that credit for residence on the original tract may be allowed under the act of May 14, 1880, in the case of adjoining farm entry.

The act of March 3, 1883 (22 Stat., 487), excluding the public lands in Alabama from the operation of the laws relating to mineral lands, provides that:

> any bona fide entry under the provisions of the homestead law of lands within said state *heretofore made* may be patented without reference to an act approved May 10, 1872, entitled . . . . . in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto.

The mere cultivation of six acres of the tract sought to be entered prior to the act of 1883 (*supra*), without residence thereon, is not such a compliance with the homestead law as will entitle the claimant to the land.

The judgment appealed from is accordingly affirmed.

DESERT ENTRY—CHARACTER OF LAND.

WILLIAM SKEEN.

The degree of productiveness after irrigation does not necessarily determine the right to enter land under the desert act, if the land is desert in fact, and water sufficient for irrigation has been supplied.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 17, 1892.

On October 26, 1885, William Skeen made desert land entry No. 1546, for the W ½ of Sec. 20, T. 7 N., R. 2 W., Salt Lake City, Utah, and submitted proof of reclamation on September 14, 1889, before the probate judge at Ogden, Utah. When the proof was presented to the register and receiver they suspended it, and called on the entryman for additional evidence. This he afterwards filed, and on October 1, 1889, the local officers rejected his proof. He appealed from the order rejecting his proof to you, and on December 12, 1890, you also rejected the proof and stated that:

On examination of the final proof, it appears that the claimant and witnesses state that the land could under no circumstances, produce an agricultural crop.

Land which will not by means of irrigation produce an agricultural crop is not deemed subject to entry under the desert land act.

You accordingly held the entry for cancellation.

An appeal has been taken to this Department from your judgment.

The final proof, and the evidence filed as amendatory thereof, shows that Skeen is a native-born citizen of the United States; has never made an entry under the desert land act prior to the one in question, and that he is the owner of a water right sufficient to irrigate the tract included in his entry. There are between two and three miles of ditch on the land, besides two dams. The ditch from Cold Spring creek, leading on the land, is from ten to twelve feet wide, and from one to one and one-half feet deep. The ditches from Dix' creek are about ten feet wide and about one foot deep. There are small cross ditches to flood the land. It has all been flooded, except about four or five acres, from October to June each year since entry was made.

The proof seems to constitute a compliance with the requirements of the law, and the regulations of the Department. However, the entryman and his witnesses state substantially that,—"the land could not be made to produce an agricultural crop under any circumstances. It is good for nothing but pasture in the spring. The water on the land helps to grow salt grass." In answer to a question as to the character of the soil, Skeen says,—"It is very poor land, large portions of it being alkali flats; there is not an acre of good farming land on the entire tract. No natural water of any kind on the land." And, in an affidavit accompanying his proof, he says,—"that . . . he would not be willing to pay one dollar an acre for the land, except for the fact that it

forms a sort of connecting link between other lands belonging to him which are more valuable." You have decided that the land is not subject to entry under the desert land law.

The Department held, in the case of George Ramsey (5 L. D., 121), "The raising of a crop may be evidence of reclamation, but it is not the only evidence that ought to be received." It was there held that,—"the whole tract for which proof is offered . . . . must be *actually irrigated* in a manner indicative of the good faith of the claimant."

And in the case of Charles H. Schick (5 L. D., 151), on page 153, it was held that,—"Proof that water sufficient for the purposes of irrigation has been brought to the land, seems to be all that was intended, either from the act itself, or the debates in Congress thereon."

The tract in question is undoubtedly desert land. That water has been conducted thereon in quantities sufficient to irrigate the whole tract, is abundantly shown, and I can see no reason why the proof may not be received and the entryman be allowed to pay for the land.

In the case of William Crusen (11 L. D., 277), it was said,—"No reason is perceived why an entryman should not be allowed to pay for a legal subdivision of desert land, if he chooses to do so in good faith, in order that he may utilize a part of it.

Your judgment, holding the entry for cancellation, is reversed.

WASHINGTON SCHOOL LANDS—PRACTICE—APPEAL.

HOLMES C. PATRICK ET AL.

School indemnity selections made by the territorial authorities are not released from reservation by the act providing for the admission of the Territory into the Union.

Double minimum lands may be selected as school indemnity in lieu of double minimum loss.

Appeals by different parties, and relating to different tracts of land should be transmitted to the Department separately.

First Assistant Secretary Chandler to the Commissioner of the General Land Office March 17, 1892.

On the 16th of December, 1887, Holmes C. Patrick made application to file pre-emption declaratory statement for lots 6 and 7, and the E ½ of the NE ¼ of Sec. 10, T. 19 N., R. 3 E., at the Seattle land office, Washington Territory. On the 19th of the same month, Elizabeth Herriott applied at the same office, to make homestead entry for the N ½ of the NW ¼ and the N ½ of the NE ¼ of Sec. 12, in the same township. On the 21st of said month Margaret Herriott applied to make homestead entry for the S ½ of the NW ¼, and the N ½ of the SW ¼ of said Sec. 12, and on the 10th of March of the following year, George W. Alexander applied to make a similar entry for lot 5, the SW ¼ of the SE ¼ and the E ½ of the

SE ¼ of Sec. 10, all of said land being in the township already mentioned.

Each and all of these applications were rejected by the local officers, for the reason that the land in question was embraced in list No. 6 of selections made by the board of county commissioners for school purposes, in lieu of deficiencies in sections sixteen and thirty-six in said township, such selection having been made on the 21st of February, 1874.

Separate appeals were taken in each case from the action of the local officers, to your office, but on the 26th of September, 1888, you rendered one decision covering all the cases, in which you affirmed the several decisions of said local officers. Upon a single appeal from your decision, you transmitted the four cases to the Department for consideration, by letter of April 16, 1891.

Four specific errors in your decision are complained of in said notice of appeal, and in substance they are as follows: That you erred in deciding that said lands had been legally and properly selected by the county of Pierce as lieu school lands; that you erred in deciding that the board of county commissioners, by John V. Meeker, selected said lands in accordance with law; that you erred in deciding that John V. Meeker could locate and select said lands as the agent of Pierce county, and that you erred in deciding that the lands selected were such as could and should have been selected to supply deficiencies, on account of the advancement in price thereof, by the location of the Northern Pacific R. R. by the filing of map of definite location on May 14, 1874, or any prior map. In addition to these specific grounds of error, a general one is added, which says:

Subsequently to said decision, Congress passed (Feb. 22, 1889) bill for admission of Washington as a state, and on October 1st, 1889, a constitution was adopted by the people of the new state, and on November 11th, 1889, the state of Washington was admitted to the Union. By the ordinances passed by Congress, and by the constitution of Washington another and different selection of lieu school lands is to be made, and the old is abandoned. Also by a vote of the board of county commissioners of later date, the said county expressly waived any claim to such lands.

In the case of Sharpstein *v.* State of Washington (13 L. D., 378), the specifications of error in the decision appealed from were ten in number, and covered all the grounds enumerated in the foregoing, except that contained in the last sentence of the general specification herein recited. If it be true that the board of county commissioners of the county within which the lands in question are situated, have expressly waived any claims to said lands, the question is one which can be settled without appeal to this Department. No evidence upon that proposition is before me, and that such a state of facts exists, is nowhere alluded to except in the general allegation of error already mentioned.

In the case at bar there is nothing before me to show that John V. Meeker had ever been duly authorized to make indemnity selections for

and on behalf of the county commissioners of Pierce county, but from your statement, and that of the local officers, that such indemnity selection had been duly made, I assume such fact to exist, and the case last cited expressly held that "the authority conferred upon county commissioners in Washington Territory to locate school indemnity selections may be properly exercised through a duly authorized agent of said commissioners." That case also held that indemnity land thus selected by the Territory of Washington, was not released from reservation by the act provided for the admission of said Territory into the Union. This latter doctrine was also held in the case of Levi Jerome, *et al.*, (12 L. D., 165), and in L. H. Wheeler (11 L. D., 381), all of which cases originated in the same land district as the one at bar. In Hulda M. Smith (11 L. D., 382), it was held that such indemnity selections, made while the territorial form of government existed, continued until such selections are canceled.

The only question raised by the appeal before me, not settled by the decisions cited, is that the land selected being double minimum in price, was not subject to selection to supply deficiencies. While this question has not been passed upon by the Department, in any case originating in the State of Washington, it has been considered and decided in cases coming from other States, and all the later decisions hold that "the State is entitled to select indemnity that is of the same general character, and belonging to the same class, as the land it would have received had there been no deficiency in the township." This was held in John B. Disch (8 L. D., 31), and in the State of Minnesota, on page 32 of the same volume, and the doctrine was repeated in the State of Louisiana (8 L. D., 126), where it was added that "double minimum land may not be taken in lieu of single minimum loss."

From the record before me it appears that the lands selected were of a similar character to those lost, and having been legally reserved from settlement and entry, the applications of the parties named were properly rejected. I see no error in the decision appealed from, and it is therefore affirmed.

In returning the papers, I desire to call your attention to the rule requiring your office to transmit appeals by different parties, relating to different tracts of land, to the Department separately. In the case of Griffin *v.* Marsh and Doyle *v.* Wilson (2 L. D., 28), you were advised that it was bad practice on your part, tending to confusion, to submit two or more cases between different parties, which involved different tracts in the same letter, and you were directed to thereafter transmit each case separately.

In the case of John W. Bailey, *et al.*, (3 L. D., 349), these instructions were repeated, and you were informed that this Department would insist upon a strict compliance therewith. In that case the papers were returned, and you were requested to "separate the cases and transmit each appeal separately." In the Southern Minnesota Railway Exten-

sion Co. *v.* Gallipean (3 L. D., 166), the subject was also alluded to, and it was said:

> Whenever an appeal is filed, either in the local office from the decision of the register and receiver or from your decision, each case should be transmitted separately. Any other practice tends to confusion and is contrary to the express directions of this Department.

Similar instructions were contained in Davison *v.* Parkhurst (3 L. D., 445).

Your attention was again called to the subject in Henry St. George L. Hopkins (10 L. D., 472), where it was said:

> 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.

In the case last cited, the questions raised by the appeal were considered and determined, and I have pursued a similar course in this case, notwithstanding the irregular manner in which it was transmitted from your office.

APPLICATION FOR SURVEY—MEANDERED LAKE.

F. M. PUGH ET AL.

The government has no jurisdiction to order a survey of lands lying within the meander line of a non-navigable lake, where the lands adjacent thereto have been patented or applications filed therefor.

Secretary Noble to the Commissioner of the General Land Office, March 17, 1892.

F. M. Pugh *et al.*, have appealed from your decision of November 7, 1889, denying their application for the survey of lands within the meander lines of Saltese lake, in townships 24 and 25 north, range 45 east, Olympia, Washington.

The application was met by the protest of Lucy A. Sims, who claims a part of the land on the west side of the lake, which appears to be a body of non-navigable fresh water, three or four miles in length and from one half to one mile in width.

The township was surveyed in September, 1877, and the plat was approved September 30, 1878.

The lake was meandered by the survey, and lots contiguous to and surrounding the lake of various areas were designated as lots 1, 2, 3, etc. The lots in the odd numbered sections were listed by the Northern Pacific Railroad Company June 27, 1888, list 12.

Mrs. Sims claims lots 1 to 8, inclusive, bordering on the west side of the lake in Sec. 29, as grantee of said railroad company.

Lots 1 and 2, in Sec. 28, and bordering on the lake, were patented to

F. A. Pugh, December 27, 1888; and lots 3, 4, and 5, in said section, also bordering on the lake, were patented to Adolph Rivers, May 26, 1888.

Homestead certificate 2390 was issued to Francis McK. Pugh, on April 22, 1889, for lot 6, in Sec. 28, and lots 1, 2, and 3, in Sec. 33, also bordering on the lake.

Lots 4 and 5, in Sec. 4, T. 24 N., R. 45 E., bordering on the lake, were patented to Hattie Wates October 12, 1891; and lot 7, in Sec. 5, in the last-named township, was selected by said railroad company in list 12, June 27, 1888.

It is alleged that there is a considerable strip of dry land between the original meander line and the water's edge of the lake, and that large quantities of hay have been cut therefrom.

E. H. Donivan, one of the applicants, alleges that he has purchased improvements, within the meander line of the lake, for which he paid $500; and that he has built a house thereon, in which he has resided since September, 1889.

William A. McWhorton alleges that he has a house, a barn, and about eighty rods of fence within the meandered line of the lake, and Francis M. Pugh, another applicant, alleges that he built a house, worth $300, within the meandered line of the lake in April, 1889, and has established his residence therein.

F. A. Pugh alleges that he has also located on a portion of the land.

Homer B. Taylor alleges that he bought a squatter's right to a portion of the lake, paying $400 therefor, and has resided thereon since 1889.

Felix M. and Francis McK. Pugh swear that they cut thirty tons of hay from the "so-called" lake in 1880; that they did ditching on the north side of the lake in October, 1880, by removing a small bar that prevented the egress of the water; that in 1881 they cut a ditch one-half mile long, eighteen inches to two feet deep, and four feet wide, for the purpose of carrying off part of the water through a natural outlet; in 1883 they run another ditch, of about the same size and about one hundred and twenty-five yards long, and again in 1889 they dug another ditch, about one mile long. They allege that the improvements put upon the lake by themselves and others are of the value of $3,500, and that vast quantities of hay have been cut during nearly every season since 1880 from the "so-called" lake bed; and that all the land surveyed as a lake is natural meadow land.

Protestant, Mrs. Sims, swears that during every spring the waters in the lake extend out to and beyond the meander line; that the lake is fed all the year round by two mountain springs, and none of the waters are carried off by any outlet or channel, but remain in the lake until absorbed by evaporation. She claims to have made the purchase of the lands bordering on the lake because of the advantages which the

lake afforded for stock-raising, and she, therefore, protests against the application for the survey.

It is manifest from the showing made by the several applicants that much of the land within the meander line of the lake is valuable for agricultural purposes; also that considerable labor and money have been expended looking to the reclamation of the land—surveyed and reported by government officers as "lake." But, inasmuch as the lots immediately contiguous to and surrounding the meandered line of the lake have been either patented or applied for by various claimants, riparian rights have intervened.

The applicants for the survey insist that the facts in this case are similar to those in the case of James Popple *et al.* (12 L. D., 433), where the survey was ordered. That may be conceded; but the Popple case was overruled in the case of John P. Hoel (13 L. D., 588), and the latter case was based upon the case of Hardin *v.* Jordan (140 U. S., 371), where it is said:

> It has never been held that lands under water (inland lakes and ponds) in front of such grants are reserved to the United States, or that they can be afterwards granted out to other persons to the injury of the original grantees.

It further says:

> The meander lines along the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander line.

In the Hoel case (supra), referring to the case of Hardin *v.* Jordan, it is said:

> It follows from said decision that non-navigable inland lakes and ponds, when the public survey shows the same meandered, and the fact appears that the contiguous lands or lots have been disposed of by the government, that the land covered by such lakes and within the meandered lines does not belong to the government, but to the adjoining proprietors under the common law right of riparian ownership.

It appears that some of the applicants for the survey own land bordering on the meander line of the lake; if so, they have their riparian rights to the center of the lake, and the improvements placed thereon are not necessarily lost.

But whatever loss may have been suffered in the expenditure of money to reclaim the lands and putting improvements thereon, the Department is powerless to give relief; it has no jurisdiction over the lands within the meander line of the lake, and therefore no power to order the survey applied for.

The decision appealed from is therefore affirmed.

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

JOHN FITZPATRICK.

The right to make additional homestead entry under section 6, act of March 2, 1889, is not barred by a previous additional entry of contiguous land made by the applicant under section 5 of said act, if the whole amount of land thus taken does not exceed one hundred and sixty acres.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 18, 1892.

The land in controversy in this appeal is the NE. ¼ of the SW. ¼, Sec. 20, T. 7 S., R. 4 W., M. D. M., San Francisco, California, land district.

The record shows that John Fitzpatrick on July 29, 1889, made application under section 6 of the act of Congress of March 2, 1889, for additional homestead entry of said land. The application discloses the fact that he made homestead entry November 20, 1882, for the S. ½ of the SE. ¼ of Sec. 20; that on June 29, 1889, he made additional homestead entry No. 10523, under section 5 of said act of Congress for the SW. ¼ of the SW. ¼ of Sec. 21, all in same township and range. Upon these two entries final certificates have been issued.

Section 6 (25 Stat., 854), under which this application is made reads as follows:

> That every person entitled, under the provisions of the homestead laws, to enter a homestead, who has heretofore complied with or who shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than one hundred and sixty acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as a personal right, and not assignable, by legal subdivisions of the public lands of the United States subject to homestead entry, so much additional land as added to the quantity previously so entered by him shall not exceed one hundred and sixty acres: *Provided*, That in no case shall patent issue for the land covered by such additional entry until the person making such additional entry shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered and otherwise fully complied with such laws.

It will be observed that the two prior entries aggregate one hundred and twenty acres and it is contended that applicant, under the section quoted, has a right to make this entry which will give him one hundred and sixty acres. Under a proper showing in conformity with the circular of March 8, 1889 (8 L. D., 314), I see no reason why this may not be done. I do not understand that it was the intention of Congress to limit the number of applications, so long as they were made in compliance with law, but the limitation is placed on the number of acres one may acquire under the homestead laws.

The application as presented was not in accordance with the statute or the regulations, (*supra*) hence your action was not erroneous, but in the absence of any adverse claim, I think you should have notified the

claimant to amend the same, to show that his entry was made for the purpose of actual settlement and cultivation when his entry should have been allowed.

Your judgment is therefore modified to that extent and you will direct the claimant to amend his application in conformity to this decision, and thereupon receive and file his application.

ROBERT L. GARLICHS.

Motion for review of departmental decision of May 8, 1891, 12 L. D., 469, denied by Secretary Noble, March 18, 1892.

RES JUDICATA—MILITARY BOUNTY LAND WARRANT—RAILROAD GRANT.

MISSOURI, KANSAS AND TEXAS RY. CO. *v.* LASSELLE.

The plea of *res judicata* is not good as against one who is not made a party to the proceedings in question by due notice thereof.

An application, duly filed with the Commissioner of the General Land Office, requesting the location of a military bounty land warrant on a specific tract, secures to the applicant an inchoate right to said tract that will serve to except the same from the subsequent operation of a railroad grant.

The loss of the land warrant and fees, accompanying the application, by the Commissioner of the General Land Office, or after the same have been filed with him, will not defeat the right of the applicant, though, on account of said loss, no record is made of the location in the local office.

The case of Lasselle *v.* Missouri, Kansas and Texas Ry. Co., 3 C. L. O., 10, overruled.

Secretary Noble to the Commissioner of the General Land Office, March 18, 1892.

I am in receipt of your letter of February 8, 1892, submitting certain papers and a statement relative to the W. ½ of the NW. ¼ and the W. ½ of the SW. ¼ of Sec. 19, T. 26 S., R. 18 E., Topeka land district, Kansas, claimed by the Missouri, Kansas and Texas Railway Company, under its grant.

This tract is within the common granted limits of the grants to aid in the construction of the Missouri, Kansas and Texas and the Lawrence, Leavenworth and Galveston Railroads, and was twice listed by said companies, jointly, viz: August 8, 1872, and July 29, 1874.

The claim of Hyacinth Lasselle, or one Nannie M. Preston, as heir, to said tract rests upon the following statement of facts, viz:

On March 26, 1861, Hyacinth Lasselle filed in your office military bounty land warrant No. 96,200, act of 1855, for one hundred and sixty acres, accompanied by $4.00 as fees and $1.68 for excess acreage, with the request that the same be located upon and applied to the entry of

the W. ½ of the NW. ¼ and the W. ½ of the SW. ¼ of Sec. 19, also the SW. ¼ of the SW. ¼ of Sec. 18, T. 26 N., R. 18 E., Kansas.

The receipt of the same was acknowledged, and he was advised that it had been forwarded to the register at Fort Scott, in whose district the land was then situated. Your records show that such letter was written to the local officers.

Not receiving a patent for the land, Lasselle made inquiry of your office, when, upon investigation, it was learned, in December, 1870, that the letter to the local officers, enclosing the warrant, had miscarried or been lost, and that the same was never received at the local office; hence, no record was ever made in that office.

Hon. W. E. Niblack, of the House of Representatives, interested himself in Lasselle's behalf, and, in answer to a letter addressed to your office, was advised, April 28, 1874, as follows:

> In relation however to the W. ½ of the NW. ¼ NW. frl ¼ and W. ½ of the SW. frl ¼ of said Sec. 19, township 26, south of range 18 east, containing 128 and 80 hundredths acres, I have to state that Mr. Lasselle may secure a title thereto by first procuring the issue of a duplicate of said warrant No. 96,200, and causing the same to be properly assigned to him by the warrantee as now required by law, and after which to file the same with the register and receiver of the land office now at Independence, Kansas, in a letter stating that he will accept said tract last above described in full satisfaction for said warrant. It will also be necessary for him at the same time to transmit with the warrant four dollars to pay the location fees, for the reason that it does not appear that the money heretofore sent as mentioned in our said letter of the 28th of March, 1861, was ever received by the local office. When the duplicate warrant shall have been procured and duly assigned as above suggested, this office will instruct Mr. Lasselle and also the local office how to proceed in the matter.

Shortly after this, to wit: in June, 1875, the Missouri, Kansas and Texas Railway Company asked for a patent for the land, and by your letter of June 11, 1875, the request was denied; whereupon the company appealed, resulting in departmental decision of March 1, 1876 (3 C. L. O., 10), which held "that there was no location of Lasselle's warrant upon the land he claims, that the land, as far as Lasselle's claim is concerned, was vacant and unappropriated at the date the right of the company attached, and must pass under the grant."

Notwithstanding this apparent adjudication, you, upon the request by the company for patent, dated November 24, 1890, directed the local officers, by letter of February 26, 1891, "to cite all adverse claimants to show cause, within thirty days, why the W. ½ NW. ¼ and N. ½ SW. ¼ of the section should not be patented to the company."

The local officers thereupon advised the heirs of Lasselle, also one Theo. S. Strickland, who, on September 3, 1890, filed homestead declaratory statement No. 119, and they both responded within the time allowed.

The local officers rendered a joint opinion, but, before the matter was considered by you, the decision of March 1, 1876, before referred

to, was called to your attention, whereupon you present the matter for my consideration.

The first question suggested is, as to the effect of the decision of March 1, 1876 (*supra*).

An examination of the record on which said decision was based shows that the case was purely an *ex parte* matter.

The decision appealed from was addressed to the attorneys for the company, without notice to Lasselle; the appeal was not served upon him, nor was any notice given him of the departmental decision upon said appeal reversing the action of your office. Lasselle was therefore not a party to said case, and, hence, neither he nor his heirs are bound by said proceedings, and the company's plea of *res adjudicata* must be overruled.

From a careful examination of the matter, I am of the opinion that the decision of March 1, 1876, holding that this tract passed under the grant to the company, is clearly wrong.

The proviso attached to the 4th section of the act of Congress, granting bounty lands for military service, September 28, 1850 (9 Stat., 521), makes it

> The duty of the Commissioner of the General Land Office, under such regulations as may be prescribed by the Secretary of the Interior, to cause to be located, free of expense, any warrant which the holder may transmit to the General Land Office for that purpose, in such State and land district as the said holder and warrantee may designate.

The act of March 22, 1852 (10 Stat., 3), made the warrant assignable, and authorized the register and receiver to charge and receive a certain compensation.

The circular of February 9, 1858 (1 Lester, 617), which is made the basis of the decision of March 1, 1876, after reciting the statutes, prescribed the following regulations:

> The Commissioner of the General Land Office will therefore receive military bounty land warrants . . . . . whenever presented at his office by the owner, with the request accompanying them, that they be located in a specified land district and . . . . . he will forward them to the register and receiver of the proper district, to be by them located, pursuant to the proviso of the last section of the act of 1850, and as it is manifest that this proviso can only be carried out in harmonious conjunction with other enactments regulating the disposal of the public lands and the assignment and location of bounty land certificates, the warrants presented at your office can have only such opportunities of location at the district office after the arrival of the money and warrants there, as the owner could have if personally present and offering said warrants and money on the day that they both first reach the local office in business hours. The act of September 28, 1850, contemplates that the particular tracts to be located in this manner shall be selected or designated by the local officers of any particular district, from the vacant public lands in such district, liable to be located by the specific warrants sent them from your office: and when locations are made by district officers in cases of this kind, they will certify, in connection with their usual certificate in each case, that the location has been made upon good farming land, etc.

Said decision proceeding upon said instruction holds:

> From these instructions it is apparent that the warrants forwarded through your office can have no opportunity of location until received in the district office in business hours, that they must be "located" by the local officers, and that they gain no additional force or efficacy by reason of being received and transmitted by you.
>
> It follows, necessarily, that there was no location of Lasselle's warrant upon the land he claims, that the land, as far as Lasselle's claim is concerned, was vacant and unappropriated at the date the right of the company attached, and must pass under the grant.

It is very plain that said instructions were intended to apply to cases where no particular tract was selected by the intending locator, he merely specifying the State and district, leaving to the officers to make a specific selection of a particular tract for him.

In such case it could very properly be held that there was no location, in so far as to affect any particular tract, until selection had been made by the local officers. It was, however, the construction that warrants could be located "through the General Land Office, by enclosing them and the fees required by law to the Commissioner." See 1 Lester, pages 574 and 575. This being so, when an application is filed for a specific tract with the Commissioner, accompanied by the warrant and fees, an inchoate right is acquired in the tract applied for, and the loss of the warrant and fees by the Commissioner, or after being filed with him, can not be considered the loss of the applicant, for he has deposited it with an officer named in the act granting the right, and by said act it is made the duty of said officer to cause it to be located as applied for. Goist *v.* Bottum, 5 L. D., 643.

If never received at the local office, no record is there made of the location, but this fact does not affect the question as to whether said tract was by reason of said location excepted from the grant.

The letter from your office to the local officers described the location as made, and the copy of said letter became a part of the records of your office.

This Department is charged with the adjustment of the railroad grant, and for this purpose the records of your office are as available as those of the local office. The record there made of said location was, to my mind, sufficient to defeat a grant, the rights under which did not attach until more than six years thereafter, and it is my duty to protect the claimants under said location in their rights. Eddy *v.* University of Illinois, 14 L. D., 50; Knight *v.* United States Land Association, 142 U. S., 177.

The departmental decision of March 1, 1876, is therefore overruled, and this tract is held to have been excepted from the grant by reason of the location by Lasselle.

The question as to the rights of Strickland under his homestead declaratory statement is not passed upon by you, and consequently need not now be considered.

The record is herewith returned, for such further action in the premises as may be warranted by the facts as presented.

SCHOOL LAND—INDEMNITY SELECTION.

McKENZIE *v.* STATE OF WASHINGTON.

A school indemnity selection, made by the Territory in lieu of land patented as mineral, and of record at the date of the passage of the act of February 22, 1889, authorizing such selections, operates to reserve the land as against a subsequent homestead application.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 18, 1892.

On the 27th of October, 1890, Charles A. McKenzie made application at the land office in Seattle, Washington, to make homestead entry for the NW. ¼ of Sec. 20, T. 21 N., R. 6 E. The local officers rejected his application, for the reason that said land had been selected for the use of common schools, by the proper authorities of King county, by list No. 10, filed June 21, 1886, as indemnity for lands lost in section thirty-six in said township, which had been patented to Colbert F. Nason, as coal land in 1876.

Upon an appeal from that decision, you affirmed the same, and rejected McKenzie's application, in a decision dated February 14, 1891. A further appeal brings the case to the Department for consideration.

The only ground of error specified in the notice of appeal is, that you "erred in deciding that said selection was not void but voidable, only, and was validated by the act of February 22, 1889."

In his argument, counsel insists that at the time the selection was made there was no law providing for the selection of lands in lieu of mineral lands, and that the selection was therefore void. He admits, however, that the act of February 22, 1889 (25 Stat., 675), which provided for the admission of the Territory of Washington into the Union as a State, made provisions for such selection. This act took effect prior to the application of McKenzie to make entry for the land, and you held that its passage validated the selection, which was not void, but voidable, up to that time. In support of your position you cite the case of Early *v.* State of California (7 L. D., 347).

There is no question but that the selection was upon the records at the time McKenzie applied to make homestead entry for the land, and in Niven *v.* State of California (6 L. D., 439), it was held that an invalid school selection of record bars the allowance of an application to enter. In the case of the Southern Pacific Railroad Company *v.* said State (3 L. D., 88), this Department held that selections under the act of July 23, 1866 (14 Stat., 218), made prematurely because the question of the loss of the State had not been ascertained, were not void but voidable and served to except the land selected from the grant to said company. See also State of California (3 L. D., 327).

The question of indemnity school selections in the State of Washington, has been before the Department quite frequently within the

past year or two, and numerous decisions have been rendered thereon. In one of the latest cases, that of Sharpstein *v.* State of Washington (13 L. D., 378), most of the cases in which the question is discussed are cited, and in view of the decision in that case, and of those in the cases therein mentioned, and for the reasons herein expressed, the conclusion reached in the decision appealed from is approved.

RAILROAD GRANT—DEFINITE LOCATION—HOMESTEAD ENTRY.

OREGON CENTRAL R. R. CO. *v.* JONES.

The grant of May 4, 1870, is in the nature of a float, and does not take effect upon specific tracts until definite location; and a homestead entry made prior to such location excepts the land covered thereby from the operation of the grant, although no exception is made therein of lands thus appropriated.

Secretary Noble to the Commissioner of the General Land Office, March 19, 1892.

I have considered the case of the Oregon Central Railroad Company *v.* James H. Jones, involving the S. ½ of the NW. ¼ and the W. ½ of the NE. ¼, Sec. 9, T. 2 N., R. 3 W., Oregon City land district, Oregon, on appeal by the company from your decision of August 14, 1890, holding that said tract was excepted from the grant for said company.

The question raised by this appeal is, when rights under the grant attached—the date of the passage of the act, or the date of the filing of a map showing the line of definite location of the road?

The grant here in question was made by the act of Congress, approved May 4, 1870 (16 Stat., 94), the first and second sections of which provide:

That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamkill River, near McMinville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, side tracks, and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

Sec. 2. *And be it further enacted*, That the commissioner of the general land office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And whenever and as often as the said company shall file with the

Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands: *And provided also,* That settlers under the provisions of the homestead act who comply with the terms and requirements of said act, shall be entitled, within the said limits of twenty miles, to patents for an amount not exceeding eighty acres each of the said ungranted lands; anything in this act to the contrary notwithstanding.

This tract is within the primary limits of the grant, as shown by the diagram on file and in use in your office, which is adjusted to the map of location filed by the company May 17, 1871, upon which withdrawal was ordered by letter of July 14, received at the local office July 31, 1871.

On September 8, 1870, Thomas Drews made homestead entry No. 1610, embracing the tract here in dispute, which entry was canceled February 14, 1878.

On November 5, 1878, Jones, the present claimant, filed declaratory statement No. 3388 for this land, alleging settlement December 16, 1876, which filing was transmuted to homestead entry No. 4468, on August 5, 1881, and upon which he made proof June 12, 1882, after due notice by publication, and on June 16, 1882, final certificate No. 1488 issued thereon.

Your decision states that:

Previous to 1886 it had been held that the right under the grant attached at the date of approval thereof, but by Commissioner's decision of February 6, of that year, in the case of Alfred F. Sears against the company, it was held that the grant was a float and attached to no particular tract until the definite location of the road, and that the tract involved having at that date been covered by a homestead entry, was excepted from the operation of the act.

The contention on the part of the company is, in effect, that the right under this grant attached upon the passage of the act; that all lands then free from valid adverse right passed, and that thereafter no rights could be acquired, as against the grant, by settlement upon and entry of the lands.

It is true that the act recites that the road was in process of construction at the date of its passage, but, aside from the termini, there is nothing to give location to the road.

The grant was therefore in the nature of a float, until location was made, for, until that act was performed, the lands passing under the grant were incapable of identification.

It is clear that the act itself did not reserve any lands prior to the definite location of the road, for by the second section of the act it is provided that

whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands.

This being so, the tract in question was, on September 8, 1870, subject to the entry by Drews, for at that time the road was, as yet, unlocated. This tract was, therefore, lawfully appropriated on September 8, 1870, and was, while said entry remained of record, severed from the mass of the public lands; hence, it was not affected by the location made more than eight months thereafter, and the act of May 4, 1870 (*supra*), will not be construed to embrace it or to operate upon it, although no exception is made of it in the granting section. Wilcox *v.* Jackson, 13 Pet., 498; Witherspoon *v.* Duncan, 4 Wall., 210.

The only requirement in the act for a reservation, or segregation, of the lands on account of the railroad grant was upon the location of the road. If, at that time, the lands were for any reason already severed from the mass of the public domain, they were not affected by the grant.

There is no requirement in the act limiting the time within which the location must be made, otherwise than that the road was required to be *built* within six years from the date of its passage.

To sustain the contention made by the company would have, in effect, served to reserve all the lands in the northwestern part of the State of Oregon, as well as a large portion of the State of Washington, to await the pleasure of the company in the matter of the location of its road, for the grant would follow the location when made, and all settlers in that part of the country would be at the mercy of the company.

This was clearly not the purpose of the act, for in providing for a reservation upon location, it, in effect, prohibited any reservation until location, and, without reservation, rights could be acquired under the public land laws, the lands being otherwise subject thereto, which would operate to defeat any subsequent grant.

In its indemnity privilege the company was not limited to these lands disposed of prior to the grant. This privilege was:

> And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

It will therefore be seen that ample provision was made to protect the grant.

I therefore affirm your decision holding this tract excepted from the grant.

RAILROAD GRANT—INDEMNITY SELECTION—ACT OF JUNE 22, 1874.

FLORIDA RY. AND NAVIGATION CO. *v.* SCRIVEN.

The right of a qualified settler excludes the land covered thereby from indemnity selection under the act of June 22, 1874.

Secretary Noble to the Commissioner of the General Land Office, March 21, 1892.

I have considered the case of the Florida Railway and Navigation Company *v.* Charles L. Scriven, involving the NE. ¼ of the NE. ¼ of Sec. 2, T. 16 S., R. 22 E., Gainesville, Florida, on appeal by the company from your decision of September 15, 1890, holding for cancellation its selection of said tract.

This tract is within the limits of the grant made by the act of May 17, 1856 (11 Stat., 15), which was conferred by the State upon the Atlantic, Gulf and West India Transit Company, and was embraced in a list of selections filed by said company January 18, 1882, under the act of June 22, 1874 (18 Stat., 194).

The Florida Railway and Navigation Company succeeded to the interests of the Atlantic, Gulf and West India Transit Company.

On February 27, 1886, Charles L. Scriven presented a homestead application for the land, alleging settlement in 1880, which was rejected by the local officers for conflict with the selection before named, and upon appeal a hearing was directed by your letter of April 2, 1887, which was regularly held, both parties being represented.

The following facts were developed at said hearing:

Charles Scriven, father of the present claimant, settled upon this land some time in 1880, with his family, including Charles L. Scriven, who was at that time a minor; he cultivated the land for two seasons, and was in the actual occupation of the land at the date of the selection by the company, at which date the present applicant was yet a minor. During the year 1883, he moved from the land, leaving the present claimant thereon, who had since married, and continued to reside upon and improve the land, his improvements consisting of a dwelling house, three out-houses, ten acres cleared and fenced, and about one acre planted to orange trees five years old—all of which are valued at about six hundred dollars.

It was not shown at the hearing that Charles Scriven, the father of the present claimant, was qualified to enter the land at the date of the company's selection, but he has since made affidavit to the effect that at the date of the company's selection he was qualified to enter under either the homestead or pre-emption laws.

The local officers held that the company's selection was invalid on account of the settlement and occupation by Charles Scriven, in which holding you agree.

The company's appeal construes your decision as giving effect to a settlement by a minor, and therein it is stated:

> We do not concede that the occupation by the father, followed by his abandonment, could defeat the company and inure to the benefit of his son, who was a minor for over a year after the selection by the company, even if the father was a qualified settler. But on the record as it is, this point is removed from discussion.

While it should have been shown at the hearing that Charles Scriven was, at the date of the company's selection, qualified to make entry of the land, yet his affidavit would, under the circumstances, seem to be sufficient upon this point, the same having been served, and not disputed by the company, and a further hearing could but result in additional expense. His affidavit would have been sufficient to have authorized an entry, and his settlement was an appropriation as against the selection by the company.

The act under which this selection was made permits of a relinquishment by the company in favor of persons who had been allowed to enter or file for lands to which it would be entitled, and provides that the company shall upon making such relinquishment——

> be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral, and within the limits of the grant, not otherwise appropriated at date of selection, to which they shall receive title the same as though originally granted.

It will be noticed that the intention of this act was to protect settlers, and the lands to be selected in lieu of those relinquished are restricted to those "not otherwise appropriated at the date of selection."

The testimony clearly shows that the tract here in question had been appropriated at the date of selection, and is now claimed by one qualified to make entry, with valuable improvements upon the land, and to permit the company to acquire title to this land would be to protect one settler at the expense of another, who is, perhaps, more deserving.

I therefore affirm your decision, direct the cancellation of the company's selection, and the allowance of Scriven's application.

PRACTICE—NOTICE—ATTORNEY. 11203 94

ATKINS ET. AL. *v.* CREIGHTON.

Notice to an attorney of record of any action taken in a case is notice to the party he represents.

Secretary Noble to the Commissioner of the General Land Office, March 21, 1892.

Counsel for Wilson Atkins and O. E. Morlan have applied for an order directing you to transmit to the Department the papers in the matter of their contest against the desert land entry of J. M. Creighton for the E. ½ and the SW. ¼ of the NW. ¼ of Sec. 34, T. 21 S., R. 23 E.,

Visalia land district, California. On April 15, 1891, you directed that said contest be suspended, to await the determination of the contest of one T. T. Sullivan against said entry. Appeal was filed October 13, 1891, which you by letter of December 1, 1891, refused to recognize, because not filed within the period prescribed by the Rules of Practice.

Thereupon the parties first named apply for a certiorari, on the ground that—

> They had employed one James S. Clack to draw up the affidavit of contest for them in said matter, and to appeal from the rejection of the register and receiver in refusing to accept said contest; . . . . . after that proceeding they dispensed with the services of said Clack, and his agreement with them ended. . . . . The said contestants, Atkins and Morlan should not be denied their right to be heard, and have their interests jeopardized, because a person who had once been employed by them as attorney received a notice of which there were no instructions authorizing the sending thereof.

If the applicants had filed in the local office a statement that Clack was no longer their attorney, and directed that any notices relative to the case should thereafter be sent to themselves personally, their contention is correct; but it is not shown that they had filed any such statement. So long as the appearance of an attorney stands of record in a case, and there remains anything to be done in connection with that case, notice of which should be sent to the parties in interest, notice to such attorney is notice to the client. In the case at bar, the parties are bound by the notice sent to their attorney of record.

Their appeal was properly rejected, and there is no reason shown why a writ of certiorari should be issued.

The application is denied.

RAILROAD GRANT—RELINQUISHMENT—SETTLEMENT RIGHT.

FLORIDA RY. AND NAVIGATION CO. *v.* WILLIAMS.

The relinquishment of June 25, 1881, in favor of "actual *bona fide* settlers" does not extend to one who was at said date not a qualified settler, being a minor and not the head of a family.

Secretary Noble to the Commissioner of the General Land Office, March 21, 1892.

The appeal of the Florida Railway and Navigation Company from your decision of November 15, 1890, involves the right to the W. ½ of the NW. ¼ and the W. ½ of the SW. ¼ of Sec. 35, T. 29 S., R. 20 E., Gainesville district, Florida.

The W. ½ of the NW. ¼ is within the primary and the W. ½ of the SW. ¼ is in the indemnity limits of the grant to that company, formerly known as the Atlantic, Gulf and West India Transit Company.

The only question for determination is, whether the claim of said company to the said tract was relinquished by its waiver of June 25, 1881.

Prior to that date, namely, on April 1, 1875, in pursuance of negotiations with this Department, the board of directors of said company resolved:

> That this company hereby waives all claim to so much of the lands on each side of their line of road, between Waldo and Tampa Bay, to which this company is entitled by law, as may be found by the General Land Department, at Washington, to be occupied by settlers who may be entitled to equitable relief up to December 13, 1875, saving and reserving to this company any and all rights of indemnity vested in the company under existing laws.

Upon request by this Department, said company, on June 25, 1881, executed a further waiver, as follows:

> In due consideration of all the circumstances, the company has decided to extend the relinquishment or waiver heretofore made to all actual *bona fide* settlers who made improvements prior to the 16th day of March, 1881, upon which date your instructions were issued to the local land officers. The Department can accordingly apply this waiver or relinquishment in its action upon the cases of all actual settlers who shall have entitled themselves to patents. In making this relinquishment the company reserves the right to select, under the act of June 22, 1874, equal quantities of other land in lieu of tracts embraced in such entries as may be relieved hereby.

Under this last waiver, Williams claims the right to make homestead entry for this land, based upon the following facts, as shown by the record transmitted with the appeal:

March 16, 1888, he applied to make homestead entry, which was rejected by the register, "for the reason land applied for has been selected by the F. R. & N. Co., per list 1 filed April 5, 1888 ('87), which list is now on appeal before Hon. Secretary." He appealed from this rejection, and on June 27, 1888, your office directed a hearing to determine "the date of Williams' settlement, the duration of his residence, the nature and extent of his improvements and cultivation, and his entire connection with the land, also his personal qualifications as a homestead claimant."

At such hearing it appeared from the testimony of claimant himself that his father went on the land March 10, 1880, with his family, among whom was the claimant, then a boy, thirteen years of age; that there were at that time some improvements on the land made by one Rawls, which claimant purchased for eighty dollars. Rawls had, in April, 1878, filed a declaratory statement for the W. ½ of the NW. ¼, alleging settlement in March of the same year; that he (claimant) has lived on the land ever since, and that the improvements are now worth eight hundred dollars. He never was the head of a family, but lived with his father until 1882 or '83, when his father made homestead entry for the east halves of the northeast and southeast quarters of Sec. 34, which join the land in controversy on the west, and he, with his father and family, continued to live in the same house, which appears to have been built so as to embrace both claims.

It does not appear from the evidence that the father ever laid any claim to the land in controversy, or made any improvements thereon.

All the improvements were made by the claimant, and he, and not his father, paid the eighty dollars to Rawls for the improvements he had put upon the land, although it appears that all or nearly all of Rawls' improvements were upon the land subsequently entered by the father of claimant.

Thus, it appears, that at the date of the waiver, June 25, 1881, the settlement of the boy alone is all that can be invoked to bring this land within the conditions of the waiver. Rawls was not at that time a settler, for he had abandoned his claim and sold his improvements, and it can not be claimed by right of claimant's father, for he was never a claimant for the land under any of the land laws.

Before the claimant had become a qualified settler, the land in the indemnity limits was selected by the company.

No discussion, it seems to me, is necessary to show that "an actual *bona fide* settler" must be one capable of acquiring title from the government—that is, he must be qualified to make settlement and entry under some one of the land laws. A minor, not the head of a family, equally with an alien, is disqualified to make settlement, filing, or entry, or to initiate any rights under the land laws, and the settlement, occupation, and improvement of one so disqualified will not except the land settled upon from the operation of a grant to a railroad. Central Pacific R. R. Co. *v.* Taylor *et al.*, 11 L. D., 354; same *v.* Booth, id., 89; Titamore *v.* Southern Pacific R. R. Co., 10 L. D., 463.

It was to protect the interests of bona fide settlers that this waiver was made—that is, it was a withdrawal of the claim of the road as against such settlers, so that they might go on and perfect their claims to the land as if no grant had been made to the company. Now, a disqualified settler would have no claim to protect.

This applicant was disqualified when the waiver was made; it therefore could have no application to his settlement. That part of the land within the primary limits of the grant was never relinquished by the company, and the record shows that the company made selection of the part within the indemnity limits before the applicant had become a qualified settler.

The application of Williams to make entry of the land is therefore denied.

The decision appealed from is reversed.

SCHOOL LAND—SURVEY—SETTLEMENT.

FRANDS C. GRUNDVIG.

A survey of land embraced within a reservation does not exclude subsequent settlement on a school section covered thereby, where such survey does not conform to the system of public surveys, and for that reason a resurvey is found necessary.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 22, 1892.

I have considered the appeal of Frands C. Grundvig from your decision of December 16, 1890, rejecting his application to make homestead entry for lots 5 and 6 and S ½ NW ¼, section 36, T. 18 S., R. 1 W., S. L. M., Salt Lake City, Utah Territory, land district, for the reason that said section is reserved for school purposes.

On November 6, 1890, the appellant filed in the local land office an affidavit setting forth that he had settled upon this land in the first part of November, 1878; that he had made certain improvements thereon and was still in occupation of the same; he asked to be allowed to make homestead entry therefor under section 2290, Revised Statutes. This application was rejected because the land was situate in a school section. From this action he appealed, and on December 16th following, your office affirmed the action of the local officers. You say upon examination of the records of your office, you do not find that the rejection was contrary to law and the regulations. Grundvig again appealed.

You state in your decision that the lines of the public survey had been regularly extended over this land long prior to the date of this settlement, etc. You do not give the date of the survey. This land was embraced in the "San Pete" Indian reservation, and was surveyed into forty acre tracts in 1856. It was restored or opened to entry by letter "C" of December 6, 1878. The surveys made in townships 18 and 19 south, R. 1, W., which were in the reservation, did not conform to the official survey of the balance of the townships, and the plats of the surveys were suspended. After the land was opened to entry, to wit, on March 29, 1879, contracts for surveying the restored portions of the townships were made, and the surveys were completed during the summer of 1879. The plats were approved August 13, 1879, and were posted in the general land office September 30th following.

On June 6, 1879, your predecessor, Commissioner Williamson, wrote to the register and receiver at Salt Lake City (Vol. 147, p. 167), in reference to an application of James Robbins to make entry in section 25, T. 19, R. 1, which land was in the exact status of the land in controversy, and after stating briefly the history of the lands formerly in the San Pete reservation, said that they were unsurveyed lands, and

he concluded his letter as follows: "In view of the foregoing, you will allow Mr. Robbins to make said entry as for unsurveyed lands."

An inspection of the surveys as platted, and on file in your office, shows that when the survey of 1879 was made, it was found that the survey of the lands in the reservation did not conform to the official survey of the township by nearly twenty chains on the lines running north and south.

In view of the facts shown by the records of your office, and following the letter of your predecessor, who had the survey of 1879 made, and who was familiar with all the facts at the time the letter was written, I reverse your decision and hold that in November, 1878, this land was properly regarded as "unsurveyed land."

I return herewith the papers in the case, for appropriate action by your office.

ALABAMA LANDS - ACT OF MARCH 3, 1883.

JAMES W. BURNUM.

The act of March 3, 1883, does not require a public offering of land that is returned as containing "iron," if such return does not show that said land is "valuable" on account of the iron it contains.

Secretary Noble to the Commissioner of the General Land Office, March 22, 1892.

James W. Burnum owns and resides on an original farm of eighty acres, described as the SW ¼ of NW ¼ and NW ¼ of SW ¼ of section 11, T. 13 S., R. 1 E., Huntsville, Alabama.

On July 22, 1890, he applied to enter an additional forty acres, described as the NW ¼ of the NW ¼ of the same section. The application was rejected by the register and receiver, because the tract "is classed on the mineral list as valuable for coal."

An appeal was taken from the finding of the local land office to you, and on January 12, 1891, after considering said appeal you affirmed the finding of the register and receiver, and found, among other things, that,—

The original mineral list in this office contains the tract involved, and it is reported as containing "iron." The land has not been offered as contemplated by the act, and it is not therefore subject to entry.

Applicant has appealed from your judgment to this Department.

It is to be noticed that the register and receiver state that the tract has been reported as being "valuable for coal," while you state in your decision that "it is reported as containing 'iron.'" It has however been ascertained, upon examination of the record in your office, that your statement of what it contains is correct.

The act of March 3, 1883 (22 Stat., 487), provided that all lands that had been reported as containing coal and iron should not thereafter be sub-

ject to homestead entry, until said lands had first been offered at public sale. In the circular of April 9, 1883 (1 L. D., 655), the local land officers were directed not to allow entries of tracts that had been investigated and reported as "valuable" for minerals.

The tract in controversy was within the limits of the belt of lands reported as containing minerals, but upon investigation it is shown to have been classed simply as containing "iron."

There are only two classes of lands reported as being mineral in Alabama which may be disposed of without first being offered:

First—Such as were included in an entry on March 3, 1883, when the act was approved, or land at that date covered by actual legal settlement.

Second—Land not reported as "valuable" for coal or iron.

The tract in question was not included within an entry, nor was it settled upon on March 3, 1883. Applicant's settlement on his original entry, and his using this tract, does not constitute settlement or residence upon it. John W. Farrill (13 L. D., 713).

It has been seen, however, that this tract of land has never been reported as being *valuable* for coal or iron. The mere report that the land contains "iron," without any statement that it is *valuable* by reason thereof, will not prevent the land from being subject to entry before it is offered. Avery *v.* Smith (12 L. D., 550).

The soundness of this construction is made to appear all the more forcible when we consider that those parties who examined the tracts in this belt of mineral lands, reported some of the tracts as "valuable" for "coal," or "iron," and others merely as "containing coal or iron." The inference to be drawn from these reports is, I think, that lands like the tract in question, not reported as valuable for coal or iron, really have no value other than for agricultural purposes.

The affidavits accompanying the application for entry in the case at bar show that the land has no value except for agricultural purposes.

Your judgment is reversed, and you are directed to allow the application.

EXTENSION OF TIME FOR PAYMENT.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 14, 1891.

Registers and Receivers
United States District Land Offices.

GENTLEMEN: In reference to the joint resolution of Congress to extend the time of payment to settlers on the public lands in certain cases, which forms the subject of departmental circular of October 27, 1890, 11 L. D., 417, I have now to communicate the following as additional rules to be observed in giving effect thereto, viz:

1. You will not accept any application for extension under said

resolution until the party shall have in due course submitted final proof on his claim, and the same shall have been found satisfactory to you, and should any such application be made prior to the submission of the proof and your favorable finding thereon, you will reject the application, so advise the applicant, and inform him that he acquired no right thereby under said joint resolution.

2. After application received according to the foregoing rule, you will note upon your records in pencil that the same has been filed, and transmit it together with the testimony filed in support thereof, and the final proof submitted and found satisfactory by you, as above, accompanied by your report, and await further instructions.

3. Thereafter you will allow no filing or entry for the land covered by the claim sought to be perfected until decision of this office on the pending application.

4. You will be careful to distinguish between an application under said joint resolution for an extension of time for payment, and an application for leave of absence under the act of March 2, 1889, the subject of circulars of 8th March, 1889, 8 L. D., 314, and September 19, 1889, 9 L. D., 433, which are still in force.

Very respectfully,

LEWIS A. GROFF,
Commissioner.

Approved:
JOHN W. NOBLE,
Secretary.

MINING CLAIM—SURVEY—MINERAL MONUMENT.

EUGENE MCCARTHY.

The general rule as to the connection of a mining claim with the public surveys is not abrogated by the departmental decision heretofore rendered in this case.

Secretary Noble to the Commissioner of the General Land Office, March 15, 1892.

I am in receipt of your letter of February 19, 1892, referring to departmental decision of January 27, 1892, in the matter of the Kendall Mountain Placer (14 L. D., 105). In that decision it was held that the omission in the published notice of the line directly connecting said claim with the Silverton monument was immaterial, inasmuch as said notice showed that said claim was sufficiently connected with said monument by being connected with a corner of the Silverton townsite, which was also a corner of the Clemmons placer, both patented, which corner was directly connected with said monument; and that this secondary connection with the Silverton monument was a substantial compliance

with the general rule as to the connection of the survey of a mining claim with a mineral monument. It was not the intention of that decision to abrogate the general rule, but to show that in that particular case there was a sufficient compliance with that rule.

No instructions are deemed necessary.

OKLAHOMA TOWNSITE—TRUSTEES—PATENT.

INSTRUCTIONS.

The issuance of patent to townsite trustees is not a disposition of the government title, but a conveyance thereof, in trust, to be held under the direction of the Secretary of the Interior.

The Attorney General will be requested to direct the proper district attorney to appear on behalf of said trustees, if judicial proceedings are instituted to control their action in the disposition of title.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 15, 1892.

I am in receipt of your letter of February 25, 1892, inclosing a letter from John Foster, chairman of board No. 6, Oklahoma townsite trustees, dated February 1, 1892, and asking for instructions as to the proper answer that should be given to the questions asked in Mr. Foster's letter.

Said letter states that the townsite trustees are in receipt of patents for the tracts included in the entries of East Guthrie and Capitol Hill townsites, and that they expect actions will be commenced by the homestead claimants against them for the purpose of procuring a judicial declaration that the trustees are holding the legal title in trust for the homestead claimants, and for a decree directing them to transfer to said claimants the legal title to said tracts.

It is further stated in said letter that,—

> It has been suggested to us that the U. S. Attorney has been directed to take care of this matter, but if that is so, we have no official notice.
>
> We can not understand in what manner the government is interested after the issuance of the patent, and after the United States has parted with the title, and particularly to the extent of furnishing attorneys and paying expenses incident to litigation without surcharging the same upon the occupants.
>
> We are now nearing the point where under our instructions we must levy the assessment upon the lots, and therefore we ask—
>
> 1st. Shall we levy for the expenses incident to this litigation?
>
> 2nd. About what amount shall we levy?
>
> 3rd. Shall we select and employ counsel, or will the government relieve us of that burden?

In answer to your communication I have to state that by the act of Congress approved May 14, 1890 (26 Stats., 109), special provision was made for townsite entries of lands in Oklahoma. Section one of this act provides that certain portions of the public lands in Oklahoma may

be entered as townsites for the use and benefit of the occupants thereof by three trustees to be appointed by the Secretary of the Interior for that purpose, and when the entry shall have been made the Secretary of the Interior shall prescribe regulations for the guidance of the trustees in the proper execution of their trust.

Section two prescribes what shall be taken as evidence of occupancy by lot claimants.

Section three relates to conveyances of church lots, and section four directs—

> That all lots not disposed of as hereinbefore provided for shall be sold under the direction of the Secretary of the Interior for the benefit of the municipal government of any such town, or the same or any part thereof may be reserved for public use as sites for public buildings, or for the purpose of parks, if in the judgment of the Secretary, such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section.

Section six prescribes the manner of adjudicating the entries, and directs that "when final entry is made, the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses and purposes herein provided."

Section seven provides that the trustees appointed by the Secretary of the Interior shall have power to administer oaths, to hear and determine all controversies arising in the execution of said act, and they are required to "keep a record of their proceedings which shall, with all papers filed with them and all evidence of their official acts, except conveyances, be filed in the General Land Office, and become part of the records of the same." The trustees, by said section, are allowed such compensation, clerk hire and traveling expenses as the Secretary of the Interior may authorize, not exceeding a certain amount.

On June 18, 1890, instructions were issued by me to guide the trustees in the execution of their trust. (10 L. D., 666.) Among other things, appeals were directed to be allowed to interested parties from any judgment made by said trustees, etc.

On May 8, 1891 (12 L. D., 612), the above paragraph of instruction was amended by adding thereto the following,—

> and a failure to appeal as herein provided shall not be construed as a waiver of, or to prejudice the rights of either party, nor held to preclude suits in the courts in case the party entitled to appeal desires to proceed in that manner for the purpose of settling the title to the lot or lots in controversy.

A complete history of the legislation of Congress, and the adjudication of the courts on the subject of the disposal of the public lands, may be seen in the additional instructions under the act in question. (13 L. D., 9)

These last named instructions were given mainly to show that that part of my instructions found in 10 L. D., 666, directing the allowance of appeals from a judgment of the trustees, was maintained by precedent.

It seems to me, if the instructions heretofore given are correct, and such as are authorized under the act, it follows that the views taken by the townsite trustees, that the government is not interested after the patents have been given said trustees, are incorrect.

Section four of the act in question provides that after the lot-holders have received deeds from the trustees, the surplus lots within the townsite shall be sold under the direction of the Secretary of the Interior for the benefit of the municipal government, or he may reserve the same, or any part thereof, for public use, etc.

This provision, directing me to dispose of surplus property, has reference to the property inside the townsite remaining after the trustees have deeded the lots to the holders thereof. Of course, the trustees have no authority to make deeds for any of these lots until, in pursuance of the provisions of the act under which they were appointed, they have received from the government the patents for the lands.

By reference to said section four it will be noticed, not only that the Secretary of the Interior is authorized to dispose of surplus lots and property, or to reserve the same for public parks, but that he "shall execute proper conveyances to carry out the provisions of this section."

If, as intimated by the trustees, title passed from the government when the patent for all the lands within the townsite entry was issued to the trustees, the Secretary of the Interior would be powerless to "execute proper conveyances, etc.", or, in fact any kind of conveyances.

The purpose of the act was to afford a speedy way by means of trustees, in which townsite claimants could secure their homes. The act makes all these cases special, and the trustees are to take and hold the title of the government under the direction of the Secretary of the Interior, merely for convenience. If this was not true, the act would not have provided that under the direction of the Secretary the surplus lands should be disposed of.

The trustees appointed under this act are trustees of the government for the purpose of carrying out the trust created by the act, and from the general scope of the act, I think it is clear that Congress intended that this Department, charged by general law with the disposal of the public domain, should exercise a supervisory control over the execution of said trust.

The issuance of patents in such cases is not technically a disposal of the land; it only placed the title in such a condition that it might be conveniently transferred and the land be disposed of to actual holders under the townsite law.

The title of the government does not actually pass until the trustees have conveyed the lands to the individual owners, and up to that time the United States has jurisdiction thereover. These trustees are appointed by the government for the purpose of carrying out the trust declared by the act. They are engaged in the public service, and if

attacked in the courts should be defended by the United States attorneys.

Entertaining these views, I do not deem it necessary to formulate answers to the questions propounded by Mr. Foster. You will direct him that if suit be entered against the townsite board, he will at once notify you of the fact, and when you have called the attention of the Department thereto, the Attorney-General will be requested to direct the proper district attorney to appear on behalf of said board. The letter of the 19th of February, 1892, to the Secretary of the Townsite Board No. 2, Oklahoma City, referred to by you, is hereby recalled.

ABANDONED MILITARY RESERVATION—IMPROVEMENTS.

FORT CRAWFORD.

The improvements on an abandoned military reservation may be sold separately under section 3, act of July 5, 1884, where the lands on which they stand are not subject to disposition under said act.

Secretary Noble to the Commissioner of the General Land Office, March 18, 1892.

By letter of December 30, 1891, you asked to be instructed as to what disposition shall be made of the buildings pertaining to the Fort Crawford military reservation, and the lands surrounding them.

It seems this reservation, which was created by executive order of March 12, 1884, embraced something over eight thousand acres of land, all within the limits of the Ute Indian reservation in Colorado. A portion of the military reservation was abandoned by the authorities and turned over to this Department by the President's order of July 22, 1884. As to these lands, it was held that they did not come within the scope of the act of July 5, 1884, (23 Stat, 103) providing for the disposition of abandoned military reservations, but were to be disposed of under the act of June 15, 1880, (21 Stat., 199) making provision for the disposition of the lands in said Ute Indian reservation. (L. V. Bryant, 3 L. D., 296).

By the President's order of October 2, 1890, the remainder of the lands in said military reservation were turned over to this Department for disposition under the act of July 5, 1884 *supra*. Upon the suggestion of this Department in letter of October 9, 1890, that these lands could "only be disposed of under the act of Congress of June 15, 1880," the order was so changed as to read "for disposition under the act of July 5, 1884, or as may be otherwise provided by law."

You now ask to be instructed as to what disposition shall be made of the buildings pertaining to said post, and the lands surrounding them, but express no opinion on the premises and make no suggestion. It would be of great assistance if, in matters of this kind, you would give your views on the questions involved.

A question very similar to the one here presented arose in connection with the disposition of the land within the Fort Dodge military reservation. The holding of your office that such part of said reservation as was made up of Osage Indian lands could be disposed of only under the act of May 28, 1880, (21 Stat., 143) and the action directing the local officers to allow filings therefor under said act, "with the exception, however, of tracts upon which buildings were erected by the government for military purposes are located," which tracts were declared to be reserved from disposal until such buildings should be appraised and sold was approved by this Department. Hiram Wing (10 L. D., 602). That decision not only recognized the authority to reserve from disposal the land upon which such buildings stood, but also the authority to sell such buildings. It was said:

Section three thereof (act of July 5, 1884) directs the Secretary of the Interior to cause such buildings to be appraised and sold to the highest bidder for cash.

Said section three provides first for the appraisement of improvements, buildings, etc., and the sale thereof, together with the tract or lot on which they stand, by the Secretary of the Interior, and then provides as follows:

or he may in his discretion, cause the improvements to be sold separately, at public sale for cash, at not less than the appraised value, to be removed by the purchaser within such time as may be prescribed, first giving the sixty days public notice before provided; and if in any case the lands and improvements, or the improvements separately, as the case may be, are not sold for want of bidders, then the Secretary of the Interior may, in his discretion, cause the same to be re-offered for sale, at any subsequent time, in the same manner as above provided or may cause the same to be sold at private sale at not less than the appraised value.

The provisions of this act are broad enough to include the disposition of buildings situated as these in question are, and the fact that the land upon which they stand may not be sold with them is sufficient reason for the exercise of the discretion of the Secretary to cause the sale of such improvements separately. You are therefore instructed that said buildings and improvements will be disposed of under the provisions of said act of July 5, 1884, quoted above, and you will take such steps as may be necessary to that end.

PROCEEDINGS BY THE GOVERNMENT—PREFERENCE RIGHT.

BARBOUR *v.* BONNEY ET AL.

It is a condition precedent to the acquisition of a preference right of entry under section 2, act of May 14, 1880, that the contestant shall pay the fees of the land office in the proceedings that result in cancellation.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 23, 1892.

I have considered the appeal of George H. Barbour, from your decision dated February 7, 1891, rejecting his claim for the S ½ of section 21, T. 21 N., R. 4 E., Helena, Montana, and allowing Lewis E.

Bonney to make homestead entry of the SW ¼, and Thomas F. Burns to make homestead entry of the SE ¼ of said section, under their several applications filed in the local office on October 21, and rejected two days later by the local officers "for the reason that one George H. Barbour has a preference right of entry by virtue of having initiated contest proceedings prior to action of the government."

It appears that said tracts were covered by a desert land entry of one Henry O'Hagan, which was canceled by your office on October 18, 1890, and hence were open to the homestead applications of Bonney and Burns, subject to the legal rights of any other persons.

The local officers rejected the homestead applications because said Barbour had a preference right of entry, on account of having initiated contest proceedings against said desert entry "prior to proceedings by the government." This was clearly error on the part of the local officers, for it appears that said Barbour did not contest said desert entry, but the same was canceled by your office upon proceedings initiated by the government. It is insisted by Barbour that he offered to contest said desert entry, but was dissuaded from doing so by the register, because the entry could be canceled more quickly by proceedings by the government and at less expense. Conceding this to be true, Barbour could acquire no preference right by any proceedings initiated by the government, and without any expense to him. It is one of the conditions precedent to securing a preference right of entry under section 2 of the act of May 14, 1880 (21 Stat., 140), that the contestant "has paid the land office fees," in the contest which results in the cancellation of the contested entry. There is no pretense that Barbour paid a cent of fees, and the fact, if it be a fact, that the register dissuaded him from contesting said desert entry, on account of the expense, and he acquiesced in said advice, can give him no preference right of entry over the homesteaders Bonney and Burns. If the latter are not acting in good faith, their entries, when allowed, may be contested by any one under the rules of practice prescribed by this Department.

No error is shown in your decision, and it is therefore affirmed.

RAILROAD GRANT—INDIAN OCCUPANCY—SETTLEMENT RIGHTS.

SCHULTZ *v.* NORTHERN PACIFIC R. R. CO.

No settlement rights can be acquired on land subject to Indian occupancy, and where lands in such condition fall within the grant to the Northern Pacific, the title thereto passes to said company subject to such occupancy.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 24, 1892.

I have considered the case of Helmuth Schultz *v.* Northern Pacific R. R. Co., on appeal from your decision of November 15, 1890, involving the NE. ¼ of the NE. ¼, Sec. 15, T. 135 N., R. 53 W., Fargo land district, North Dakota.

It appears that on October 29, 1881, Schultz made entry under the homestead law of the SE. ¼ of Sec. 10, town and range as above, and that on February 23, 1882, final certificate was issued and subsequently the entry was patented to him.

December 27, 1889, the local officers transmitted to you the verified petition of Schultz asking for permission to surrender his patent, relinquish the NE. ¼ of the SE. ¼ of Sec. 10, embraced therein, and amend his entry, taking in lieu of the tract relinquished the NE. ¼ of the NE. ¼ of Sec. 15, same town and range, as above.

He set forth in said petition that he had valuable improvements upon the tract in section fifteen, and had established his residence on the said tract in 1869. In view of said allegations, you, on January 14, 1890, on account of said tract being within the grant to the Northern Pacific railroad, directed that a hearing be had to ascertain the rights of the respective parties.

The local officers decided in favor of the applicant on the ground of occupancy and settlement upon the land prior to survey, and the location of the railroad grant, and recommended the petition to be allowed. You reversed the action of the local officers and declined to allow the relinquishment and amendment to be made, on the ground that the land in section fifteen, was within the granted limits of the Northern Pacific railroad, whereupon the petitioner appealed.

The land in question, viz., the NE. ¼ of the NE. ¼, Sec. 15, and other lands in North Dakota, were within what was known as the Indian country. Under date of July 2, 1864 (13 Stat., 365), Congress conferred a grant to aid in the construction of the Northern Pacific railroad, and on February 21, 1872, a map of general route was filed and the lands embraced in said grant withdrawn from settlement, entry or sale

At the time said act was passed, the Indian title was not extinguished and the Indians had the right of occupancy and use of the land subject to the dominion and control of the government. The railroad company could only take the lands granted subject to this right of occupancy by the Indians, and such right could not be interfered with or determined, except by the United States. No private individual could invade such rights and be protected by the government.

The right of the United States to dispose of the fee of lands occupied by Indians has always been recognized by the United States supreme court from the foundation of the government. Beecher *v.* Wetherby (95 U. S., 517–525).

Therefore the fee to the lands being in the United States, the act of 1864, operated to pass the same to the railroad company subject of course to the usufructuary right of the Indians.

Congress in the grant to the company not unmindful of the Indian title to the lands granted, stipulated for its extinguishment as rapidly as public policy and the welfare of the Indians would permit; therefore

in compliance with this pledge the United States by various steps procured the relinquishment of the Indian title and thus the grant to the railroad company was relieved of the Indian claim.

This case appears to be identical with that of Buttz *v.* Northern Pacific R. R. (119 U. S., 55), in which the court held in effect that while the Indian title was in force no settlement rights could be initiated and that as soon as the same were extinguished the rights of the railroad attached to the granted lands.

In the case under consideration Schultz clai ns to have settled upon and occupied the land in 1869, five years after the grant to the railroad company was made, and while the right of the Indian occupation was still intact. The appellant could not initiate any right to the land in question so long as the Indian title remained unextinguished, and when it was extinguished the right of the company attached to the alternate sections and the appellant could never afterwards acquire any rights against the company by virtue of his alleged settlement.

Your decision rejecting Schultz's petition to amend his entry is ffirmed.

UNITED STATES *v.* SMITH.

Motion for review of departmental decision of November 11, 1891, 13 L. D., 533, denied by Secretary Noble, March 25, 1892.

SISSETON AND WAHPETON INDIAN LANDS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 22, 1892.

REGISTERS AND RECEIVERS,
Fargo, North Dakota, and Watertown, South Dakota.

GENTLEMEN: In view of a proclamation to be hereafter issued by the President, opening to settlement and entry the unallotted lands embraced within the limits of the Sisseton and Wahpeton (Lake Traverse) Indian reservation, in the States of North Dakota and South Dakota, you will consider sections 28 and 30 of the act of Congress approved March 3, 1891 (26 United States Stats., 1039), which read as follows:

Sec. 28. That any religious society or other organization now occupying under proper authority any of the lands by said agreement ceded, sold, relinquished. and conveyed shall have the right for a period of two years from the date hereof, within which to purchase the lands so occupied not exceeding one hundred and sixty acres in any one tract at the price paid therefor by the United States under said agreement.

Sec. 30. That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes and be subject to the laws of the State wherein located:

Provided, That patents shall not issue until the settler or entryman shall have paid to the United States the sum of two dollars and fifty cents per acre for the land taken up by such homesteader, and the title to the lands so entered shall remain in the United States until said money is duly paid by such entryman, or his legal representatives, or his widow, who shall have the right to pay the money and complete the entry of her deceased husband in her own name, and shall receive patent for the same.

Any religious society or other organization wishing to purchase any of these lands for religious uses, must make proof after six weeks advertisement, of its proper occupancy of such lands on March 3, 1891, and pay for the same, at the rate of two dollars and fifty cents per acre, within two years from the date aforesaid, such being the price, time and terms of payment thereof fixed by the Honorable Secretary of the Interior under section 35 of said act.

No other applicant will be allowed to make an entry of these lands, who does not possess the qualifications required in the case of an ordinary homestead entry under existing law, except in cases of townsites. The homestead applicant must reside upon and cultivate and improve the tract embraced in his entry for the full term of five years, except in case of commutation under section 2301, Rev. U. S. Stats., as amended, but the rights of honorably discharged soldiers and sailors in the late war, as defined in sections 2304 to 2309 of the Revised Statutes of the United States, are not abridged by the section 30, of the act recited, except as to the payment required therein.

The sum of $2.50 per acre must be paid by each settler at the time of making final proof, for the land taken in addition to the fee and commissions on double minimum land provided by law.

The lands in North Dakota will be attached to the land office at Fargo, North Dakota, and those in South Dakota will be attached to the land office at Watertown, South Dakota.

The new survey of the seventh standard parallel or boundary line between the States of North and South Dakota across the Lake Traverse reservation, makes it necessary to have certain supplemental surveys made showing the connections of the previous township and subdivisional surveys with the new boundary in order that amended plats may be prepared showing the areas of the fractional lots adjoining the boundary, and *north* and *south* thereof.

Until such supplemental surveys shall have been made and amended plats prepared, it will not be possible to state definitely the areas of, or to properly describe the tracts along the boundary, which fall respectively within the Fargo and Watertown districts. The N. ½ of the N. ½

of sections 28, 29 and 30, township 129, range 49, and sections 25 to 30 inclusive in township 129, ranges 50 to 54 inclusive should, therefore, be withheld from entry until such time as the supplemental surveys above referred to shall have been made, and the amended plats thereof filed in your offices.

The townsite laws referred to in the thirtieth section of said act and generally made applicable to these lands are embraced in sections 2380 to 2394 of the Revised Statutes, inclusive, which, together with the necessary instructions, were published in circular form by this office, under date of July 9, 1886 (5 L. D., 265).

Of the three separate and distinct methods thus provided for the acquisition of title to public land for townsite purposes, the first (sections 2480 and 2381) is exercised only in rare and exceptional instances. And the second method (sections 2382 to 2386, inclusive) has fallen into disuse because of the fact that the third method (sections 2387, 2388 and 2389) is more speedily, unlimitedly and economically advantageous to the town-lot claimants in the matter of acquiring titles. Concerning the requirements to be complied with in making an entry under said third method, which you will recommend to be employed in all cases, nothing remains to be said in addition to what is set forth in the above-cited circular, except that the minimum price of these lands, for townsite as well as for homestead purposes, is two dollars and fifty cents per acre. The ordinary homestead and cash blanks will be used for original and final homestead and townsite entries under the foregoing act, reference being made thereon to the act of March 3, 1891, Lake Traverse lands.

In addition to the usual affidavits required of homestead applicants, must be one stating that the applicant did not enter upon and occupy any portion of the lands described and declared open to entry in the President's proclamation dated (insert date of proclamation) prior to 12 o'clock, noon, of (insert date when lands are opened to settlement). You will not open a new series of numbers for these entries.

A schedule of lands within the Sisseton and Wahpeton (Lake Traverse) Indian reservation, in the States of North and South Dakota, having been published by this Department on February 8, 1892, (additional copies of which may be had upon your application), it is deemed unnecessary to reprint said schedule in connection herewith.

These instructions it must be understood, are not to be acted upon by you for the allowing of entries, nor will settlement be admissible, until after the time which shall be fixed therefor in the President's proclamation to be hereafter issued as first above stated.

Very respectfully,

THOS. H. CARTER,
Commissioner.

Approved:
JOHN W. NOBLE,
Secretary.

SECOND HOMESTEAD ENTRY—MORTGAGEE.

RIPLEY *v.* CAUFFMAN ET AL.

A second homestead entry under section 2, act of March 2, 1889, cannot be held to relate back to a former entry of the same tract, and thus affect a re-instatement of said entry.

A mortgagee is not entitled to plead the status of an innocent purchaser without notice where there is a contest of record at the date of the execution of the mortgage.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 26, 1892.

On October 28, 1886, Asher Cauffman made commutation cash entry (No. 3449) for NE ¼, section 30, T. 3 N., R. 32 W., at McCook, Nebraska.

His original homestead entry for said land was made June 4, 1884, which was under contest made by Allen J. Blackwood at the date of said entry.

On said October 28, 1886, Cauffman mortgaged said land to Frederick Ripley to secure a note of about $400.

On May 21, 1889, said entry was canceled for non-compliance with the law as to residence.

On April 9, 1890, Cauffman made homestead entry (No. 9548) for said land under the second section of the act of March 2, 1889 (25 Stat., 854), and the act of May 14, 1880 (21 Stat., 140). The said Blackwood failed to exercise his preference right under said last mentioned act, and is no longer in the case.

On August 7, 1890, said Asher Cauffman relinquished his entry to the United States, and on the same day his son, Simon E. Cauffman, made homestead entry (No. 9659) for said tract.

On August 26, 1890, said Frederick Ripley filed in the local office his affidavit and motion that you re-instate and pass to patent the said commutation cash entry of Asher Cauffman, on the ground that his homestead entry (No. 9548)—

having been allowed under the act of May 14, 1880, the right related back and perfected the final proof submitted by the entryman, consequently the entryman could not thereafter relinquish said homestead while the conveyance of the land by mortgage to this applicant and others remained unsatisfied and of record.

This motion was denied by you October 4, 1890, and on motion for review, you re-affirmed that decision by your letter of January 23, 1891.

An appeal now brings the case before me.

The contention of the mortgagee in this case cannot be sustained. The third section of the act of May 14, 1880, does not apply to an original entry which has been forfeited and canceled for non-residence. The second entry of Cauffman (No. 9548) cannot be made to have the effect of relating back and re-instating the former entry.

Asher Cauffman exercised a right recognized by the first section of said act of May 14, 1880, when he relinquished his second entry, and

the land was then "open to settlement and entry without further action on the part of the Commissioner of the General Land Office," by the express provision of said section.

When Cauffman made his mortgage he had only an equitable title to said land, against which a contest was then pending, which was liable to be decided against him. As this contest was a matter of record at the local office, Ripley is chargeable with notice of its pendency. He is not an innocent purchaser without notice. Murphy *v.* Sanford (11 L. D., 123).

He is a conditional incumbrancer, to whom the doctrine of *caveat emptor* applies, and has no rights not earned by the entryman. George Hague, et. al. (13 L. D., 388).

Your judgment is affirmed.

CONTEST—ACTION OF LOCAL OFFICE—RELINQUISHMENT.

BROWN *v.* HENDERSON.

The failure of the local officers to take appropriate action upon an application to contest an entry does not impair the right of the contestant.

The right of a contestant to proceed against an entry is not defeated by its subsequent relinquishment.

A relinquishment inures to the benefit of a contest if filed as the result thereof.

First Assistant Secretary Chandler to the Commissioner of Land Office, March 28, 1892.

On November 5, 1885, Lewis F. Pate made homestead entry (No. 4841) for the NE ¼, section 25, T. 2 N., R. 32 W., at McCook, Nebraska.

On February 15, 1887, George E. Brown filed affidavit of contest against said entry, alleging abandonment by Pate, which was held subject to a previous contest by Burdett Lufkin against said entry on the same ground.

On April 2, 1887, Lufkin's contest was dismissed for his non-appearance, on motion of said Brown, and the local officers, instead of issuing notice upon Brown's affidavit of contest, inadvertently sent it to your office with other papers.

On May 9, 1887, William Henderson filed Pate's relinquishment of his entry, and was allowed to make homestead entry (No. 7591) of said tract.

On June 25, 1887, said Brown filed homestead application for said land and affidavit, claiming preference right under his contest. His application was rejected on account of Henderson's entry, and an appeal was taken by Brown July 10, 1887.

By letter of July 30, 1888, you held that Brown's contest inured to his benefit, and allowed him thirty days to apply to perfect his entry after notice, and ordered that Henderson should show cause why his

entry should not be canceled as in conflict with Brown's preference right. Thereupon Brown again applied August 6, 1888, to make homestead entry of said tract.

On September 10, 1888, hearing was had before the local officers, when the parties appeared and testimony was submitted.

On September 21, 1888, the local officers decided the contest in favor of Henderson.

An appeal was taken by Brown, and by your letter of October 22, 1890, you reversed their decision, held the entry of Henderson for cancellation, and allowed Brown to perfect his entry. On February 10, 1891, you re-affirmed your decision on motion for review.

An appeal now brings the case before me.

The specifications of error allege, *inter alia*, that the Commissioner erred in his finding that by Brown's affidavit of contest, upon which no summons ever issued, and of which Henderson had no knowledge, Brown acquired a right as against Henderson, an actual settler on the tract.

The records show that Pate's relinquishment is written upon the back of the receiver's duplicate receipt (No. 4841), issued to him at the date of his entry, and that his execution of it was acknowledged before a notary public December 23, 1886, which affords indirect evidence that he had then determined to abandon his entry whenever he could sell out. As Lufkin made default of appearance on April 2, 1887, when the hearing between him and Pate was to be held, it shows, in absence of any explanation, that his contest was not in good faith. It follows that Brown was the only *bona fide* contestant of Pate's entry.

On April 2, 1887, Brown filed a motion with the local officers that notice issue, on his contest affidavit of February 15, 1887, to said Pate for a hearing, Lufkin's contest having been then dismissed. This motion was apparently neglected. The negligence of the local officers to take appropriate action upon Brown's application to contest did not impair his rights. Hawkins *v* Lamm (9 L. D. 18).

Brown's right to proceed under his contest could not be defeated by the subsequent filing of Pate's relinquishment. Webb *v.* Loughrey (10 L. D., 302).

The evidence adduced at the hearing by Brown shows that Pate finally abandoned the land in March 1887, the next day after a conversation between one of Brown's witnesses and Elias Cottrell, who was one of Pate's friends, in which the latter was informed of Brown's contest.

It is a fair presumption, under the circumstances, that Pate's final abandonment of the land and subsequent sale or surrender of his relinquishment were occasioned by Brown's contest, and therefore that Brown was entitled to his preference right under the act of May 14, 1880 (21 Stat., 140). Pate's relinquishment was put into Cottrell's hands, who sold it to Henderson for the latter's note, which was unpaid at the

date of the hearing, from which inferences might be drawn as to the bona fides of the transaction. However, I do not see how the right of Brown can be ignored. It must take effect by relation as of the date when his contest affidavit was filed Westenhaver *v.* Dodds (13 L. D., 196).

As his affidavit was filed February 15, 1887, and Henderson did not make entry till May 9, 1887, the former's application to enter should be allowed, and the latter's entry should be canceled.

Your judgment is affirmed.

MINING CLAIM—JUDICIAL PROCEEDINGS.

SILVER KING LODE.

On the termination of judicial proceedings the local office should make the entry conform to the decree of the court, and the entry should not be allowed in the absence of the judgment roll.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 29, 1892.

On July 13, 1885, the owners of the Silver King Lode (survey No. 4746), filed an adverse claim against the application for a patent made by the owners of the Sanquoit Lode (survey No. 3924), at Glenwood Springs, Colorado, for a part of the land claimed by both of said parties.

Suit was brought by the adverse claimants in the district court of the fifth judicial district of Colorado, to determine the question of the right of possession of said land in conflict.

In July, 1886, said court rendered judgment by stipulation of the attorneys for said parties, by which the northerly part of said land in conflict, containing 2.64 acres, was awarded to the owners of the Silver King Lode, and the southerly part, containing 1.67 acres, was awarded to the owners of the Sanquoit Lode.

On December 23, 1887, the owners of the Silver King Lode made application for a patent, including the 1.67 acres awarded to the Sanquoit Lode, and on June 25, 1888, were allowed to enter the same—(mineral entry No. 166).

On July 20, 1888, the owners of the Sanquoit Lode made application for a patent "exclusive of conflict with survey No. 4746, 3.96 acres," and on December 18, 1888, were allowed to enter the same—(mineral entry No. 188).

By your letter of February 6, 1891, to the local officers, you held it was error on their part to allow the claimants of the Silver King Lode to enter all of said land in contest and covered by said judgment, and held their entry for cancellation to the extent of said 1.67 acres. This judgment was reaffirmed by you on March 31, 1891, and April 27, 1891, on motions for review.

An appeal now brings the case before me.

The judgment of the court in mineral cases is made conclusive upon the parties by section 2326, Revised Statutes of the United States, which provides, *inter alia*, that—

> After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office . . . 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.

It appears that a copy of the judgment-roll in this case was not filed with the register by the owners of the Silver King Lode when their entry was allowed. It was error on the part of the local officers to allow said entry in the absence of the judgment-roll. It was their duty to make the entry conform to the decision of the court, as shown by such judgment roll, and then transmit the same to your office, in order that the patent might also conform to it, as provided by the statute.

It is contended in this case that a suit has been brought to set aside said judgment, because the stipulation upon which such judgment was rendered was unauthorized by these claimants; and a record is transmitted of a suit brought to vacate and set aside said judgment, in which it appears that the defendants made default of appearance. But this record does not show that the former judgment has been in fact vacated and set aside; and if such were the case it would not help these claimants, for it would then appear that the adverse claim had not been decided, but is still to be adjudicated. The said judgment cannot be attacked collaterally in this Department, so long as it is outstanding and in force, if the Court had jurisdiction which rendered it. Nettie Lode *v.* Texas Lode (14 L. D., 180, 185).

In this case its jurisdiction has been practically admitted by these claimants by bringing suit to set aside the judgment on other grounds.

Your judgment is affirmed.

PRE-EMPTION ENTRY—SECTION 2260, REVISED STATUTES.

BROWNLEE *v.* SHILL.

A settler who has received final homestead certificate for a tract is not within the second inhibition of section 2260 R. S., where a subsequent government survey brings his improvements within the lines of an adjacent tract, and he files therefor under the pre-emption law.

Secretary Noble to the Commissioner of the General Land Office, March 29, 1892.

On the 29th of September, 1884, William H. Shill filed his pre-emption declaratory statement for the SE ¼ of Sec. 18, T. 20 S., R. 17 W.,

Larned land district, Kansas, and on the 10th of March, 1887, Nancy M. Brownlee made timber culture entry for the same land.

After giving due notice by publication, with special notice to Brownlee, Shill submitted his final proof at the local office on the 13th of June, 1887. Brownlee filed a protest against said final proof, alleging that Shill was not a qualified pre-emptor when he made filing for the land. Shill and his final proof witnesses were cross-examined by the counsel for Brownlee, as were also several other witnesses produced by him. No evidence was offered by Brownlee.

A motion in behalf of Shill was made before any evidence was taken, to dismiss the protest, on the ground that it did not allege facts sufficient to invalidate said proof, that it was not corroborated by any witnesses, and that the timber culture claimant was a sister and member of the family of the register of the local land office. The motion was overruled, and upon being renewed at the close of the evidence, was again overruled, to which ruling an exception was taken by Shill's counsel.

In a decision dated December 6, 1887, the register found in favor of his sister, and held for rejection the final proof of Shill, and for cancellation his pre-emption filing. The receiver, in a decision dated May 28, 1888, stated that the testimony clearly showed such an amount of natural growing timber on the section as to place the land in controversy clearly within the statute of inhibition, and not subject to timber culture entry. He also stated that two applications to contest the entry of Miss Brownlee had been filed in the local office, one on the ground that the land was not subject to timber culture entry, on account of the timber naturally growing thereon; and the other that she had failed to comply with the requirements of the law under which the entry was made. He concluded by holding "that the timber culture entry of Nancy M. Brownlee for the tract in dispute should be held for cancellation, and the final proof of Shill approved, and cash entry allowed upon presentation of final entry fees as required by law."

There being disagreeing decision by the local officers, you considered the case under rule 48 of Rules of Practice, and rendered decision therein on the 18th of November, 1890, affirming the decision of the register, which held the declaratory statement of Shill for cancellation, and reversing that of the receiver, and holding the timber culture entry of Brownlee intact. An appeal from your decision brings the case to the Department for consideration.

From the record in the case it appears that Shill, on the 19th of July, 1877, made homestead entry for the SW $\frac{1}{4}$ of section 18, which was the quarter section immediately west of the lands in question. He constructed buildings thereon, and with his family resided upon, and cultivated the land until 1884, when he made final proof, and received final certificate, and soon afterwards a patent for the land.

On the 20th of July, 1884, the township in which said homestead is

located, was re-surveyed by the government, which showed that the buildings, wells, and considerable improvements of Shill were located on the SE ¼ of said section, which tract was then covered by the timber culture entry of one Moses Tall, Jr. The new survey changed the east and west lines of the section about thirty rods further west, and the north and south lines about three or four rods further south, and put about twenty-three acres of Shill's homestead, including his buildings, wells, etc., as already stated, into the timber culture entry of Tall. The improvements of Shill were not of a movable nature, and in order to save them, he procured the relinquishment of Tall's entry, paying him $400 therefor. He filed such relinquishment in the local office on the 29th of September, 1884, and on that day filed pre-emption declaratory statement for said land.

The decision of the register states that patent for Shill's homestead was issued on the 20th of April, 1884. It also states that his final proof was submitted on the 12th of June of that year. Upon an examination of the records in your office, I find that final certificate was issued on the 12th of June, 1884, and patent on the 20th of April, 1887.

Shill's homestead final proof was made prior to the re-survey of the township, and up to the time of such re-survey, he supposed he was living on the south-west quarter of section eighteen, the land for which he made homestead entry in 1877. He so testified in his final proof, and as the section lines were then established and recognized, he testified truly. He was therefore guilty of no perjury or fraud in making such proof, and when he made the proof and received his final certificate, he had performed his part of the contract between himself and the government, relating to the land for which he made entry. He could then remain upon, or remove from it, as he saw fit, or he might sell or dispose of the same, if so inclined.

After issuing to Shill a final certificate for the south-west quarter of section eighteen, the government re-surveyed the township, and took twenty-three acres from the south-west, and put them in the south-east quarter section. Upon these twenty-three acres were about one thousand dollars worth of buildings and improvements of Shill. The buildings were quite extensive, but were mostly of sod, and could not be moved, neither could his wells, of which he had two, some thirty odd feet in depth, properly stoned up.

He testified that he had no desire for any land, except that which he supposed he had in his homestead, and that he never should have sought to acquire title to the south-east quarter of the section, had not the new survey placed his buildings and improvements therein. He then found that he could procure the relinquishment of the entry of Tall for that quarter section much cheaper that he could tear down his buildings which were thereon, and reconstruct them on the south-west quarter of the section, and he therefore took that course, and paid Tall $400 for his relinquishment, and made pre-emption filing as stated.

Section 2260 of the Revised Statutes provides what persons shall not acquire or enjoy the right of pre-emption, and the second division of said section reads as follows:

> Second. No person who quits or abandons his residence on his own land to reside on the public land in the same state or territory.

The first and most important question to be determined in this case is: Was Shill within this inhibition? Did he quit or abandon his residence on his own land to reside on the public land? He established his residence on the public lands in 1877. During the first half of the year 1884, certain land which was public in 1877, became his own. When he made pre-emption filing for the south-east quarter of section eighteen, he did not quit and abandon his former residence, but continued to reside in his old home, without any quitting or abandonment. Whatever moving there was in the case was done by the government, and not by Shill. Up to the time that the government issued patent for the land, it could have raised the question that Shill had never resided upon the tract for which patent was applied. Previous to that time he had made the proof required, without fraud or falsehood as the case then stood, and when patent issued, the jurisdiction of this Department over the land ceased. That transaction is closed, and its rights and wrongs cannot be adjusted in any subsequent dealings between the parties. A proceeding may be instituted to set aside that patent, but this Department has no jurisdiction in cases of that character, which must be determined by the court upon their own merits.

Had Shill purchased his homestead from a private individual, and afterwards found that he was residing upon public land, would he have been inhibited from making pre emption filing for the land upon which he resided? No moving would have been required to make him a resident upon the land for which he filed, and it could not be claimed that he had quit or abandoned his residence on his own, to reside upon the public land. I do not understand that the inhibition applies to land acquired under the homestead act, with any greater force than to land to which the title is acquired by purchase from a private individual. Land becomes "his own," when a person secures title thereto by a deed from his neighbor, or by a patent from his government, and he cannot leave his residence thereon, to reside upon the public land in the same state or territory. He may, however, own a homestead upon which he is not residing, and establish his residence upon the public land.

In the case at bar, Shill was not residing upon his homestead on the 29th of September, 1884. He therefore did not then remove from his own land to the public land. He possessed the qualifications required of a pre-emptor by section 2259 of the Revised Statutes, and was not included in the inhibited classes mentioned in section 2260.

When he submitted his final proof Shill tendered the two hundred dollars required, in payment for the land, and he renewed the tender at the conclusion of the evidence in the case. His final proof also shows

a very thorough compliance with the requirements of the pre-emption law, in the matter of residence, improvements and cultivation, and every act of his in connection with this land is characterized by the utmost good faith.

The evidence in the case would justify a conclusion that owing to the natural growth of timber upon the section, the land in question is not subject to entry under the timber culture law. That question, however, is not before me for determination.

There is no dispute as to the facts of the case as stated, and after carefully considering them, my conclusion is that Shill was a qualified pre emptor when he filed his declaratory statement for the land; that his final proof should be accepted, and that his administrator should be allowed to complete the entry, by making payment as required by law. The decision appealed from is therefore reversed.

This conclusion is arrived at on the peculiar facts of this case, brought about by the action of the government in changing the lines of survey, and not by the action of Shill, and the judgment is limited to the facts in this record.

PRE-EMPTION—SECTION 2260, REVISED STATUTES.

MANTLE *v.* MCQUEENY.

A contract for the purchase of land does not bring the holder within the inhibition of section 2260 R. S., where the title to said land is not in the vendor named in the contract.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 29, 1892.

I have considered the case of Joseph H. Mantle *v.* John H. McQueeney, on appeal by the former from your decision of September 29, 1890 dismissing his protest and accepting the final proof of the latter for the W ½ of the SE ¼, NE ¼ of the SW ¼, and SE ¼ of the NW ¼, Sec. 9, T. 2 N., R. 7 W., Helena, Montana, land district.

Your decision states the record and testimony fairly and substantially, and upon a review thereof I find no reason for disturbing your conclusions.

Counsel for Mantle insist that the contract between McQueeney and the Northern Pacific Railroad Company for the purchase of section 5 of the same township constitutes him the proprietor of three hundred and twenty acres of land, and that he cannot, under the statute, (Sec. 2260 R. S.) pre-empt the land in controversy.

McQueeney says he has a contract for said section 5. It is not offered in evidence, nor are its terms given as to payment, nor what payment has been made. The testimony shows that he was to fence the section when directed to do so by the company, and being so directed he had

fenced it and had grazed stock on it. The record shows that the title to the land is in the government; that the land is covered by the grant to the Northern Pacific Railroad Company in its indemnity limits.

McQueeney may have a contract enforcible in court, if first he shall pay for the land according to the terms of the contract, and secondly the railroad company obtains title from the government. It is quite clear that he is not the present owner or proprietor of the said section 5, nor has he a contract that can be at present enforced. In Washington *et al. v.* Ogden (4 U. S., 542, 1 Black, 450), this question was discussed. Here was a contract to sell certain land, but there was an outstanding contract with another party for the sale of the same land. This, by the terms of the latter contract, was to be surrendered and canceled, then the vendees were to make a cash payment, receive a deed and secure deferred payments by mortgage. Suit was brought by the vendor (Ogden) on the contract for specific performance. The declaration averred that the outstanding contract had been surrendered and canceled; that plaintiffs were ready and willing to receive the money and "to deliver to the defendants a deed for the property." The court quotes and italicises the words in quotation here, and says

> But there is no averment in the *narr* that the plaintiff had a good and sufficient title free from all incumbrance, which he was ready and willing to convey. . . . The legal effect of a covenant to sell is that the land shall be conveyed by a deed from one who has a good title, or full power to convey a good title. A sale *ex vi termini* is a transfer of property from one man to another. It is a contract to pass rights of property for money. . . . This defect in the declaration cannot be cured by the verdict, etc.

I do not see under the above rulings that McQueeney is the owner of section 5. He may be obligated to fence and have the right to graze the land, and may pay taxes on the improvements, but he could not compel the railroad to specific performance as it has not title as yet, nor could the road compel him to specific performance, as it could not offer a title that is "free from all incumbrances." He merely has a contract for a title which, if all conditions shall be fulfilled, as between the railroad company and the government, and then between himself and the railroad company, will entitle him to become the "proprietor" of the land. He now has legal *occupancy* under that contract, but has not dominion of the land to do with it as he pleases, and is not the owner or proprietor of it.

The judgment appealed from is therefore affirmed.

TIMBER CULTURE CONTEST—PREFERENCE RIGHT OF ENTRY.

BARBER *v.* ROWLEY.

An application to make timber culture entry of a quarter section, filed with a contest, precludes, while pending, the allowance of a similar application filed by another for a different tract in the same section.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 30, 1892.

On September 13, 1890, you canceled the timber-culture entry of Simon Goodenough, for the SW. ¼ of Sec. 34, T. 8 N., R. 11 W., Los Angeles land district, California.

The entry was canceled upon the contest of Charles J. Barber. He was duly notified of the cancellation, and within thirty days afterward—to wit, on October 21, 1890—he applied to enter the tract by virtue of his preference right. His application was rejected by the local officers, because one Warren E. Rowley had previously—to wit, on October 9, 1890—been allowed to make timber-culture entry of the NW. ¼ of the same section.

Your decision of January 15, 1891, holds Rowley's entry for cancellation, in view of the prior and superior right of Barber.

Rowley has appealed to the Department. He concedes that he was precluded from making entry of the tract contested by Barber, but contends there is no law or rule inhibiting his entry of any other tract.

Section 2 of the act of May 14, 1880 (21 Stat., 140), provides that any person who has contested, paid the land office fees, and procured the cancellation of any timber-culture entry shall be allowed thirty days from notice in which to enter the tract.

Section 1 of the timber-culture act (of June 14, 1878, 20 Stat., 113,) provides that no more than one-quarter of any section shall be granted under the provisions of said act.

In view of the act last above cited, and of Barber's application, filed when he initiated contest, to make timber-culture entry of the tract—which application took effect as of the date when filed (Lamb *v.* Sherman, 13 L. D., 289; Bludworth *v.* Augustin *et al.*, ib., 401)—Rowley's application to make timber-culture entry of any portion of said section ought not to have been allowed. Your decision is affirmed.

LOCAL OFFICE—SUSPENSION OF BUSINESS—APPLICATION.

JOHNSON *v.* VELTA.

The Commissioner of the General Land Office may direct the suspension of all business at a local office that requires the joint action of the district officers, where the illness of one of said officers renders him unable to perform the duties of his office; and no rights can be acquired by an application to enter offered during such period of suspension.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 30, 1892.

May 20, 1890, your predecessor sent the following telegram to the register of the local office at Fargo, North Dakota: "Keep the office open for information only. Transact no business requiring joint action of both officers."

This order was due to the sickness of the receiver, which at that time rendered him incapable of attending to his official duties.

Just a week subsequent to the date of this order, and while it was in force, John Johnson applied to make timber culture entry for the SW. ¼ of Sec. 12, T. 131 N., R. 56 W., in said Fargo district.

On the same day, in obedience to said order, the register returned his application without action, other than the following letter, enclosed with the application so returned:

I return herewith the timber culture application of John Johnson, for SW. ¼ Sec. 12-131-56, without taking any action thereon, for the reason that owing to serious illness of the receiver, the Hon. Commissioner has directed that the office be kept open for information only, and that no business be transacted requiring joint action of both officers.

This letter was addressed to Skuse and Morrill, attorneys for applicant. Some time after this, the receiver was permanently relieved from duty, and a successor appointed, and on July 29, 1890, the office was again regularly opened for the transaction of business. At nine o'clock A. M., of that day, Ole E. Velta applied to make timber culture entry for the same tract. An hour and fifty-five minutes later, Johnson renewed his application to enter. On the next day, the local officers allowed the entry of Velta and rejected that of Johnson.

Johnson appealed, and your office, by decision of October 1, 1890, sustained the action of the local officers, and he now appeals to this Department.

Your decision is based upon the case of Graham *v.* Carpenter, 9 L. D., 365.

The cases are not parallel, because in the case at bar both offices were filled, while in the Carpenter case the office of receiver was vacant, and so the register could not be considered as his agent in the performance of the duties devolving by law upon his associate in office. See the case of Paris Meadows *et al.*, 9 L. D., 41.

This case must therefore be decided upon principles differing in some respects from those governing the cases above cited.

The order of the Commissioner to the register, directing him to suspend all business requiring joint action, was directly within the authority given him by statute. See section 2478, Revised Statutes. This order was in force at the time of Johnson's first application, and the action of the register in returning the same was entirely proper. He could therefore establish no rights by applying to make entry when entries (which required the joint action of both officers) were not allowed to be made.

In fact, the allowance of this entry by the register while such order was in force would have conferred no rights upon the applicant. John Kirkpatrick, 3 L. D., 238.

It follows that Johnson lost nothing by failing to appeal from the action of the register in refusing to receive and note upon the records his first application, for no such duty devolved upon the register, because all business, except the imparting of information, was inhibited by the order, *supra*, of your office. Pending that order, no entries could be allowed.

When the office was opened for the transaction of business, Velta was the first to apply to enter this land, and being first his application was properly allowed.

The suspension of business at the date of Johnson's application was very unfortunate for him, but the exigencies of the public service can not yield to the convenience of individuals.

Your decision is affirmed.

SCHOOL LAND—INDEMNITY—CERTIFICATION.

TONNER *v.* O'NEILL.

A school indemnity selection of land subject thereto, according to the official surveys, approved and duly certified, precludes the allowance of another selection in lieu thereof until such certification shall be set aside by proper authority.

First Assistant Secretary Chandler to the Commissioner of the General Land Office April 1, 1892.

On the 3d of January, 1889, P. H. O'Neill made application at the local land office, Los Angeles, California, to file pre-emption declaratory statement for the SE. ¼ of Sec. 20, T. 1 S., R. 7 W., S. P. M., which was rejected on the ground that the tract applied for was covered by State lieu selection No. 854, made June 23, 1884, to supply deficiency in school lands in Sec. 16, T. 1 N., R. 14 W.

When the said selection came before you for consideration, you held it for cancellation, on the ground that said deficiency had been provided for by a prior selection by the State, which had been duly ap-

proved. This decision was made by you on the 15th of April, 1890, and an appeal was taken therefrom.

O'Neill appealed from the decision of the local officers, rejecting his application to make pre-emption filing for the land, and on the 15th of November, 1890, you decided that his application being in the nature of an attack upon the selection, might be accepted, subject to the final action upon said selection, citing the case of Niven *v.* State of California (6 L. D., 439), in support of your conclusion. An appeal was also taken from this decision, and each of said appeals are now before me for consideration.

From the record before me I learn that on the 3d of January, 1871, the State of California made an indemnity selection of certain lands in Sec. 7, T. 5 S., R. 1 W., to supply the deficiency in school lands in section sixteen, already mentioned. This selection was numbered 167, and was approved January 23, 1875. A survey made subsequent to such selection and approval showed that the lands in section seven were embraced in the Mexican grant San Jacinto Viejo, which was patented on the 17th of January, 1880.

The survey in force at the time selection No. 167 was made and approved, showed the land included therein subject to such selection, and in the case of The State of California (7 L. D., 91) it was held that "a school selection of land subject thereto according to the official surveys, approved and duly certified, precludes the allowance of another selection in lieu thereof, until such certification shall be set aside by proper authority."

It appears that the proper authorities of the State of California, on the 1st of July, 1889, sold, or agreed to sell, to Jefferson D. Greenwade, the land in question, and on the 11th of that month he sold his right, title and interest therein to P. C. Tonner, the appellant in this proceeding. These facts are made to appear, as required by rule 102 Rules of Practice, and hence the motion of O'Neill to dismiss the appeals because they are not brought by the State of California, is denied.

Under the ruling of Secretary Vilas, in the case of the State of California (7 L. D., 91), that a second lieu selection cannot be allowed until the first one is set aside by proper authority, your action in holding the second selection for cancellation would seem to be justified. You refused to approve of selection No. 854, to supply a deficiency already apparently supplied by selection No. 167, which latter selection had been duly approved. So far as appears by the case as presented, that selection has never been set aside by proper authority, nor relinquished by the State. Until this is done, a second selection to supply the deficiency covered by such first selection cannot be allowed, even though such first selection was invalid. By its approval and certification of that first selection, the Department exhausted its jurisdiction over the land covered thereby, as completely as though it had transferred the same by patent, and until said selection is canceled or set aside by

"the judgment of a court competent to try the question of title," or by the voluntary relinquishment of the State, a second selection can not be approved. This is the doctrine of the case of Hendy *et al. v.* Compton *et al.* (9 L. D., 106).

In the present state of the case I do not find that the confirmatory provisions of the act of March 1, 1877 (19 Stat., 267), relating to indemnity school selections in the State of California, afford Tonner any relief, and I am of the opinion that the application of O'Neill to make pre-emption filing for the land, although improperly allowed, should be permitted to remain of record, but stand suspended until the right of the State to make such second selection is finally adjudicated. Said selection should not, however, be canceled without first giving the proper parties notice of the contemplated action and an opportunity to be heard in support of the validity thereof. You will therefore give said parties notice that they will be allowed ninety days from notice hereof within which to show cause why said selection should not be canceled, and will thereafter take such steps as may be proper and necessary to a final adjudication of the rights of the respective claimants.

The decision of your office is accordingly modified.

CONTEST—PROOF OF SERVICE—NOTICE OF DECISION.

JOHNSON *v.* STILL.

Failure to receive notice of a decision will not warrant the re-instatement of a contest, in the presence of an intervening adverse right, when such failure is due to the contestant's negligence.

It is the duty of the contestant to see that due proof of service of notice is filed in the local office.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 1, 1892.

On July 28, 1886, Eddie Johnson filed an affidavit of contest against the timber-culture entry of Edward R. Still for the NE. ¼ of Sec. 33, T. 25, R. 48 W., Chadron, Nebraska, upon which a hearing was ordered, and the testimony was directed to be taken before a notary public.

The contestant appeared and submitted testimony, but the defendant failed to appear.

When the testimony was received by the local officers, they dismissed the contest, because there was no proof of service, either personally or by publication.

Notice of this decision was addressed the contestant at the post-office given in his affidavit.

No appeal was taken by him, but the record was transmitted to your office, and it appearing that the testimony set forth in the record sustained the charge set out in the complaint, you returned it to the local

officers, with direction that he be advised that he will be allowed to take out a new summons, and proceed with the case in accordance with the rules of practice.

No action was taken by him under this order, and on March 1, 1889, you dismissed the contest and closed the case.

On February 14, 1890, Johnson filed an application to have his contest re-instated, alleging that he never had any notice of the decision of the local officers dismissing his contest; that at the date of the contest he was living at Hemingford, Nebraska, but, before the decision of the local officers, he had moved to Johnston, Nebraska, where his mother lived, to which point he instructed the postmaster at Hemingford to forward his mail; that in answer to a third letter of inquiry, addressed to the register and receiver, he learned that the contest had been dismissed. He states that he did not furnish the proof of service, for the reason that it was customary for the publishers to forward proof of publication to the land office, and he should not suffer for the fault of the publishers.

It further appears that since the dismissal of said contest, the entry has been contested by another party, the entry canceled, and the land has been again entered.

You refused to re-instate said contest, and from your decision Johnson appealed.

I see no error in your action. The failure of the contestant to receive notice of the ruling of the local officers was due wholly to his negligence in failing to notify them of his change of post-office address. A notification to the postmaster at Hemingford to forward his mail to Johnston was not sufficient to relieve him of the consequences of his failure to receive the notice.

Granting that the publishers should have furnished the evidence of publication of notice, yet it was the duty of the contestant to see that proof of such service was on file, which must consist of a copy of the advertisement and the affidavit of the publisher or foreman attached thereto, showing that the notice was successively inserted the requisite number of times and the dates thereof before he proceeded with the trial of the case.

Besides, it is not shown, in the manner required by the rules, that service by publication was properly made. The only evidence of service being the statement of contestant in his affidavit, and motion to re-instate, that he did make such service.

The applicant, in my judgment, shows no sufficient ground why the contest should be re-instated in the presence of an adverse claim. Smith *v.* Fitts, 13 L. D., 670. Your decision is therefore affirmed.

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

SEABOARD RAILWAY CO.

A railway company that does not appear to be organized as a common carrier for the benefit of the general public, with the accessories of passenger and freight facilities, is not entitled to the privileges of the right of way act.

Secretary Noble to the Commissioner of the General Land Office, April 1, 1892.

I have your letter of the 9th ultimo submitting a certified copy of the articles of incorporation and the due proofs of the organization of the Seaboard Railway Company of Alabama; also two maps showing sections of the definitely located line of the company's road, for distances of 18.7 miles and 17.3, miles respectively, and filed under the provisions of the right of way act of March 3, 1875 (18 Stat., 482).

Your recommendation is that the papers be not accepted and the maps not approved. They are therefore accordingly herewith returned without acceptance or approval.

It is gathered from your letter that this is a narrow gauge road owned and operated by the Seaboard Manufacturing Company which conducts extensive lumbering operations in the timber regions of Alabama, that Special Agent Mayfield, of your office, has submitted several reports charging these companies with timber trespasses and that this attempt to secure the benefits of the provisions of the right of way act appears to be for the purpose of continuing the operations of these corporations under the fancied protection of law.

The maps show that the company proposes to operate nineteen spur lines which aggregate a much greater length than the main line of road.

From a consideration of the matter as presented I am not convinced that this company is one that is contemplated by the right of way act. It does not appear to have been organized as a common carrier for the benefit of the general public with the accessories of passenger and freight facilities, but for the personal benefit of interested parties. Under these circumstances your recommendation was eminently proper.

RAILROAD GRANT—DECLARATION OF FORFEITURE.

NEW ORLEANS PACIFIC RY. CO.

A forfeiture of a railroad grant, for breach of condition subsequent, may be declared judicially, in a proceeding duly authorized, or by a direct assertion of ownership by an act of Congress.

The lands granted and certified in aid of the New Orleans and Opelousas road under the act of June 3, 1856, and embraced within the act of forfeiture declared by Congress July 14, 1870, were by said act restored to the public domain, and the certifications thereof were annulled and vacated thereby; and the lands so released being public lands, at the date the grant to the New Orleans Pacific became effective, passed thereunder to said company.

The case of Horace B. Rogers *et al.*, 10 L. D., 29, overruled.

Secretary Noble to the Commissioner of the General Land Office, April 2, 1892.

I have considered the appeal of the New Orleans Pacific Railway Company from the decision of your office, dated October 9, 1891, rejecting its claim under the act of Congress, approved February 8, 1887 (24 Stat., 391), for a large amount of land, and holding for cancellation the lists of selections filed by said company for the same, for the reason that at the date of the definite location of said company's road the title of said lands vested in the State of Louisiana, which served to except them from the operation of the grant to said company.

In its appeal the company alleges error—"In holding that title to said tract was vested in the State of Louisiana at the date of definite location, which served to except said tracts from the company's grant." At the request of the company an oral hearing was had, and the arguments then made by the counsel for the company, together with their elaborate printed briefs, have received very careful and patient consideration. The record facts, so far as necessary to the decision of this case, are as follows:

The act of Congress approved June 3, 1856 (11 Stat., 18), made a present grant of lands to said State for the purpose of constructing a railroad (*inter alia*) from "New Orleans by Opelousas to the State of Texas," known as the New Orleans, Opelousas and Great Western Railroad. Section four of said act prescribes the manner of the disposition of the granted lands, and provides that "if said roads are not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States."

It appears that said grant was adjusted in 1859, and 719,193.75-100th acres were certified to said State, embracing lands within both the primary and the secondary limits. Only eighty miles of the road were constructed, and the forfeiting act of July 14, 1870 (16 Stat., 277), was passed, which declared,—

> That all the lands which were granted by Congress, in the year eighteen hundred and fifty-six, to the State of Louisiana, to aid in the construction of the New Orleans, Opelousas and Great Western Railroad, and which have not been lawfully disposed of by the said State under said grant, which has expired by limitation, or by act of Congress since the original grant, are hereby declared forfeited to the United States, and these lands shall hereafter be disposed of as other public lands of the United States.

By section 22 of the act of Congress approved March 3, 1871 (16 Stat., 573-579), it was provided,—

> That the New Orleans, Baton Rouge, and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have the right to connect by the most eligible route to be selected by said company with the Texas Pacific railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with the said Texas Pacific Railroad Company at its eastern terminus,

there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this act granted in the State of California, to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor, and opened for settlement and pre-emption, upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company, within said State of California: *Provided*, That said company shall complete the whole of said road within five years from the passage of this act.

By section one of the act of Congress approved February 8, 1887 (24 Stat., 391), the lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company by said act of March 3, 1871, were forfeited to the United States and restored to the public domain—

In all that part of said grant which is situate on the east side of the Mississippi River, and also in all that part of said grant on the west of the Mississippi River which is opposite to and coterminous with the part of the New Orleans Pacific Railroad Company, which was completed on the fifth day of January, eighteen hundred and eighty-one.

By section two of said act it was provided that the title of the United States to the lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, by said act of 1871,—

not herein declared forfeited is relinquished, granted, conveyed and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, said lands to be located in accordance with the map filed by said New Orleans and Pacific Railway Company in the Department of the Interior October 27, 1881, and November 17, 1882, which indicate the definite location of said road.

On February 24, 1888, the Governor of said State, in compliance with the request of the Commissioner of the General Land Office, made a reconveyance of the lands in question, with others, to the United States. You state that said lands are within the primary limits of said grant of 1871, and that some of them were selected by the New Orleans Pacific Railway Company on November 13, 1883, and the remainder on December 28, same year, under the provisions of said act of March 3, 1871.

In order to determine the question whether said lands passed to said New Orleans Pacific Railway Company, it will be necessary to ascertain their status at the date of the definite location of the road when the company's grant became effective.

There appear to be no conflicting claims of settlers, and the question arises did the certification of said lands to the State, under said grant of 1856, except the same from the grant to the company, under said acts of 1871 and 1887, or did said act of forfeiture operate to vacate said certification and revest the title in the United States.

The grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company, its successors and assigns, by said section 22, was of the same number of alternate sections of public lands per mile in said State as were granted by the same act in the State of California to the Texas Pacific Railroad Company. The amount of land granted to the last

named company in California, by section 9 of said act of 1871, was ten alternate odd numbered sections of land per mile, not mineral, "on each side of said railroad in California, where the same shall not have been 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."

The uniform construction of public grants in this country from its earliest history is that the grant must be construed most strongly against the grantee; that railroad grants are laws as well as conveyances, and must be executed in accordance with the intention of Congress. The Dubuque and Pacific R. R. Co. *v.* Litchfield (23 Howard, 66–88); Leavenworth etc. R. R. Co. *v.* United States (92 U. S., 733–747); Missouri etc. Ry. Co. *v.* Kansas Pacific Ry. Co. (97 U. S., 491–497); Hall *v.* Russell (101 U. S., 503–509).

In the case of Schulenberg *v.* Harriman (21 Wallace, 44), the supreme court considered a railroad grant made to the State of Wisconsin upon the same day, and upon almost the identical conditions as prescribed in said act of 1856, and it was said (page 60),—

> That the act of Congress of June 3, 1856, passed a present interest in the lands designated there can be no doubt. The language used imports a present grant and admits of no other meaning. The language of the first section is 'that there be, and is hereby, granted to the State of Wisconsin' the lands specified. The third section declares 'that the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof'; and the fourth section provides in what manner sales shall be made, and the lands unsold 'shall revert to the United States.' The power of disposal, and the provision for the lands reverting, both imply what the first section in terms declares, that a grant is made, that is, that the title is transferred to the State.

The court also said (page 63),—

> And it is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor, if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground the title remains unimpaired in the grantee.

The court further indicated the manner in which the grantor may assert his right of re-entry on account of a breach of the condition subsequent, so as to restore the estate as if it had never been granted.

At common law, an actual entry for breach of condition by the grantor, or his heirs, must be made in order to revest the estate in the grantor, and when such entry is made he "becomes seized of his first estate and he avoids of course all intermediate charges and incumbrances." Shep. Touchstone, Vol. 1, pp. 121, 155; 4 Kent's Comm., 126; 3 Black. Comm., 174.

This rule was not applicable to the King for his right was determined by an "inquest of office," which was "an inquiry made by the King (or Queen's officer), his sheriff, coroner, or escheator, *virtute officii*, or by writ sent to them for that purpose, or by commissioners especially appointed, concerning any matter that entitles the King to the posses-

sion of lands or tenements, goods or chattels." Wharton's Law Dictionary, p. 493.

If the inquiry relative to real property is found in favor of the King, it operates to place him in immediate possession without any actual entry; provided, however, "a subject in a like case would have had a right to enter." 3 Black. Comm., 260; 4 Kent's Comm., 427.

But we are not confined to the rules of the common law to determine the mode or manner in which the government may assert its right to the lands granted, upon the breach of the condition annexed to the grant. It has been repeatedly held by the courts that the forfeiture may be judicially declared in a proceeding duly authorized, or by a direct assertion of ownership by an act of Congress.

Congress has the power of disposition of the public lands of the United States. Articles IV, section 3, clause 2, Constitution of the United States.

In the case of the United States *v.* Repentigny (5 Wallace, 211–268), the supreme court said,—

> The mode of asserting (a forfeiture) or of assuming the forfeited grant, is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings.

citing Smith *v.* Maryland (6 Cranch., 286), and Fairfax *v.* Hunter (7 Cranch., 603, 622, 631).

This doctrine was reasserted in the case of Schulenburg *v.* Harriman (*supra*), in which the court said,—

> In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate, depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement.

The same principle has been repeatedly announced by the court in the following cases: Farnsworth, et. al. *v.* Minnesota and Pacific R. R. Co. (92 U. S., 49); McMickin *v.* United States (97 U. S., 204–218); Van Wyck *v.* Knevals (106 U. S., 360); St. Louis etc. Ry. Co. *v.* McGee (115 U. S., 469); New Orleans Pacific Ry. Co. *v.* United States (124 U. S., 124–129); Bybee *v.* Oregon & California R. R. Co. (139 U. S., 663, 675).

Keeping in mind the fact that in the construction of the laws of Congress, the rules of the common law should be followed (1 Story Comm. on Con., Sec. 158, note); (1 Kent's Comm., 336–341); Rice *v.* The Minnesota & Northwestern R. R. Co. (1 Black, 502–507), we can easily determine the effect to be given to said forfeiting act of 1870. The act expressly declares that *all* the lands granted to aid in the construction

of the New Orleans, Opelousas and Great Western Railroad, which had not been lawfully disposed of by the State under the grant which had expired by limitation, or which had not been disposed of by some act of Congress subsequent to the grant, "are hereby declared forfeited to the United States, and these lands shall hereafter be disposed of as other public lands of the United States." There can be no question but that Congress intended to forfeit to the United States and resume possession of the unearned lands and those not lawfully disposed of by the State of Louisiana under said act of 1856, and that thereafter such lands should be disposed of as other public lands of the United States. Indeed, the language is so plain and free from ambiguity as to admit of no doubt as to the intention of Congress.

In the case of United States *v.* Fisher (2 Cranch, 358–386), Mr. Chief Justice Marshall said, "Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived." Doggett *v.* Railroad Company (99 U. S., 72–78).

It is true that prior to the date of said forfeiting act, lists of the lands inuring to the State under said grant had been certified by this Department in accordance with the custom then prevailing. But such certification could not add to or detract from the title vested in the State by said granting act. Mr. Attorney General Black was of the opinion that a similar act of Congress, granting certain lands to the States of Missouri and Arkansas, vested in those States "all the estate which the United States had in the subject matter of the grant, except what is expressly excepted"—citing United States *v.* Percheman (7 Peters, 51); Mitchell *v.* United States (9 Peters, 711); United States *v.* Brooks (10 Howard, 442); Lessieur *v.* Price (12 Howard, 59); Ladiga *v.* Roland (2 Howard, 581); Godfrey *v.* Beardsley (2 McLean, 412). He also declared that the act of Congress approved August 3, 1854 (10 Stat., 346), now embodied in section 2449, Revised Statutes of the United States, applied "to legislative grants where the law does not convey the fee simple title, or require patents to be issued for the lands. The Missouri and Arkansas grants are not of that kind." He also added that when the road was definitely located, the title to each particular parcel "will be as complete as if it had been granted by name, number or description;" that there was no objection to furnishing lists of lands inuring to the grantee to any person who desires to make a proper use of them by the Commissioner of the General Land Office, just as he would give other information from the records of his office, but "such lists can have no influence on the title of the States," (9 Op., 41).

This view was also held by Solicitor-General Phillipps, and approved by Attorney General Williams, concerning the grant by act of Congress approved May 17, 1856 (11 Stat., 15, 16) to the State of Alabama. (See 14 Op., 615–623).

But, in my judgment, it is not necessary to decide whether said cer-

tificates "shall be regarded as conveying the fee simple of all the lands embraced in such lists," for if, as declared in St. Louis, etc. Ry. Co. *v.* McGee (*supra*), the forfeiting act "is to take the place of a suit by the United States to enforce a forfeiture," and when such is the object of the act beyond question, it must be held to be as effective in revesting the title in the United States as if a judgment or forfeiture to the same effect had been duly rendered in the proper judicial tribunal.

In the case of Wisconsin R. R. Co. *v.* Price County (133 U. S., 496–510), the supreme court said that the road having been built, as required by law, it had an absolute *right* or *title* to the lands granted, and it matters not which term is used; that,

> The subsequent issue of the patents by the United States was not essential to the right of the company to those parcels, although in many respects they would have been of great service to it. They would have served to identify the lands as coterminous with the road completed; they would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved of possibility of forfeiture for breach of them; they would have obviated the necessity of any other evidence of the grantee's right to the lands; and they would have been evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would have been in these respects deeds of further assurance of the patentee's title, and, therefore, a source of quiet and peace to it in its possessions.

It must be remembered that the absolute right of disposal of all of the lands granted can accrue only upon the building of the road by the company in accordance with the terms of the granting act, and, if the road is not built as required by law, then Congress is authorized to say in what manner the title shall be revested in the United States. Railroad Land Co. *v.* Courtright (21 Wallace, 310); Billups *v.* Lindsey (70 Ala., 521); Alabama and Chattanooga R. R. Co. (8 L. D., 33–37).

This being so, it necessarily follows that the lands embraced within the provisions of said forfeiting act were restored to the public domain, and, in the language of the act, they were therafter to "be disposed of as other public lands of the United States." Moreover, this view seems to have been acted upon by the Executive Department, for under the provisions of the act of July 4, 1876 (19 Stat., 73), a large amount of the lands certified to the State under said act of 1856, were sold at private entry, under the proclamations of the President, dated February 20 and May 8, 1879 (Nos. 847 and 852), and also to pre-emption settlers. The only departmental decision contrary to the view herein expressed, is the case of Horace B. Rogers, *et. al.* (10 L. D., 29), in which it was held that the lands applied for "have been certified to the State of Michigan," for the benefit of the Marquette, Houghton and Ontonagon R. R. Company, and, although Congress by act of March 2, 1889 (25 Stat., 1008), had forfeited said lands and "resumed title to the same," yet "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." It does not appear in said decision when

the lands applied for were certified to the State, and it would seem to be unnecessary, if by the forfeiting act of 1889 the United States "resumed title to the same," to require any reconveyance, or to institute suit to cancel said certification. Besides, said case appears to be in conflict with the later case of Victorien *v.* New Orleans Pacific Ry. Co. (10 L. D., 637), which held that "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." If the lands were subject to settlement it must have been because they were to "be disposed of as other public lands of the United States." It must therefore be held that said certificates, so far as they covered lands included in the terms of the forfeiting act of 1870, were annulled and vacated, and the lands restored to the public domain, and being public lands at the date the right of said company attached they passed under its grant.

The case of Horace B. Rogers *et al.* (*supra*) is overruled, and the decision of your office must be, and it is hereby, reversed.

RAILROAD GRANT—DECLARATION OF FORFEITURE.

NEW ORLEANS PACIFIC RY. CO. *v.* SANCIER.

Under a grant of lands in aid of a railway company, a forfeiture for breach of condition may be declared by judicial decree or act of Congress.

The grant of June 3, 1856, provided that if any of the roads for which lands were granted should not be completed within ten years the unsold lands should revert to the United States, and under this grant lands were certified to the State for the benefit of the New Orleans and Opelousas road. The act of July 14, 1870, declared a forfeiture of the lands so granted to said company, and provided that said lands "shall be hereafter disposed of as other public lands of the United States. *Held*, That said act of forfeiture operated to restore said lands to the public domain free from the effect of the original grant and the certification thereunder.

Secretary Noble to the Commissioner of the General Land Office, April 2, 1892.

I have considered the case of New Orleans Pacific Railway Company *v.* Alcie Sancier, on the appeal of the former from your decision of May 24, 1889, rejecting its claim to the SW. ¼ of Sec. 5, Tp. 4 S., R. 1 E., New Orleans, Louisiana, land district.

This tract is within the granted limits of the grant made by the act of March 3, 1871 (16 Stat., 573) to the New Orleans, Baton Rouge, and Vicksburg Railroad Company, the appellant here being recognized as the successor of that company. The line of the company's road was definitely located opposite this tract November 17, 1882, and on December 28, 1883, said company applied to list this tract as a part of its grant.

On June 30, 1888, Sancier applied to make homestead entry for said tract, alleging settlement thereon March 1, of that year. The company

filed objections to the allowance of such application, and a hearing was ordered to determine the rights of the parties. Before the day set for such hearing, the homestead applicant filed a statement setting forth that he had settled upon said tract as public land; that the company's claim was against the government and to be settled between them and not between him and the company, whereupon the local officers forwarded the papers to your office for instructions in the premises.

Your office, in deciding the case, recited the fact that this tract was certified to the State of Louisiana, October 7, 1859, for the New Orleans, Opelousas and Great Western Railroad Company, under the act of June 3, 1856, and that while said grant was declared forfeited by act of July 14, 1870, yet the certificate to the State remained intact until February 24, 1888 when a reconveyance was made by the governor, and held that at the date the rights of the New Orleans Pacific Company attached "the title to the land was in the State of Louisiana and did not pass under said grant but was excepted therefrom by the certification aforesaid."

The question then is as to the effect of the forfeiting act upon the title to this land, and it is all the more important because a large body of land, stated by counsel for the railroad company as nearly two hundred thousand acres, will be affected by the ruling upon this question.

The act of June 3, 1856 (11 Stat., 18) was as to the granting clause in the same words as grants to other States made about that time, viz. "That there be and is hereby granted to the State of Louisiana" etc. and further provided that if any road for which land was thus granted should not be completed within ten years, the land then remaining unsold should revert to the United States. A list of lands, embracing the tract here in question, was, on October 7, 1859, certified to as containing lands inuring to the State under said grant. The company claiming that part of the grant to the State pertaining to the line of road "from New Orleans to Opelousas to the State line of Texas" failed to complete its road, and by act of July 14, 1870 (16 Stat., 377) that part of the grant of 1856 was declared forfeited. The forfeiting act reads as follows:

> Be it enacted etc. That all lands which were granted by Congress, in the year eighteen hundred and fifty-six, to the State of Louisiana, to aid in the construction of the New Orleans, Opelousas, and Great Western Railroad, and which have not been lawfully disposed of by the said State under said grant, which has expired by limitation, or by act of Congress since the original grant, are hereby declared forfeited to the United States, and these lands shall hereafter be disposed of as other public lands of the United States.

Section 22 of the act of March 3, 1871 (16 Stat., 573) declares "there is hereby granted" to the New Orleans, Baton Rouge and Vicksburg Railroad Company in aid of its construction from New Orleans to Baton Rouge, thence by way of Alexandria to connect with the eastern terminus of the Texas Pacific road, the same number of alternate sections of public lands per mile as had been in section 9 of said act granted the

Texas Pacific Company in California, and said lands were to be withdrawn from market, selected, and patents issued therefor, upon the same terms and in the same manner as provided for in the case of the Texas Pacific Company. This grant was of alternate sections of public lands, not mineral, designated by odd numbers, to the amount of ten sections per mile "where the same shall not have been 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." It was also provided (Section 12) that the company should, within two years, designate the general route of its road and file a map thereof in this Department, and that thereupon, the Secretary of the Interior should immediately cause the lands within the granted limits to be withdrawn from pre-emption private entry and sale.

On November 11, 1871, the company filed a map of designated route of that portion of its road running from Shreveport by way of Alexandria to Baton Rouge, and on November 29, a withdrawal of public lands along the line so designated was ordered by your office. On February 13, 1873, a map of general route covering that portion of the road from New Orleans to Baton Rouge was filed, and the public lands along the line designated thereby were ordered withdrawn.

By order of January 30, 1873, your office directed that all lands approved to the State under the act of 1856 "and falling outside the withdrawn limits of New Orleans, Baton Rouge, and Vicksburg Railroad, authorized by act of March 3, 1871" be restored to settlement and sale. This was the condition of the land in question at the date the New Orleans Pacific Company filed its map of definite location, and the question presented is as to whether it was public land which had not then "been sold, reserved or otherwise disposed of by the United States."

It may be mentioned as a part of the history of this grant that by act of February 8, 1887 (24 Stat., 391) a portion of the grant to the New Orleans, Baton Rouge and Vicksburg Company was declared forfeited, and the title of the United States and said company to the lands in that portion of the grant not therein declared forfeited was "relinquished, granted, conveyed and confirmed" to the New Orleans Pacific Company as assignee of the former company.

The fundamental proposition submitted in behalf of the appellant company that the act of 1856 made a present grant, and that the title to the tracts to be afterwards designated by the location of the roads passed to the State as of the date of said act, and in support of which counsel cite Schulenberg *v.* Harriman (21 Wall., 60) no one will attempt to controvert. It is equally well settled that the title thus conveyed did not revest in the United States upon default in the construction of the road within the time limited in the granting act in the absence of appropriate action upon the part of the grantor to that end. These specific points were considered by Attorney General Brewster, and his conclu-

sions thereon are found in his opinion of June 13, 1882, addressed to Secretary Teller (17 Ops., 370).

Whether the action taken in this case was effectual, *proprio vigore*, to re-invest in the United States the title to this tract of land, and others similarly situated, is the question to be determined.

One of the earliest cases in which the question as to the forfeiture of a public grant was presented to, and discussed by, the supreme court of the United States is the case of United States *v.* Repentigny (5 Wall., 211) in the decision of which case it was said:

> We agree that before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant, is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings.

That case was referred to in the case of Schulenberg *v.* Harriman (21 Wall., 44) wherein was involved the question of the status of a tract of land, included in a grant to the State of Wisconsin, in all respects similar to the grant in the case now under consideration, after condition broken, but prior to any declaration of forfeiture. The court there said:

> In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore, an office-found was necessary to determine the estate, but, as said by this court in a late case, "the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings."

In the case of Farnsworth *et al. v.* Minnesota and Pacific R. R. Co. *et al.* (92 U. S., 49), which involved the effectiveness of a legislative declaration of forfeiture, it was said:

> A forfeiture by the State of an interest in lands and connected franchises, granted for the construction of a public work, may be declared for non-compliance with the conditions annexed to their grant, or to their possession, when the forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. Such mode of ascertainment and determination—that is by judicial proceedings—is attended with many conveniences and advantages over any other mode, as it establishes as matter of record, importing verity against the grantee, the facts upon which the forfeiture depends, and thus avoids uncertainty in titles, and consequent litigation. But that mode is not essential to the divestiture of the interest where the grant is for the accomplishment of an ob-

ject in which the public is concerned, and is made by a law which expressly provides for the forfeiture when that object is not accomplished. Where land and franchises are thus held, any public assertion by legislative act of the ownership of the State, after default of the grantee—such as an act resuming control of them and appropriating them to particular uses, or granting them to others to carry out the original object,—will be equally effectual and operative.

These cases were cited and the doctrine laid down in them was reaffirmed in the case of McMicken *v.* United States (97 U. S., 204) wherein it was said:

This court has in several cases maintained the doctrine that an actual entry or office found is not necessary to enable the government to take advantage of a condition broken, and to resume the possession of lands which have become forfeited.

In the case of New Orleans Pacific Railway Company *v.* United States (124 U. S., 124) the court referred to the Farnsworth case *supra*, and re-affirmed the doctrine there laid down.

Again in the case of Bybee *v.* Oregon and California Railroad Company (139 U. S., 663) involving the force and effect of the forfeiture clause in the act of July 25, 1866 (14 Stat., 239) similar to the one in the grant now under consideration, it was said:

And in all the cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the government itself to take advantage of it, and forfeit the grant by judicial proceedings, or by an act of Congress, resuming title to the lands.

The court after citing the case of Schulenberg *v.* Harriman, and stating the doctrine therein laid down, proceed as follows:

The doctrine of this case was approved and reapplied to a similar grant to the St. Joseph and Denver City Railroad, in Van Wyck *v.* Knevals, 106 U. S., 360. In St. Louis &c. Railway Co. *v.* McGee, 115 U. S., 469, 473, it was said by Chief Justice Waite to have been often decided "that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at common law." "Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and judgment therein establishing the right, it should be direct, positive and free from all doubt or ambiguity." The manner in which this forfeiture shall be declared is also stated in United States *v.* Repentigny, 5 Wall., 211, 267; Farnsworth *v.* Minnesota and Pacific Railroad Co., 92 U. S., 49, 66; McMicken *v.* United States, 97 U. S. 204, 217.

These authorities sufficiently present the doctrine applicable in such cases, and it only remains to make the application to the case before us. Here there was a grant made for the accomplishment of an object in which the public was concerned by a law which expressly provided for a forfeiture when the object of the grant was not accomplished within a limited time therein. This grant then presents the conditions of a grant which the supreme court said in Farnsworth *et al. v.* Minnesota and Pacific R. R. Co. *et al.* might be forfeited as effectually by legislative

act as by judicial proceedings. The court has said, however, that where a grant is of the character that may be forfeited by legislative action any public assertion by legislative act of the ownership of the State is effectual and operative. In the different cases cited, illustrations are given of the character of legislative action that would be sufficient to re-invest the title in the grantor, and among these we find an act "directing the possession and appropriation of the land," or one directing "that it be offered for sale or settlement," or one appropriating the lands to others to carry out the original object. The forfeiting act here under consideration, after declaring a forfeiture for condition broken, proceeds "and these lands shall hereafter be disposed of as other public lands of the United States." This is exactly the provision which the supreme court said in Schulenberg *v.* Harriman *supra* would render a forfeiting effective to re-invest title in the United States. This act was sufficient to and did, in my opinion, operate to effect a reunion of the lands affected by it, with the public domain.

Your decision in this case is upon the theory, apparently that the title to these lands was vested in the State by the certification in 1859, and that it required a reconveyance or release from the State to re-invest the title in the United States. It is doubtful if the list certified to the State was intended for any other purpose than to give notice of the lands that it was supposed would be within said grant. That list, it is stated, contained both granted and indemnity lands, and that fact strengthens the theory that it was simply an "information list."

The act of June 3, 1856 did not require or provide for a certification of the lands granted, nor did it provide for the issuance of patents.

The act of August 3, 1854 (10 Stat., 346) provides as follows:

> That in all cases where lands have been, or shall hereafter be, granted by any law of Congress to any one of the several States and Territories; and where such law does not convey the fee simple title of such lands, or require patents to be issued therefor; the lists of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office, under the seal of said office, either as originals, or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said list, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby.

In 1857, Attorney General Black held that this act did not apply, in any manner whatever, to the land granted by grants similar to that of June 3, 1856, and added (9 Ops., 41):

> I can see no objection to your furnishing lists of those lands to any person who desires to make a proper use of them, just as you would give other information from the records of your Department. But such lists can have no influence on the title of the States.

The lists in this case were certified after this opinion had been ren-

dered. Reference is also made to the opinion of Solicitor-General Phillips, approved by Attorney General Williams (14 Ops., 617). There, after naming a large number of grants, including that to Louisiana, of June 3, 1856, it was said:

> I find myself unable to perceive in them any authority for any certificate, patent, or other writing, to proceed from any other agent of the United States in connection with that title. The act and that alone is the conveyance and that conveys the fee.

The views thus expressed, clearly sustain the conclusion that the certification in this case did not, in any manner, strengthen or affect the title of the State in the tracts included in said lists.

In cases where patents have been issued after the title had been conveyed or confirmed by act of Congress, the supreme court has said that such a patent constituted documentary evidence of the existence of the title, but was not itself the grant. Langdeau *v.* Hanes (21 Wall., 521); Wright *v.* Roseberry (121 U. S., 488); Wisconsin Central R. R. Co. *v.* Price County (133 U. S., 496). The outstanding certification in this instance did not, in my opinion, constitute a title in the State, as held by you, or prevent the re-investment of the title to said lands in the United States, by the force of the forfeiting act of 1870.

In the case of Horace B. Rogers *et al.* (10 L. D., 29) it was held that so long as the certification was outstanding, the title was outstanding, and that until reconveyance or cancellation of the certification by suit for that purpose, the lands falling within the terms of the forfeiture act were not subject to entry under the settlement laws. In that case, the forfeiting act does not seem to have been given the force and effect to which it was entitled. As we have seen by reference to the decisions of the supreme court, legislative action may be just as effective to divest the grantee of all title acquired under a grant of this character as a judicial decree would be. In the later case of Victorien *v.* New Orleans Pacific Ry. Co. (10 L. D., 637), the granting act and the forfeiting act involved being to the same effect and in almost the same terms as the acts involved in the Rogers' case, it was held that the lands coming within the terms of the forfeiting act became at once, on the passage of that act, subject to settlement. This later case announces the proper rule and the one that will be followed. It follows then, and I so hold, that the land in question was public unappropriated land at the date the rights of said railroad company attached, and as such passed under its grant.

The decision appealed from is accordingly reversed.

DESERT LAND ENTRY—EXCESSIVE ACREAGE.

MARY A. R. JENKINSON.

A desert land entry made after the passage of the act of August 30, 1890, is restricted in area to three hundred and twenty acres.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 2, 1892.

Mary A. R. Jenkinson, on September 11, 1890, made desert-land entry for the S½ of the NW¼, the S½ of the NE¼, and the S½ of Sec. 26, T. 2 S., R. 35 E., Blackfoot land district, Idaho.

The area of the tract above described was four hundred and eighty acres.

On May 18, 1891, you held for cancellation so much of said entry as was in excess of three hundred and twenty acres, on the ground that the act of August 30, 1890, restricted desert-land entries to that amount.

She has appealed to the Department, the allegations of error being that at the date of entry (September 11, 1890) the local officers had not yet received "official knowledge" of the passage of the act; that she has fenced the entire tract and constructed ditches upon each subdivision thereof; that she did this in accordance with the information received from the local officers; and that it would be manifest injustice to her to forfeit the fruits of her labor.

The act to which reference is made is that approved August 30, 1890, making appropriations for sundry civil expenses of the government; and the portion limiting the amount of land allowed to be entered is the following (26 Stat., 391):

> No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement, under any of the land laws, shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under *all* of said laws; but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands.

If the law above quoted was intended to include desert-land entries, as in my opinion it was, it curtailed the rights of all who had not "heretofore made entry"—that is, prior to the approval of the act, August 30, 1890. An act of Congress goes into effect—unless otherwise explicitly stated therein—at the date of its approval. (See case of August W. Hendrickson, 13 L. D., 169.) The fact that the local officers had not received "official knowledge" of the fact has no bearing upon the question. The fact that she made the entry upon the advice of the local officers will not operate to confer upon her a right denied by the law (William A. Parker, 13 L. D., 734).

Your decision is affirmed.

RIGHT OF WAY ACTS—RAILROADS—CANALS.

INSTRUCTIONS.

There is no authority under the acts of March 3, 1875, and March 3, 1891, for filing maps of location over unsurveyed lands, and such maps will not be received by the Department.

Secretary Noble to the Commissioner of the General Land Office, March 21, 1892.

I herewith return, approved, regulations concerning the right of way granted by Congress over the public lands for railroads, canals, ditches, and reservoir sites, under the acts of March 3, 1875 (18 Stat., 482), and March 3, 1891 (26 Stat., 1095).

In the matter of your suggestion relative to the decision of this Department in the case of the Santa Cruz Water Storage Company (13 L. D., 660), to the effect that maps of location over unsurveyed lands, "if otherwise acceptable," be received and filed, even if not formally approved, I have but to say that unless the location is in some way connected with the public surveys, the map would be of little value to furnish information as to the actual location of the canal, ditch, or reservoir.

Said maps could not be approved, as held in said decision, and no rights would accrue from such filing. Such a practice can not, therefore, receive the sanction of this Department, as it could only result in unnecessary expense to the locators, greatly increase the duties of this Department, as well as incumber the files with maps and papers not warranted by law nor necessary to the preservation of the rights of parties.

Heretofore railroad companies desiring to secure the right of way over the unsurveyed lands of the United States have been permitted to file a map of location for the approval of this Department, without waiting for survey, but it was required that immediately upon the survey of the lands traversed by the road, the company must file another map showing the line of route in connection with the public surveys. No rights followed the approval of the map over unsurveyed lands, the same being furnished presumably as a matter of information.

The act of 1875 makes no provision for the filing and approval of maps of location over unsurveyed lands, its provision being, "if upon unsurveyed lands, within twelve months after the survey thereof by the United States," the company must "file with the register of the land office for the district where such land is located a profile of its road; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office."

No note was to be made upon the local office records to guide in the disposition of the public lands, until the approval of the map of location, which was to be filed *after survey*, and I am therefore of the opin-

ion that what has already been said relative to the location of canals, ditches, and reservoirs over unsurveyed lands, applies with equal force to railroads claiming the right of way under the act of 1875.

I have therefore omitted from the circular that portion referring to the filing and approval of railroad maps of location over unsurveyed lands, and in future you will not transmit such maps to this Department.

In this connection, I have considered your communication of February 9, 1892, relative to the application by the Coeur d'Alene Railway and Navigation Company to amend the form of affidavit and certificate required by the regulations of this Department to be attached to the maps of definite location, presented for approval under the act of March 3, 1875. The basis for this application is the fact that maps of location have been filed by said company over unsurveyed lands, which maps have been approved by this Department; that the surveys were made by different parties some of whom are not now in the company's employ, and it is extremely difficult to make the certificate correspond with the circular form; further, there is nothing in the form prescribed to be attached to the map of location filed after survey, to show the approval by the Department of the location made prior to survey. Amended forms are presented by the company for approval, and your letter states that "the principal advantage of the form is that, where the road shall have been constructed when the government surveys are made, it allows of one map being filed covering both location and construction."

As heretofore shown, no rights accrued from the filing and approval of the location prior to survey, and I can see no necessity for such fact appearing in the certificate attached to the map filed after survey.

If the party who made the survey is no longer in the company's employ, I can see no objection to so wording the affidavit and certificate as to contain the actual facts, conforming as far as possible to the prescribed form, nor can there be any objection to the consolidation of the maps of location and construction, where construction preceded the survey.

I am unwilling to approve the forms in the shape presented, and they are herewith returned.

Any maps hereafter presented for approval by this company complying with the above, if otherwise in form, will be duly considered.

RIGHT OF WAY REGULATIONS—RAILROADS CANALS.

RAILROADS.

The following is a copy of an act of Congress approved March 3, 1875, granting to railroads the right of way through the public lands of the United States:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also, ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

SEC. 2. That any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided,* That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

SEC. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act [to amend an act entitled an act] to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

SEC. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if

the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

SEC. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed.

SEC. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Approved March 3, 1875. (18 Stat., p. 482.)

The regulations under the law are as follows:

I. Any railroad company desiring to obtain the benefits of the law is required to file, through this office, or they may be filed with the register of the land district in which the principal terminus of the road is to be located, who will forward them to this office—

First. A copy of its articles of incorporation, duly certified to by the proper officer of the company, under its corporate seal.

Second. A copy of the State or Territorial law under which the company was organized (when organized under State or Territorial law), with certificate of the governor or secretary of the State or Territory that the same is the existing law.

Third. When said law directs that the articles of association, or other papers connected with the organization, be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

No forms are prescribed for the above portion of the "due proofs" required, as each case must be governed, to some extent, by the laws of the State or Territory.

Fourth. The official statement, under seal, of the proper officer, that the organization has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing law of the State or Territory; and that the copy of the articles filed is true and correct. (See Form I.)

Fifth. A true list, signed by the president, under the seal of the company, showing the names and designation of its respective officers at the date of the filing of the proofs. (See Form II.)

II. Upon the location of any section of the line of route of its road, not exceeding 20 miles in length, the company must file with the register of the land district in which such section of the road, or the greater portion thereof, is located, a map, for the approval of the Secretary of the Interior, showing the termini of such portion of the road, its length, and its route over the public lands according to the public surveys.

The map must be filed within twelve months after the location of such portion of the road, if located upon surveyed lands, and if upon unsurveyed lands within twelve months of the survey thereof. It must bear—

First. Affidavit of the chief engineer of the company (or person employed to make the survey, if the company has no chief engineer), setting forth that the survey of route of the company's road from ——— to ———, a distance of ——— miles (giving termini and distance), was made by him (or under his direction) as chief engineer of the company (or as surveyor employed for the purpose, if such be the case), under authority of the company, on or between certain dates (giving the same), and that such survey is accurately represented on the map. If the affidavit is made by the chief engineer of the company, it must be signed by him officially. (See Form III.)

Second. Official certificate of the president of the company, attested by its secretary under its corporate seal, regarding the person signing the affidavit, either as to his being the chief engineer of the company or as to his employment by the company for the purpose of making such survey; that the survey was made under authority of the company; that the line of route so surveyed and represented by the map was adopted by the company, by resolution of its board of directors of a certain date (giving the date), as the definite location of the line of route of the company's road from ——— to ———, a distance of ——— miles (giving termini and distance), and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." (See Form IV.)

III. It will be observed that the requirements of the law regarding the filing of the proper papers are conditions precedent to the obtainment of the right to construct a railroad over the public lands, or to take therefrom material, earth, stone, and timber for its construction, or to occupy them for station or other purposes. It is therefore imperative that proper steps, as pointed out in this circular, should be taken by a company, and the approval of the Secretary of the Interior obtained, prior to the construction of any part of its road or its occupancy of the public lands in any manner.

IV. Upon construction of any section of the line of its road the company must file with the register of the proper land district, for transmission to this office, a map of such constructed portion of road, bearing—

First. Affidavit of the chief engineer or person under whose supervision the portion of the road was constructed, that its construction was commenced on ——— and finished on ——— (giving dates); that the line of constructed road is accurately represented upon the map, and that it conforms to the line of located route which received the approval of the Secretary of the Interior on ——— (giving date). (See Form V.)

Second. Certificate of the president of the company, attested by the secretary under the corporate seal, that the portion of the road indicated by the map was actually constructed at the time as sworn to by the chief engineer of the company (or person making the affidavit), and on the exact route shown on the map; that in its construction the road does not deviate from the line of route approved by the Secretary of the Interior, and that the company has in all respects complied with the requirements of the act of March 3, 1875, granting right of way through the public lands. (See Form VI.)

Any variation within the limits of 100 feet from the central line of the road as located will not be considered a deviation from such line, but where, upon construction, it is found necessary to transgress the limits within which the company has right of way, the company must at once file proper map of amended route for approval.

V. If the company desires to avail itself of the provisions of the law which grant the use of "ground adjacent to the right of way for station buildings, depots, machine shops, side tracks, turn outs, and water stations, not to exceed in amount 20 acres for each station, to the extent of one station for each 10 miles of its road," it must file for approval, in each separate instance, a plat showing, in connection with the public surveys, the surveyed limits and area of the grounds desired. Such plat must bear—

First. Affidavit of the chief engineer or surveyor by whom or under whose supervision the survey was made, to the effect that the plat accurately represents the surveyed limits and area of the grounds required by the company for station or other purposes, under the law (stating the purposes), in —— (giving section, township, range, and State or Territory); that the company has occupied no other grounds for station or other similar purposes upon public lands within the section of 10 miles for which this selection is made, and that, in his belief, the grounds so represented are actually and to their entire extent required by the company for the necessary uses contemplated by law. (See Form VII.)

Second. Certificate of the president of the company, attested by the secretary under the corporate seal, that the survey of the tract represented on the plat was made under authority and by direction of the company by or under supervision of its chief engineer (or person making the survey), whose affidavit is attached; that such survey accurately represents the grounds actually and to their entire extent required by the company for station (or other) purposes in ——— (giving section, township, range, State, or Territory), allowed by the provisions of the act of Congress approved March 3, 1875, granting to railroads the right of way through the public lands; that the company has no station or other grounds upon public lands within the section of 10 miles for which this selection is made; and that the company, by resolution of its board of directors of a certain date (giving the date), directed the proper officers to present the plat for the approval of the Secretary of the Interior in order that the company may obtain the use of the grounds under the law above referred to. (See Form VIII.)

When maps of a line of any road have been approved by the Secretary of the Interior, a copy of so much thereof as relates to the lands within the boundaries of a given district will be transmitted to the register and receiver.

Immediately upon receipt of such copy, if the same represents surveyed lands, the local officers will mark upon the township plats the line of route of the road as laid down on the map. They will also note, in pencil, on the tract books opposite each tract of public land cut by said line, that the same is to be disposed of subject to the right of way for the road, giving its name. Thereafter, in disposing of any tract cut by the line of route, the claim to which shall have been initiated subsequent to the receipt of the copy of the approved map, the register and receiver will note, in red ink, across the face of the certificate issued upon any entry made, that the same is allowed subject to the right of

way of the road, giving its name, and refer to the letter from this office, transmitting the map, by its initial and date.

When there is received from this office a copy of an approved plat of grounds selected by a company, under the act in question, for station purposes, etc., they will mark the proper township plat accordingly, make the necessary notes on the tract books, and in disposing of the tracts which may include the grounds so selected, the officers will note on the certificate of entry, in addition to the note concerning the right of way, the entry is permitted subject to the use and occupation of the company (naming it) for station purposes, etc.

When copies of approved maps or plats are sent, showing lines of route through unsurveyed lands, they will be placed on file, awaiting further compliance with the law and instructions by the companies after survey of the lands.

The act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the "right of way" or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States.

Each tract selected for station purposes under the act must represent its particular section of 10 miles, and can not be selected in any other section of 10 miles. That is, within the first 10 miles a tract may be selected at any point within said section, and for the next 10 miles another tract may be selected within the limits of that section in the same manner as the first; and other tracts may in like manner be selected for each additional section of 10 miles to represent said section in its particular locality. All selections for station purposes are now adjusted in conformity to the above ruling, as shown by Forms VII and VIII.

All persons settling on public lands to which a railroad right of way has attached, take the same subject to such right of way, and must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases.

If a settler has a valid claim to land existing at the date of the approval of the map of definite location of a railroad company, his right is superior, and he is entitled to such reasonable measure of damages for "right of way," etc., as may be determined upon by agreement or in the courts, the question being one that does not fall within the jurisdiction of this office.

All maps must be filed with the register of the proper land office, who will note upon the same the fact that they are filed in duplicate, and transmit both map and duplicate to this office.

Registers are instructed, in any case where information is received by them of the construction of railroads within their districts, of the rights of which they have no official knowledge, to promptly advise this office of the facts, in order that proper information or directions in the matter may be given them.

All maps of location presented for approval should be drawn on tracing linen, the scale not less than 2,000 feet to the inch, and should be filed in duplicate. Station plats should be upon a scale of 400 feet to the inch, and should also be filed in duplicate.

The attention of companies seeking the benefits of this act should be specially directed to these suggestions, as serious delays and embarrassments are often incurred through the inability of this office, owing to its limited clerical force, to prepare the necessary copies for transmission to the district offices.

RIGHT OF WAY FOR CANALS, DITCHES, AND RESERVOIR SITES.

Sections 18, 19, 20, and 21 of the act of Congress approved March 3, 1891 (26 Stat., 1095), entitled, "An act to repeal timber-culture laws, and for other purposes," grants the right of way through the public lands and reservations of the United States for the use of canals, ditches, and reservoirs, heretofore or hereafter constructed by corporations, individuals, or associations of individuals, upon the filing and approval of the certificates and maps therein provided for, but the word "reservations" as here used does not include Indian reservations.

The following instructions, under said act, are added for the information of those who may desire to secure the benefits granted thereby:

THE EIGHTEENTH SECTION

provides that the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company, formed for the purpose of irrigation, and duly organized under the laws of any State or Territory, which has filed or may hereafter file a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir, and of the canal and its laterals, and 50 feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch. The right of way must not interfere with the proper occupation by the Government of any reservation, and all maps of location must be subject to the approval of this Department and of the Department having charge of any reservation in which the right of way is proposed to be located.

THE NINETEENTH SECTION

is drawn in the same general terms of section 4 of the right-of-way act for railroads, approved March 3, 1875 (18 Stat., p. 482), and directs that any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of 10 miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof by the United States,

file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir, and, upon the approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way. The section further provides that whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Under this section all maps or plats showing the location of canals, ditches, or reservoirs, must first be filed in the proper local land offices. The register will note in red ink on the map or plat over his official signature the date of such filing in his office, and the fact that it is "filed in duplicate", and then promptly transmit the same to this office for appropriate action. It is imperatively necessary that all maps or plats submitted under this section should be filed in duplicate.

THE TWENTIETH SECTION

directs that the provisions of this act shall apply to all canals, ditches, or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals, or associations of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual, or association of individuals, it shall be sufficient for such individual, or association of individuals, to file with the register of the land office where said land is located a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it. Forfeiture is declared if any section of said canal or ditch shall not be completed within five years after the location of said section, to the extent that the same is not completed at the date of the forfeiture.

By the provisions of this section it is obligatory upon all corporations, individuals, or associations of individuals, owning, controlling, or operating canals, ditches, or reservoirs, whether the same have been constructed, or are to be hereafter constructed, in order to be admitted to enjoy the benefits provided for in this statute, to file the necessary papers and maps entitling them to recognition under this act; and the registers and receivers are directed to give notice to all such corporations that may be found within their districts that the conditions precedent to obtaining rights of way over the public lands, as enumerated by the statute, must be fully complied with before any easement can be secured.

declares that nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

All maps of location, either of canals or ditches, presented for approval, should be in duplicate and drawn upon the scale not less than 2,000 feet to the inch, as required in the case of locations under the act granting the right of way to railroads, but the survey of a reservoir may be mapped to the scale of 1,000 feet to the inch, and must also be in duplicate. The smallest legal subdivision of the public survey should be shown.

The termini of a canal or ditch and laterals should be fixed by reference to established corners of the public survey, and described in the field notes and in the certificate of the engineer. The course and distance of the line of route and also the width of the canal or ditch should be noted upon the maps, and wherever the location crosses a line of the public survey the distance to the nearest established corner should be ascertained and noted.

Where the boundary lines of a reservoir cross the lines of the public survey the point of intersection should be marked with a stake or stone. and the distance from such point to the nearest established corner, outside of the reservoir, should be noted on the map.

In surveying a reservoir, the initial point should be fixed by reference to an established corner of the public survey, outside of the reservoir, and the outer or shore line should be so marked that adjoining proprietors may know the boundary and that surveyors may retrace the line in after years regardless of the water line.

In all cases, maps filed under this act should be accompanied by the field notes of the survey, which, like the maps, must be in duplicate, and in these notes the variation of the magnetic from the true meridian should be noted.

This act does not contemplate the appropriation, for reservoir purposes, of natural lakes that are already the source of a water supply; nor the damming of a river, so that the adjacent country is overflowed. Its intention seems to be to encourage the much-needed work of constructing ditches, canals, and reservoirs in the arid portion of the country, and not as granting an easement in a natural source of water supply.

The duties of registers and receivers under this law are identical with those prescribed in the first part of this circular containing the rules and regulations for railroads claiming right of way over the pnblic lands under act of March 3, 1875.

No separate forms are prescribed to be used under the said sections, but the attached forms prescribed for use by railroads claiming right

of way under the act of March 3, 1875, may be used in such proceedings *mutatis mutandis*.

THOS. H. CARTER,
Commissioner.

Approved March 21, 1892.

JOHN W. NOBLE,
Secretary.

FORMS FOR "DUE PROOFS" AND VERIFICATION OF MAPS OF RIGHT-OF-WAY RAILROADS.

(I.)

I, ——— ———, secretary [or president] of the ——— railroad company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing laws of the State [or Territory]; and that the copy of the articles of association [or incorporation] of the company filed in the Department of the Interior is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company.

[SEAL.]

———— ————,
——— *of the* ——— *Railroad Company.*

(II.)

———— ————, being duly sworn, says that he is the president of the ——— railroad company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: [Here insert the full name and official designation of each officer.]

[SEAL OF COMPANY.]

———— ————,
President of the Company.

(III.)

———— ————, being duly sworn, says he is the chief engineer of [or is the person employed to survey the line of route of the road of] the ——— railroad company; that the survey of the line of route of said road from ——— to———, a distance of ——— miles, was made by him [or under his direction] as chief engineer of the company [or as surveyor employed by the company] and under its authority, commencing on the —— day of ———, 18—, and ending on the —— day of ———, 18—; and that such survey is accurately represented on the accompanying map.

———— ————,
———— ————.

Sworn and subscribed to before me this —— day of ———, 18—.

[SEAL.]

———— ————,
Notary Public.

(IV.)

I, ——— ———, do hereby certify that I am the president of the ——— railroad company; that ——— ———, who subscribed the foregoing affidavit, is the chief engineer of [or was employed to make the survey by] the said company; that the survey of line of route of the company's road, as accurately represented on the accompanying map, was made under authority of the company; that the said line of route so surveyed and as represented on the said map was adopted by the company by resolution of its board of directors on the —— day of ———, 18—, as the definite location of the road from ——— to ———, a distance of ——— miles; and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may ob-

tain the benefits of the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

——— ———,
President of the ——— Railroad Company.

Attest: ——— ———,
Secretary.
[SEAL OF COMPANY.]

(V.)

——— ———, being duly sworn, says that he is the chief engineer of [or was employed to construct the road of] the ——— railroad company; that said road had been constructed, under his supervision, from ——— to ———, a distance of ——— miles; that its construction was commenced on the —— day of ———, 18—, and finished on the —— day of ———, 18—; that the line of constructed road as aforesaid is accurately represented on the accompanying map, and that it conforms to the line of located route which received the approval of the Secretary of the Interior on the —— day of ———, 18—.

——— ———,
———.

Sworn and subscribed to before me this —— day of ———, 18—.
[SEAL.]
——— ———,
Notary Public.

(VI.)

I, ——— ———, do hereby certify that I am the president of the ——— railroad company; that the portion of the road from ——— to ———, a distance of ——— miles, was actually constructed as set forth in the foregoing affidavit of ——— ———, chief engineer, [or, the person employed by the company in the premises,] and on the exact route as represented on the accompanying map; that in its construction the road does not deviate from the line of route approved by the Secretary of the Interior on the —— day of ———, 18—; and that the company has in all things complied with the requirements of the act of Congress approved March 3, 1875, granting to railroads the right of way through the public lands of the United States.

——— ———,
President of the ——— Railroad Company.

Attest: ——— ———,
Secretary.
[SEAL OF COMPANY.]

(VII.)

——— ———, being duly sworn, says he is the chief engineer of [or the person employed by] the ——— railroad company, under whose surpervision the survey was made of the grounds selected by the company for [station, buildings, depots, etc., as the case may be], under the act of Congress approved March 3, 1875, granting to the railroads the right of way through the public lands of the United States; said grounds being situated in the ——— quarter of section ——— of township ——— ———, of range ——— ———, in the State [or Territory] of ———; that the accompanying plat accurately represents the surveyed limits and area of the grounds so selected, and that the area of the ground so selected and surveyed is ——— acres and no more; that the company has occupied no other grounds for similar purposes upon public lands within the section of ten miles for which this selection is made; and that, in his belief, the grounds so selected and surveyed, and represented, are actually and to their entire extent required by the company for the necessary uses contemplated by said act of Congress approved March 3, 1875.

——— ———,
———.

Sworn and subscribed to before me this —— day of ———, 18—.
[SEAL.]
——— ———,
Notary Public.

(VIII.)

I, ——— ———, do hereby certify that I am the president of the ——— railroad company; that the survey of the tract represented on the accompanying plat was made under authority and by direction of the company, and under the supervision of ——— ———, its chief engineer [or the person employed in the premises], whose affidavit precedes this certificate; that the survey as represented on the accompanying plat actually represents the grounds required in the ——— quarter of section ——— of township ——— ———, of range ——— ———, for the purposes indicated, and to their entire extent, under the act of Congress approved March 3, 1875, granting to railroads the right of way through the public lands of the United States; that the company has selected no other grounds upon public lands, for similar purposes, within the section of ten miles for which this selection is made; and that the company, by resolution of its board of directors, passed on the —— day of ———, 18—, directed the proper officers to present the said plat for the approval of the Secretary of the Interior, in order that the company may obtain the use of the grounds described, under said act approved March 3, 1875.

——— ———,
President of the ——— Railroad Company.

Attest:

——— ———,
Secretary.

[SEAL OF COMPANY.]

PRE-EMPTION ENTRY--SECTION 7, ACT OF MARCH 3, 1891.

WITCHER *v.* CONKLIN.

A pre emptor who duly submits final proof and pays for the land secures a right thereto that can not be defeated by the fact that the entry is not made of record in the General Land Office, through the failure of the local officers to forward the final proof.

The pendency of a contest does not defeat the confirmation of an entry in the interest of a transferee under section 7, act of March 3, 1891.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 5, 1892.

I have considered the case of William V. Witcher *v.* Charles W. Conklin, upon the appeal of the former from your decision of October 11, 1890, dismissing his protest against the final proof of the latter in support of his pre-emption filing for the E. ½ of the NW. ¼, the NE. ¼ of the SW. ¼, and the NW. ¼ of the SE. ¼ of Sec. 29, T. 41 N., R. 9 E., Susanville, California, land district.

The record shows that on the 28th day of January, Conklin filed his pre-emption declaratory statement for said land, alleging settlement January 1, 1887. He advertised to make final proof for said tract July 14, 1888, at which time said Witcher appeared and filed a protest in the nature of an affidavit of contest. The testimony of Conklin, and his two witnesses, was taken and the hearing continued to the 16th of July, at which both parties appeared and introduced their testimony.

Witcher, in his affidavit of contest, alleged that on the 13th day of March, 1878, one Albert Scherfen filed his pre-emption declaratory statement for the tract; that said Scherfen settled upon said land and placed valuable improvements thereon, consisting of a house 20x25 feet, of the value of $200; a stable and hay-barn 40x50 feet; a granary 15x20 feet; said buildings of the value of $400. That he fenced about two acres of the land. It is further alleged that on the 19th day of February, 1884, Witcher purchased from said Scherfen his improvements and interest in the land, and received a warranty deed therefor; that at the same time Scherfen delivered to Witcher "the duplicate receipt No. 1402 of final payment of the then receiver of the above-named land office." Copies of the deed and receipt were attached to the affidavit. It is alleged that Witcher went into the possession of the property under his purchase from Scherfen, and that he placed further improvements upon the tract, consisting of a good and substantial fence, enclosing about twelve acres of the land; that about October 19, 1886, he leased the premises for one year to the father of Charles W. Conklin, who as tenant under said lease entered into the possession of the premises, "and suffered his son, the said Charles W. Conklin, to reside with him upon the same premises." That after the expiration of about twelve months, the elder Conklin removed from the tract and

left his son in his stead upon the place; that thereafter the son filed his pre-emption declaratory statement, under which he seeks to make final proof.

A conspiracy is charged between the Conklins to get possession of the land by the elder Conklin, under the lease, and defraud Witcher out of his rights in the premises. A suit in the State court, was tried between Witcher and the younger Conklin, respecting the right to the possession of the premises, which resulted favorably to Witcher, and under a writ issued after the judgment was rendered in said suit, Conklin was put out of the possession of the premises and Witcher put in, and was still in possession when this controversy was tried before the local officers.

From the testimony introduced before them, the local officers found in favor of the protestant, and rejected the final proof offered by Conklin. Conklin appealed.

You, by letter of October 11, 1890, reversed the judgment of the local officers, dismissed Witcher's protest, and found Conklin's final proof to be sufficient. Witcher appeals.

The first and second assignments of error are as follows:

1. That Witcher (Plaintiff) failed to furnish satisfactory evidence that Scherfen (Plaintiff's assignor) ever made cash entry as alleged:

2. That proof was necessary to establish the genuineness of the Receiver's duplicate receipt, issued to said Scherfen, and filed as evidence in this case.

The local officers found "That Albert Scherfen had in good faith complied with the pre-emption law and had made final proof and payment upon said land, and had an equitable title thereto. That his rights should not be defeated by the neglect or wilful non-performance of official duty upon the part of the local officers. . . . That W. V. Witcher obtained from said pre emptor Scherfen, on 19th February, 1884, all the latter's title and claim to said premises; that he examined the land, and there found ample evidence of the compliance with law, on the part of Scherfen as to residence, improvement and cultivation."

The records of the local land office show that Albert Scherfen made pre-emption declaratory statement for the tract on April 18, 1878, alleging settlement on March 13, 1878. The records of the local office and your office appear to be silent as to whether Scherfen made his final proof under his said filing, and the evidence relied upon by the protestant to show that such final proof had been made consisted of an alleged receiver's duplicate receipt, dated November 5, 1880, and signed by Andrew Miller, then the receiver of that land office. The record shows that such a receipt was offered in evidence at the trial, but the original is not found among the papers, but there is a copy, duly certified by the register of the local office, attached to the protest filed by Witcher, and for the purposes of this case it may be treated as the original. The objection made to the introduction of this receipt, as shown by the report of the local officers, was "on the ground that

the records of this (local) office do not show that final entry was ever made by Scherfen; that the signature thereto was not identified and that the said receipt had never been transferred." The local officers held that the objections were not well taken and say:

> From our knowledge of the conduct of this office during the period in which this receipt purports to have been issued are fully persuaded that said receipt is a genuine receiver's duplicate receipt, and that, as by it shown, Albert Scherfen did on the 5th day of November, 1880, make final proof and payment upon the tract of land in controversy; that he received the receipt provided by law, duly signed by Andrew Miller, then receiver of this office, and in the absence of any evidence to the contrary it is to be presumed that such proof, was made in accordance with the laws and regulations governing the submission of proof in such cases, and that such proof was of such character as to entitle him to enter said land.

In your decision, you say there was no proof that the signature to the original duplicate receipt was the genuine signature of the then receiver; that the witness introduced for that purpose failed to testify to the fact. In this, I think, you were in error. The witness, F. N. Long, testified that he was acquainted with Andrew Miller former receiver of the Susanville U. S. Land Office; that he had known him since 1855. In response to the question "Do you know the signature of said Miller?" he answered, "I think I would. I have done considerable business with Mr. Miller first and last." He further testified that he believed he was familiar enough with Miller's signature to recognize it, although he would not like to swear point blank to any man's signature. And when the counsel submitted to the witness the duplicate receiver's receipt and asked if he believed the signature of Andrew Miller thereto was genuine, he answered "I do." The witness was not cross-examined by Conklin's counsel nor asked to explain fully the grounds upon which he based his opinion.

From a careful examination of all the evidence in the case, I am convinced that the finding of the local officers is sustained thereby and that Scherfen made final proof and payment for the tract as found by the local officers. When said final proof and payment were made and the duplicate receiver's final receipt given thereon, his entry was completed so far as he was concerned. The fact that his final proof was not forwarded to your office, and there made a matter of record, can not be held to defeat his entry, for he could have no control over these matters.

Scherfen's entry having been made and completed on the 5th day of November, 1880, it becomes unnecessary to discuss or pass upon the other questions involved in the record, for the reason that under the act of March 3, 1891 (26 Stat., 1095) said entry is confirmed. The seventh section of said act provides, among other things, that:

> All entries made under the pre-emption, homestead, desert-land or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and

eighty-eight, and after final entry, to *bona fide* purchasers or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.

The adverse claim of Conklin did not orignate prior to final entry. The land embraced therein was sold prior to the first day of March, 1888, and after final entry, to Witcher, who is shown to be a *bona fide* purchaser for a valuable consideration and no fraud on the purchaser has been found upon an investigation by a government agent. Under these circumstances the entry of Scherfen is confirmed without reference to Conklin's claim. See Axford *v.* Shanks (on review) 13 L. D., 292. Shepherd *v.* Ekdahl (13 L. D., 537).

Your decision admitting Conklin's final proof is reversed and you are directed to cause his filing to be canceled. The papers in the case are herewith returned with directions to proceed under the act of March 3, 1891, in harmony with the views herein expressed.

PRACTICE—PREFERENCE RIGHT—SECTION 23, ACT OF MARCH 2, 1889.

COX *v.* NEWBURY.

Ten days additional are allowed for the perfection of appeal from the local office, where notice of the decision is sent by mail.

The preference right of entry conferred by section 23, act of March 2, 1889, is limited to the lands originally claimed by the settler.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 5, 1892.

The land involved in this appeal is lot 9 and the SE. ¼ of NW. ¼ of Sec. 14, T. 104 N., R. 71 W., Chamberlain, South Dakota, land district.

The record shows that Edwin C. Newbury on April 3, 1890, made homestead entry for lot 9, N. ½ of NW. ¼ and the SE. ¼ of NW. ¼ of said section, township and range.

On April 8, 1890, Thomas H. Cox applied to make homestead entry for the SE. ¼ of NW. ¼ and lots 7, 8, and 9, of said section, township and range, and at the same time filed an affidavit of contest, alleging that he made settlement on the land last above described on February 28, 1885, under a proclamation of President Arthur, dated February 27, 1885, declaring said lands to be opened for settlement, that he built a house thereon which was completed prior to the date of President Cleveland's proclamation of April 17, 1885, revoking the one of February 27th, aforesaid; that he made other improvements consisting of an addition to this house, a stable, dug a well, had two hundred and fifty rods of wire fence, planted apple trees and small fruits, and had twelve acres in cultivation. The value of his improvements being placed at $750; that he made the settlement in good faith, and desires

to make a homestead entry of the same; that while he was residing upon said land in February, 1890, defendant commenced improvements on lot 9, and made homestead entry on the land described above, thereby including 79.64 acres of contestant's land. He asked for a hearing and that defendant's entry may be canceled so far as the same is in conflict with his application. A hearing was accordingly had before the local officers, beginning May 13, 1890, and as a result thereof they decided that the contestant was entitled to make his homestead entry, and that defendant's entry be canceled so far as the same conflicts with contestant's application. This decision was made May 27, 1890. Notice of the same was sent by registered letter to the defendant June 7, 1890, and he receipted for it on the same day. On July 3d, following, he filed a notice of appeal. On July 13, following, the contestant filed a motion to dismiss "the notice to take an appeal," for the reason that no specification of errors has been filed or served upon appellee within thirty days after notice has been received of the decision. On the 12th defendant filed his specification of errors, and the local officers overruled the motion to dismiss. Contestant appealed from the decision on his motion, and defendant appealed from the decision on the merits. A motion was made before you to advance the case, and, for reasons deemed sufficient, you did so and took it up out of its regular order, and by letter of March 14, 1891, sustained the decision of the local officers on the motion to dismiss the appeal, and reversed them on the merits of the case, holding that the defendant had a prior right to the land, and that plaintiff had entirely failed to sustain the charges in his affidavit of contest. Contestant appealed, assigning as error your action in allowing defendant forty days in which to perfect his appeal. The remaining four assignments are substantially that your decision is against the evidence.

In regard to the first assignment of error, it would seem that all that could be required is to quote rule 67 (Rules of Practice) to support your ruling. It reads:

> The party aggrieved will be allowed thirty days from receipt of notice in which to file his appeal in the local land office. Where the notice is sent by mail, five days additional will be allowed for the transmission of notice and five days for the return of the appeal.

Therefore when the notice of the decision is sent by mail the time allowed in which to file the notice of appeal and serve a copy of the specification of errors on the appellee is forty days. Trainor *v.* Stitzel (7 L. D., 387). But counsel for appellee maintains that rule 15 controls in appeals, and that, inasmuch as it has been held that notice by registered letter is personal service as required by that rule, defendant should have been limited to thirty days from receipt of the registered letter, and cites Anderson *v.* Tannehill *et al.* (10 L. D., 388) and William W. Waterhouse (9 L. D., 131) in support of his theory. An examination of these cases will show that they do not apply to appeals. The

"personal notice" required by rule 15, applies to the initiation of the contest and has no reference to appeals. The appellant having completed his appeal within forty days, it was not error to allow it.

The land in controversy herein was in the Sioux reservation, which was opened to settlement by executive proclamation dated February 27, 1885. On the following day Cox settled upon lot 7, in said section and placed his improvements thereon. The testimony shows that in addition to lot 7, he claimed lot 8, lying immediately west of 7, and one or two forties lying east and north-east of 7, (the NE. ¼ of SE. ¼ and lots 7 and 8 extend clear across the section from east to west, and the other 40 he claimed is the SE. ¼ of NE. ¼). The NW. ¼ of said section, which includes the land in controversy, was settled upon by one Maughan on the same day, but prior to Cox's settlement. The proclamation opening this territory for settlement was revoked by executive proclamation of April 17, 1885, (23 Stat., 844), and by said proclamation it was ordered that all persons who had settled thereon were required to vacate and remove therefrom within sixty days from that date. Maughan obeyed said order, but Cox continued to live upon, improve and exercise rights of ownership over his claim. By executive proclamation of February 10, 1890, (26 Stat., 1554) said land was again opened for settlement. Said proclamation was issued in pursuance of "an act to divide a portion of the reservation of the Sioux Nation of Indians," etc., approved March 2, 1889 (25 Stat., 899). By section 23 of said act it was provided,—

> That all persons who, between the 27th day of February, 1885, and the 17th day of April, 1885, in good faith entered upon or made settlement with intent to enter the same . . . . . shall for a period of ninety days after the proclamation of the President required to be made by this act, have a right to re-enter upon said claims and procure title thereto . . . . . and their said claims shall, for such time, have a preference over later entries, etc.

It will thus be seen that the question before me is as to whether Cox had a preference right as created by the above statute. I will say that Congress clearly contemplated in giving this preference right that the claimant should be confined to the land originally claimed. In other words, that he could not take other lands than those he settled upon and claimed during the period the reservation was open for settlement, to wit, between February 27 and April 17, 1885. So that if it appears that Cox is now seeking lands other than those he claimed then his entry can not be entertained.

I think the testimony very clearly shows that contestant never made any claim to the land in dispute until February, 1890. He admits that when he found Maughan on the land he did not seek to get it, but informed him that if he (Maughan) had not taken the land that he would. Subsequently, he sought Maughan to buy his right for his brother. He continued to live upon lot 7, until the spring of 1887, when he moved his house on to lot 8, a little south of the center line of the section run-

ning east and west, the dividing line between lots 8 and 9, where he resided at the time of the hearing. He has no improvements on lot 9. It seems he did some plowing across the line but when his attention was called to the fact by Newbury, he explained it by saying that he thought he was south of the line. By consent of Newbury he planted some pumpkins one year on the ground, on which Newbury had broom-corn, and it is shown, I think, that he distinctly pointed out to the defendant his north line along this center section line between lots 8 and 9, on two occasions. He claims to have put some wire fence on lot 9, for the purpose of enclosing it, but I do not think he did so with any serious intention; at least the fence consisted of one wire only, strung to trees and stakes, supported by rocks and frozen earth. This was done before the land was opened by the later proclamation, and he being a trespasser could acquire no rights by that act. As a further evidence of his original intention, he cut hay upon the south-east of the north-east, forbid others from cutting on it, and appropriated some he found cut there, on the ground that it was part of his claim.

I think a preponderance of the evidence shows clearly that contestant is now seeking to enter land under the preference right given by the statute quoted above, that was not included in his "said claim" as originally intended by him. The defendant having made his entry first and complied with all the requirements of the law, his entry should be allowed to stand.

Your judgment is therefore affirmed.

RAKE *v.* STATE OF IOWA.

Motion for the review of departmental decision rendered September 30, 1891, 13 L. D., 344, denied by Secretary Noble, April 6, 1892.

PRIVATE CLAIM—CONFIRMATION—BOUNDARY.

LOS TRIGOS GRANT.

The confirmation of this claim based on the report of the surveyor general was a final settlement of the question pertaining to "enclosure and cultivation" and conferred a full and perfect title to the land contained within the boundaries of the grant.

Secretary Noble to the Commissioner of the General Land Office, April 6, 1892.

On the appeal of the owners of the Donaciano Vigil, or Los Trigos, grant, situated in New Mexico, the decision of your office, January 9, 1888, ordering a resurvey of the grant, has been considered, in connection with the record in the case.

The grant in question was reported upon favorably by the surveyor-

general of New Mexico September 15, 1857, under the provisions of section 8 of the act of July 22, 1854 (10 Stat., 308), and was confirmed as claim No. 8 by section 1 of the act of June 21, 1860 (12 Stat., 71).

A survey of the grant was made in the following December, showing an area of 12,545.66 acres. That survey was rejected by your office because of an error in the field notes, as to the length of one course on the eastern boundary, which was deemed insuperable, and a new survey was ordered; on appeal this action of your office was sustained by Secretary Delano. The second survey, showing an area of 9,646.50 acres, was made in 1877, was rejected by your office decision and appealed from, as before stated.

In said decision two grounds are set forth upon which the correctness of the last survey is questioned: The first is that the eastern boundary is located too far to the east, inasmuch as it overlaps the west line of the grant of San Miguel del Bado; and the second ground is that the survey includes all the lands within certain boundaries, whilst, it is said, the grantees were only entitled, in the language of the grant, to the "lands which they mark, cultivate and fence" within said boundaries. Upon the last ground the survey was rejected, and the surveyor-general was directed to cause a new survey to be made, so as to include only the lands "actually under cultivation, and in the occupancy of the grantees or their legal representatives," on February 2, 1848, the date of the treaty of Guadalupe Hidalgo, confining them within the boundaries described in the act of possession, and not to interfere with the lands of the Pueblo of Pecos, or on the San Miguel del Bado grant.

The specifications of error, eight in number, filed with the appeal present the points involved with sufficient particularity, and need not be recited herein.

The general inquiry is whether the grant is properly located by the last survey. As a preliminary to the proper determination of that main question, the nature and extent of the grant should be first ascertained. This can only be done by examination of the record in the case.

By the act of 1860, *supra*, the grant is "hereby confirmed" "as recommended for confirmation by the surveyor-general" of New Mexico. The recommendation of the surveyor-general of that Territory is therefore our guide as to the nature and extent of the grant.

The record of the grant as reported to Congress by the surveyor-general is found on page 351, Volume 1, Private Land Claims, and the decision of that officer commences on page 356. It is unusually full, showing a careful investigation of the subject before him, and his reasons at length for recommending the approval of the grant. The record shows that application for the grant was presented May 26, 1814, to Gov. Don Jose Manrique. It asked for,—

a tract of uncultivated land situate in the place called Los Trigos, as far as El Gustano, independent of the league of the Indians of the Pueblo of Pecos.

The petition was referred by the governor to the corporation of Santa Fe, it being stated in the reference that the corporation was clothed with authority to act thereon by decree of the Viceroy of August 23, 1813, and by the royal order of January 4th of the same year. On July 30, 1814, the council of Santa Fe granted the lands petitioned for that "may not belong to the natives of the town of Pecos, or to the residents of the Point El Bado;" and ordered that the parties be put in possession of "the boundaries which may be assigned to them as they solicit."

On June 22, 1815, Gov. Mayne approved the grant of the town council,—"provided, that a royal grant to property is only to be considered to be upon lands which they mark, cultivate and fence in, etc."

Subsequently, on December 5, 1815, the Indian lands were measured off and set apart, and the senior justice of Santa Fe placed the petitioners in possession of the lands asked for by them.

It will be seen also by the record that the right of Vigil and his associates to the land in question, was vigorously contested before the surveyor-general by parties claiming adversely, who asserted that possession of the lands had been delivered to them by a public officer having lawful authority to do so. In the objections to the approval of the grant, filed by the contestants before the surveyor general, it is insisted,—

2nd. That the grant was only to such portions of the land as should be enclosed, built upon, and cultivated, ...

3rd. That the proofs show conclusively that the grantees built upon, enclosed and cultivated only a very small portion of the lands included within the limits, etc.

The surveyor-general, in his opinion on the above objections, says that the grant in question was made by the town council of Santa Fe, which had full authority so to do under the Spanish law of January 4, 1813; that grants under said law were in fee simple; by fixed limits and specific boundaries; that the insertion of the clause by Governor Mayne, relative to inclosures and cultivation, was,—

the interpretation of the law by a subsequent governor, made after the grant had been made according to law by the town council, was not binding on the parties, and was therefore null and void, as the law vested in him no authority to impose conditions; and any part taken by him in the premises, with the exception of being the medium between the town council and the grantees, was an assumption of power on his part for which he had no authority of law.

It was therefore held that whilst cultivation was required as an evidence of good faith, and in order to acquire title, and inclosure was advised in order to avoid disputes, "it was optional with the parties whether they should cultivate a portion only or the whole of the land granted," and that the matter of inclosure was also "left to the option of the owner, and not a condition imposed upon him by law," and that "the law certainly does not require every foot of the land to be cultivated and enclosed."

The surveyor-general thereupon found that the boundaries of the grant are proven to be fixed and permanent landmarks, known to all persons familiar with the locality; that the grantees went upon the land, cultivated it in good faith, and that it was always recognized as their property. He was therefore of the opinion that the law gave "a full and perfect title to the land contained within the boundaries of the grant" made by the town council of Santa Fe, and hence recommended that it be thus confirmed to the grantees.

It is thus made plain that the matter of the inclosure and cultivation of the lands was presented to and passed upon by the surveyor-general, who decided plainly that the provision relating thereto was illegal and of no effect, and that the grantees took "a full and perfect title to the land contained within the boundaries."

With this full and careful report before it Congress confirmed the grant as recommended by the surveyor-general. This seems to me to be a final settlement of the question of enclosure and cultivation, beyond the power of your office or this Department to reopen it. "A full and perfect title to the land contained within the boundaries of the grant" was confirmed by Congress, and the executive has no power to limit that confirmation to such lands only "within the boundaries" as were "actually under cultivation and in the occupancy of the grantees," at the date of the treaty with Mexico.

There is therefore manifest error in the instructions issued to the surveyor general in this respect, and the same are hereby overruled.

The other ground of objection is not passed upon by your office. The testimony taken in relation thereto, or rather, excerpts therefrom, are recited in the decision, but no opinion is expressed thereon, and no instructions are issued to the surveyor-general to guide him in respect to that point. It was doubtless thought, inasmuch as it was decided, only such lands were to be surveyed as were "actually under cultivation and in the occupancy of the grantees" at the date of the treaty, that the area of the grant would be so reduced it could not reach to the point where the alleged conflict is said to take place; therefore, it was unnecessary to decide a question which would not arise on survey.

But this Department having now determined that there is manifest error in said ruling of your office, the question of the other alleged error becomes an important one, which should be regularly acted upon and decided. The papers in the case are herewith returned to you that the same may be re-examined and considered in accordance with the views herein expressed, and fully adjudicated, to the end that if said survey be defective, proper steps be taken to reform it; or, if correct, that it be formally approved and patent issued thereon in accordance with the provisions of section 4, act of March 3, 1869 (15 Stat., 342).

RAILROAD GRANT—STATUTORY FORFEITURE—SETTLEMENT.

SOUTHERN PACIFIC R. R. CO. *v.* HAMMOND.

The forfeiture declared by the act of September 29, 1890, was complete on the passage of the act, and opened to settlement immediately the lands designated therein.

Secretary Noble to the Commissioner of the General Land Office, April 6, 1892.

I have considered the case of the Southern Pacific Railroad company *v.* Maria S. Hammond, on appeal by the former from your decision of November 12, 1889, holding for confirmation the entry of the latter for the NW. ¼, Sec. 27, T. 15 S., R. 7 F., M. D. M., San Francisco, California, land district.

This land is within the primary limits of the grant to the said railroad company by act of July 27, 1866 (14 Stat., 292), which attached January 3, 1867.

The township plat of the official survey was filed in the local land office February 3, 1873.

On September 22, 1885, Maria S. Hammond made application to make a homestead entry for said land. She presented the usual affidavits showing her qualifications to make entry, together with the non-mineral affidavit and accompanied the same by several affidavits from which it appears that one Charles Pierce located upon the land in 1868, and built a house thereon and that he resided there continuously until April, 1872, when he sold his improvement to C. Y. Hammond, late husband of this applicant, who immediately established his residence thereon, and lived there until September, 1884, when he died, leaving the applicant and her minor children in possession of the tract, and that they have continued to reside thereon.

The testimony tends to show that Pierce was a qualified entryman. From the best information the witnesses have, he was born in Massachusetts, he was over 21 years of age, and none of them have any knowledge of his ever exercising his right to "pre-empt" or "homestead" any other tract of land.

Mrs. Hammond is qualified to make homestead entry.

On July 17, 1886, your office by letter of that date directed the local officers to permit Mrs. Hammond to make entry for said land, in pursuance of which on August 11, 1886, she filed her pre-emption declaratory statement, alleging settlement September 26, 1869, and on November 14, (not the 16th as stated) 1888, she submitted final proof in support of her claim, and the same was accepted and a cash certificate was issued accordingly.

On November 12, 1889, your office held said entry for confirmation and notified said railroad company of your action and of its right of appeal.

On December 7, following, the company filed its appeal from said decision, and assigns the following errors:

1st. Error in not sustaining the right of said company under its grant.
2. Error in finding the land excepted from the grant by the occupation of a settler.

The final proof shows that Pierce settled upon the land in the fall of 1866, and lived there till 1872, when he sold his improvements to C. Y. Hammond, who resided there continuously until his death in 1884, and that Maria S., his widow, with his minor children have maintained continuous residence thereon since that time.

This land lies opposite a portion of the line of the railroad between Tres Pinos and Huron as shown by the said company's map of designated route filed in the general land office January 3, 1867.

The testimony is somewhat conflicting as to the year that Pierce went upon this land. In one affidavit it is fixed 1868; two fix it in 1866. Mrs. Hammond did not know Pierce till 1872, another witness says Pierce lived on the land in 1870, when he first knew him; nor is the evidence very satisfactory as to his right to make entry or pre-empt the land even if living upon it.

But if the road was not completed and in operation on September 29, 1890, these questions cease to be material. The first section of the act of Congress, approved September 29, 1890 (26 Stats., 496), reads as follows:

Be it enacted, etc. That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain: *Provided,* That this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted.

The second and third sections of the act relate to the settlement of the lands so forfeited, and provide for their disposition by the government.

This act rendered the lands designated therein subject to settlement immediately on its passage,—the forfeiture was complete on the passage of the act. Victorien *v.* New Orleans Pacific Ry. Co. (on review) (10 L. D., 637); Van Wyck *v.* Knevals (106 U. S., 360–368); McMicken *v.* United States (97 U. S., 204–218).

It appears by the records of your office that said railroad has not been constructed opposite T. 15 S., R. 7 E., M. D. M., and therefore this land comes within the terms of the said act of September 29, 1890.

Your decision, in so far as it holds Mrs. Hammond's entry for confirmation, is affirmed.

ADJOINING FARM HOMESTEAD—SECTION 2289 R. S.

WILLIS *v.* MESSENGER.

The statute authorizing adjoining farm entries contemplates that the original farm as well as the adjoining farm must be held for agricultural purposes, and that the entryman must be the owner in his own right of the original farm.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 7, 1892.

On May 26, 1887, Joseph Messenger made adjoining farm entry of the NE. ¼ of the SE. ¼ of Sec. 1, T. 19 S., R. 2 W., S. B. M., Los Angeles, California, containing forty acres, based upon his application, alleging that he was the owner of and then residing upon an original farm containing 67.30 acres, which comprised lots 1, 2, and 3 of said section 1.

On November 12, 1887, William D. Willis filed contest against said entry, charging that:

> Joseph Messenger has subdivided and surveyed all the land described above into city or town blocks and streets; that the plat of same had been filed in the county recorder's office of said San Diego, thus dedicating the streets as therein represented to the public; that said Messenger has thus by intervening streets cut himself off and separated himself from the said NE. ¼ of SE. ¼, Sec. 1, 19 S., 2 W., S. B. M.; that the official plat now filed represents the whole of said land above described divided into lots, blocks and streets, and that further said Messenger has sold an undivided half interest in the whole of lots 1, 2, 3, Sec. 1, 19 S., 2 W., S. B. M., to which said Messenger claims the said NE. ¼ SE. ¼, Sec. 1, to be adjoining; that said Messenger holds none of said lands as a farm, or farming property, but as speculative city lots, and that many of said lots have been sold, and they are yet offered for sale upon the market.

Upon the evidence taken at said hearing, the local officers found "that the land embraced in the additional farm homestead entry of Joseph Messenger had been subdivided into town lots and sold at public sale," which placed it beyond his power to comply with the requirements of the homestead law. They therefore recommended that his "adjoining farm homestead entry be canceled." Upon appeal, you reversed said decision and dismissed the contest, and contestant appealed therefrom.

The evidence shows beyond all controversy, that the tract in question was laid off into blocks, lots, streets, and alleys, shortly after entry, with the corners staked on the ground, and a plat of said subdivision was made and the lots offered for sale. It is also shown that part of the alleged original farm had also been subdivided, and part of it had been offered for sale.

There is not in this case a single element of good faith. Section 2289 of the Revised Statutes, under which this entry was made, contemplates that the original farm, as well as the adjoining farm, must be held for

agricultural purposes. The law requires that the entryman must fulfill the requirements of the law as to residence and cultivation for five years before the issuance of patent, but that he will not be required to remove from the land originally owned, it being contemplated that the original and the additional shall constitute one body of land.

The division of this land was the result of an agreement made between Messenger and the owners of adjoining tracts, and the offering of the same for sale as town lots indicated a clear purpose and intention on the part of this entryman to take the land for speculative purposes, and not for the purposes contemplated by the homestead law.

Furthermore, the law requires that the entryman must be the owner in his own right of the original farm, and this fact must appear.

The entryman in his application alleged that he was the owner of lots 1, 2, and 3, of Sec. 1, T. 19 S., R. 2 W., S. B. M., the original farm upon which the adjoining entry was made.

The abstract of title to said lots 1, 2, and 3, put in evidence by the contestant, showed that they were patented by the United States to John F. Gould, and were conveyed through mesne conveyances to William Lane, by deed, dated November 9, 1875. This showed title in Lane, and, at least, shifted the onus upon defendant to show title out of Lane and in himself at the date of his entry. No title was so shown, and this, of itself, was sufficient to cancel the entry.

For the reasons above set forth, your decision is reversed, and the entry of Messenger will be canceled.

RAILROAD GRANT—SETTLEMENT CLAIM.

IRVINE *v.* NORTHERN PACIFIC R. R. CO.

When settlement and occupancy, alone, at the time rights under a railroad grant attach, are relied upon to except the land from such grant, it must affirmatively appear that the party in possession had the right at that time to assert a claim to the land in question under the settlement laws.

Secretary Noble to the Commissioner of the General Land Office, April 8, 1892.

The appeal of John H. Irvine, from your decision of December 8, 1890, holding his homestead entry for the S. ½ of the SE. ¼, Sec. 31, T. 44 N., R. 5 W., Lewiston, Idaho, for cancellation and awarding the land to the Northern Pacific Railroad Company, has been considered.

The records show in this case that on June 1, 1885, the local officers permitted Irvine to make a homestead entry of the land in question and on August 18, 1885, he presented final proof thereon alleging settlement and residence on the land from June, 1872, whereupon final certificate was issued and the case regularly reported to you in the order of business.

In view of the fact that the above tract was within the granted limits of the Northern Pacific Railroad, and the homesteader alleged that the land was excepted from the withdrawal for the railroad by reason that the tract was occupied by a settler at the date of withdrawal, and for the further reason that the land was excluded from said withdrawal on account of Coeur d'Alene Indian Reservation, you directed that a hearing be had to determine the status of the land.

March 4, 1890, the hearing was concluded and the local officers decided adversely to the homestead party, whereupon he appealed and on December 8, 1890, you affirmed the decision below.

The homesteader again appeals.

This land is within the granted limits and was withdrawn on a map of general route of said railroad, filed February 21, 1872, a copy of which was received at the local office April 29, following.

The evidence in this case shows that sometime in October or November, 1871, one Rosewood camped on Sec. 31 or 32, it does not positively appear which; that he remained some two weeks on the land, (the improvements consisting of four logs laid as a foundation for a house) then he left and has not since returned. There is no evidence to show that this man was qualified to make an entry under any of the settlement laws or that he intended to claim it as a home. When settlement and occupancy, alone, at the time rights under a railroad grant attach, are relied upon to except the land from such grant, it must affirmatively appear that the party in possession had the right at that time to assert a claim to the land in question under the settlement laws. Northern Pacific R. R. Co. *v.* McCrimmon (12 L. D. 554); Stewart *v.* Northern Pacific R. R. Co. (11 L. D., 568).

The appellant bases his right to the land upon Rosewood's supposed occupancy of the tract, claiming that such occupancy and claim were sufficient in themselves to reserve the land from the operation of the railroad grant, and that therefore the land was subject to homestead at the date his entry was made. As before stated, Rosewood went upon the land in October or November, 1871, and remained about two weeks, then left the land; hence at the date of withdrawal on map of general route, filed February 21, 1872, the claim of Rosewood, even allowing that he camped on section 31, had been abandoned and the land was subject to the operation of the grant. This being the case, the claim of Irvine initiated subsequent to said withdrawal must of necessity fail as the railroad right had attached to the lands.

The Coeur d'Alene Indian reservation appears from the records of your office to have been created by executive order of June 14, 1867, but it does not appear that the land in question is embraced by said reservation or by any withdrawal therefor; hence, it cannot be maintained that the tract was excepted by reason of such reservation from the railroad grant at the date of withdrawal.

Your decision is therefore affirmed.

RAILROAD GRANT—PRE-EMPTION FILING—ACT OF MARCH 3, 1887.

GILKERSON *v.* LEAVENWORTH, LAWRENCE AND GALVESTON R. R. CO. ET AL.

A pre-emptor who has taken the initiatory steps required by law in regard to actual settlement, and is called away by engagement in the military service of the United States, is entitled, under section 5, act of March 20, 1864, to six months after the expiration of his service in which to submit final proof.

A withdrawal for the benefit of a railroad company does not take effect upon land embraced within an unexpired pre-emption filing.

Proceedings for the recovery of title under the act of March 3, 1887, are authorized, where it appears that land has been erroneously certified on account of a railroad grant.

Secretary Noble to the Commissioner of the General Land Office, April 8, 1892.

In your letter of February 15, 1892, you report that under date of August 28, 1891, the Leavenworth, Lawrence and Galveston and the Missouri, Kansas and Texas Railroad Companies, were called upon to show cause why demand should not be made upon them for the reconveyance to the United States of the S. ½ of the SW. ¼ of Sec. 27, T. 23 S., R. 18 E., Topeka land district, Kansas, and that no response had been made by either company.

Said tract is within the common granted limits of the grants for said companies under the act of March 3, 1863 (12 Stat., 772), and said roads were definitely located opposite this land November 28, 1866, and December 3, 1866, respectively. A withdrawal was made on account of these grants, which became effective May 5, 1863, and this tract falls within the limits of that withdrawal.

The records show that one John Gilkerson filed declaratory statement No. 1647, for this tract and the N. ½ of the NW. ¼ of Sec. 34, same township and range, on January 16, 1861, alleging settlement December 17, 1860.

He made homestead entry No. 655, for same land on March 6, 1865, but said entry was canceled, as to the tract now in question, on April 27, 1870, for the reason that his filing, being for offered land, expired before the withdrawal on account of the grant.

This tract was jointly listed by the companies July 29, 1874, and was certified to the State February 11, 1875.

Gilkerson now files affidavits, which show that he settled upon the land embraced in his filing, together with his family, in 1858, and resided thereon until the year 1861, when he left to enter the United States army; he was discharged from the army in 1865, and immediately returned to his claim, upon which his family still resided, and it has since been their home.

The 5th section of the act of March 20, 1864 (14 Stat., 35), provides:

That where a pre-emptor has taken the initiatory steps required by existing laws

in regard to actual settlement, and is called away from such settlement by being actually engaged in the military or naval service of the United States, and by reason of such absence is unable to appear at the district land office, to make, before the register or receiver, the affidavits required by the thirteenth section of the pre-emption act of the fourth of September, eighteen hundred and forty-one, the time for filing such affidavit and making final proof and entry or location, shall be extended six months after the expiration of his term of service, upon satisfactory proof by affidavit, or the testimony of witnesses, that the said pre-emptor is so in the service, being filed with the register of the land office for the district in which his settlement is made.

Under said act, the filing by Gilkerson was an unexpired and subsisting claim to the land at the date of the withdrawal of 1863, and, hence, the land was not embraced in said withdrawal. His homestead entry, made in 1865, was therefore properly allowed, and, being of record at the date of the definite locations of said roads, served to defeat the grants. Kansas Pacific R. R. Co. *v.* Dunmeyer, 113 U. S., 629; Hastings and Dakota R'y Co. *v.* Whitney, 132 U. S., 357.

The certification to the State on account of the railroad grants was therefore erroneous, and I have to direct that demand be made upon said companies for the reconveyance of said tract to the United States, as contemplated by the act of March 3, 1887 (24 Stat., 556), and upon the expiration of the time allowed for that purpose, you will report the result thereof to this Department for such further action as the facts may warrant.

RAILROAD GRANT—INDEMNITY—SETTLEMENT CLAIM.

NEW ORLEANS PACIFIC RY. CO. *v.* CHARLOT ET AL.

A settlement claim upon land within the indemnity limits of the grant conferred upon the New Orleans Pacific Company by the act of February 8, 1887, is protected by section 2 of said act.

Secretary Noble to the Commissioner of the General Land Office, April 9, 1892.

I have considered the appeal by the New Orleans Pacific Railway Company from your decision of May 26, 1890, holding for cancellation its indemnity selection for the SW. ¼ Sec. 35, T. 7 S., R. 3 E., New Orleans, land district, Louisiana, on account of the outstanding certifications for the New Orleans, Opelousas and Great Western Railroad and the settlement by Don Louis Charlot.

This tract is within the thirty miles indemnity limits of the grant made by the act of March 3, 1871 (16 Stat., 579), to the New Orleans, Baton Rouge and Vicksburg Railroad Company, and is opposite that portion of the road the grant for which was conferred upon the New Orleans Pacific Railway Company by the act of Congress approved February 8, 1887 (24 Stat., 391).

The second section of said act, being the confirmatory section, provides:

> That all such lands occupied by actual settlers at the date of the definite location of said road, and still remaining in their possession or in the 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.

This tract is opposite the definite location shown upon the map filed November 17, 1882, and was selected by the company December 28, 1883.

Your decision states that this tract was certified to the State January 29, 1861, for the New Orleans, Opelousas and Great Western Railroad Company, and that it was reconveyed by the governor February 24, 1888, subsequent to selection by the New Orleans Pacific Railway Company.

On May 12, 1888, Charlot presented a homestead application for the land, and alleged settlement thereon in December, 1864, upon which allegation a hearing was regularly had.

The testimony, taken at said hearing, clearly shows that he was residing upon the land both at the date of definite location and selection, above given, and for a long time prior thereto.

In the case of said company *v.* Elliott (13 L. D., 157), in considering the effect of the act of February 8, 1887 (*supra*), it was held that

> there is nothing in the act to indicate that it was intended to extend the benefits of the withdrawal in favor of the original grantee to the latter company . . . The New Orleans Pacific R'y Co. can only claim whatever rights were granted or confirmed by the act of February 8, 1887 . . . . . if a settler was on the land at the date of definite location it is excepted from the grant.

In that case the tract was within the primary (or granted) limits, but the reasoning applies with equal force to lands within the indemnity limits; otherwise, it must be held that a greater privilege was conferred upon the company within the indemnity limits than within the granted limits.

As before said, after confirming certain of the lands granted by the act of 1871 upon the New Orleans Pacific Railway Company, the second section provides "that all such lands" occupied at the date of definite location shall be subject to entry.

The intention is plain. It was to protect all qualified settlers within the limits of the grant at the dates named.

I therefore agree with you in holding that the settlement claim of Charlot was, under the second section of the act of February 8, 1887 (*supra*), sufficient to defeat any claim to said tract on account of the grant, and its selection will accordingly be canceled.

Your decision states that there are conflicting claims to the land under the public land laws, the respective rights under which, not having been determined by your office need not now be considered.

The decision appealed from is affirmed.

TOWNSITE—SETTLEMENT—SOLDIERS' ADDITIONAL—SECTION 7, ACT OF MARCH 3, 1891.

BONDS' HEIRS ET AL. *v.* DEMING TOWNSITE (ON REVIEW).

The occupancy of land by townsite settlers, prior to and at the time of soldiers' additional homestead entry, constitutes an "adverse claim" that defeats confirmation of said entry under the body of section 7, act of March 3, 1891.

Secretary Noble to the Commissioner of the General Land Office, April 9, 1892.

I have before me a motion filed by the attorneys representing the Rio Grande, Mexico and Pacific Railroad Company, asking for a review and rehearing of the departmental decision of December 8, 1891, in the case of the heirs of William Bond *et al. v.* Deming Townsite (13 L. D., 665), involving the S. ½ of Sec. 27, T. 23 S., R. 9 W., Las Cruces, New Mexico.

The motion asks a review on two grounds, upon which it is claimed that the Department erred in applying the law to the facts in the case. The first ground of the motion alleges error in holding the soldiers' additional homestead entries, covering land involved in the case, invalid, because at the time the same were made, the land was occupied for the purpose of trade and business and not for agriculture. The second ground of the motion, alleges error in the decision in denying the application of the Rio Grande, Mexico and Pacific Railroad Company, to purchase forty acres of the land involved in said case, for station purposes, under section 21, of the act of March 3, 1871. (16 Stat., 573–579.)

In support of the first ground of the motion it is urged that the additional homestead entries in question, are confirmed by the seventh section of the act of March 3, 1891 (26 Stat., 1095), and that the Department erred in not so deciding.

This question was not presented by the record in the case nor by counsel representing the parties in whose behalf the motion for review is made, nor passed upon in the decision, and under some circumstances this of itself would be a sufficient reason for denying the motion. Bramwell *v.* Central and Pacific Railroad Companies (on review), 2 L. D., 844; Haling *v.* Eddy (9 L. D., 337); United States *v.* Montgomery *et al.* (on review) (12 L. D., 503).

In this case, however, I am of the opinion that if these entries are confirmed under the act of March 3, 1891, the parties are entitled as a matter of law, to have patents issued to them for the land embraced therein; on the other hand, if said entries are not confirmed by said act then the motion in their behalf must be denied.

That part of the seventh section of the act of 1891, relied upon as confirming these entries is as follows:

All entries made under the pre-emption, homestead, desert land, or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which

have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona fide purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.

The additional homestead entries in question were made, and final receipts issued thereon, March 24, 1885. It is claimed in argument for the motion that the lands embraced in them were sold and transferred to the Rio Grande, Mexico and Pacific Railroad Company, on the 15th day of April, 1885. While the requisite proof as to the *bona fides* of the alleged sales and transfers of the lands, based upon the valuable considerations required by the terms of this section, are not before me, I will treat these as existing for the purposes of this motion.

It is also claimed "that the claims of both Bond and Kidder do not possess a single element of validity," which, for the purposes of this motion may also be conceded.

The sole question in the case is between the railroad company as transferee, under its purchase from the additional homestead entryman, and the townsite claimants. The record clearly shows that the townsite claimants occupied the land and had improvements on the same of a substantial and permanent character, such as residences, hotels, stores, barber shops, restaurants, etc., long before the date of these entries. In other words, there was a town there before these entries were made. They were made with the full knowledge of the fact that the lands covered by them were at that time, and for a long time prior to such entries, used, selected and occupied for townsite purposes. Under these circumstances, the land was not subject to entry for agricultural purposes when these entries were made. See Guthrie Townsite *v.* Paine *et al.* (on review) 13 L. D., 562; Carnahan *v.* Haywood *et al.*, (13 L. D., 143).

The seventh section of the act of March 3, 1891, under which it is claimed these entries are confirmed, by its plain terms only confirm entries "to which there are *no* adverse claims originating prior to final entry." One of the definitions of 'claim' given by Bouvier is, "The possession of a settler upon the wild lands of the government of the United States; the lands which such settler holds possession of." (See Bouv. Law Dict., word claim.) The claims made by these townsite claimants come literally under this definition. Their claims originated prior to these final entries, and were adverse to them within the letter as well as the spirit of the act.

It follows that said entries are not confirmed by the seventh section of the act of March 3, 1891. This disposes of the first ground of the motion.

In support of the second ground of the motion, it is urged that the Rio Grande, Mexico and Pacific Railroad company should have been allowed to purchase, for station purposes, forty acres of the land in

controversy, under its application in the fall of 1882, under section 21, act of March 3, 1871.

This question was fully presented and carefully considered when the decision was made in the case. There is nothing new suggested in the argument of counsel nor by way of authority in support of this ground of the motion, therefore, it is not sufficient to warrant a review. Fort Brooke Military Reservation (3 L. D., 556); Chas. W. McKallor (9 L. D., 580); Pike *v.* Atkinson (12 L. D., 226). For the foregoing reasons the motion is denied.

RAILROAD GRANT—WITHDRAWAL—SETTLEMENT.

ARD *v.* MISSOURI, KANSAS AND TEXAS RY. CO.

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

Secretary Noble to the Commissioner of the General Land Office, April 11, 1892.

John Ard has appealed from your decision of December 4, 1890, rejecting his application to make homestead entry of the N. W. ¼ of section 11, T. 26 S., R. 20 E., Topeka land district, Kansas.

The tract lies within the indemnity limits of the grant of July 25, 1863 (12 Stat. 772), for the benefit of the Missouri, Kansas and Texas Railroad Company. Withdrawal was ordered by your office on March 19, 1867. The company selected the tract August 8, 1872; and, there appearing no adverse claims thereto, it was certified to the State for the benefit of said company, on April 10, 1873.

Ard applied to make homestead entry on September 19, 1887. His application was rejected by the local officers, and he appealed to you; and from your rejection he now appeals to the Department, upon ten different allegations of error, the substance of the same being that the withdrawal, the selection, and the certification, were all illegal and void. The only allegation to which any weight could possibly be attached is that of priority of right in view of the date of his settlement. He alleges, and files affidavits to prove, that he "settled upon and improved said tract about March, 1870."

By a comparison of dates it will be seen that settlement is alleged prior to the date of selection and certification, but after the date of withdrawal. The question in issue, then, is whether any right was acquired as against the railroad by settlement upon the tract after its withdrawal?

The withdrawal in the case of this railroad was an executive withdrawal—not directed by the granting act. In this respect it was similar to that in the case of the Chicago, St. Paul, Minneapolis and Omaha

Railway, wherein the granting acts, of June 3, 1856 (11 Stat., 20), and of May 5, 1864 (13 Stat., 66), contain no provisions for withdrawal of indemnity lands, but an executive withdrawal was nevertheless made. In the case of Shire against said company (10 L. D., 85), it was held that no rights, either legal or equitable, as against a railroad grant, are acquired by settlement upon lands withdrawn by executive order for the benefit of such grant. In the departmental instructions relative to the restoration and disposition of lands withdrawn for the benefit of said company, dated March 11, 1891 (12 L. D., 260), this doctrine was re-affirmed. It applies equally and directly to the case now under consideration.

The recent decision of the United States Supreme Court in the case of the United States *v.* The Missouri, Kansas and Texas Railway Company (141 U. S., 358) has no direct application to the case at bar, inasmuch as it involved (1) only even numbered sections; (2) it expressly avoids determining the rights of any settlers excepting those "whose rights attached prior to the withdrawal of 1867" (page 379).

In view of the facts set forth, I concur in your conclusion that the tract described is not properly subject to entry, and affirm your decision rejecting the application to enter.

APPLICATION—REGULATIONS OF LOCAL OFFICE.

REUBEN G. EPPLER.

An order of procedure, adopted by the local office regulating the presentation of applications on the opening of public lands to entry, is conclusive upon parties taking action thereunder without protest.

Secretary Noble to the Commissioner of the General Land Office, April 9, 1892.

I am in receipt of a letter from you bearing date January 20, 1892, in which you say:

I have the honor to transmit herewith what purports to be a petition in certiorari in the case of Reuben G. Eppler, asking that an order be granted by you directing the register at Oklahoma City, Oklahoma Territory, to receive, act upon, and place of record a soldier's declaratory statement made by said Eppler.

You conclude your letter by saying:

As there appears to be no rule of practice governing the disposition of such a petition, and as it is addressed to you, the papers are transmitted for your consideration. The matter has never been before this office for adjudication.

In the case of Wood *v.* Goodwin (10 L. D., 689), it was said:

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.

The case also held that "certiorari will not lie to review an interlocutory order of the local office where the ordinary methods of procedure afford relief."

In his petition in the case at bar, and in the affidavits which accompany it, it is alleged by Eppler that an application to make soldier's declaratory statement in his favor, for the NE. ¼ of Sec. 14, T. 9 N., R. 3 W., was made at the Oklahoma land office, on the 22d day of September, 1891, a few seconds after 12 o'clock noon, by his duly authorized agent; that the lawful fees accompanied such application, being attached thereto, at the request of the local officers, in order to facilitate business; that the register refused to receive said application, or to endorse his reasons for such refusal thereon, as required by rule 66 of Rules of Practice; that on the 23d day of September, 1891, which was the day after the local officers had refused to receive said application, he caused to be filed with said officers an appeal from their action in refusing to receive the same, which appeal the said officers also refused to receive, but returned the same by mail to his agent who had filed it.

The circumstances connected with the transaction are detailed by James M. McCarnack, the agent acting in the matter for said Eppler, as follows:

> On the 22d day of September, 1891, and prior to the hour of 12 o'clock noon of said day, affiant was at the entrance of the U. S. land office at Oklahoma City, in waiting for the same to open at said hour, and that many others were there at that time for that purpose, that while affiant was so in waiting there, the Hon. John H. Burford, register, appeared and addressing the people there assembled stated, among other things, that when the hour for filing arrived no person would be allowed to file more than two applications of any kind at one time. Affiant further saith that at the hour of 12 o'clock noon on said day, affiant was admitted to the land office and proceeded directly to the filing window, being the first to reach the same, that he there found the honorable register in charge, and affiant at once presented to him for filing two applications which affiant had in his hand, which applications were received, and some endorsement or numbering placed upon them by the register. That upon so delivering said applications as aforesaid or directly thereafter, affiant addressed the register, asking him in substance whether he would be allowed to file any other papers at that time, and stated I have some more here I want to file, and at about the same time took into his hand from his pocket thres soldier's declaratory applications, one of the same being Eppler's, and presented said three applications to the register, to which tender the register made reply immediately: "I will not receive them now, pass right along out," or words in substance the same. That thereupon affiant passed from said window, taking with him the three applications so presented as aforesaid.

On the 13th of October, 1891, the register and receiver united in a communication addressed to you, in which they explained their proceedings of September 22. They state that prior to 12 o'clock noon of that day, about three hundred people congregated on the street and sidewalk at the entrance to the stairway leading to their office, with the avowed purpose of filing upon land opened to settlement that day. Each was striving to be the first one into the office after 12 o'clock, and

violence and bloodshed was feared. The mayor and police force was called upon to preserve order, and by the combined efforts of the local land officers, and the peace officers, an orderly procession was arranged. It being currently reported that those at the head of the line and nearest to the entrance, had in their possession to offer for filing large numbers of declaratory statements, the local officers, after consultation, and in order to quiet disorder and bring about peace, announced to the waiting crowd that no person would be allowed to make more than two filings until he should retire to the rear of the line and come to the desk again in his turn. This announcement, the officers say, met with a hearty approval, and not a protest or dissent was, at the time, made. They add: Its effect was what we anticipated, to quiet the murmurings, and bring about good feeling. In reference to Eppler's application they say:

> McCarnack was the head man in the line, and was the first one to reach the filing desk, after 12 o'clock. He presented as agent two S. D. S., which were both accepted and filed. He then said to the register, "Can I file any more now?" The register answered, "Not until you are reached again; pass on to the receiver's window and pay your money." He answered, "I have some more here I want to file." He then passed on to the receiver's window and paid for the two he had filed and passed out without further action or protest. The application filed with the appeal was never formerly presented to the register, or to any one else in the office. It was never rejected or refused. In fact the said agent, by his acts and conduct, acquiesced in the rule established without protest. He made no tender of fees to the receiver at that or any other time, and asked for no action on the application, until presented with his appeal.

The local officers also state that had McCarnack gone to the rear of the line, he would have reached the window again by 1:30 o'clock on the afternoon of September 22, as all were waited on inside of two hours, and some of them came to the desk and returned to rear of line as many as six to eight times, filing at each time. They add that the land in question was not filed for until the 25th of September, when Samuel D. Wagoner made homestead entry No. 856 for said tract.

The local officers admit that they had no authority to make the rule to allow only two filings by each individual, when he first came to the register's desk, but say that they regarded it as an emergency measure, and justified by the circumstances and "are yet firmly of the conviction that it prevented violence, disorder and probably bloodshed."

The rule seems to have been acquiesced in by every person present when it was announced, and it does not appear that McCarnack protested against it when he was before the register presenting his filings, or that any person objected to its enforcement during the entire afternoon. Those who took part in the proceedings that day, without protest, I think were estopped from afterwards raising objections to the regularity of the proceeding.

The local officers state positively that the application of Eppler was not presented to them, nor rejected by them on the 22d of September,

1891, nor was it presented to them at any other time, until it came into the office with the pretended appeal on the 23d. It does not appear that at this time it was presented with a view of having it acted upon by the local officers, by an acceptance or rejection, but simply as a part of an appeal from their action of the previous day.

The transaction on the 22d, as detailed by McCarnack, does not show that the local officers were requested to, or even had an opportunity to comply with the rule laid down in Mahin *v.* Chappell (4 L. D., 350), which says that "on the presentation of an application for public land, the local office, in the event of not accepting the same, should duly endorse upon such application the reason for such action, and note upon the record a memorandum of the transaction." He seems to have made an offer to present it, in bulk, with several others, but not to have presented it in a formal manner.

I have detailed the facts and circumstances of the case at considerable length, and I find nothing therein to call upon me to exercise the power and authority mentioned in Wood *v.* Goodwin, *supra*, or to "make an order directing the register of the United States land office at Oklahoma City, to receive, act upon, and place of record the petitioner's application to make or file a soldier's declatory statement for the above named tract," and the application for such order is therefore denied.

CONTEST—DISMISSAL—RE-INSTATEMENT—PREFERENCE RIGHT.

JONES ET AL. *v.* INHELDER.

A contest should be re-instated where it is dismissed on the order of the contestant's attorney without the authority or consent of the contestant.

The preference right of such contestant will not be defeated though the entry is canceled on the subsequent contest of another, where proceedings therein are allowed subject to the re-instatement of the first contest.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 12, 1892.

This appeal involves solely the preference right of entry of the S. ½ of the NE. ¼ and the N. ½ of the SE. ¼ of Sec. 14, T. 29, R. 46, Chadron, Nebraska, which was formerly embraced in the timber-culture entry of Christian Inhelder.

A contest was filed against said entry by Richard Jones, upon which notice issued, and March 30, 1888, was fixed for the trial.

On March 20, 1888, R. F. Milford, the attorney of Jones, dismissed said contest, and on May 23, 1888, he filed a contest for Henry Schmidt against said entry, upon the same grounds as were set forth in the contest of Jones.

June 1, 1888, Jones filed a motion to have his contest re-instated, and filed in support of said motion an affidavit stating that he filed his con-

test in good faith, and paid his attorney the fee and expenses for conducting said contest, and that said attorney, without the authority or consent of affiant, dismissed his contest and procured other parties to file one for said land.

On February 18, 1890, you returned said application to the local officers, and directed them to proceed to a hearing in the case of Schmidt *v.* Inhelder, and to allow Jones to appear at the same time and submit testimony on the allegations set forth in his motion for re-instatement, in order that it might be determined which contestant is entitled to the preference right, in the event the entry should be canceled.

On the day fixed for the hearing, Jones and Schmidt both appeared and submitted evidence, but the defendant was in default, and thereupon the local officers held his entry for cancellation and awarded the preference right to Jones.

Upon the appeal of Schmidt, you affirmed the action of the local officers awarding the preference right to Jones and canceled the entry of Inhelder, he having failed to appeal from the decision of the local officers.

From this decision Schmidt appealed, alleging error in awarding the preference right to Jones, for the reason that his contest was commenced in good faith, and the entry was canceled upon said contest, at the trial of which he furnished the testimony. He further insists that, as he had no knowledge of the contest of Jones, he should not be made to suffer by reason of the fraudulent conduct of Milford toward his client.

Attached to said motion is an affidavit by R. F. Milford, stating that "at the time he agreed to obtain said land for said Schmidt he did not tell Schmidt of Jones' contest," but he does not deny in any particular the charge of his fraudulent conduct in dismissing the contest of Jones without his authority and consent, after having accepted from him the fees and expenses to conduct said contest.

Jones' contest should have been re-instated and the trial should have proceeded upon that contest, but the irregularity in directing that the trial proceed upon the contest of Schmidt should not affect the rights of Jones, especially as Schmidt proceeded with his contest with full notice that Jones would be allowed to submit testimony in support of the allegations set forth in his motion to re-instate in order to determine who was entitled to preference right of entry.

Your decision canceling the entry of Inhelder and awarding the preference right to Jones is affirmed.

overruled 53 I.D. 44,

PATENTED LAND—SURVEY—ACCRETION. overruled as

GLEASON *v.* PENT. (15 L.D. 286) law case in conflict 59 I.D. 416, 422.

The disposal of land that is bounded by a water line, as shown by the official survey conveys to the patentee a riparian right, including subsequent accretions.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 12, 1892.

This case involves 40.50 acres in the Gainesville, Florida, land district, hereinafter more particularly described.

On April 4, 1870, W. H. Gleason made homestead entry for 164.84 acres, that is, lots 1 and 2, which comprised all of fractional Sec. 19, T. 53 S., R. 42 E., in said district, as shown by the survey approved August 1, 1845. On January 12, 1877, he made final entry therefor. Upon said entry patent was issued June 24, 1878. Upon a new survey of said township approved February 1, 1875, the subdivisions of said section were changed. Of these last subdivisions lot 2 or the NE. ¼ of the NW. ¼ of said section, is the tract in controversy.

On January 18, 1890, Edward C. Pent made application to homestead said lot, which was rejected at the local office for conflict with the Gleason entry and patent. Upon his appeal, you, by decision dated June 11, 1890, directed that if qualified, he should be allowed to enter the said tract.

On February 25, 1891, an appeal from your said decision was filed by W. H. H. Gleason, who swears that on June 24, 1884, he "in good faith" purchased land embraced in the entry of W. H. Gleason, and that he was without notice of your action allowing Pent's entry until December 29, 1890.

By letter of transmittal, dated March 4, 1891, you transmitted the record upon such appeal. By letter dated April 25, 1891, you forwarded for consideration with said appeal the proof (against which Gleason protested) and other papers relating to the cash entry made January 26, 1891, by Pent for said lot 2, and by letter dated April 30, 1891, you likewise transmitted Gleason's appeal to you from the allowance at the local office of such cash entry.

By the survey of 1845 the eastern boundary of said fractional section 19, was shown to be the water line of Biscayne bay, a navigable arm of the Atlantic ocean.

By the survey of 1875, such boundary is shown to have shifted eastward to a considerable extent.

The said lot 2, to wit, the tract here in question, is contiguous to the land originally entered by the patentee, and lies between the different boundaries indicated by said surveys.

The appellant claims said lot as accretion to the land patented to his grantor.

It is, I think, manifest from an inspection of the official copies of said surveys filed by counsel, that the enlargement of said section 19, is the result of gradual and imperceptible tidal action during the period of almost thirty years that elapsed between the approval of the survey of 1845 and that of 1875. It is therefore, I think, only necessary for me to refer to the ruling of the supreme court in the case of Jefferis *v.* The East Omaha Land Co. (134 U. S., 178) (one of the numerous authorities cited in the brief by appellant's counsel) which, in my opinion, controls the present question. In that case the court, following the doctrine of the English cases, defined accretion to be—

> An addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived, and does not admit of the view that, in order to be accretion, the formation must be one not discernible by comparison at two distinct points of time.

The public surveys are the official description by which the public lands are disposed of by the government. When, therefore, the patentee made his original entry, the then official survey of 1845 was as claimed by counsel, an "assurance of the proprietor that a riparian estate was for sale."

Such entry was a segregation and a disposal of the land in accordance with that survey, and rights thereby acquired, could not be impaired by the subsequent survey of 1875.

The patent under which the appellant claims being based upon such original entry, took effect as of its date and conveyed the riparian estate described by the first survey.

That riparian owners are entitled to such accretion as that now under consideration, is too well settled for serious discussion. In the case of Jefferis *v.* The Land Co., *supra*, it was held that—

> Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary; and a deed describing the lot by its number conveys the land up to such shifting water line; so that, in the view of accretion, the water line, if named as the boundary, continues to be the boundary, and a deed of the lot carries all the land up to the water line.

As heretofore stated the patent through which the appellant claims, conveyed the whole of said fractional section as described in said first survey, whereby the boundary was shown to be the water line referred to. It follows under the authority cited, that it must convey the land embraced within such boundary as extended by the second survey.

I must, accordingly find that the appellant W. H. H. Gleason as owner of the patent hereinbefore mentioned, is entitled to the lot in question, as accretion to the land described in said patent.

Your decision of June 11, 1890, allowing Pent's application to enter is reversed, and you are accordingly, directed to cancel his cash entry for the said lot 2.

DOUBLE MINIMUM LAND—AGRICULTURAL COLLEGE SCRIP.

MICHAEL DALTON.

The even numbered sections within the granted limits of the Northern Pacific became double minimum when the line of general route was fixed.

The agricultural college scrip issued under the act of July 2, 1862, is on the basis of a single minimum grant, and must be so computed in the location of double minimum land.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 12, 1892.

The land involved in this appeal is the E. ½ NE. ¼, and lots 1, 5 and 6, Sec. 32, T. 139, R. 41, Crookston, Minnesota, land district.

The record shows that Michael Dalton located said land containing 178.65 acres, with agricultural college scrip, No. 317, State of Arkansas, March 20, 1873. In his final proof submitted on said day, it is shown that he made settlement on said land October 9, 1870.

It seems that by letter of December 23, 1873, the entry was suspended and Dalton was required to make an additional payment of $1.25 per acre for the reason that said land had been increased to double minimum price August 13, 1870. Apparently no attention was paid to this, and by letter of January 20, 1876, you instructed the local officers as follows:

> You are now advised that said entry is held for cancellation, with sixty days for appeal, Mr. Dalton may, however, if he so desires, within said sixty days, make the additional payment of $1.25 per acre, or elect to retain one half of the land embraced in his entry, upon which his improvements are situated, retaining in such selection regular legal subdivisions, which entry will be approved as to said selection, and canceled as to the residue.

From this decision claimant appealed, assigning error as follows:

> First. By the act of Congress dated July 2, 1864, the grant of lands made to the Northern Pacific Railroad Company did not vest until the definite location of said road, which was not until November 21, 1871.
>
> Second. That, until said date, the even numbered sections remained at the minimum price of $1.25 per acre.
>
> Third. Appellant made settlement prior to said 21st day of November, 1871.

Through an inadvertence in your office the case has remained there until recently called up by one Calvin P. Bailey, who claims to have purchased the land from Dalton in 1877.

The land in controversy is an even numbered section within the granted limits of the Northern Pacific Railroad Company. Section 6 of the granting act (July 2, 1864, 13 Stat. 365), provided for the survey of the lands for forty miles in width on each side of the road after the general route shall have been fixed; that the odd numbered sections should not be subject to sale by the government thereafter; that the even numbered sections should be subject to settlement and sale as provided by law, and then specially provides: "And the reserved alter-

nate sections shall not be sold by the government at a price less than $2.50 per acre, when offered for sale."

"The reserved alternate sections" named in the statute refer to the even numbered sections open for settlement and sale by the government.

Now the general route of the road was fixed August 13, 1870, hence this land became "double minimum price," or $2.50 per acre, at that date.

The act creating this scrip (July 2, 1862, 12 Stat., 503), section 5, provides, "that the grant of land and land scrip hereby authorized shall be made on the following conditions;" and the fifth condition is:

> When lands shall be selected from those which have been raised to double minimum price, in consequence of railroad grants, they shall be computed to the states at the maximum price, and the number of acres proportionately diminished.

In view of the legislation upon this subject, there certainly ought to be no question as to the correctness of the order above quoted. (See State of Kansas, 5 L. D., 243).

Your judgment is therefore affirmed, but inasmuch as the original entryman seems to have transferred the land you will cause notice to be served on the transferee requiring him within the period mentioned in the order, to comply therewith upon production of satisfactory evidence to the local officers that he is entitled thereto.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT.

NORTHERN PACIFIC R. R. CO. *v.* ANDERSON.

> The departmental order of May 28, 1883, relieving the Northern Pacific Company from the necessity of specifying the basis of indemnity selections, does not contemplate the selection of lands subject to settlement without designating the basis therefor, but is applicable only to lands protected by withdrawal.

Secretary Noble to the Commissioner of the General Land Office, April 12, 1892.

This record presents the appeal of the Northern Pacific Railroad Company from your action rejecting its claim to the SW. ¼ NE. ¼, SE. ¼ NW. ¼, and W. ½ SE. ¼, Sec. 1, T. 129 N., R. 36 W., Saint Cloud, Minnesota, and holding for approval Gustaf Anderson's homestead entry for the said tracts.

The tracts named were embraced in the homestead entry of Samuel G. Meader, made April 16, 1868, and canceled August 19, 1876. They were also within the limits of the withdrawal ordered December 26, 1871, and received at the local office January 10, 1872, for the benefit of the grant to said company. On August 2, 1883, the company applied

to select the same. This application was rejected at the local office and the company appealed. On October 12, 1883, Anderson made homestead entry for said tracts and final entry therefor, May 17, 1890.

By decision of September 9, 1890, you stated that the company's application to select was made December 29, 1883. You accordingly found that the land, having been excepted from the grant by the Meader entry, it was, on October 12, 1883, the date of Anderson's original entry, properly subject thereto. You therefore held Anderson's final entry for approval. On October 27, 1890, the company called your attention to the fact that its said application to select was made August 2, as well as December 29, 1883, and asked that you sustain its appeal from the said rejection of its application to select. Against this a protest was filed by the attorney for Anderson. Thereupon by letter dated December 5, 1890, you held in effect that notwithstanding the priority of its application to select, the company could thereby acquire no right because of its failure to specify the particular loss for which the land was sought as indemnity. You accordingly adhered to your former decision, and allowed the company the right to appeal within sixty days.

Thereupon the company filed its pending appeal.

The material matter urged in behalf of this appeal is that the company's application of August 2, 1883, should have been allowed under the provisions of the departmental instruction of May 28, 1883. By these instructions, which were issued "to open for settlement as speedily as possible all the lands within the indemnity limits of the grant to the Northern Pacific Company" the local officers were instructed to note all selections free from conflict and forward the same for final examination, "leaving the ascertainment of the lands lost in place, to your office, instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company, as heretofore."

The precise question thus presented was, as you have well held, disposed of adversely to the appellant by the decision in the similar case of Northern Pacific Railroad Company *v.* John C. Miller, on review, (11 L. D., 428) wherein it was held that the—

> The departmental order of May 28, 1883, did not contemplate the selection of lands subject to settlement without designating the basis therefor, but was applicable only to such lands as were protected by withdrawal.

The land involved was, by the Meader entry, excepted from the said withdrawal. It being therefore open to settlement it could, under the ruling cited, not be selected by the company without a specific designation of loss. The company having failed to make such designation, its application of August 2, 1883, was of no effect. It follows that at the date of Anderson's original entry, that is, October 12, 1883, the land was vacant and that such entry was properly allowed. The record showing that Anderson has complied with the law, his final entry must be sustained. Your judgment is accordingly hereby affirmed.

PRACTICE—MOTION TO DISMISS—ORDER OF JANUARY 17, 1891.

AMMUND PEDERSON ET AL.

A motion to dismiss under the order of January 17, 1891, must be sustained where it appears that the Department is without jurisdiction, patent having issued for the land.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 13, 1892.

On November 27, 1883, Ammund Pederson made homestead entry No. 26,217, for the N. ½ of the S. W. ¼ of section 20, T. 104, N. R. 52 W., Mitchell, South Dakota.

He submitted proof and received a final certificate on February 17, 1887. You rejected the proof and held the entry for cancellation on February 25, 1887, and no appeal being taken from said action on October 14, 1887, you canceled said entry. On December 10, 1887, following, John Albertson made homestead entry No. 28,536 for said tract and upon making proof received a final certificate on September 9, 1889, and on October 24, 1890, a patent was issued on said certificate.

On March 27, 1891, Frederick T. Day claiming to have a mortgage on said tract executed by Pederson, to secure the payment of $300.00 which amount is unpaid, filed his application asking that Pederson's entry be re-instated and approved for patent under the 7th section of the act approved March 3, 1891 (26 Stat. 1095). You rejected the application on May 19, 1891, citing as authority therefor, the case of James Ross (12 L. D. 446). You also held that you had no jurisdiction over the matter because of the issuance of the patent. Day has appealed from your judgment to this Department and on March 4, 1892, John Albertson filed a motion here asking that said case be dismissed under the order of January 17, 1891, (12 L. D. 64.) Said order is as follows:

> It is hereby ordered that until otherwise directed, motions to dismiss pending cases, on jurisdictional questions arising on the record, may be presented, orally or otherwise, before the office of the Assistant Attorney-General, on the first Monday in each month; such motion to be filed at least five days previous to its presentation, with ten days' notice thereof to the opposite party, where such party is represented by a resident attorney, and thirty days' where such attorney is a non-resident. Ten minutes to each party will be allowed on the presentation of such motion orally, and no question will be considered in any case that involves an examination of the testimony.

The motion must be granted for since a patent has issued for the land in question, it is clear that this Department has no jurisdiction over the tract.

Said motion is accordingly allowed, and the case is dismissed.

CONTESTANT—PREFERENCE RIGHT OF ENTRY.

PENDLETON *v.* GRANNIS.

A contestant is estopped from asserting his preference right as against one with whom he has verbally agreed to waive said right, and thus induced said party to settle upon and improve the land.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 15, 1892.

In the contest case of John H. Grannis *v.* Francis M. Rathbun involving the N. E. ¼ Sec. 27, T. 2 N., R. 48 W., the cash entry No. 5131, of the latter, made November 11, 1885, at Denver, Colorado, was ordered canceled by you on July 24, 1890 in accordance with departmental decision of June 30, 1890, (unreported); and Grannis, if duly qualified was held to have preference right to enter said land, under act of May 14, 1880, (21 Stat., 140), by your letter of February 26, 1891.

On August 1, 1890, said Grannis applied to make homestead entry for said land and tendered the fees therefor, and the same was held for consideration by the local officers, in view of the application of Granville Pendleton to make homestead entry for the east half of said quarter, and of his protest against the allowance of the application of said Grannis to enter said east half.

Said Pendleton's protest alleged,

1st. That said Grannis had waived his preference right in and to the east half of said northeast quarter, awarded to him as contestant.

2nd. That said Pendleton was a settler on said east half, had been residing thereon, had valuable improvements thereon, and was entitled to enter the land on the contestant's waving his preference right.

3rd. That said Grannis desired to enter said east half for speculative purposes and with the intention of taking advantage of the improvements made by Pendleton thereon.

A hearing was ordered thereon by the local officers, for October 2, 1890. On September 2, 1890, Grannis appealed from the action of the local officers in not allowing him to exercise his preference right, and in ordering said hearing. On September 20, 1890, said appeal was dismissed by the local officers on motion of Pendleton.

On petition in behalf of Grannis you directed by letter of October 1, 1890, that the papers in the case be transmitted to your office.

By letter of February 26, 1891, you dismissed said contest and directed that the entry of Grannis be allowed.

From this decision an appeal is now taken to this Department. Pendleton was one of the attorneys for Grannis in his contest with Rathbun and submits an affidavit alleging that in the fall of 1887, it was verbally agreed between him and said Grannis that Pendleton on account of his fees and disbursements in that contest, should settle upon and improve said east half of the land in dispute, the said Grannis

waiving his right thereto, and in consequence of said agreement he (Pendleton) has settled upon said east half, built a house thereon, and made other improvements to the value of $700, and has resided there with his family since January or February, 1888. He is corroborated in these allegations by the affidavits of several other witnesses.

The right conferred on a successful contestant by section two of the act of May 14, 1880, is a personal one which can not be transferred to another, but such preference right may be waived even prior to the cancellation which is contested. Kellem *v.* Ludlow (10 L. D. 560, 562).

The first section of the act of May 14, 1880, provides for a "written relinquishment," which is one mode of manifesting an intention of abandoning a claim to public land, but it is not the only one. An amicable agreement by which two persons divided the land between them has been recognized as another mode. Ayers *v.* Buell *et al.*, 2 L. D. 257.

In the present case it is alleged that such an amicable agreement was made between Grannis and Pendleton and that pursuant to such an agreement the latter has gone on the land and made valuable improvements with the full knowledge and consent of said Grannis and for more than two years lived upon and improved the land upon the faith of said agreement. If this be true Grannis as much manifested an intention to relinquish his preference right to said eighty acres as if he had filed a written relinquishment to that effect. The doctrine of estoppel would be applicable with respect to such an agreement to prevent its operating as a fraud upon one who has been led to rely upon it. If Grannis agreed to abandon his preference right to said east half in favor of Pendleton, provided the contest should be decided in his favor, and thereby induced Pendleton, in reliance upon said agreement, to alter his condition, to settle upon the land, and place valuable improvements thereon, Grannis now cannot be permitted to deny the truth of said agreement, or enforce his rights against his declared intention of abandonment. Insurance Co. *v.* Mowry (96 U. S. 544).

The general principle now is, that where the conduct of a party has been such as to induce action by another, he shall be precluded from afterwards asserting, to the prejudice of that other, the contrary of that of which his conduct has induced the belief. The primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. Hill *v.* Epley (31 Penn. St., 334).

The foregoing case is cited with approval in Brant *v.* Virginia Coal and Iron Co. (93 U. S., 336).

If Grannis had manifested his intention to abandon his preference right to the eighty acres in dispute by a written relinquishment, it would have been recognized by this Department. If he has manifested the same intention by an unwritten agreement which he is equitably estopped from denying, this Department, in the exercise of its judicial functions, will recognize it as a practical relinquishment which precludes Grannis from now asserting any preference right to said eighty acres.

I am of the opinion that a hearing to determine the questions raised by the contest affidavit of Pendleton should be ordered. You will so direct and notify the local officers.

Your judgment is modified accordingly.

CONTEST—RELINQUISHMENT—CONTESTANT.

TURNER *v.* PAYNE ET AL.

A relinquishment does not inure to the benefit of a contest that is initiated for the purpose of fraudulently defeating rights acquired in good faith under said relinquishment.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 15, 1892.

I have considered the appeal of Earnest S. Turner from your decision holding for cancellation his timber culture entry for lots 1 and 2, and S. ½ of the NE. ¼ of section 4, T. 27 N., R. 49 W., Chadron, Nebraska.

The facts in this case, as developed from the testimony taken at two hearings, are as follows:

Christian Voss made timber culture entry for said lands October 14, 1884. Up to April 8, 1887, he had complied with the requirements of the law, in the matter of breaking and cultivating the land. About noon on the 8th day of April, 1887, he executed a relinquishment of said entry at the village of Hemingford, Nebraska, and received from Earnest S. Turner, for said relinquishment the sum of $250. During the afternoon Turner prepared an application to enter the land under the timber-culture law and enclosed it in an envelope together with the relinquishment and the proper entry fees, and about 4 o'clock deposited it in the post office at Hemingford, addressed to the local land office at Valentine, Nebraska. By due course of mail this letter should have reached the land office on the 11th or 12th of April, as a matter of fact it did reach there on the 12th of April, and the entry of Voss was duly canceled.

In the meantime, on April 8, E. D. Payne of Hemingford, had ascertained that the entry of Voss had been relinquished and the relinquishment purchased by Turner, and he immediately started for the land office at Valentine to file a contest against the said entry of Voss. On April 9th, and while the relinquishment of Voss was in the mail on its way to the local land office together with the application of Turner to enter the land, Payne appeared before a notary public and made the following affidavit of contest,—

> Christian Voss has sold and relinquished said tract to the government of the United States and that said relinquishment is being held by one Turner of Box Butte county for speculative purposes.

On April 10, he filed this affidavit in the local land office.

On the receipt of the relinquishment and application of Turner to enter, the local officers notified the latter of the pending contest of Payne, but on the request of Turner his entry was put of record subject to the right of Payne as a contestant.

With these facts clearly established, you held that Payne had the better right to the land, and held the entry of Turner for cancellation.

In this I think you erred.

The act of May 14, 1880 (14 Stat., 140), provides that where a person has contested and procured the cancellation of an entry, he shall have the preference right to enter the land. It is a well established principle that a relinquishment filed during the pendency of a contest does not inure to the benefit of the contestant, unless it be found that it was filed as the result of the contest. Sorenson *v.* Becker (8 L. D., 357).

A relinquishment filed during the pendency of a contest is presumptively the result thereof, though such presumption may be overcome. Webb *v.* Loughrey *et al.* (9 L. D., 440); Brakken *v.* Dunn *et al.* (9 L. D., 461).

The record clearly shows that the relinquishment was in no way, the result of the contest; on the contrary, the contest was filed for the purpose of defrauding Turner out of a right which he had obtained in a lawful and honorable manner, and in a manner sanctioned and recognized by law. There was no ground for a contest, the charge made by Payne was without foundation, as shown by the evidence.

While on the one hand the law will not permit a *bona fide* contestant to be defrauded out of the rights he has lawfully obtained under the law, by means of a relinquishment executed either before or subsequent to the filing of the contest; on the other hand, it will not permit a party who has, in a lawful and proper manner, obtained a valuable right by means of a relinquishment to be defrauded out of that right by means of a subsequent contest. Each case must be determined upon the facts.

Your decision is reversed, and the entry of Turner will remain intact.

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SCHOOL LAND—SETTLEMENT BEFORE SURVEY.

CICHY *v.* PALTZER.

In case of a pre-emption settlement on a school section prior to survey, the State may either select indemnity therefor, or await the action of the settler, and, if his claim is abandoned, assert its right to the land in place.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 15, 1892.

I have considered the case of Paul Cichy *v.* Anna Maria Paltzer on appeal by the former from your decision of November 10, 1890 dismissing his protest and allowing the homestead entry of the latter for the W½ SE¼ and lots 3 and 4 of Sec. 36, T. 131, R. 39 W., St. Cloud land district, Minnesota.

It appears that Phillip Paltzer, late husband of Anna Maria, settled upon land then unsurveyed, but which proved, upon survey being made, to be in Sec. 36, T. 131 N., R. 39 W., and he claimed the tracts described and filed a declaratory statement for them on April 27, 1873, the plat of official survey having been filed on March 27 of that year.

Paltzer died in June, 1875, having as yet offered no final proof, leaving a widow, and it is said, some children.

In 1881, Mrs. Paltzer advertised that she would offer final proof. The State authorities of Minnesota were notified of this, but gave it no attention, and Mrs. Paltzer made default, and nothing was done at the time the proof should have been offered.

On October 12, 1886, Cichy purchased, of the State, lot No. 3, moved onto it, erected a house, made other improvements on the land, and has continued to reside thereon.

On May 20, 1889, Mrs. Paltzer applied to transmute the pre-emption filing of her late husband to a homestead entry, alleging in an affidavit her residence, and that she was the head of a family, the widow of Phillip Paltzer, was poor and unable to pay for the land. The local officers allowed this homestead entry, and on December 11 following, she offered final proof upon due notice. Thereupon came Cichy and protested said proof as to lot No. 3. No attention was paid to this protest, no hearing was ordered, but the final proof was accepted and the case sent to your office. The State authorities were notified of the allowance of her application to transmute to homestead and of its right of appeal, and on June 10, 1889, the auditor of State acknowledged the receipt of the notice, and among other matters, said

> Relying upon your (the register's) statement that said application was supported by affidavit corroborated by the evidence of two witnesses that settlement was made prior to survey, the State made no appeal and now makes no claim to the said described lands adverse to that of the homestead application of Anna M. Paltzer.

The matter of Mrs. Paltzer's right to make homestead entry came up for consideration before your office on March 31, 1890, and after reviewing the record in the case and discussing the same at length, you held that the State had no claim to the land and allowed the entry of Mrs. Paltzer to remain intact, and on November 10, 1890, the cause came on to be heard upon the final proof of Mrs. Paltzer, and your office dismissed the protest of Cichy and directed that her proof be examined with a view to issue of patent, from which decision Cichy appealed.

There has been filed in the Department a statement by Cichy which, if true, shows that the local officers and your office have been imposed upon. It alleges that Mrs. Anna Maria Paltzer, who has signed all the papers by that name, is Mrs. Anna Maria Kline; that she was married to Kline over fourteen years ago; that of the six children of which she claims to be the mother, three are the fruits of the marriage with Kline; that Paltzer's youngest child is sixteen years old; that Mrs. Paltzer's proof is false; that by false statements she procured the State to cancel his agreement of purchase. He says that Kline and his wife, for-

merly Mrs. Paltzer, never occupied, nor in any way used or improved lot 3, and that he went to see Kline before buying the lot of the State, and was advised to buy it "or some stranger would," and added "because we cannot and will not buy the land ourselves;" that Kline assisted him in building his house on the land, and never made any claim to it until the land became valuable, and until he (Cichy) had improved it and lived on it a number of years. The protest denied her right to make entry or proof and set up Cichy's purchase, occupancy and improvements, and a hearing should have been had upon it.

Your decision discusses at length the distinction between a failure to "file" in time and failure to "enter" in time, and finally you decide that she can neither transmute her late husband's filing to a homestead entry, nor complete his filing by making proof and cash entry, but you conclude in your decision of March 31, 1890, based on a line of authorities and reasoning that she has a right to homestead the land on "the hereditable quality of rights acquired by mere settlement." You cite the case of Tobias Beckner (6 L. D., 134) as authority for this, and conclude that a settlement right descends to the heirs or legal representatives. In the Beckner case, the settler had lived about seven years upon the land. It had not been surveyed. He died in 1882. The heir, Beckner, continued to reside upon the land. In 1885, May 26, the township plat was filed, and on June 11 following, within sixteen days of the filing, the heir applied to make homestead entry. It was held that the case came clearly within the purview of section 2291, Revised Statutes; that the heir could do what the ancestor could have done if living. But it will be observed that this section applies to homesteads, not to preemption filings. This land was in section 36. The settlement before survey excepted it from the reservation, and the filing by the heir within the required time was held to be sufficient to maintain the exception; the heir having complied with the law as his ancestor might have done if living, acquired the rights the ancestor would have acquired.

In the Watson case (on review) (6 L. D., 71) cited by you, it will be noticed that the issue was not the same as that in the case at bar. In that case, one May had settled upon and filed for the land. The settlement was made before survey, and the filing within proper time. Thereupon the school authorities selected a tract in lieu of the May tract. Afterward May sold his improvements to Watson, and he attempted to make homestead entry for the land. Your office thereupon held that on May's abandonment the land reverted to the State, and Watson's entry was canceled as was the selection of "lieu" land. It was held by the Department that this was error, because the State having made selection of equivalent land it took the place of the original school land, and that the selection was equivalent to a relinquishment of the school tract. The selection was restored, and Watson's entry reinstated.

Paltzer's settlement being upon unsurveyed land, he is governed by

section 2266, Revised Statutes, which allows three months to file declaratory statement after "the receipt at the district land office of the approved plat of the township." Section 2267, Revised Statutes provides that: "All claimants of pre-emption rights under the two preceding sections, shall . . . . make the proper proof and payment for the land claimed within thirty months after the date prescribed therein respectively for filing their declaratory notices has expired." This would give Paltzer until December 27, 1875 to make proof and payment, but on June 3, 1874, Congress passed an act (18 Stat., 52) providing "that the time at which pre-emptors on the public lands in the State of Minnesota . . . . are now required to make final proof and payment, is extended for the period of two years." Allowing this to apply to pre-emptions on school land, Paltzer's time for making final proof and payment expired December 27, 1877. But this act did not change the mandatory character of section 2267, and while it extended the time of limitation, it did not remove the bar by limitation when the same is insisted upon by an adverse claimant. See Crane *v.* Stone (10 L. D., 216) and cases there cited.

Is the State an adverse claimant? Did its rights attach upon failure of Paltzer's heirs to make proof and payment within the time fixed by law?

It is quite clear that the statutes in existence when the compact between the State and the government was concluded became a part of the agreement, and the State was bound to know the rights of a settler, but at the same time it was bound to know the duties and obligations he was under before he could acquire title to public land, and it had a right to have those statutes enforced. It accepted the government's proposition, and came into the union upon this basis.

In Beecher *v.* Wetherby (95 U. S., 517) the court say:

> It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future or as operating to transfer the title to the State upon her acceptance of the proposition as soon as the section could be afterwards identified by the public surveys. In either case the lands which might be embraced in those sections were appropriated to the State.

In Cooper *v.* Roberts (18 Howard, 173) the court, in a case arising in Michigan said (syllabus)

> (2) When the State accepted this act (of admission) the grant became a contract or compact between the State and the United States. (3) As the government extended its surveys so that the location of these sections was ascertained, the title to the State became complete.

In Water and Mining Co. *v.* Bugbey (96 U. S., 165) Bugbey was a settler on school land when the survey was made. He did not file his declaratory statement, or enter the land under any U. S. statute, but purchased it of the State. The Water and Mining Company claimed substantially that his settlement on the land at date of survey excepted it from the grant, that his failure to acquire or assert any right under

the government law left the land as a part of the public domain. The court say:

> Here the company does not claim under the settler's title, but seeks by means of it to defeat that of the State. . . . The settler, however, was under no obligation to assert his claim, and he abandoned it, the title of the State became absolute as of May 19, 1866, when the surveys were completed. The case stands, therefore as if at that date the United States had parted with all interest in and control over the property.

It has been held as in Watson's case *supra*, that on abandonment by the settler or pre-emptor, the land goes to the State, unless in the meantime it has made a selection of other lands in satisfaction of the loss, and thereby, as was said in that case, it has in effect relinquished its claim to the school tract.

Section 2269, Revised Statutes, provides for consummating the claim of a deceased pre-emptor. It is competent for the "executor" or "administrator" of the estate of such party or "one of the heirs" to consummate the claim, filing the necessary papers to complete the same, but the title in such cases goes to the heirs. There is nothing in this section, however, nor in the law, that gives to the representative of the deceased person rights superior to those he would have enjoyed or could have exercised if living, nor do I find any extension of time given to representatives of the deceased pre-emptor. I am of opinion that the State is an adverse claimant in this class of cases. It is in the position of a subsequent settler. It may await what the prior settler does, or it may go into other land and make selection. As the subsequent settler may file a second declaratory statement and await the action of the prior settler, and may secure the land if the prior fail to comply with the requirements of the law, so the State may decline to select lieu land and await the action of the settler. The State, in the case at bar, asserted its right to lot 3, and sold it to Cichy in October, 1886. It is said that in 1889 the Auditor wrote a letter which, in effect, was a waiver of the claim on the part of the State. This can not, however, affect Cichy's title. If the State had a right to assert its claim in 1884, Cichy took its claim by purchase, and it had nothing to waive. Cichy may assert all it could have asserted on the day it sold to him. If up to that time it had not waived its right or transferred its claim by selecting other lands, the time for final proof having long previously expired, its right attached, and if proof had been offered on the filing, it would have had to be rejected upon the protest of Cichy or the State, but there is nothing to show whether or not the State has selected lands in lieu of those in controversy, or whether its right to the land remains. There is no testimony as to whether Mrs. Paltzer is a married woman, or if married, whether she is living with her husband, or has been deserted by him. This will become important if the State has selected lands in lieu of those in controversy.

There is no testimony upon the question of actual occupancy of the tract of land in dispute, by building upon it, or by cultivation, nor is

there any testimony as to what was done and said by Kline and his wife to induce Cichy to go upon the land and make improvements, or what knowledge she had that he was making improvements thereon, or what notice, if any, she gave him of any claim she had to the land, even if she had knowledge of his settlement and improvements. There is no testimony properly presented showing that Phillip Paltzer left any children when he died, or if so, whether they are living.

Mrs. Paltzer, or Kline, says in her affidavit for homestead, that she is "the head of a family." She does not say she is unmarried. If she married Kline, she ceased to be the head of the family. She abandoned, by that act, her claim to make a homestead, and her settlement as "the head of a family," and Kline became the head of the family from the date of her marriage to him. But were this all so, I see, no reason why the heirs of Phillip Paltzer may not complete his entry to the land upon which there is no adverse claimant, provided the State has selected other lands. As I have not before me the facts in the case upon which I can form any conclusion satisfactory to myself, or upon which I have reason to believe I can do justice to the parties, I set aside your decision, and return the case that you may remand it to the local office with directions to the register and receiver to order a hearing upon notice to the parties, including the State of Minnesota, and all parties will be allowed to offer testimony upon the points herein indicated, and upon a report of the evidence you will re-adjudicate the case.

PATENT—CLERICAL MISTAKE—CANCELLATION.

FRANK SULLIVAN.

The Commissioner of the General Land Office may properly, on the request of the patentee, withhold and cancel a patent that fails to describe the land entered, and issue one that correctly describes said land, even though a relinquishment of the erroneous patent is not filed.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 15, 1892.

With your letter of June 4, 1891, you transmit an appeal taken by G. L. Miller, as attorney for Frank Sullivan from your decision of April 29, 1891, denying his application for the cancellation of the erroneous patent issued on cash entry for the SE. ¼ of Sec. 22, T. 32 S., R. 43 W., Garden City, Kansas, and to issue a new patent to Sullivan correctly describing the tract.

It appears from the record before me that Frank Sullivan made homestead entry of the SE. ¼ of Sec. 22, T. 32 S., R. 43 W., Garden City, Kansas, and made final proof upon said entry, upon which final certificate issued.

The local officers, in issuing the final certificate, described the tract as the SE. ¼ of Sec. 22, T. 32 S., R. "42" W., and patent issued to said

Frank Sullivan, December 28, 1889, for the tract as described in the final certificate, which was transmitted to the local officers for delivery to the patentee.

On February 24, 1890, the local officers returned to your office a number of patents for correction, among which was the patent issued to Sullivan.

By letter of April 29, 1890, you instructed the local officers to require Sullivan to file a deed of relinquishment to the United States for the tract embraced in said patent and the certificate from the register of deeds for Morton county, Kansas, in which the land is situated, showing that Sullivan had not conveyed or encumbered the land. The final certificate was also returned to them, and they were instructed to correct without erasure said certificate, and upon the receipt of such relinquishment and certificate, the patent would be canceled and a new patent issued, in accordance with the certificate as corrected.

In reply thereto, the local officers informed your office that Sullivan had been notified accordingly, by registered letter which was returned to them uncalled for.

With a supplemental report, the local officers transmitted to your office the certificate of the register of deeds of Morton county, Kansas, that the records of that county show no instruments executed by said Sullivan affecting the title to the land described in the patent, or of the corresponding tract in range 43 west; also an affidavit made by G. L. Miller, as attorney for the S. L. Davidson Mortgage Company, stating that said company held a mortgage on the land described to secure the payment of a loan negotiated by said company to the entryman Frank Sullivan; that they had used every means to find said Sullivan, to obtain the required deed of relinquishment, but have been unable to find him.

On March 16, 1891, the local officers reported that your letter of April 29, 1890, enclosing the final certificate issued to Frank Sullivan and instructing them to correct said certificate, had been, with the certificate, lost or misplaced, and they therefore forwarded a new certificate correctly describing the land entered, upon which they had placed a certificate that it was issued in lieu of the erroneous certificate issued December 9, 1887, but which had been lost.

By letter of May 11, 1891, you still declined to cancel said patent and issue a new patent correctly describing the land, unless the relinquishment was filed by Sullivan as directed. From this action an appeal has been filed in the name of Frank Sullivan, by his attorney G. L. Miller.

From the foregoing statement of facts, it will be seen that Sullivan made homestead entry of the SE. ¼ of Sec. 22, T. 32 S., R. "43" W., Garden City, Kansas, and that he received final certificate under said entry, describing the land as the SE. ¼ of Sec. 22, T. 32 S., R. "42" W., and patent issued for the land described in said certificate. It also appears that the final certificate has been corrected so as to properly

describe the land entered by Sullivan, which is now a part of the record in your office.

The question presented is, whether the Commissioner of the General Land Office has the authority, and whether it is his duty to cancel the erroneous patent and to issue a patent to Frank Sullivan properly describing the land entered, whether the relinquishment is filed or not.

The Commissioner had no authority to issue a patent to Sullivan for the SE. ¼ of Sec. 22, in T. 32 south, R. 42 west, for the reason that the records of your office show that he never entered said tract, and at the date of the issuance of the patent it had been entered by another, as shown by the records of your office.

The issuance of such a patent was the result of a purely clerical error, which is plainly shown by the record, and it conveyed no title to Sullivan. It was therefore not necessary that Sullivan should file a relinquishment to the United States, in order to invest your office with jurisdiction to cancel said patent and to issue a proper patent correctly describing the land.

The power of the land department, with the consent of the parties, to recall even a delivered defective patent, and to issue one in conformity to law, has frequently been sustained by the supreme court and this Department. Where a patent has issued which fails to conform to the record upon which the right to a patent rests, and has not passed out of the control of the Department, it is not only the right, but the duty of the Commissioner to withhold the delivery of such patent, and to issue one in conformity with the record. Bell *v.* Hearne, 19 How., 252; Maguire *v.* Tyler, 1 Black, 199, 8 Wal., 655; Adam *v.* Norris, 103 U. S., 594; Wm. H. McLarty, 4 L. D., 498; W. A. Simmons *et al.*, 7 L. D., 283.

In the case of Bell *v.* Hearne, *supra*, it appears that John Bell made cash entry of a certain tract of land, for which final certificate issued, but the register in making up his duplicate certificate of purchase to be returned to the General Land Office inserted in it the name of James Bell for that of John Bell. A patent issued in accordance with said certificate, which was sent to the register at the local land office, and was by him delivered to John Bell. Upon a representation of the facts to the Commissioner of the General Land Office, this patent was canceled and a new one issued to John Bell. The defendant Hearne claimed that the land had been sold by the United States to James Bell, and had been legally sold as the property of James Bell under a valid judgment at a sheriff's sale, and that the person under whom Hearne derived his title was the purchaser at said sale. In speaking of the power of the Commissioner to cancel the erroneous patent, and to issue a new patent in the proper name, the court says:

> The question then arises, had the commissioner of the general land office authority to receive from John Bell the patent erroneously issued in the name of James Bell, and to issue one in the proper name of the purchaser? And the question, in our opinion, is exceedingly clear. The commissioner of the general land office exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of

justice, and to prevent the consequences of inadvertence, irregularity, mistake, and fraud, in the important and extensive operations of that officer for the disposal of the public domain. The power exercised in this case is a power to correct a clerical mistake, the existence of which is shown plainly by the record, and is a necessary power in the administration of every department. Our conclusion is, that the supreme court of Louisiana erred in denying the validity of this title, and in conceding any effect or operation to the certificate of purchase or patent issued in the name of James Bell, as vesting a title in a person bearing that name.

The delivery of this patent to Sullivan would place in his possession evidence of title to a tract of land to which the records of your office show he is not entitled, and he has therefore no right to demand its delivery. It is therefore your right and duty to withhold said patent, and it must necessarily follow that it is also your duty to issue to Sullivan a patent for the land to which he is entitled.

When a patent has issued in conformity with the record upon which the right to patent is predicated, and has been signed, sealed, and countersigned, and recorded, as in the case of United States *v.* Schurz (102 U. S., 378), the title to the land has passed, and the patent can not be recalled by the government, without the consent of the patentee, but when the patentee declines to receive the patent, it has not passed by delivery, although it may have been sent to the local officers for delivery, and the power to recall the defective patent, and to issue one in conformity to law is fully sustained by the authorities above cited. See also Leroy *v.* Jemison, 3 Sawyer, 389.

In the case at bar, the patent has never passed out of the control of the Department, and the patentee is not demanding its delivery, but, on the contrary, insists that the erroneous patent be canceled and a proper patent issued.

Your decision is reversed, and you are directed to cancel the erroneous patent and to issue a patent in conformity with the record of the homestead entry of Frank Sullivan.

TIMBER LAND ENTRY—TRANSFEREE—EVIDENCE.

THE UNITED STATES *v.* ALLARD ET AL.

The statements and admissions of an entryman against the validity of his entry are admissible as evidence in a proceeding against such entry, where the said entryman fails and refuses to appear and testify in relation thereto.

An entry of timber land under the act of June 3, 1878, not made for the "exclusive use and benefit" of the entryman, but in the interest of, and for the use of another, is in direct violation of the terms of said act, and must be canceled.

A purchaser, prior to patent, of land entered under said act, takes but an equity, and is not entitled to plead the status of a *bona fide* purchaser without notice; nor can it avail such purchaser that the matters wherein the entryman testified falsely were solely within the knowledge of such entryman.

The case of the United States *v.* David E. Budd *et al.*, 143 U. S., cited and distinguished.

Secretary Noble to the Commissioner of the General Land Office, April 16, 1892.

This is an appeal from a decision of your office, dated March 29, 1888, in the case of the United States *v.* Richard Allard, *et al.*, involving the validity of forty timber land entries made by various parties, in 1883, under the act of June 3, 1878 (20 Stat., 89), at the Humboldt land office, in the State of California, and of one pre-emption entry, made in the same year and at the same land office. The names of the parties who made the several entries, and the lands covered thereby, are given and described as follows:

* * * * * * *

The appeal is filed by W. H. Swift and others, trustees, and H. C. Putnam, who claim to be the present owners of all the lands in question, by purchase, and deeds of conveyance, several removes from the original entrymen.

The record shows that thirty-five of the foregoing entries were originally canceled, and four were held for cancellation upon ex-parte reports of special agents of your office, to the effect that said entries had been made in the interest of other parties than the original entrymen; and that the remaining two entries, namely, those of John A. Marsh and Daniel Campbell were canceled because of failure of the entrymen to appear at hearings ordered upon like reports of special agents.

On June 29, 1886, said H. C. Putnam filed in this Department his application, in which he stated under oath that he was a *bona fide* purchaser for value, without notice of any defect of title; that if opportunity were afforded, he would be able to show "that the said entries were made in good faith and for the benefit of the entrymen, and were not fraudulent as alleged," and asked that a hearing be ordered to determine the truth of the charges made against the entries which had been canceled. On July 24, 1886 (case of H. C. Putnam, 5 L. D., 22), my predecessor, Secretary Lamar, directed that the hearing applied for should be had, and the same was accordingly ordered by your office, on August 20, 1886. Subsequently, upon like application, hearings were also ordered as to the four entries which were simply held for cancellation, as aforesaid.

By departmental instructions of November 17, and December 1, 1886, the local officers were directed to make one hearing of all the entries here in question, and the same were accordingly heard together. Some half dozen or more entries, in addition to these, were involved in the application of Putnam, as to which hearings had been previously had.

At the hearing herein the government was represented by a special agent of your office, and the intervenors, Swift and others, appeared by their attorneys. There was no appearance for any of the entrymen.

A very large amount of testimony was submitted by the government, relative to the manner in which the entries in question, and many others of like character, were made. Twenty of the entrymen, namely, Isham

Lloyd, George C. Lewis, Robert McEntee, Samuel P. Jarnagan, Richard Bradley (two entries), Isaiah S. Perkins, John A. Marsh, Charles W. Walker, A. R. Brown, Frank Baker, Fred. W. Kopp, Henry S. Peterson, Charles F. Flinn, Walter Schell, Thomas Burnett, Richard D. Swift, E. H. Burnett, James McKenna, F. M. Haines and Frank Stevenson, appeared in response to subpoenas issued by the government, and were examined as witnesses in the case. The others failed to appear, though most of them were personally served with notice and with subpoenas. Notice of the hearing was given by publication, as against those not personally served. In addition to the entrymen who testified, as stated, a great many other witnesses were examined on behalf of the government.

No testimony was offered in defense of the entries, but, as a rule, the witnesses for the government were cross-examined by counsel for the intervenors, at great length. The evidence introduced by those parties relates solely to matters tending to support their claim to be *bona fide* purchasers for value, without notice of any fraud in the entries, or other defect of title. They apparently made no effort to secure the attendance of any of the entrymen at the trial; on the contrary, it is shown that their attorneys repeatedly advised some of the entrymen and other persons summoned as witnesses that they could not be compelled to attend the trial.

The lands in controversy are shown to be covered by dense forest of redwood timber, which is considered to be very valuable. This timber is of immense size, the trees being estimated to be from ten to eighteen feet in diameter, and on an average of one hundred and thirty-five feet in height. It exists in great quantities in that portion of Northern California, where the entries in question are located.

The local officers, in their decision of August 10, 1887, found that the entries were fraudulent; that there was "utter want of good faith" on the part of the entrymen; and recommended "the cancellation of each and all of the entries."

On appeal by Swift and others, intervenors, your office, in effect, affirmed the judgment below, by the decision from which the present appeal was taken.

It is contended by appellants, in effect, (1) that the entries have been held as fraudulent upon insufficient proof, especially those relative to which the entrymen themselves were not examined; (2) that they (the appellants) are *bona fide* purchasers without notice of any fraud or other defect of title, and (3) that as such *bona fide* purchasers, they should be protected against the cancellation of said entries.

The second section of said act of June 3, 1878, provides:

> That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is un-

fit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same, and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

The testimony by the government abundantly shows, in my judgment, that all of these entries, except the one in the name of Daniel Campbell, as to which, for some unexplained reason, no evidence was introduced, were made in the interest and for the benefit of other parties than the entrymen themselves, in plain violation of the provisions of the statute. The testimony of the several entrymen who were examined, though varying in some particulars, is substantially the same in many material respects. It shows, among other things, that in each instance the numbers of the tract applied for were obtained from, and the filing was made at the instance of Charles E. Beach, or Harry A. Marks, or some one associated with them at the time, in the business of securing parties to make entries for redwood timber lands at the Humboldt office; that in nearly every instance the filing fees were paid by Beach or Marks; that none of the entrymen, except Richard Bradley, ever saw the lands applied for, or had any personal knowledge whatever as to the character thereof; that none of them ever made proof or payment for the land, except Bradley, who made proof under his pre-emption filing, only, and but few of them knew anything about when, or by whom the proofs and payments were made; that the numbers or description of the tracts filed for were generally obtained at the office of one Fred Bell, a notary public, in or adjoining a place in Eureka, known as "Barnum's saloon," where Beach and Marks and their associates appear to have had their headquarters; that the entryman in each case, some time after making his filing, and usually at Fred Bell's office, signed a paper, the contents of which, as a rule, he did not know, but which he supposed to be a deed conveying the land for which he had filed to one David Evans; and that each entryman, upon signing said paper or deed, received from Beach or Marks the sum of $50, except Bradley, who received $50 for making a timber land entry, and $150, or over, for making his pre-emption entry. Bradley has a written agreement with Marks, to the effect that he was to have $50 in the one case and $150 in the other. Entryman Henry S. Peterson also testified

that there was a written agreement in his case, to the effect that he was to receive $50 for making his filing. Most of the other entrymen who were examined testified, either that they were each promised the sum of $50 by Beach or Marks when they made their filings, or that they fully understood they would receive that amount of money for their services. Several of them testified that their filings were made for their own benefit, but in every case, without either proof or payment having been made by the entryman, the lands were conveyed to David Evans in the usual manner, and each entryman received his $50 as in other cases.

A great many persons not parties to this proceeding were examined as witnesses. Thirty, or more, testified, in effect, that about the time the entries in question were made, they were induced by Beach and Marks to file for lands under the aforesaid act of Congress, and that they were severally paid the sum of $50 for their services, except that in a very few instances a larger amount was paid; that they never made proof or payment for the lands embraced in their filings, nor did they know by whom such proof and payment were made; that in nearly every instance the entryman, about sixty or seventy days after having made his filing, and not infrequently within a much shorter period, was taken by Beach or Marks to Fred Bell's office in Barnum's saloon, where he signed some sort of a paper which he never read, but supposed to be a deed conveying the land for which he had filed to David Evans or some one else, at which time the $50 was paid. They also testified, either that they were promised the sum of $50 each, by Beach or Marks, when the filings were made, or that they fully understood they would each receive that amount.

The testimony further shows that in 1883, about the time these entries were being made, it was a matter of current rumor in the town of Eureka, and in the vicinity thereof, that Beach and Marks were paying men $50 each for taking up timber claims for them, and that any one could get $50 for making a timber filing by applying to Beach or Marks at Barnum's saloon. Several of the present entrymen testified that this matter was so generally understood, that it was unnecessary for them to make any express agreement as to the amount they were to receive for their services.

As already stated, a number of the parties whose entries are here involved failed to appear at the hearing, though notice was given them either by personal service, or by publication when personal service could not be had, and most of them were personally summoned as witnesses. Relative to their entries, in addition to what has already been shown as to the existing state of affairs in Eureka at the time they were made, Special Agents B. F. Bergen and Wilson T. Smith, of your office, testified to statements and admissions made to one or both of them, by the entrymen, except in the case of Daniel Campbell, generally under oath, which show that these entries were made substantially in the same

manner, as were the entries of the parties who appeared and testified in the case. The filings were made at the instance of Beach or Marks or some one associated with them, who paid the filing fees; the entrymen never made proof or payment; they never saw the land filed for, nor had any personal knowledge of its character; and, as in other cases, they received the amount of money promised them, or which they understood they would get, upon signing a paper or deed, usually at Fred Bell's office in Barnum's saloon. The testimony of Bergen and Smith is corroborated as to several of the entrymen by parties in the presence of whom their statements and admissions were made.

The testimony also shows that Beach and Marks had several parties in their employ, who acted as proof witnesses, and made the proofs for them in the various cases; that for such services the parties were usually paid one dollar apiece for every proof submitted; that upon proof being made the lands were paid for by Beach or Marks, the former having paid into the land office as much as $6,000 on one occasion, during the time these entries were being made; that Beach frequently made payments on account of lands entered by other parties, varying in amount from the price of one claim to $6,000; that Beach and Marks also had persons in their employ, whose business it was to induce men to make timber filings for them, at the price of $50 each, and for every man so obtained the sum of $5.00 was paid to the party who secured him; that a number of persons were approached by Beach or Marks and asked to make timber filings for them, but who declined to do so; that Beach and Marks were men of small means and wholly unable to make the payments they did, on their own account.

Nearly all of the entrymen who were examined testified that they were not made acquainted with the contents of the statements to which they were sworn when their original entries were made; that they did not read the statements, nor were the same read or explained to them by anyone else.

It further appears from the original deeds of conveyance, or duly certified copies thereof, filed in the record, that very shortly after the entries in question were made, the lands embraced therein were conveyed by the several entrymen, to David Evans, except in one case where the first conveyance was made to Beach, who shortly afterwards conveyed to Evans; that Evans, immediately after the several conveyances to him, reconveyed the lands to one James D. Walker; and that Walker, by deed dated March 13, 1885, conveyed an undivided one-tenth interest therein to the appellant, H. C. Putnam, and by deeds dated respectively July 16, 1885, October 9, 1885, and February 17, 1886, conveyed the remainder of said lands to William Henry Swift, Turlington Walker Harvey, and Robert S. Walker, trustees, the other appellants herein.

It is evident to my mind from the testimony that some of the deeds from the original entrymen to Evans were prepared and signed before

proof and payment had been made for the lands intended to be conveyed thereby, and that in such cases the deeds and certificates of acknowledgment thereto were dated so as not to show the true state of the facts. It is also evident that Beach and Marks were either employed by Evans to procure men to make the entries in question, and many others, or were partners with him in the business, and that they employed other parties to aid them in the execution of their purposes. Beach and Marks were present at the hearing, but refused to testify, although several times requested to do so, and it is shown that they were at the time under indictment in the United States court for their conduct in connection with some of the entries in question. It is also shown that an attempt was made by Evans at Eureka, in December, 1883, to bribe Special Agent Willson T. Smith, who was at that time engaged in investigating these and other entries with a view to presenting an adverse report thereon.

The foregoing is believed to be a fair summary of the evidence submitted on behalf of the government, as far as deemed necessary to an intelligent understanding and proper disposition of the present controversy.

The evidence clearly shows, in my judgment, nothing having been produced in contradiction thereof by the defendants, or the intervenors, that the entries in question, except in the case of Daniel Campbell, were made by the several entrymen, not for their "own exclusive use and benefit," but in the interest and for the benefit of David Evans and other parties associated with him in a bold and deliberate attempt to secure title from the government to large bodies of these valuable redwood lands, in direct violation of the express provisions of the statute under which the entries were made. It is true that, under ordinary circumstances, no very great weight could reasonably be given to the testimony of the original entrymen, who, when they took the necessary steps to procure their entries, appear to have each filed the sworn statement required by the statute. If they testified truthfully as witnessess in this case, they wilfully swore falsely when their original written statements were filed, unless it be true that they did not know the contents of such statements. In view, however, of the great amount of other evidence in the case, all strongly corroborative of the present testimony of these entrymen, there can be no reasonable question, in my opinion, that they told the truth when on the witness stand, and that they either deliberately swore falsely when their original written statements were filed, or were misled and deceived by Beach and Marks into swearing to such statements without knowing the contents thereof. It is my opinion that in most cases they were so deceived, and that they really did not know what they were doing. The evidence shows that there existed at Eureka, about the time these entries were made, a most deplorable condition of affairs, brought about by the operations of Evans, Beach and Marks, and other parties employed by, or associ-

ated with, them in the execution of their unlawful purposes. Honest men were deceived by these persons as to their rights; aliens temporarily stopping at Eureka were induced to declare their intention to become citizens so as to enable them to make timber filings, and the whole vicinity appears to have been literally scoured for the purpose of obtaining men who were willing to make timber entries and accept the sum of fifty dollars each for their services.

It is contended by counsel for the appellants that the testimony of special agents Bergen and Smith, and other witnesses, relative to the statements and admissions made to them by the several entrymen (except Daniel Campbell, who did not appear at the hearing) is not admissible. I do not think the point is well taken. The entrymen are parties to the record, and the real defendants against whom these proceedings were instituted. It must be remembered that the government was without power to have compelled their attendance at the trial as witnesses, and I know of no rule of law governing the admissibility of testimony which would exclude statements and admissions made by them against the validity of their entries, especially in view of their failure, and in most cases, their absolute refusal to appear and testify in relation thereto. That the intervenors have not had the opportunity to cross-examine the entrymen is in great measure, their own fault, inasmuch as the record shows that their attorneys at the trial not only advised that the entrymen could not be compelled to attend and testify, but also took active measures to secure, and did secure, the defeat of the government in its effort to obtain compulsory process against them and other witnesses in the State courts of California. They can not now be heard to complain that they have not been allowed the privilege of cross-examination.

It is my judgment, therefore, that the fraudulent character of all the entries in question, except the one in the name of Daniel Campbell, is abundantly proven.

The defense interposed by the intervenors, namely, that they are *bona fide* purchasers without notice, and as such are entitled to protection under the law, is next to be considered. The testimony submitted by these parties shows that James D. Walker was, in 1882 and 1883, a member of the firm of Faulkner, Bell and Co., of San Francisco, at that time composed of himself, Thomas Menzies and W. B. Harrison, which had been, for many years previously, doing business as merchants, agents and brokers, having at various times, made investments in the United States for parties in Scotland and elsewhere; that David Evans was a member of the firm of J. Russ and Co., also of San Francisco, composed of J. Russ, C. H. King and himself. Russ and King, it appears, resided in San Francisco, but Evans resided at Eureka. Some time in the spring or early summer of 1882 a broker in San Francisco, whose name is not stated, asked Walker if he wanted to purchase some redwood timber lands, to which he replied that he would do so, if every-

thing was satisfactory. Walker was thereupon introduced by the broker to C. H. King, of the firm of J. Russ and Co. King told him there was a large body of redwood timber lands in Humboldt county that would soon be offered for entry; that his firm had dealt largely in such lands, but did not, at that time, have the money to purchase or develop these lands; and the proposition was made to Walker that he and his friends should buy the lands and allow King's firm (J. Russ and Co.) an interest therein by way of a loan. King further represented that his firm was well known in the district, and was in a position to acquire the lands very readily; that they would be quickly taken up if it were known that his firm was a buyer. Walker thereupon sent an expert lumberman to examine the lands, and his report was so favorable that, after several interviews with King, it was finally arranged between them that Walker should buy of J. Russ and Co. fifty thousand acres at seven dollars per acre.

Thereupon, in the early fall of 1882, Walker went to Edinburgh, Scotland, and on October 23, of that year, entered into a written agreement or contract with certain Scotch parties, by which the latter agreed to make a purchase of fifty thousand acres of redwood timber lands in Humboldt county, California, at the price of seven dollars per acre, and to provide the necessary funds to make such purchase; that the title to the lands should be taken in the name of Walker, as trustee for the Scotch parties; that upon acquiring said lands, Walker should forward to William John Menzies, of Edinburgh, one of the parties to the agreement, the certificate of C. Temple Emmett, a lawyer of San Francisco, to the effect that he had acquired a good title, accompanied by the certificate of one James Townsend as to the character of the lands, whereupon he would be entitled to draw upon said William John Menzies for the amount of funds necessary to pay for the lands acquired, at the price named, not to exceed fifty thousand acres, it being further agreed by the Scotch parties that they would severally contribute the amounts subscribed by them for the purpose of meeting the drafts on said Menzies; that after the lands had been acquired and paid for, there should be formed in Scotland a company, for the purpose of taking the same and providing the necessary funds to develop them; that in forming such company the subscribers to the agreement should be entitled to preferred stock, to the extent of the several amounts originally subscribed, and that any profits which might arise in floating such company should be divided, one half to Walker and the other half to the Scotch parties.

It is stated by Walker in his testimony, taken in July, 1887, in London, England, where he then resided, having removed thereto from California, that after said agreement was made he cabled his firm (Faulkner, Bell and Co.) to accept the proposition of J. Russ and Co., and he did not return to San Francisco until November, 1882. He further states, in substance, that the price of seven dollars per acre was agreed upon

by King and himself, without any knowledge on his part of the price the government charged for the lands; that he never knew what price Russ and Co. paid, and was always informed by them that they made but little profit in the transaction; that he had no knowledge how, or by what means, Russ and Co. were to purchase or acquire the lands; that there was no contract to furnish any particular lands, but simply redwood lands, on Redwood Creek in Humboldt County, to the extent of fifty thousand acres; that when he went to Edinburgh and got the Scotch parties together, he informed them of the offer that had been made him, and what he knew about redwood lands, stating to them that as they were apprehensive as to the outcome of some previous investments made in the United States through his firm, he thought they had a good chance to make something out of the purchase of these lands, which he would sell them at just what they were to cost him, with the understanding that he was to have one-half the profits that might accrue from the floating of a company to take and develop the lands; that before going to Edinburgh he had consulted C. Temple Emmett, one of the most prominent lawyers in San Francisco, and a man of high reputation for integrity, who informed him that the title to the lands, if purchased, as proposed, would be good; that he was unacquainted with the timber land act, knew nothing about the manner in which the lands were to be entered, and only understood that after they were entered, Russ and Co. would become purchasers; that Russ and Co. were to acquire a good title to the lands and to turn that title over to him; that he stated all the facts to the Scotch parties, who thereupon accepted his proposition, which resulted in the agreement aforesaid; that, subsequently thereto, H. C. Putnam, of the State of Wisconsin, became a contributor to the fund and was allowed a one-tenth interest in all the lands purchased; that after his return from Edinburgh he frequently consulted with Mr. Emmett, and took no step in the matter without his advice and approval; that deeds were received from Russ and King and he was then told that David Evans was a member of their firm and held the titles for the firm; that he did not know Evans, and had never met him or had any communication with him, all his business with J. Russ and Co. having been done with either Russ or King; that when he learned he was not to get patents for the lands when paid for, he consulted Mr. Emmett, who informed him that after the receipt was issued by the receiver, the issuing of patent was a mere formality and would follow in due time as a matter of course; that Emmett pointed out to him several cases wherein the deed had been made before the issue of the receiver's receipt, but explained that under certain regulations of the Land Department this did not constitute a defect in the title, and that as the deed was always made after the issue of the receiver's receipt, and was accompanied by the receipt, he could safely take such title; that the deeds and papers were all submitted to Mr. Emmett, and were only accepted in accordance with his opinion

and advice, the question of title being left entirely to him; that the lands were subsequently conveyed to Swift, Harvey and Walker, trustees, in consequence of a disagreement between the Scotch parties and himself; that he executed a deed directly to Putnam for his interest as a matter of justice to him, inasmuch as he was not concerned in the difficulty with the Scotch parties; that in August, 1883, he parted with any interest then in him, or that he might acquire in connection with the purchase of said lands and has now no interest whatever therein. He further stated:

I knew nothing whatever of the manner in which Mr. Evans acquired the title of the lands beyond what was disclosed by the title papers which were presented to me. I never knew of Beach and Marks. I saw Marks for the first time in September, 1883, and never previously had heard of him. I have never met Beach. Some time after the lands had been obtained by me and paid for, I saw some charges in the newspapers that Redwood timber lands in Humboldt county had been fraudulently entered. . . . . I had no knowledge or notice of any agreement or arrangement to enter the lands or any of them and then sell them after the entry was made. I knew nothing whatever about the entering of the lands. I purchased the lands from Russ and Co., and told Mr. Emmett everything I knew about the matter and submitted all papers of every kind connected with the lands to him, and trusted to his legal advice in regard to the title, and in fact I did not accept any of the lands until Mr. Emmett had approved the title . . . . I was not a partner, nor was I interested, either directly or indirectly, with Russ, King or Evans, or either of them, in the acquisition or purchase of any lands from the United States.

It is further shown that as fast as the lands were conveyed by Evans to Walker and the titles accepted by the latter, drafts were drawn on the Scotch parties by Faulkner, Bell and Co., whereby the funds to pay for the same were secured. In this manner the firm of J. Russ and Co. was paid for the lands, at the rate of seven dollars per acre.

On July 7, 1885, the Scotch parties organized the Humboldt Redwood Company (limited) for the purpose of taking these lands, and they are now held, except the one-tenth interest of Putnam, which is in his own name, by the said Swift and others, trustees, under the aforesaid deeds from Walker, for the benefit of that company.

There is nothing in the record to contradict the testimony of Walker. On the contrary, he is corroborated in many particulars by the testimony of Sir George Warrender, and others, of the Scotch parties, whose depositions were taken in Edinburgh, in 1887, and are now on file in the record. Most of these parties were subscribers to the fund which was raised under the agreement of October 23, 1882, to pay for the lands, and were stockholders in the Humboldt Redwood Company when their depositions were taken. Their testimony is to the effect that they had no knowledge whatever of any fraud or irregularity of any kind or description in the manner in which the title to the lands in question was obtained, until after their several subscriptions to the fund aforesaid had been fully paid, or their respective interests in the lands had been acquired; that in making the agreement of October 23, 1882, they

relied entirely upon the representations made to them by Walker, in whose integrity they had the utmost confidence; that they had no knowledge of the manner in which title to the lands was to be acquired by Walker, the understanding being that he was to be their vendor and was to acquire a good title before they should be called upon to pay for the lands; that they never knew of Evans having had anything to do with acquiring the title from the government until after the lands had been obtained and paid for, and that they never knew or heard of Beach or Marks until after the institution of the present proceedings. The testimony of Putnam is also to the effect that when he acquired his interest in the lands, he had no knowledge whatever of any irregularity or defect in the title, and that he first learned of such irregularity in May, 1866.

Conceding, *arguendo*, that the intervenors had no actual knowledge of the fraudulent character of said entries, are they entitled to the lands on the claim that they are "bona fide purchasers"? I think not.

The act under which the entries were made contains a provision, as we have seen, that if any person taking the oath therein prescribed

> shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void.

The pre-emption law (section 2262 R. S.) contains a similar provision, except it is not therein stated that the person swearing falsely shall "be subject to all the pains and penalties of perjury."

Many cases have arisen before this Department and in the courts, under the general land laws, involving the rights of purchasers before patent, without notice of defects in the title, subsequently found to have existed at the time of the purchase. In such cases, as a general rule, it has been held, in effect, (1) that the action of the local officers in accepting proof and payment, and issuing duplicate receiver's receipt, is not a final adjudication in favor of the entryman, and does not preclude the Land Department from subsequently inquiring into the good faith of the transaction, and canceling the entry, if found to have been obtained through fraud, or that the entryman has failed in any particular to comply with the requirements of the law; (2) that, even when an entry is made in good faith, and the law in all respects has been complied with, the entryman, by his receiver's duplicate receipt, takes only an equity, the legal title to the land remaining in the government until patent issues; and (3) that a purchaser prior to patent takes only the equity of the entryman, is charged with notice of the law and the supervisory control of the Land Department over the action of the local officers, and stands in no better position than the entryman himself. A long line of decisions support these propositions as applied to the public land laws as a whole, and in the later cases they have been adhered to with marked uniformity. I need only refer to the cases of

Smith *v.* Custer (8 L. D., 269); Travelers' Insurance Company (9 L. D. 316), United States *v.* Montgomery, *et al.* (11 L. D., 484); Gates *v.* Scott (13 L. D., 383).

Counsel for the appellants do not assail the correctness of the principle announced in those authorities, but, conceding the same to be correct in a general way, contend that Congress has engrafted a modification of that *general* doctrine upon the pre-emption law, and upon the timber and stone act now under consideration. Their contention, substantially stated, is that, whilst the general doctrine is correct in its application to all other land laws except these two, and whilst it is equally correct even as to these two laws in all matters involving jurisdiction to sell the lands entered, or, where the proof of compliance with the conditions precedent to entry are either lacking or false; yet that Congress has modified the doctrine and made an exception of its application to those matters of pure conscience, which rest wholly upon the oath of the entryman and relate to matters either entirely within his own personal knowledge, or about which the public has no means of informing itself: In other words, that in all cases where the affirmative acts required of the entryman have not been performed, or the land entered, for any reason, was not of the character subject to entry, it is conceded that it was not the intention of Congress to protect purchasers after entry and before patent, without knowledge in fact of such defect in the entry; but that, in cases arising under either of these two laws, wherein there is nothing on the ground or in the record to advise purchasers before patent of the existence of fraud in the entry, or of non-compliance with the law, and the only defect arises from the false oath of the entryman as to matters of personal conscience and touching his antecedent intent or concealed purpose to violate the law, it was the intention of Congress to protect innocent purchasers in all such cases.

The case of Smith *v.* Custer, *supra*, was one which involved this precise question. It is asserted, however, by counsel for appellants, that no such case has, as yet, arisen in the courts. In Smith *v.* Custer the controversy arose under the pre-emption law, and was based upon the false oath of the entryman. The affidavit prescribed by the statute had been made, but subsequently to the entry it was ascertained that prior to making final proof the entryman, Custer, had made an agreement with one Cavanaugh, to convey the land to him upon receipt of final certificate from the local officers. By means of several conveyances, the land had passed into the hands of a purchaser having no knowledge of the existence of said agreement. It was held by the Department that such purchaser, having taken the title, such as it was, which was evidenced by the receiver's receipt to the pre-emptor, was not entitled to protection as a *bona fide* purchaser.

It is to be observed that the oath required to be taken by an applicant to purchase under the timber and stone act, is not confined to mat-

ters solely within his own knowledge, or about which the general public could have no means of informing itself; such as, that he has made no other application under the act, does not apply to purchase on speculation, but for his own exclusive use and benefit, and has made no agreement or contract in any way or manner, by which the title should inure, in whole or in part, to the benefit of any one other than himself; but it also covers matters relating to the character and condition of the land, about which all persons would have an equal opportunity with the applicant to inform themselves. He is required to swear, among other things, that the land is unfit for cultivation, is valuable chiefly for its timber or stone, is uninhabited, and contains no improvements, except for certain purposes, save such as were made by or belong to himself.

It is further to be observed that, under the act, if it shall be ascertained that the person taking such oath has sworn falsely "*in the premises*," that is, with reference either to the character or the condition of the land, as to which the general public has had equal opportunity with himself to become informed, or with reference to matters about which the public has had no such opportunity, the penalties and forfeitures prescribed are visited upon him, and any grant or conveyance which he may have made, with the exception stated, is declared to be null and void, alike in either case. The statute makes no distinction as to the consequences of the false swearing of the entryman; they are the same whether the oath be false in the one particular or the other.

To sustain the contention of counsel, the statute would have to be construed to mean that where the applicant had sworn falsely as to the character or condition of the land, and subsequently to entry and before patent had sold to a party having no knowledge of the false oath, such party would not be protected as an innocent purchaser, whereas, if the entryman had sworn falsely as touching some antecedent hidden intent, or concealed purpose on his part to violate the law in making the entry, and subsequently thereto and before patent had sold to a party having no knowledge of the false oath, in such case it was the intention of Congress to protect the party buying, as a "*bona fide* purchaser": In other words, that in the latter case the transferee would be a "*bona fide* purchaser," within the meaning of that term as used in the statute, while in the former he would not. In my judgment, there is nothing in the statute to warrant such a construction. There is nothing to indicate a purpose on the part of Congress to distinguish between the two classes of purchasers mentioned, or to constitute the latter class "*bona fide* purchasers," within the legal import of that term.

A *bona fide* purchaser of land is one who is the purchaser of the legal title, or estate; and a purchaser of a mere equity is not embraced in the definition. Boone *v.* Chiles (10 Peters, 177); (3 Ops. Att'y Gen'l, 664). This was the well-defined meaning of the term long before the enactment of the statute under consideration, and, under a well established rule of construction, unless it is apparent that Congress intended

it to have a different meaning, it is to be presumed to have been used in its technical sense. There is nothing in the present statute to indicate that Congress used the term in any other than its technical sense. Indeed, it may properly be considered as having attained a technical meaning as used by Congress in previous legislation relating to the disposal of the public lands. As long ago as 1841, Attorney-General Legare (3 Op'ns, *supra*), in considering a case which arose under the pre-emption act of 1838 (1 Lester, 49), involving the use of the term in that act, and the right of an assignee of a pre-emption claimant thereunder, held:

> The assignee took only an equity, and he took it of course subject to all prior equities. The patent, it is needless to say, is the only complete legal title under our land laws. But to protect a purchaser under the plea of a purchase for a valuable consideration, without notice, he must have a complete legal title.

To the same effect is the case of Root *v.* Shields (1 Wool., 340), decided in 1868 by the late Justice Miller of the supreme court. That case arose under the pre-emption act of 1841, which is substantially the law as interpreted in the Revised Statutes. The transferees of Shields, the pre-emptor, whose entry was declared to be void, claimed protection as *bona fide* purchasers. In denying that claim, the court said:

> Until the issue of patent, the legal title remained in the United States. Had his entry been valid, Shields would have taken only an equity. His grantees took only an equity. They did not acquire the legal title. And in order to establish in himself the character of a *bona fide* purchaser, a party must show that in his purchase and by the conveyance to him, he acquired the legal title.

It thus appears that prior to the passage of the act under consideration (June 3, 1878,) it had been determined, both by executive construction and judicial interpretation, that the term "*bona fide* purchaser," as used in the pre-emption law, was so used in its technical sense, or with reference to its previously-known and well-defined legal import. It is therefore to be presumed, nothing appearing to the contrary, that Congress in making use of the term in the timber and stone act did so in the light of such construction, and must have intended its use in the same sense as in the pre-emption law, namely, that to be a *bona fide* purchaser within the protection of the statute, a party must have acquired by his purchase and the conveyance to him a complete legal title.

Walker, by his purchase of the lands in question from J. Russ and Co., and the conveyance to him by Evans as the representative of that firm, took only an equity. He did not obtain the legal title. Patents never having been issued, the legal title still remains in the United States. Walker purchased for the Scotch parties with full knowledge of that fact, as is shown by his own testimony. He is charged with notice of the law, and the supervisory control of the Land Department over the action of the local officers in allowing the entries to be made. He is not, thereofore a "bona fide purchaser" within the meaning of that term as used in the statute. The intervenors herein stand in no

better position. By the conveyance to them from Walker, they took only such title as the latter had. It is my judgment, therefore, that the entries in question, except that of Daniel Campbell, were properly canceled.

The recent decision of the supreme court in the case of the United States *v.* David E. Budd and James B. Montgomery (143 U. S.,) has not escaped my attention, and in my judgment, it does not conflict with the views herein expressed. That case arose upon the application of the government to set aside a patent issued to Budd, for land which was subsequently conveyed to said Montgomery upon the ground that the land was not timber land within the meaning of said act, and that the title to it was obtained wrongfully and fraudulently, and in defiance of the restrictions of the statute, and the court held that the act provides for the sale of lands valuable chiefly for timber, but unfit, at the time of the sale, for cultivation, and that the evidence submitted by the government in that case was not sufficient to sustain the charge of the United States that the patentee had wrongfully and fraudulently made an agreement with his co-defendant by which the title he was to acquire from the government should inure to the benefit of such co-defendant. In the case at bar, however, the decision of the Department is not based upon the character of the land, whether chiefly valuable for timber or not, but upon the sufficient and overwhelming proof of fraud in the making of said entries, which renders it necessary that the same should be canceled. In the case last cited the court said "But after all, the question is not so much one of law for the courts after the issue of the patent, as of fact, in the first instance, for the determination of the land officers."

The claim of counsel that the entries should be submitted to the board of equitable adjudication for final action thereon cannot be sustained. Rule 15, adopted by that board in 1847, within the spirit of which it is claimed these entries are embraced, has long since become obsolete, which fact furnishes a sufficient answer to the contention of counsel, even if it be conceded that said rule, when adopted, was not entirely without the contemplation of the statute creating said board. (See section 2450 Revised Stats.)

The judgment of your office, cancelling the entries in question, must therefore be affirmed, except as to the entry of Daniel Campbell, relative to which you are directed to make further inquiry, and if necessary, to order a special hearing in the premises; whereupon you will proceed to readjudicate the case as to that entry.

PROCEEDINGS ON FINAL PROOF—CONTEST.

NIX *v.* BRAZIEL.

The pendency of an appeal from a decision that rejects final proof, but leaves the original entry intact, does not preclude the initiation of a contest against such entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 16, 1892.

On the 15th of June, 1885, Jobe R. Braziel made homestead entry for the NW. ¼ of the NE. ¼, the N. ½ of the NW. ¼, and the SE. ¼ of the NW. ¼ of Sec. 14, T. 53 N., R. 82 W., at the Cheyenne land district, Wyoming.

He made final commutation proof before the clerk of the district court of Johnson county, Wyoming, on the 19th of January, 1886, which was accompanied by an affidavit in which he stated that he made settlement upon the land in December, 1884, and had continued to reside thereon up to the date of making such final proof, and that he had broken and cultivated fifty acres of said land.

The register and receiver endorsed upon said proof the following: "Rejected because testimony of witnesses and claimant as to residence is not satisfactory," and on the 15th of March, 1886, returned the same to Braziel, with a letter stating that such proof was rejected as not satisfactory to them. From this action on their part, he appealed to your office.

On the 28th of February, 1888, Robert L. Nix filed in the local office his corroborated affidavit of contest, wherein he alleged that Braziel had wholly abandoned the tract, had changed his residence therefrom for more than six months since making said entry, that the tract was not settled upon and cultivated by him as required by law, and that for the six months last past he had been a non-resident of the Territory of Wyoming.

The parties were summoned to appear before a notary public, named in the notice of contest, on the 9th of April, 1888, "to respond and furnish testimony concerning said alleged abandonment," with final hearing before the local officers on the 17th of that month. This notice was served upon Braziel by publication, and on the said 9th of April, Nix appeared in person and by attorney and filed affidavits of compliance with the rules of practice in the matter of posting the contest notice, and of mailing a copy thereof to Braziel in a registered letter.

Braziel made a special appearance by attorney, for the purpose of moving to dismiss the contest, and that the service be set aside, on the ground that the notice had not been posted upon the land as required by rule 14, supporting his motion by affidavits.

The notary having been commissioned to take the testimony in the case, declined to decide the motion, but continued the hearing until the next morning when additional affidavits on the question of posting the notice were filed, and the defendant's counsel appeared specially and moved to dismiss the contest because the notice of contest did not comply with rule 8 of practice, and because it did not allege or state any grounds or reasons on which a contest could be based. This motion was denied, and defendant's counsel excepted to such ruling.

The contestant then submitted his evidence, his witnesses being cross-examined at great length by defendant's counsel who introduced no testimony in support of Braziel's claim.

The testimony was not returned to the Cheyenne land office in time for the final hearing before the local officers there on the 17th of April, and a new office having been established at Buffalo, Wyoming, which district embraced the land in question, the Commissioner was directed to return the testimony to that office. This new office was opened for business on the first of May, 1888, and the testimony in the case was received there on the third of that month. On the 23d, the counsel for the respective parties appeared at the land office in Buffalo, and agreed to submit argument in the case on the first of June following. On that day, the several motions made in the case were argued, but not then decided.

No decision was reached upon these motions until the 25th of January, 1889, when they were respectively denied, and the entry of Braziel held for cancellation. From such decision an appeal was taken to your office, the defendant insisting that the contest was irregularly allowed, during the pendency of his appeal in your office from the decision of the local officers in rejecting his final proof, and asking that the judgment of the local officers in the contest proceedings be reversed, that said proceedings be dismissed, and that in other respects your decision be confined to the acceptance or rejection of Braziel's final proof.

You rendered a decision in the case on the 20th of February, 1891, in which you say:

> In view of this contest and the view I take of the law, it cannot be very material what disposition is made of the appeal of this defendant from the action of the local officers in rejecting the commutation proof, but for the purpose of making a disposition of that case I hold that the proof was properly rejected for the reasons stated by them and Jobe R. Braziel's appeal dismissed.

Braziel's appeal from the contest decision of the local officers is then considered by you, and affirmed, you also held his homestead entry for cancellation. An appeal from this decision brings the case to the Department for consideration.

The errors complained of in your opinion are enumerated as follows:

> First. In holding that any contest could be recognized by the local officers pending the appeal by said Braziel from the decision of said officers rejecting his final proof.
>
> Second. In holding the local office or your office had jurisdiction over this case,

because the notice of contest did not conform to and was not issued in accordance with the rules of practice.

Third. In holding that the notice of contest was properly posted upon the land, and in holding that the defendant has ever by his presence or otherwise waived objections as to the service of the summons in the case.

Fourth. In holding homestead entry No. 1016 for cancellation, and not rejecting the contest of said Nix.

The decision of the local officers in rejecting the final proof of Braziel, left his homestead entry intact. Had his entry been held for cancellation prior to the initiation of the contest, a different question would have been presented, and a contestant would not be allowed to step in between the claimant and the government, and secure preference rights of entry in case of the cancellation of the entry as the result of the proceedings on the part of the government. In the case at bar the government had instituted no proceedings questioning the validity of Braziel's entry. In the case of George F. Stearns (8 L. D., 573) it was held that "an application to contest an entry should not be allowed, pending proceedings instituted against the same by the government." This doctrine was repeated in Gage *v.* Lemieux (9 L. D., 66).

The question presented by the case before me was discussed and decided in the case of Clymena A. Vail (6 L. D., 833). In that case the local officers and the Commissioner had rejected the final proof submitted, and the case was pending in the Department upon an appeal from the Commissioner's decision. The decision of your office simply rejected the final proof, but did not hold the entry for cancellation, and the Department held that the application to contest was properly allowed, and that action on the final proof of the claimant would be suspended by the Department, until a decision was rendered in such contest proceedings.

At the time the contest was initiated the fact was duly established before the local officers, that Braziel was not a resident of the Territory of Wyoming, but that he resided with his family at Vernon, in the State of Texas. The notice was therefore served upon him by publication. The notice itself conforms in every particular with rule 8 of Rules of Practice, and the record in the case establishes the fact that the requirements of rule 14 were fully complied with, the affidavits filed by the defendant tending to show that a copy of the notice was not posted upon the land in controversy, being more than overbalanced by the affidavits and oral evidence of the contestant on that question. My conclusion, therefore, is that the local officers and your office had jurisdiction of the subject-matter of the controversies and of the person of the defendant, at the time you respectively rendered judgments in the case.

The fact that Braziel's residence upon the land prior to his submission of final proof, was not such as to meet the requirements of the law under which his entry was made, was found by the local officers, and concurred in by you, and as no objection is made to that part of your decision, in the appeal before me, your conclusion is considered final

on that point. The fact that he has not resided upon the land since submitting such final proof, is established by all the evidence in the case, and the contrary is not claimed in his behalf.

Being clearly of the opinion that the contest was properly allowed, notwithstanding the pendency of the appeal of Braziel from the decision of the local officers rejecting his final proof, and the allegations of the contest affidavit having been established by the evidence submitted at the hearing, it follows that the decision of the local officers in favor of the contestant was correct, and that you did not err in affirming the same. The decision appealed from is therefore affirmed.

PRE-EMPTION—SECOND FILING—FINAL PROOF.

SMITH *v.* CHAPIN.

A pre-emption filing, made in good faith by a minor, but abandoned when the defect is discovered, is no bar to a second filing.

Final proof submitted during the pendency of adverse proceedings on appeal, and prior to the amendment of rule 53 of practice, may be considered under said amendment, where due notice is given, and no adverse right is found to exist.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 16, 1892.

On the 27th of April, 1883, George W. Chapin filed his pre-emption declaratory statement for the NW ¼ of Sec. 20, T. 128 N., R. 57 W., Watertown land district, Dakota, alleging settlement on the 2d of September, 1882. At that time he was not the head of a family, nor twenty-one years of age, and his filing was therefore invalid. He was then eighteen years of age.

His disability as a pre-emptor was cured by his marriage, on the 14th of June, 1884, and on the 12th of February, 1885, he made actual settlement on the land with his wife, and within three months thereafter made application at the local land office to make pre-emption filing for the tract, which was rejected by the local officers for the reason that he had previously exercised his pre emption right. He then applied to your office for restoration thereof, serving notice of such application upon Smith, the plaintiff herein, who had made homestead entry for the land on the 28th of February, 1885. Smith moved to dismiss the application, but on the 6th of January, 1886, you canceled his declaratory statement of April 27, 1883, as illegal, without prejudice to his pre-emption right. He also appealed from the action of the local officers in rejecting his application to make filing for the land, serving notice of such appeal upon Smith. In a decision made by you on the 7th of February, 1887, you directed the local officers to accept his declaratory statement of February 12, 1885, as of the date of presentation.

Smith appealed from such decision, and on the 19th of December,

1888, your decision was affirmed by the Department. On the 26th of July, 1887, pending the said appeal by Smith, Chapin submitted his final proof, Smith protesting. A hearing was had on the 6th of October, 1887, resulting in a decision by the local officers in favor of Chapin. From this decision Smith appealed to your office, and in a decision dated November 19, 1889, you affirmed the decision appealed from, allowed the final proof of Chapin, and held the homestead entry of Smith for cancellation. The case is before me upon an appeal from your said decision, the errors alleged to exist therein being specified as follows:

1. Error in finding that Chapin was a legally qualified pre-emptor prior to date of Smith's homestead entry, and hence had the prior right.

2. Error in not finding that Chapin did not file for the land in controversy, after settlement thereon, within three months from date of becoming qualified to file a declaratory statement.

3. Error in not holding that although Chapin's settlement antedated Smith's homestead entry, he could not take advantage of such settlement unless he became a legally qualified pre-emptor prior to the date that an adverse right attached.

When Chapin made settlement upon the land with his wife, on the 12th of February, 1885, he was a qualified pre-emptor, and it is not disputed that within three months thereafter he applied to make pre-emption filing therefor. That the local officers erred in rejecting such application, on account of his prior filing, was determined by your decision of February 7, 1887, which was affirmed by the Department on the 19th of December, 1888. The doctrine of those decisions was reaffirmed in the case of Maloney *v.* Charles (11 L. D., 371) where it was held that "A filing made in good faith by a minor, but abandoned when the fact of minority is discovered, is no bar to a second filing."

The settlement of this question in favor of Chapin, disposes of all the grounds of error complained of by Smith, in your decision. Chapin was a qualified pre-emptor before any adverse right to the land attached, he made settlement upon the land prior to the date of Smith's homestead entry, and he applied to file therefor within three months after his settlement. He was a resident, and had valuable improvements upon the land at the time of Smith's entry, which facts were well known to Smith, and he has since continued to reside upon and cultivate the land.

The questions raised by the appeal being disposed of, a still further one is presented for consideration. This relates to the final proof made by Chapin in the case. In a long line of departmental decisions, which will be found in nearly every published volume, from the case of the Chicago, Rock Island and Pacific Railroad Company *v.* Easton (4 L. D., 265) to that of Bunn *v.* The Heirs of Franklin (13 L. D., 236), it has been held that final proof should not be allowed to be made, nor submitted and accepted, during the pendency of a contest that involves the land in question. Should this rule be adhered to, Chapin's final proof, made during the pendency of the contest over the land in controversy could not be accepted or acted upon, but it would be necessary to

require him to submit new final proof, after due publication of notice therefor.

The Department, recognizing the fact that this rule often resulted in embarrassment, hardship, and unnecessary expense to entrymen, whose every act was characterized by the utmost good faith, changed rule 53 of the Rules of Practice, which controlled the subject, on the 15th of March, 1892 (14 L. D., 250) by adding to said rule the following:

> In all cases, however, where a contest has been brought against any entry or filing on the public lands, and trial has taken place, the entryman may, if he so desires, in accordance with the provisions of the law under which he claims, and the rules of the Department, submit final proof and complete the same, with the exception of the payment of the purchase money or commissions, as the case may be, said final proof will be retained in the local land office and should the entry finally be adjudged valid, said final proof, if satisfactory, will be accepted upon the payment of the purchase money or commissions, and final certificates will issue, without any further action on the part of the entryman, except the furnishing of a non-alienation affidavit by the entryman, or in case of his death, by his legal representatives.

Your allowance of Chapin's final proof, in your decision of November 19, 1889, was improper, under the rule of the Department then in force. That rule remained in force until the adoption of the foregoing amendment, and ordinarily would control in the decision in this case. An examination of the circumstances under which such final proof was made shows that notice by publication was given to all the world of the time and place of making the same, and that Smith, the only party who claimed an adverse interest in the land, was specially notified to be present. He appeared and protested, and a trial was had to determine the rights of Chapin and Smith to the land. After a full hearing of all the facts of the case, and a fair consideration of the claims of the parties, the protest of Smith was overruled. Such determination on the part of the local officers was approved by you, and is concurred in by the Department. Under these circumstances, I think equity and justice will be promoted, and the rights of no one will be prejudiced, by applying the amended rule to the case, and allowing the final proof already completed to be considered by you.

My judgment, therefore, is that the homestead entry of Smith be canceled, and that the final proof already submitted by Chapin be examined by you, and if found satisfactory it will be accepted, and final certificate will issue, upon the payment by Chapin of the amount required by law, and the furnishing by him of a non-alienation affidavit as required by rule 53 of Rules of Practice, as amended. To enable you to comply with this direction, the papers in the case are herewith returned to your office.

RAILROAD RIGHT OF WAY—GRAVEL BED.

GRAND ISLAND AND NORTHERN WYOMING R. R. CO.

Selections for railroad purposes under the act of March 3, 1875, are restricted to lands immediately accessible from the company's right of way theretofore acquired.

Gravel beds, or ballast pits are not subject to selection under said act, but may be used temporarily for construction purposes.

Secretary Noble to the Commissioner of the General Land Office, April 11, 1892.

I have before me your letter of the 25th ultimo submitting a plat filed by the Grand Island and Northern Wyoming Railroad Company, showing a tract selected by it in the SE. ¼ of section 27 township 50 north, range 71 west, Wyoming, for a ballast pit, and not for station grounds as your letter states, under the provisions of the right of way act of March 3, 1875 (18 Stat., 482).

This plat is filed in place of that submitted with your letter of January 18, last, which was returned unapproved in accordance with your recommendation, because it contained more than the legal limit of twenty acres and was not on the main line of the company's road, but on the line of a "proposed track."

It appears that the area of the selection now before me is twenty acres and this fact disposes of one objection that prevailed against the plat originally presented.

A reason given in my letter of January 29, last, 14 L. D., 117, returning the objectionable plat, for not approving it, was that "such grounds must so adjoin the right of way as to enable them to be reached, by means of rail communication without traversing public lands," and it was held that they "must be so selected that they can be rendered available without transgressing the right of way theretofore acquired."

You have now, as appears from your letter transmitting the plat under consideration, withdrawn your objection to the fact that the grounds lie at a distance from the line of road, and your present recommendation is that the plat be approved. This recommendation is based on the information given in your letter that the lands the company must cross in going from its right of way to the grounds selected, are covered by valid existing entries, and further that the tract is only selected for the purpose of obtaining material for road construction.

As regards the first ground for your present recommendation I have to say that the fact that the lands which intervene between the right of way and the selection, are now shown not to be public lands, furnishes no reason for the Department to modify its previous ruling that the company must not transgress the right of way theretofore acquired under the law to reach any selection of which it may secure the approval. The customary and logical location of such grounds is along side of the line of road and immediately accessible from it, and not at a

distance therefrom. In this instance the grounds are one fourth of a mile from the line of road.

The second ground for your recommendation, viz: that the tract is only selected for the purpose of obtaining material for road construction, is borne out by the letter you enclose from the attorneys of the company, wherein they state that the tract is desired particularly for a ballast pit.

This statement of fact was not apparent when the matter was first presented, for your letter submitting the original plat stated that the tract was selected for station purposes. Your present letter repeats the statement which is however contradicted by the further explicit avowal above mentioned.

Gravel beds or ballast pits are not subject to selection under the right of way act. They can only be used temporarily for the purpose of supplying material for road construction and such use is provided for by the act, under regulations in the circular of your office dated August 25, 1885, approved by the Department. 4 L. D., 150.

The plat is herewith returned without approval.

TIMBER LAND ENTRY—IMPROVEMENTS.

WARD *v.* FITZPATRICK.

Land is not excepted from purchase under the act of June 3, 1878, by the improvements of one who is not asserting a claim to said land under any law authorizing the occupancy thereof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 18, 1892.

E. H. Ward has appealed from your decision of November 13, 1890, dismissing his protest against the application of John W. Fitzpatrick to make timber land entry of the SE. ¼ of the NE. ¼ of Sec. 30, T. 34 N., R. 6 E., Susanville land district, California.

The protest was based upon the ground that there were upon the tract, at the date of the application to enter "a number of watering troughs and more than a fourth of a mile of fencing . . . . . Said fencing formed a part of an enclosure on said land and on land adjoining."

A hearing was had, at which it was shown that the fence and watering troughs were placed upon the land, several years before, by the cattle company of Cone and Ward, who herded sheep, for three or four months during the year, upon this tract, together with several thousand acres more of government land in the vicinity.

The local officers held that because of the "improvements" named the tract in question was not subject to entry under the timber-land act of June 3, 1878 (20 Stat., 89).

The applicant appealed to your office, which held that—

The improvements upon the land in dispute are not of such a character as to withdraw the land from entry. To hold otherwise would be to decide that Cone and Ward could, by their improvements, defeat the sale of all the thousands of acres of government land used by them as a ranch, and enable them to use and hold these lands indefinitely, without any effort to purchase or enter the same, to the exclusion of *bona fide* purchasers.

The "improvements" which, according to the second section of the act, except timber land from entry under the timber-land act, are those referred to in the first section of said act, which provides—

That nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any *bona fide settler*, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by said States, under any law of the United States donating lands for internal improvements or other purposes.

The written statement which the second section of the act prescribes shall be filed must show that the tract—

Contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant.

Cone and Ward, who herd sheep for three or four months of the year upon several thousand acres of land in this vicinity, including the tract in controversy, are asserting no claim to the latter "under any law of the United States." The watering troughs and fencing placed upon the tract by them are not improvements by a "bona fide settler;" neither are they "such as were made by or belong to the applicant." They are not "mining improvements," nor were they made "for ditch and canal purposes." They are, therefore, not of such a character as to except the tract from entry under the timber-land law.

The tract in question was selected by the State of California as school land in September, 1884, and a short time thereafter, the protestant claims, he made application to the state for the same, and paid the first installment of twenty per cent of the price, and the first year's interest. A reference to the records of your office shows that said tract is one of a considerable number that had been selected by the state, which selections were canceled by your letter of June 4, 1885,—

Being illegal, from the fact that they were based upon deficiencies in fractional townships caused by a portion of the land being swamp or overflowed, also upon deficits which have been satisfied by prior selections approved to the State.

From said cancellation the state has never appealed, and the decree of cancellation long ago became final.

There remains no reason why Fitzpatrick's application to enter should not be granted. Your decision dismissing the protest is affirmed.

TIMBER CULTURE APPLICATION—REPEALING ACT.

THOMAS M. SPARROW.

A timber culture application that is not received at the local office until after the repeal of the timber culture act, is not a "lawfully initiated" claim protected by the repealing statute.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 18, 1892.

Thomas M. Sparrow has appealed from your decision of June 19, 1891, sustaining the action of the local officers in rejecting his application to make timber-culture entry of the S. W. ¼ of Sec. 6, T. 19 S., R. 27 W., Wa-Keeney land district, Kansas.

Applicant alleges that he made the application, with the other entry papers at Dighton, Kansas, on March 3, 1891; that it reached the local office on March 5; and that it was rejected because you had on the 4th of that month instructed the local officers to allow no more timber-culture entries—the timber-culture law having been repealed on March 3, 1891, (26 Stat. 1095).

He alleges that he had "lawfully initiated" a timber-culture entry prior to the passage of the act, and that therefore the local officers and your office were in error in rejecting his application.

The question as to what constitutes the "lawful initiation" of a timber-culture entry is fully discussed in the case of August W. Hendrickson (13 L. D., 169). It is clear that the applicant had not "lawfully initiated" a timber-culture entry at the date of the passage of the repealing act.

Your decision is affirmed.

SCHOOL INDEMNITY—HOMESTEAD SETTLEMENT.

FOUNTAIN *v.* STATE OF CALIFORNIA.

An intervening school indemnity selection does not defeat the right of a homesteader, who settles prior to survey, but fails to make entry within the statutory period.

Acting Secretary Chandler to the Commissioner of the General Land Office, April 18, 1892.

With your letter of January 27, 1891, you transmitted the appeal of Joseph Fountain from your decision of December 19, 1890, holding for cancellation the homestead entry of said Fountain, for the NW. ¼ of NE. ¼, Sec. 34, T. 14 N., R. 1 E., Humboldt, California, by reason of a prior State selection for said tract which was authorized by your decision of December 19, on the appeal of Marcus J. McNamara and others.

It does not appear from the record before me when the State selection was made, but, as the survey of said section 34, T. 14 N., R. 1 E., was not made until 1888, the selection could not have been made prior to that time.

It is true that Fountain's entry was not made until November 13, 1889, which you state was subsequent to the filing of the State's application, but he made final proof upon said entry May 10, 1890, and received final certificate. In said proof it was shown that he first settled upon the tract November 1, 1884, and on the 15th of that month he moved his family upon it and camped; on the 25th of December thereafter, he built a house, and has made an actual and continuous residence upon said tract with his family ever since.

It is true that the claimant did not make his entry within three months from the filing of the township plat, but the failure to comply with the law in this particular could only forfeit his right in favor of the next settler in the order of time, who had complied with the law.

The selection of the State was therefore subject to the right of the claimant, and it should be called upon to show cause why the selection as to this tract should not be canceled. If it fails to show cause, you will cancel the selection, and take such action upon the final proof of Fountain as may be proper.

Your decision is reversed.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT—FILING.

MARY J. FLIPPEN *v.* SOUTHERN PACIFIC R. R. CO.

During the pendency of an appeal from the rejection of an indemnity selection no rights can be acquired to the land involved by settlement or filing, and a filing allowed for land in such status should be suspended, and no action taken thereon until final disposition of the application to select.

Secretary Noble to the Commissioner of the General Land Office, April 20, 1892.

I have considered the case of Mary J. Flippen *v.* Southern Pacific Railroad Company on appeal by the former from your decision of November 15, 1890, rejecting her application to transmute to homestead entry her pre-emption filing for the E ½ NE ¼ of Sec. 22, the SE ¼ of the SE ¼, Sec. 15, and NW ¼ of the NW ¼, Sec. 23, T. 25 S., R. 30 E., M. D. M., Visalia, California, land district.

The tracts in sections 15 and 23 lie within the indemnity limits of the grant to the Southern Pacific Railroad Company, and in 1885, prior to the settlement of Mrs. Flippen, the railroad company applied to select these in lieu of land lost within the primary limits of its grant. The applications to select, it appears, were rejected, and an appeal was taken to your office. Pending this appeal, Mrs. Flippen settled upon the land

and filed pre-emption declaratory statement for it, and afterward she applied to transmute her filing to homestead entry. The company filed an objection to this, and the local officers rejected her application, from which action she appealed to your office. On November 15, 1890, you sustained the local officers, affirmed their decision and rejected the application to transmute, from which action she appealed to the Department.

It is useless to discuss the effect of the withdrawal of the land. The fact that the company had an application to select pending before the Department, was sufficient to prevent Mrs. Flippen from acquiring any right to the land thus selected until that matter was disposed of.

It was said in Southern Pacific R. R. Co. *v.* Nancy A. Flippen (12 L. D., 18) "The proper practice is to suspend the filing and proof until the final disposition of the appeal of said company now pending before your office. Mrs. Flippen, however, may be allowed to intervene under the rules of practice." In that case a pre-emption filing had been allowed and final proof had been submitted while an application to select the land as indemnity was pending on appeal before your office. The rule is equally applicable to the case now under consideration, where a pre-emption filing had been allowed and an application to transmute the same to a homestead entry presented while the railroad company's claim to the land as indemnity was pending in your office. Mrs. Flippen's application to transmute, and her pre-emption filing will remain suspended until the final disposition of the railroad company's application which should be considered with the least possible delay. The decision appealed from is accordingly modified.

OKLAHOMA LANDS—TOWNSITE LAWS.

JAMES T. FARRALL ET AL.

Lands acquired from the Sac and Fox Nation under the agreement approved February 13, 1891, and included within a homestead entry, may be purchased for townsite purposes under the second proviso of section 22, act of May 2, 1890.

Payment for such land should be made either in currency, or by draft on New York, exchange paid.

Secretary Noble to the Commissioner of the General Land Office, April 20, 1892.

I am in receipt of your letter of March 21, 1892, transmitting for my consideration the final proofs and triplicate plats of James T. Farrall and Etta B. Beard, née Ray, made and submitted under the provisions of the second proviso of section 22, of the act of May 2, 1890, covering the SW. ¼ and NW. ¼ of section 19, T. 10 N., R. 4 E., respectively, Oklahoma City, Oklahoma.

These lands are portions of the tract acquired from the Sac and Fox Nation of Indians and opened to settlement at noon on the twenty-second day of September, 1891.

By the seventh section of the act ratifying the agreement made with said Indians, approved February 13, 1891 (26 Stat., 759) said lands were made subject to disposal "to actual settlers only, under the provisions of the homestead laws."

You express the opinion that no portion of said lands can be entered under any of the Oklahoma townsite laws.

The first question therefore to be determined is this: Can an entry be made on these lands under the second proviso of section 22 of the act of May 2, 1890 (26 Stat., 81).

This question was discussed at length in an opinion rendered October 12, 1891, by the Assistant Attorney General, assigned to this Department, and he held that the lands obtained from the Sac and Fox Nation of Indians, were subject to entry under the provisions of the act in question. A copy of this opinion was sent to the United States district attorney for Oklahoma, on October 17, 1891, with a statement that in view of the fact that the question had not been fully heard before the Department, I did not deem it proper to formally adopt the same, or to consider it binding upon myself, in the event of a conflict of opinion.

Since that date no argument has been advanced in opposition to the views taken by the Assistant Attorney General, and upon further consideration of the case, I am of the opinion that the views expressed by that officer are correct, and it is therefore held, that entries of the lands in question may be made under the second proviso of section 22 of the act of May 2, 1890.

* * * * * * *

As you have expressed no opinion as to the sufficiency of the proofs submitted by the applicants, I herewith return the papers for such action as may be deemed proper in the premises, especially calling your attention to the affidavits of contest filed against the entry of Etta B. Beard, also calling your attention to the manner of payment for the lands in question.

Said payment should be made either in currency, or by draft on New York exchange paid, and not by cashier's check on a bank in Arkansas City, Kansas.

CONTEST—RELINQUISHMENT—SECOND CONTESTANT.

BARNABY *v.* LAZIER ET AL.

A relinquishment filed during the pendency of a contest, and as the result thereof, inures to the benefit of the contestant, and excludes all rights under the subsequent application of another to proceed against the entry in question.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 20, 1892.

I have considered the appeal of Healy A. Watuston from your decision on February 24, 1891, in the case of Nelson Barnaby *v.* George B.

Lazier, involving the latter's entry under the homestead law, for NW. ¼, Sec. 23, T. 63 N., R. 11 W. Duluth, Minnesota.

Defendant made entry of said tract February 3, 1887, and on March 13, 1888, Barnaby filed affidavit of contestant against the entry alleging that the defendant had never settled upon or cultivated any portion of the S. ½ of NW. ¼ and NE. ¼ of NW. ¼ of said section 23, but had wholly abandoned the same.

May 1, 1888, the day set for the hearing, both parties appeared with counsel, defendant moved to dismiss the contest on the ground that the affidavit was void, it failing to describe all the land in said entry; this motion was overruled by the local officers, and the contestant submitted testimony to show abandonment by the homestead party, the defendant offering no testimony in defense.

The local officers sustained the contest, whereupon the defendant appealed. On December 19, 1890, you decided that the overruling of defendant's motion was in error, and therefore sustained the appeal, remanding the contest affidavit as a basis for a new hearing, instructed the local officers to allow thirty days within which to file a new or amended affidavit of contest and issue new notice of hearing in the case.

December 26, 1890, Healy A. Watuston filed application to contest said entry, asking that notice of contest be issued, which was refused by the local officers for the reason that you had on the 19th of the same month, remanded the former contest by Barnaby for the same land to the local office for a new hearing. December 30, following Watuston appealed on the ground that he was an adverse claimant and therefore Barnaby should not be allowed to amend his application or to file a new affidavit of contest. On February 24, 1891, you affirmed the decision below, when the party again appealed.

It appears that the contestant Barnaby filed an amended contest affidavit within the time allowed and a hearing was had March 24, 1891, at which time the contestant appeared and produced testimony—the defendant in default.

On March 27, 1891, before the local officers rendered a decision in the case, the defendant filed a relinquishment of his entry and the contestant filed a withdrawal of the contest, whereupon Barnaby was allowed to enter the land in controversy.

The local officers reported the above fact to you April 10, 1891, and on April 29, following, you dismissed and closed the case, thereby approving the action of the register and receiver in allowing the homestead entry of contestant Barnaby.

Subsequently, on May 29, 1891, you directed the local officers to suspend action on the Barnaby entry until the pending appeal of Watuston be disposed of, and on July 2, 1891, the local officers reported to you that on June 22, 1891, said Barnaby had relinquished his entry and that at the same time Edward E. Murphy filed application for the same land.

The local officers furthermore report that the Murphy application is

held in abeyance and transmit the petition of Watuston asking, in view of the relinquishment by Barnaby, that his homestead application be placed of record.

Watuston contends, in his appeal, that by reason of his application to contest an adverse interest had intervened and therefore you were in error in allowing Barnaby thirty days to amend his affidavit of contest or to substitute a new one.

The record shows that Watuston did not file his affidavit of contest until December 26, 1890, seven days after the decision remanding the first contest to the local office for a new trial.

Under these circumstances it is plain that the filing of the second contest application could not, in any wise constitute a valid adverse interest, unless the proceeding by which the first contestant was allowed a new trial was clearly in error and illegal. But this does not appear. Barnaby should have been allowed to amend his contest affidavit. Sims *v.* Busse *et al.* (4 L. D., 369); Griffin *v.* Forsyth (6 L. D., 791); hence in this case the local officers were in error in overruling the motion of defendant and therefore I perceive no error in your decision in remanding the case for another trial. This action in effect is simply a continuance of the original trial and carries the amendment back to the date of filing of the original contest affidavit.

The application of a second contestant may be received but no action should be taken thereunder until the final disposition of the prior contest. Hawkins *et al. v.* Lamm (9 L. D., 18), Westenhaver *v.* Dodds (13 L. D., 196); Carter *v.* Griffith (13 L. D., 437), and cases cited therein.

In the event of the success of the first contest, a hearing in the second would be unnecessary. Kiser *v.* Keech *et al.* (7 L. D., 25).

The relinquishment of an entry which is the result of a contest pending, inures to the benefit of the contestant and he would be entitled to the preference right of entry. Hay *v.* Yager *et al.* (10 L. D., 105); Carter *v.* Griffith (13 L. D., 437); Brown *v.* Henderson (14 L. D., 306).

In the case under consideration, it appears that the defendant relinquished his entry March 27, 1891, and at the same time Barnaby filed a withdrawal of the contest and made entry of the land under the homestead law. There appears to be no question as to the relinquishment having been the result of the contest, as all the papers were executed on the same day before the local officers. This being the case then Barnaby's contest has been prosecuted to a successful issue and the contest closed, therefore the second application to contest was concluded and of no further force and effect.

Subsequently, however, Barnaby relinquished his entry and one Murphy made entry of the land. Watuston now seeks to have his application for the land allowed on the ground that Barnaby by relinquishing his entry admits the claim of said Watuston.

Although this question was not raised by Watuston in his specification of errors but was brought to the attention of this Department in-

formally, yet I deem it expedient to pass upon the matter. When the land was awarded to Barnaby as the successful contestant, the rights of the second contestant were concluded. Hyde *et al. v.* Eaton *et al.* (12 L. D., 157), hence at the time Barnaby relinquished his entry and Murphy re-entered the land, Watuston did not possess an adverse interest therein, but if it had been shown that the relinquishment of the defendant and entry of Barnaby was the result of collusion, the relinquishment would not have inured to the benefit of Barnaby and the land in question would have been subject to the rights of the second contestant.

It does not appear, however, from the record in the case at bar, that any collusion was had and as the whole transaction occurred in the local office and the relinquishment and other papers were executed before the local officers, the presumption is that there was no collusion and that the entry of Barnaby was legally made.

With this understanding of the case your decision is affirmed.

DAVIS *v.* FOREMAN.

Motion for the review of departmental decision rendered February 6, 1892, 14 L. D., 146, denied by Secretary Noble, April 21, 1892.

TIMBER CULTURE CONTEST—APPEAL—EXTENSION OF TIME.

HAFFEY *v.* STATES.

The time within which an appeal must be taken can not be extended by stipulation of attorneys; nor have the local officers authority to grant an extension of such period. An application for such purpose should be addressed to the General Land Office, and presented before the time allowed for appeal has expired.

One who consents to delay in the taking of an appeal can not be heard to raise the question of time, if the Department, in the exercise of its discretion, takes action on the merits of the case.

Failure to secure the requisite growth of trees does not warrant cancellation of a timber culture entry, if such result is not due to the negligence of the entryman.

An application to enter can not be allowed during the pendency of an appeal from a decision holding for cancellation the existing entry of another for the land in question.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 21, 1892.

On the 25th of July, 1891, you transmitted to the Department the record in the above entitled case, in accordance with a writ of certiorari, dated July 14, 1891, 13 L. D., 44, issued upon the application of Thomas K. States.

From the record it appears that on the 3d of May, 1880, States made timber culture entry for the NE. ¼ of Sec. 2, T. 150 N., R. 53 W., Grand Forks land district, North Dakota, which entry was contested June 9, 1885, by William Haffey. The hearing which followed, resulted in a decision by the local officers on the 29th of December, 1885, in which they recommended the dismissal of the contest. From that decision an appeal was taken to your office, and on the 14th of February, 1887, you reversed the decision of the local officers, and held the entry of States for cancellation.

All parties in interest were notified of this decision, on the 23d of February, 1887, States and his attorney being each notified by registered letter. At the time of receiving notice of your decision of February 14, 1887, the attorney for States was officially engaged at the Territorial capital, and he and the attorney for Haffey entered into a stipulation by which they agreed to extend the time for serving and filing an appeal from your decision until such time as the official duties of said attorney would permit him to return to Grand Forks and perfect the same.

No appeal was therefore filed in the case until the 7th of May, 1887, which was transmitted to your office on the 12th of that month.

Overlooking the fact that you had rendered a decision in the case on the 14th of February, 1887, and that an appeal therefrom had been transmitted to your office on the 12th of May of that year, you directed that the entry be canceled on the 18th of July, 1887. No record to this effect was made in the local office, and when Anna M. Gray applied to make homestead entry for the land, on the 19th of February, 1891, her application was rejected on account of the uncanceled timber culture entry of States.

From such decision by the local officers she appealed to your office, and in their letter to you, transmitting her application and appeal, the local officers, under date of March 6, 1891, gave an abstract from their docket, the last entries thereon prior to her application being a record of your decision of February 14, 1887, holding States' entry for cancellation, and the appeal therefrom.

Upon the receipt of this letter you examined the record in your office, and found that your decision of July 18, 1887, canceling States' entry, was inadvertently made. You, therefore, under date of March 28, 1891, revoked the same, and reinstated said entry. You then dismissed the appeal from your decision of February 14, 1887, as not having been filed in time, and allowed States twenty days within which to apply for a writ of certiorari, with notice that if such application was not made, his entry would be canceled and the case closed. In that decision you also approved the action of the local officers in rejecting the application of Miss Gray to make homestead entry for the land.

The application for certiorari was made and granted, and the case is accordingly before me for consideration. Among the papers which con-

stitute the record, is an appeal by Miss Gray, from that part of your decision of March 28, 1891, in which you approved the action of the local officers in rejecting her homestead application.

The time within which appeals must be taken from decisions by local officers, and from your decisions, is fixed by the Rules of Practice of the Department. These rules can not be changed, nor the time for appeal extended by the stipulation of attorneys. Neither have local officers authority to grant extension of the time limited by the rules. Where an extension is necessary, application therefor should be addressed to your office, and be presented before the time for appeal allowed by the rules has expired.

Still, the subject is one which the Department may, in its discretion, consider, and Haffey, by his attorney, having consented to the delay in bringing the appeal, is not in a position to now raise the question that it was not brought in time.

By its decision upon the application for certiorari, the Department in effect gave notice that the merits of the case would be considered when the record was brought before it, and I have therefore examined the evidence submitted at the hearing, upon which the register and receiver united in a decision recommending that the contest be dismissed.

This evidence shows that the first five acres were planted prior to the expiration of the third year, May 3, 1883. The trees planted failed to grow, and the land was replanted with trees and seeds in the fall of that year, and additional seeds were planted in the spring of 1884. That season, however, was an exceptionally dry one, and the trees did not prosper. In the spring of 1885, the entire ten acres were plowed and put in proper condition, and tree seeds sown and planted thereon. Before the result of this last planting was made known, the contest was instituted.

As is usual in cases of this character, the evidence as to the condition of the ground, the cultivation of the trees, and the growth of weeds, is conflicting, but the contestant failed to show by a preponderance of the evidence submitted, that the claimant had not acted in good faith, or that he had not planted and replanted the land, and done all that could be reasonably expected to promote the growth of trees.

In Kelsey *v.* Barber (11 L. D., 468), it was held that "the failure of the entryman to secure the requisite growth of trees does not call for cancellation, when such result is not due to negligence in planting and cultivation, but to the character of the season, and seed that proves defective." This ruling is repeated in the case of Friel *v.* Bartlett (12 L. D., 502); Cropper *v.* Hoverson (13 L. D., 90), and Griffin *v.* Forsyth (13 L. D., 254).

Under these decisions of the Department, and from the facts in this case, I concur in the conclusion reached by the register and receiver, that the contest should be dismissed. The decision appealed from is therefore reversed, and the timber culture entry of States will remain intact.

As to the appeal of Anna M. Gray, which constitutes part of the record before me, it is only necessary to say that her application to make homestead entry for the land was properly rejected by the local officers, and their action was properly approved by you.

In Patton *v.* Kelley (11 L. D., 469), it was held that

An application to enter cannot be allowed during the pendency of an appeal to the Department from a decision holding for cancellation the existing entry of another for the land in question.

This is her case, and her appeal is accordingly dismissed.

HOMESTEAD ENTRY—MINERAL LAND—REVIEW.

DICKINSON *v.* CAPEN (ON REVIEW).

The discovery of coal on land embraced within a homestead entry precludes the completion of such entry.

A motion for review on the ground that the decision is against the weight of evidence will not be granted where the testimony is of such character that fair minds might differ as to the conclusion to be drawn therefrom.

Secretary Noble to the Commissioner of the General Land Office, April 22, 1892.

This is a motion by George H. Capen for "a review and recall" of the departmental decision dated November 2, 1891, in the case of J. T. Dickinson *v.* said Capen, involving the SE. ¼ of SE. ¼ of Sec. 6, T. 15 N., R. 120 W., Evanston, Wyoming.

Capen made homestead entry for said land July 17, 1889. On September 11, 1889, Dickinson filed his affidavit of protest against said entry, alleging that the land was valuable for coal, and on the 23d of the same month, he applied to enter it under the coal land laws. Thereupon the parties were cited to appear before the local officers October 29, 1889, and submit testimony. Dickinson filed a motion to summarily cancel Capen's entry. This motion was denied and the hearing had. From the evidence adduced the local officers found that Dickinson had failed to prove that the land was more valuable for coal than for agriculture and that Capen's entry should remain intact. Dickinson appealed, whereupon you reversed said ruling and held Capen's entry for cancellation. On appeal by Capen this judgment was affirmed by the decision that I am now asked to reconsider.

In said decision it was in effect held under the ruling in the case of Mulligan *v.* Hansen (10 L. D., 311), that the land, having been designated in the public surveys as "coal land," Dickinson's said affidavit of protest off-set Capen's non-mineral affidavit and that in consequence, the burden of proving the land more valuable for agricultural than mining was with Capen.

The Department found that Capen failed to so prove the agricultural character of the land, and also that the evidence favored the proposition that coal could be taken from the land in paying quantities.

The motion is based upon seven allegations of error which set out in substance, that Capen was not obliged to show the greater agricultural value of the land; that it was not enough for Dickinson to show that the land contained coal, but that it must appear that the same could be worked with profit; that Capen's improvements (valued at $450), which made the land more valuable as a place of residence, should have been considered, and that said decision is contrary to law and against the evidence.

In its said decision this Department found that "when Capen entered the tract no coal had been discovered upon it." It is urged that the said decision is in conflict with that in the case of Harnish *v.* Wallace (13 L. D., 108), wherein it was held that "to defeat a pre-emption entry on the ground of the mineral character of the land, it must be shown that the mineral was known to exist at the date of entry."

This contention is without force. In the case of Harnish *v.* Wallace, *supra*, the entry in question was a final pre-emption entry. The complaint alleging *inter alia* that forty acres thereof "are mineral in character" was not made until almost five years after the date of such entry.

In the case at bar the entry involved is an original homestead entry and the affidavit of protest was filed within two months after its date. Said entry could not, of course, be completed for land valuable for coal.

The existence of coal on the land is not questioned. Moreover, there is some evidence to sustain the finding that the testimony favored the proposition that coal could be taken from the land in paying quantities. Unless this finding is clearly against the palpable preponderance of the evidence it is plain that review can not be granted. Mary Campbell (8 L. D., 331). Concerning the question just stated, the testimony is conflicting, but is of such character that fair minds might differ as to the conclusion to be drawn therefrom. Waiving, therefore, the question as to whether or not the burden of proving the land valueless for coal was with Capen it follows that the motion can not be allowed on the ground that the decision is against the evidence. Tyler *v.* Emde (13 L. D., 615).

The remaining allegations contained in the motion simply recite matters that were necessarily considered by the Department in making its finding of fact touching the character of the land. In the absence of new evidence, the matters thus alleged do not warrant a review of the decision complained of. Pike *v.* Atkinson (12 L. D., 226).

The motion is denied.

This action renders it unnecessary for me to discuss Dickinson's motion to dismiss, filed pending the said motion for review.

17 L.D. 480
See page 443-218

PRACTICE—NOTICE OF DECISION—APPEAL.

COOPER *v.* ARANT.

Where notice of a decision is served both on the attorney of record, and the party he represents, the time within which an appeal must be taken runs from the date of the service first made.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 26, 1892.

On October 11, 1887, William F. Arant made homestead entry No. 889 for the W. ½ of the N. E. ¼ and the W. ½ of the S. E. ¼ of Sec. 8, T. 39 S., R. 10 E., Lakeview, Oregon.

He made commutation proof thereon on October 15, 1888, and on the same day James R. Cooper filed a protest against the approval thereof. A trial was had on April 17, 1889, and on September 18, 1889, the register and receiver found in favor of protestant Cooper; an appeal was taken by claimant to you and on November 7, 1891, you affirmed the finding of the local land officers and held Arant's entry for cancellation.

He filed an appeal in your office from said judgment on January 19, 1892, and on March 23, 1892, attorneys for Cooper filed, in your office a motion to reject said appeal because not taken in time, alleging among other things, that

The decision in this case was made by letter "H," dated November 7, 1891. Notice was given by letter "H" of the same date to Mr. William B. Mathews of this city, as attorney for the defendant, Arant. Allowing one day for transmission of this notice (Rule 97) the time for appeal expired on January 7, 1892.

You did not reject the appeal but transmitted it to this Department.

The attorneys for Cooper have now renewed the motion to dismiss the appeal.

The record transmitted by you on the appeal of Arant from your judgment shows that notice of your decision was served on Arant by registered mail on November 19, 1891, and the appeal is shown to have been filed by him on January 19, 1892, Allowing the sixty days prescribed by Rule 86 of the Rules of Practice within which an appeal may be filed from your judgment and the additional ten days allowed by Rule 87, the appeal was taken in time, but on inquiry at your office it has been ascertained that a notice of your judgment was given to William B. Mathews of this city, the attorney of record representing Arant by letter of your office, dated November 7, 1891, and you have since furnished a copy of this letter, which has been added to the record where it properly belongs. Why it was not with the other part of the record has not been explained. Mathews received this letter, as is shown by his written acknowledgment on November 8, 1891, and as the appeal was not filed until January 19, 1892, it was not filed within the sixty days allowed for such filing when service of notice is had on counsel residing in this city.

In this case notice was served on local counsel on November 8, 1891, and on claimant in person on November 19, 1891. Under the decision in the case of Peterson *v.* Fort (11 L. D. 439) the time in which an appeal may be taken runs from the date of the first service; following this rule the motion to dismiss this case must be allowed.

The appeal is accordingly dismissed.

TIMBER CULTURE ENTRY—PENDING CONTEST—COMPLIANCE WITH LAW.

SIMMS ET AL *v.* BUSSE.

A timber culture entryman who is irregularly allowed to enter land involved in a pending contest, is required to comply with the law during the pendency of such contest.

The case of Jones *v.* Kennett, 6 L. D., 688, overruled.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 26, 1892.

On November 4, 1881, Theodore B. Vestry made timber culture entry No. 6969 for the N. E.¼ of Sec. 18, T. 107 N., R. 62 W., Mitchell, South Dakota.

On November 6, 1883, Edmund L. Davis filed a contest against said entry, charging that it was made for speculative purposes. The register and receiver dismissed the contest because of the insufficiency of the affidavit of contest. An appeal was taken to you and after considering the appeal you affirmed the action of the local land officers and dismissed the contest.

An appeal was then taken from your judgment to this Department and in January 1886, your judgment was modified and Davis was allowed to amend his contest affidavit, this he did, on March 26, 1886, alleging bad faith on the part of Vestry. Another hearing was had and the case was finally disposed of on March 17, 1890, by failure of Davis to appeal from your decision of July 18, 1889, adverse to him.

On February 25, 1884, while Davis' contest was still pending, Vestry's entry was canceled on relinquishment and notwithstanding the pending contest W. H. Busse was allowed to make timber culture entry No. 11,826 for the tract in question.

On December 6, 1887, Ansel L. Sims initiated a contest against said entry, alleging that Busse had not complied with the law in that he had failed to plant trees, seeds or cuttings on said tract during the third year after making said entry and that said tract was then entirely destitute of trees, seeds or cuttings. On December 10, 1888, Minnie L. Burdick also initiated a contest against said entry.

On August 26, 1889, Ansel L. Sims filed an amended contest in lieu of the original contest filed by him in 1887.

Notice was issued on the contest of Burdick and December 10, 1887, set for hearing on that day; both Burdick and Sims appeared and Sims protested against the hearing, claiming a preference right to contest the entry. The 10th day of February 1890, was designated by the local land officers to hear evidence as to which was entitled to contest the entry, the trial was had and after considering the case the register and receiver awarded the preference right to Sims. His original contest papers could not then be found, but since then they have been discovered in the local office and transmitted to this Department.

Evidence was introduced by both Sims and Burdick showing conclusively that Busse had made no attempt to comply with the timber culture law since his entry was made.

Busse made a motion before the register and receiver to dismiss the contest of both Sims and Burdick and appealed to you from their order, rejecting said motion.

Burdick appealed to you from the finding of the register and receiver awarding Ansel L. Sims the prior right to contest the entry of Busse and on August 2, 1890, the local land officers transmitted to you the contest record of Sims *v.* Busse and the appeal of Busse from their decision, recommending his entry for cancellation.

On December 10, 1890, you considered these various appeals and held that the motion of Busse to have the contests of Sims and Burdick dismissed should be sustained, you accordingly sustained the motion and dismissed said contests, stating that

> I am of the opinion that the timber culture entry of Busse No. 11,826 made February 25, 1884, for the said land was not open to contest for any failure to comply with the law, until sometime subsequent to March 17, 1890, when there was a determination of the contest of Davis *v.* Vestry.

Sims and Burdick have appealed from your judgment to this Department.

It is stoutly maintained by counsel for Busse that your judgment is correct because while the contest of Davis against the entry of Vestry was pending, Busse, who had purchased the relinquishment of Vestry and made an entry on the tract, was not bound to perform any labor on the land or to comply with the timber-culture laws. As a reason for this contention it is asserted that to require him to expend money and labor on the tract without having any assurance that he would ultimately get the land, would be a great hardship.

I do not think your judgment is correct. The allowance of Busse's entry during the pendency of the contest of Davis was in violation of the rules of the Department, but having been allowed and he given whatever benefits it conferred (and it did confer the right of possession) he should be held to have also assumed all the obligations incident to said entry; one of these obligations is that he should comply with the law the same as other entrymen under the timber culture law.

It is held by the Department that during the pendency of a timber

culture contest, the entryman is not excused from complying with the law, but it is said in this case that no contest was pending against this entry prior to the initiation of the present one and that therefore the rule above referred to is not applicable. This contention is untenable, of course, if no contest was pending an entryman is required to comply with the law. In any event, Busse having been allowed, at his own instance and upon his own application to make an entry must be held bound to comply with the law. The application of Sims to contest having been received first must be held to have conferred upon him the preference right to contest. The application of Burdick to contest said entry is denied, the contest of Sims held to be prior and as the evidence introduced by him shows that Busse has not complied with the timber culture law his entry must be and is hereby canceled and Sims allowed the preference right to make an entry on the tract.

The case of Jones *v.* Kennett (6 L. D., 688), decided May 17, 1888, is hereby overruled, in so far as it is conflict with this decision.

Your judgment is accordingly reversed.

PRE-EMPTION ENTRY—CONFIRMATION—SETTLEMENT.

FOX *v.* CUMMINGS.

An adverse claim originating prior to final entry defeats confirmation under the body of section 7, act of March 3, 1891.

An erroneous allegation in a pre-emption declaratory statement as to the date of settlement, does not preclude the pre-emptor from showing the actual date thereof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 27, 1892.

I have considered the case of Henry Fox *v.* William D. Cummings, involving pre-emption entry made by the latter November 17, 1886, for the SE. ¼ of the NE. ¼, the E. ½ of the SE. ¼ and the SW. ¼ of the SE. ¼ of section 12, T. 2 N., R. 68 W., Denver land district, Colorado.

Fox made homestead entry of the tract August 28, 1886.

One William F. Lewis, claiming to be a mortgagee of the entryman Cummings, has filed a protest against the cancellation of the entry, setting forth that he is the present owner of the land, having foreclosed a mortgage thereon; and that, should the entry be canceled, it would involve a loss to him of $2,500.

The entry can not be confirmed under section 7 of the act of March 3, 1891; because the adverse claim of Fox (whether or not it shall be held to be a *valid* adverse claim) originated prior to Cummings' final entry, and is therefore expressly excluded by the terms of said section (26 Stat., 1095).

Final proof was made (before the local officers) November 15, and final certificate issued November 17, 1886. Fox and his attorney were present and cross-examined the entryman and his witnesses.

From the proof it appears that Cummings settled on the tract on February 18, 1884; that he soon afterward built a small frame house, eight by sixteen feet, in which he and his family resided for a while; that he afterward erected a brick house, measuring sixteen by thirty feet, a story and a half high, with two rooms below and two above; with two outside doors, six inside doors, eight windows, matched flooring throughout, and a shingle roof; contract price $940; the small house in which he first lived is now used for a coal-house; that he also built a frame barn, sixteen by thirty-six feet; a granary sixteen by twenty feet; that he put up a wire fence (partly of two wires and partly of three) around the entire tract; that he broke eight or ten acres, and has since cultivated the same, but that the principal use he has made of the farm has been for grazing purposes. In regard to residence he testifies that "for the first two years he was not gone at all"; since then he has worked elsewhere "off and on"; that he and his family were on the claim all the winter preceding his making proof; that for the six months preceding final proof he had been absent, working (principally for his father) probably about four months; that his family were a part of the time with him at his father's and a part of the time on the claim even when he was absent; that during the absences of the family the house was locked, and the furniture left in it—consisting of bedstead and bedclothes, stove, table, five or six chairs, safe, dishes, etc.

It is clear that no failure to comply with the law as to residence, cultivation, or improvements is shown that would justify a cancellation of the entry.

The ground upon which you held the entry for cancellation is, that in his pre-emption declaratory statement, filed March 4, 1884, Cummings alleged settlement on February 18, 1883—a year and two weeks previously. Calculating from that date, you find that filing expired November 18, 1885; and that his final proof of November 15, 1886, made nearly a year afterward, could not be accepted, in view of the homestead entry of said Fox, made August 28, 1886.

The attendant circumstances strongly indicate that the date of February 18, "1883," upon which settlement is alleged in the pre-emption declaratory statement, is a clerical error for February 18, 1884. It seems much more probable that a person would file his declaratory statement within a fortnight after settlement than that he would violate the law and risk the loss of his claim by postponing such filing for a year and a fortnight thereafter. It seems more probable that he would make his final proof two days before the time prescribed by law, than that he would risk the loss of his finely improved claim by postponing it until a year (lacking two days) after the expiration of that period. It is not necessary, however, to enter into any careful investigation to determine the origin of the error in the date of settlement, as found in the declaratory statement, in case it is clearly shown to be an error.

In his final proof, the entryman states that he first made settlement

on "February 18, 1884." Both his witnesses testify that he made settlement in the "spring of *1884*."

In the case of Tipp *v.* Thomas (3 L. D., 102) the Department held that the law gives the entryman a right to the land from the date of his settlement, if duly exercised; and this right is not to be defeated by a discrepant allegation he may have made, when he can show that it was made by mistake." See also the case of Zinkand *v.* Brown (3 L. D. 380); Northern Pacific R. R. *v.* Stuart (11 L. D., 143); same *v.* Sales, (12 L. D., 299).

In the cases above cited the date as proved is earlier than that set forth in the declaratory statement; but the principle applies equally to the case at bar, wherein it is shown by sworn testimony (and not denied by the protestant,) that the settlement was actually made at a date later than that alleged in the declaratory statement.

Accepting it as a fact that the pre-emption claimant settled on the land February 18, 1884, the time prescribed by law had not expired when he made final proof, November 15, 1886.

The homestead entry of Fox, made while Cummings was residing upon and occupying the tract, and prior to the expiration of the period prescribed by law within which final proof must be made, conferred upon him no rights as against the pre-emption claimant.

Your decision is reversed. Patent will issue upon Cummings' final proof, and Fox's homestead entry will be canceled.

APPLICATION FOR SURVEY—ISLAND.

L. F. SCOTT.

An island formed in a river, after the survey and disposition of the adjoining shore lands, does not belong to the United States, and the Department, therefore, has no jurisdiction to direct its survey.

Acting Secretary Chandler to the Commissioner of the General Land Office, April 27, 1892.

I am in receipt of your letter of September 28, 1891, transmitting the application of L. F. Scott, of Howard county, Missouri, for the survey of an island, described as being in the Missouri river, "opposite sections 10, 14, and 15, township 52 N., R. 19 W., Saline Co., and opposite sections 17 and 18, T. 52 N., R. 18 W., in Chariton Co., Missouri."

It is shown that the island contains about three hundred acres of land; that the width of the channel on either side, between the island and the main shore, is one thousand feet, and the depth thereof at ordinary stages of water is about ten feet; that the island is about three feet above high water mark not subject to overflow, and the land fit for agricultural purposes. No improvements are on the island.

Notice of the applicant's intention to apply for the survey appears to have been served upon the owners of all the adjoining lands upon opposite sides of the river, and also upon the Attorney General of the

State of Missouri, as evidenced by his acknowledgment thereof on August 26, 1891.

No protest appears to have been filed against the application, either by the State, or by other persons, and you recommend that the application be allowed and the survey ordered.

The survey applied for can only be ordered when it clearly appears that the island belongs to the United States; otherwise the Department has no jurisdiction and therefore no power to direct the survey.

The photolithographic copies of the official plats of the townships 52 north, ranges 18 and 19 west, Missouri, transmitted with your letter, indicate no island in the Missouri river in the location represented on the diagram submitted with the application.

The survey of the two townships was made in the year 1820, and the same was approved by the surveyor-general August 9, 1843.

South of Sec. 17, T. 52 N., R. 18 W., is an island, called "Island No. 24," which by the survey of 1820 contained 57.81 acres, and, in a letter of June 28, 1891, R. B. Caples, attorney for applicant, says:

> There is now no island at the point indicated for Island 24. What was an island when the survey was made is now a part of the main land—the slough having filled up many years since. The island we desire surveyed is a later formation, and is about half a mile from the old island 24, at the nearest point. The main channel of the Missouri river passes between the two bodies of land. They were never connected.

It appears from the above statement that the island applied to be surveyed is of late formation. It is represented as being nearly equidistant from the opposite shores of the river, which is about ten feet deep on each side of the island.

This island having formed since the survey and disposition of the adjoining shore lands, does not belong to the United States, and therefore this Department has no jurisdiction to direct its survey. Hardin *v.* Jordan, 140 U. S., 371; John P. Hoel, 13 L. D., 588.

Your recommendation that the island be surveyed is therefore disapproved.

TIMBER CULTURE ENTRY—FINAL PROOF—ACT OF MARCH 3, 1891.

SAMUEL C. DONALDSON.

The act of March 3, 1891, does not relieve a timber culture entryman from cultivating the quantity and character of trees specified in the act of 1878, nor repeal the provision in said act that requires at least six hundred and seventy-five living and thrifty trees to each acre at the time final proof is submitted.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 28, 1892.

Samuel C. Donaldson has appealed from your decision of April 1, 1891, rejecting his final proof upon timber-culture entry No. 512, made January 9, 1882, for the W. ½ of NW. ¼ and the W. ½ of SW. ¼, Sec. 2, T. 3 S., R. 26 E., The Dalles land office, Oregon.

Your decision affirms that of the register and receiver.

Claimant's testimony in his final proof, made March 21, 1890, shows that he broke ten acres in April of the first year; thirty acres in March and April of the second year, and sixty acres in March and April of the third year; that in April of the second year (1883) he planted five acres to lombardy poplar cuttings and box-elder seeds, measuring the ground with a tape line; that in the third year (1884) he planted five additional acres to box-elder poplars and walnuts—again measuring the land; that the ground was well plowed, harrowed, and cultivated, and he raised thereon fine crops of wheat. He says "some trees died out in dry summers and was filled up by replanting and are now growing;" that he had planted eleven acres in trees, and they were all in a healthy condition; that he had planted over 27,000 seeds and cuttings on the tract, and that on day proof was made there were, by actual count, 750 trees to the acre.

One of the proof witnesses (Swoggant), substantially, corroborated claimant's testimony, as to the planting and cultivation of the cuttings and seeds, but had no personal knowledge as to the number of growing trees at date of proof.

Witness, Charles E. Fell, keeper of a nursery, testified that he had no personal knowledge of the breaking done the second and third years; but swears that the land was well prepared and planted; that claimant lost by the drouth quite a number of trees in 1886 and 1887, and during those years 15,000 trees were planted (presumably in the missing places); that, in 1889, 5,000 additional trees were planted, and in 1890 1,000 more; that on the day proof was made there were 750 trees growing on each acre, all in good cultivation "at present in character from the size of a lead pencil up to three inches," height from one foot to twelve feet; that the planting and cultivation had been throughly done. Witness, Krow, knew nothing of the breaking, cultivation, or replanting, but swears eleven acres were planted to trees, and corroborated the other witnesses as to the number growing at date of proof and the size of the trees.

You rejected the proof, because

> There is nothing to show that a sufficient number of the trees are of a size and age to indicate that they have been cultivated the proper length of time.

It will be seen that final proof was submitted but little over eight years from date of entry. Five thousand trees were planted in 1889, and one thousand in 1890. The last thousand were evidently planted just before proof was offered.

While the act of March 3, 1891 (26 Stat., 1095), changed the departmental construction then in force as to the period of cultivation and as to what shall be deemed acts of cultivation, it does not relieve the claimant from cultivating "the quantity and character" of trees mentioned in the timber-culture act of 1878, or repeal the provision which requires at least "675 living and thrifty trees to each acre" to be growing at the time final proof is submitted.

If in 1890 it was needful to plant one thousand trees to fill up missing places, occasioned by dry weather, it can not be said that such trees in March of that year were "thrifty."

While the proof shows that claimant has used diligence in his efforts to grow trees, yet unfavorable seasons have prevented such growth, and the provisions in the act of 1878, giving five years additional time, were enacted to meet just such contingencies as have happened in this case.

I think the proof fails to show such a number of "living thrifty" trees as justifies its acceptance. He still has about five years from date of proof to show full compliance with law.

The judgment appealed from is accordingly affirmed.

TIMBER LAND—APPLICATION—PRELIMINARY AFFIDAVIT.

GRACE *v.* CARPENTER.

The prior personal inspection of land required of an applicant under the act of June 3, 1878, does not necessarily require said applicant to actually pass over the land in question.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 29, 1892.

I have considered the appeal of A. O. Carpenter from your decision of August 23, 1890, awarding to Frank P. Grace the S. ½ of SW. ¼, Sec. 14, and E. ½ of NW. ¼, Sec. 23, T. 16 N., R. 15 W., San Francisco land district, California.

It appears that Grace and Carpenter filed applications on the same day (March 1, 1888,) to enter the above described tracts under the timber law, filing therewith the usual sworn statement as to the character of the land, etc. In point of time the application of Grace was received some two or three hours before that of Carpenter and both parties gave notice of intention to submit proof in support of their claims before the local officers.

May 23, 1888, the day set for the hearing to decide which applicant had the better right, Grace and Carpenter both appeared with counsel and witnesses and the testimony submitted was taken. The local officers decided in favor of the contestant; thereupon the defendant appealed and you sustained the decision below.

Defendant again appealed, alleging in substance, that Grace did not make personal examination of the land as required and therefore he was not competent to make said timber application.

The fact that the land in question is uninhabited; that it contains no mining, or other improvements, or known minerals, and that the tracts are timber land chiefly valuable as such and unfit for agricultural purposes, is satisfactorily established and is also conceded by both parties.

to this contest; therefore the only question in this case is, whether Grace did make such an examination of the land contemplated by the timber law as would entitle him to the prior right of purchase.

The testimony adduced in this case shows that Grace was a conductor on a railroad in California, and desiring togpurchase some government timber land, made arrangements with W. H. Snell, land agent, to select him a tract.

About February 25, 1888, he wrote Grace that he had found a timber tract such as would probably suit him, and set a day that he would go with him and examine the land.

In accordance with this understanding, Grace made arrangements to leave his employment for a few days and on February 27, 1888, met Snell and five other parties seeking government land, at Ukiah, the county seat of Mendocino county, California.

The agent gave Grace a township plat, showing the above described tracts marked thereon, as the land selected for him, and the morning after his arrival at Ukiah, Snell being unable to act as guide to the party, himself, sent Charles Smith, county assessor, and a Mr. Montgomery to show the parties the different selections of government land.

It further appears that when the party started from Ukiah, Carpenter, the defendant, also joined them with the understanding that as he came in last, the others were to have the right to make their selections first. After a ride on horseback of about twenty miles, the whole party remained over night at the house of Robert W. Kellen, one of the witnesses in this case, and in the morning, as the lands to be inspected were located in different directions within a radius of a few miles, the party divided, Montgomery, one of the guides, taking with him Grace, Shattuck, Hughs, and Davidson; and Assessor Smith taking the balance of the party, including the defendant. Grace testifies that soon after starting out he asked Montgomery if they were not going to see all the selections, particularly the one selected for him by Snell; to which he replied "he did not think we could go over all of them in one day, but that we would in a short time be near enough to see it all and that was all that was necessary to file;" that after going some two miles Montgomery pointed out the land on the opposite side of the river, plainly seen and covered with timber. A little farther on they reached another high point where they could see for miles around. Here Montgomery again pointed out the land, and on returning, after inspection of the other tracts, they again passed in sight of the land in question.

On reaching Kellen's after the inspection, they found the other party there, and Assessor Smith corroborated Montgomery's statement that Grace had examined the land sufficiently to make his filing and therefore it was not necessary for him to go upon the land.

Grace further testifies that after their return to Ukiah, he learned that the parties proposed drawing lots for the different tracts exam-

ined; that he declined to enter into such an arrangement, as he had already selected the land now in controversy. Soon afterwards he was informed that one Gibson had drawn his claim and subsequently it transpired that Gibson and Carpenter before presenting their applications at the local office, exchanged claims and in this manner Carpenter became applicant for the same land Grace had applied for.

After making application Grace with a view of confirming his statement as to the character of the land again visited that section accompanied by Snell and Smith and made a thorough examination of the tracts. He found that not only had the agent correctly represented the land, but that his former observations in relation to the land, although at a distance therefrom, were in every particular correct.

Montgomery's testimony in the main corroborates that of Grace; he admits pointing out the land as indicated and that Grace showed him the plat given him by Snell with the land marked thereon, also that he instructed him that seeing and examining the land in the manner indicated was sufficient to make a filing.

The testimony of Kellen shows that he has lived in the vicinity of the land for fourteen years; that he is well acquainted with the country and can point out the land in question from the places Grace saw it; that "he (Grace) seemed anxious to be in the right" and secure this particular land and that he heard Assessor Smith tell Grace at his house after the inspection, that the examination made was all that was necessary.

Shattuck's testimony shows that he heard Grace ask where his land was and that Montgomery took him out on a high bluff overlooking the land and pointed out the tract marked out for him by Snell, and when asked by Grace if he was certain, answered "yes," pointing out a well-known claim in the vicinity of the land as establishing the correctness of the designation.

The act of June 3, 1878 (20 Stat., 89), for the sale of timber and stone lands, provides that applicants to purchase such lands shall file a sworn statement designating the land, that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements nor any valuable deposits of minerals; that applicant has made no other application under this act and that he applies in good faith for the same for his own use and benefit.

It will be observed that this statement is divided into two parts. First, the applicant must state that the land is unfit for cultivation, uninhabited and unimproved. This statement he makes under oath and this necessarily implies a personal knowledge of the land. Secondly, he must make oath that to the best of his belief the land contains no valuable deposits of mineral, etc. This part of the affidavit may of course be made on information.

There is no doubt that Congress intended to distinguish between those conditions of the land that could be known by observation and those that are known or determined upon information and belief. The circular of instructions approved by this Department July 16, 1878, prescribes the language of the sworn statement in part as follows:

> That I have personally examined said land and from my *personal knowledge* state that said land is unfit for cultivation and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements, etc.

The question naturally arises in this case: What is meant by personal knowledge? Is the applicant actually required to travel over the land to obtain a personal knowledge of the same, or can the land be inspected by passing near it, or by inspecting the land from some elevation overlooking the same, sufficiently to meet the requirements of law?

It would seem that where a party has examined the land personally to such an extent, either by passing over the tracts or by inspecting them from an elevation, that he can and does swear to the material facts in making his application, that it is a substantial compliance with law. Especially is this true where the actual status of the land is found to be as set forth in said affidavit.

The mere technicality that a party made the examination of the land without actually going upon it, where no fraud is shown, and the facts are as sworn to, should not in my opinion be construed to affect the rights of the applicant. There is no evidence in this case to show that Grace has in any manner acted with a fraudulent purpose in view; he traveled a long distance, losing time with his employers, on purpose to examine this land and although he did not actually go upon it, yet he was in a position to, and did, know its condition as being unfit for cultivation, uninhabited and unimproved as fully as if he had been over it. Under such circumstances, I do not feel justified in disturbing your conclusions.

Your decision is accordingly affirmed.

SETTLEMENT RIGHT—RELINQUISHMENT—APPLICATION.

FOSGATE *v.* BELL.

A timber culture entryman who files a relinquishment of his entry, and thereupon applies to enter the land under the homestead law, cannot thereby defeat the adverse right of a settler who is residing upon the land at the date of the relinquishment.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 30, 1892.

On the 18th of June, 1886, George F. Bell made timber culture entry for the NE ¼ of Sec. 33, T. 25 S., R. 13 E., M. D. M., San Francisco land district, California.

On the 31st of August, 1887, he filed a relinquishment of his timber culture entry, and at the same time made homestead entry for the land.

On the 1st of September, 1887, Chester L. Fosgate was allowed to file his pre-emption declaratory statement for the same tract, in which he alleged settlement on the 22d of August, 1887.

On the 4th of September, 1888, Fosgate submitted final proof before the local officers, against the acceptance of which Bell protested. A hearing followed, resulting in a decision by the register and receiver on the 30th of October, 1888, in which they accepted the final proof of Fosgate, and recommended the cancellation of the homestead entry of Bell.

From that decision an appeal was taken to your office, and on the 29th of January, 1891, you reversed the decision appealed from, allowed the entry of Bell to remain intact, rejected the final proof of Fosgate, and held his pre-emption declaratory statement for cancellation.

On the 25th of February, 1891, a motion for a reconsideration and a rehearing was filed in the case, which motion was denied by you on the 9th of April of that year. An appeal from your decision of January 29, 1891, brings the case to the Department for consideration.

While holding the land under his timber culture entry, Bell much more than complied with the provisions of that law, as he plowed and cultivated to crop twenty acres the first year. Becoming apprehensive that he might not be able to hold the land on his timber culture entry, by reason of a natural growth of timber on some parts of the section, he decided to relinquish his timber entry and make homestead entry for the tract. In his relinquishment, the jurat, and the acknowledgement, the date was each time written "March 28, 1887," but the day and the month were subsequently scratched out by pen marks, and "August 30," substituted. This is the date upon which it was executed, and it was filed in the local office at 9:45 o'clock the next morning, at which time his homestead entry was made. In his evidence he explains that it was not executed at the time it was written, for the reason that there was no notary public present or convenient before whom he could acknowledge the instrument. He did nothing more in the matter, except to harvest his crop, until he heard that Fosgate had made settlement upon the land. He then executed and filed the relinquishment, and made his homestead entry.

Within six months after making his homestead entry, he built a comfortable house and other buildings upon the land, and moved his family thereon. Bell and his oldest son conducted a store in Paso Robles, sleeping in the back part of the store during the week, and going to the tract where his family resided each Saturday evening and remaining there until Monday morning. His residence and cultivation, after making homestead entry for the land up to the time of the hearing, was amply sufficient to meet the requirements of the homestead law.

On the other hand the testimony shows that Fosgate went upon the

land August 22, 1887, and laid what he called the foundation for a house. This foundation consisted of four strips or pieces of board, nailed together in the form of a square, and a couple of boards erected at each corner, and held in an upright position by means of braces. Nothing further was done upon the land by Fosgate until the evening of August 30, when he, accompanied by two friends, went thereon with a team, wagon, camping outfit and provisions. They all slept within the above mentioned foundation upon the land during the night of August 30, and cooked and ate breakfast there the following morning, after which Fosgate started to Paso Robles for a load of lumber with which to construct a house upon the land, and with which he returned on the morning of September 1. He at once commenced the construction of a house, which was completed in a few days. His wife and four children joined him there on the 2d of September, where they have since continued to reside. The house which he built was not erected upon the foundation laid by him on the 22d of August, but on another part of the tract. The material which constituted such foundation was, however, used in the construction of the new house. His improvements and cultivation are more valuable and extensive than those of Bell. His final proof shows a full compliance with the requirements of the pre-emption law, and his acts performed upon the land prior to the homestead entry of Bell, were sufficient to constitute settlement under that law. These acts of settlement, however, were performed with full knowledge that the land was occupied by another. The growing or harvested crop of grain gave him this information, and whatever rights he secured by his settlement were subject to those of the prior claimant.

The good faith of Bell in making his timber culture entry, was never assailed by contest or otherwise, neither is his good faith in attempting to change that to a homestead entry questioned. As between himself and the government he would have been allowed to make such change without question, but if other rights had intervened, the change would be subjected to such rights. In the case of Bradway *v.* Dowd (5 L. D., 451), this doctrine was stated in these words:

> On the presentation of the entryman's relinquishment accompanied by his application to enter the land under a different law, the existing entry should be at once canceled and the application allowed subject to any intervening adverse right.

The question for determination therefore is: What rights did Fosgate gain by making settlement upon the land during the pendency of the timber culture entry of Bell? In the case of Tilton *v.* Price (4 L. D., 123), it was held that "a pre-emptor can acquire no rights to a tract of land by settlement and residence thereon while the same is occupied and under the control of another." That case also held that "a relinquishment takes effect immediately upon being filed, and the tract so relinquished becomes at once public land, and subject to entry by the first legal applicant."

The rights of a pre-emptor are established by his settlement, and take effect as of that date, provided he makes his filing within three months after his settlement, and an entry for the land, made prior to the filing, but subsequent to the settlement, cannot deprive the pre-emptor of the rights secured by such settlement.

In the case of Wiley *v.* Raymond (6 L. D., 246), it was said that

> on the relinquishment of an entry the right of a settler, then residing on the land, attaches *eo instanti*, and is superior to that of a homesteader who enters the land immediately after the said relinquishment.

In that case the entryman had purchased the relinquishment of a prior occupant, but it was held that he acquired no rights thereby to the land, and that his right as a settler must date from the time when he made actual personal settlement.

In the case at bar Bell never made actual personal settlement upon the land prior to his relinquishment, although his rights to the land were superior to those of Fosgate up to that time. Had his relinquishment not been filed, Fosgate, instead of acquiring rights by his settlement, would have been a mere trespasser upon the land.

The case of Zaspell *v.* Nolan (13 L. D., 148) is on all fours with the one at bar. In that case Zaspell filed a relinquishment of his timber culture entry, and at the same time applied to make homestead entry for the land. Prior to this, Nolan had made settlement on the tract, and was then residing thereon. The Department held that

> a timber culture entryman who files a relinquishment and thereupon applies to enter the land under the homestead law, cannot thereby defeat the adverse right of a settler who is residing upon said land at the date of the relinquishment.

In the case of Stone *v.* Cowles (13 L. D., 192) the same doctrine is expressed in these words:

> The right of a settler who is residing upon land covered by the entry of another attaches *eo instanti* on the relinquishment and cancellation of such entry, and is superior to that of a homesteader who makes entry of the land immediately after its relinquishment.

In your decision you distinguished between the case of Wiley *v.* Raymond, *supra*, and the case at bar. In that case the relinquishment was filed, and the application to enter was made, not by the original entryman, having previously existing rights in the land, but by a third party, who had purchased the relinquishment, while in the case at bar the former entryman made the relinquishment, with no intent or purpose to abandon the land, but simply to change his entry from timber culture to homestead. That was precisely the situation in Zaspell *v.* Nolan, *supra*, in which it was held that no such distinction existed. I regard the case last cited as decisive of the questions involved in the case before me, and the decision appealed from is therefore reversed.

See page 428

PRACTICE—NOTICE OF DECISION—REVIEW—JURISDICTION.

NORTHERN PACIFIC R. R. CO. *v.* BASS (ON REVIEW).

Notice of a decision may be served either upon the attorney of record, or the party he represents, and the time within which a motion for review must be filed begins to run from the date that service is first made.

In the absence of a motion for review the Department, through the supervisory power conferred upon the Secretary, has the requisite authority to correct its own mistakes while the subject matter is yet under its jurisdiction.

Secretary Noble to the Commissioner of the General Land Office, April 30, 1892.

The motion herein made was filed in your office December 26, 1891, by Messrs. Curtis & Burdett, attorneys for Thomas J. Bass, for a review and reconsideration of departmental decision, dated August 24, 1891 (13 L. D., 201), in the case of the Northern Pacific Railroad Company *v.* Thomas J. Bass, involving the NE. ¼ of Sec. 13, T. 127 N., R. 33 W., St. Cloud land district, Minnesota.

On January 26, 1892, the railroad company moved the dismissal of said motion for review, upon the ground that it was filed out of time, and in support thereof make the following statement of facts, viz:

Under date of September 9, 1891, the Commissioner of the General Land Office notified the district officers of said decision.

By letter of the register, dated January 16, 1892, and the accompanying return registry receipt signed by Bass it is shown that said Bass was duly notified of said decision by their letter of September 15, 1891, and admitted receipt thereof September 17, 1891.

Motion for review was filed by Messrs. Curtis and Burdett, att'ys for Bass, December 26, 1891.

It is well settled that notice of decisions "commence to run from the date that service is *first* made, whether it be upon the party himself or upon his attorney, either local or resident in Washington." (Peterson *v.* Fort, 11 L. D., 439). Motions for review must be filed 'within thirty days of notice of decision.' (Rule 77.)

Now allowing to Bass the full ten days for notice by mail and return, he had forty days from September 15, 1891, within which to file his motion; this time expired October 25, 1891.

The motion was not filed until two months afterwards.

As against this, counsel for Bass allege that:

On February 3, 1890, we duly entered our appearance in the case as attorneys for Mr. Bass.

On August 24, 1891, the Department rendered a decision reversing that of the General Land Office.

On November 28, 1891, the Commissioner of the General Land Office sent us an official notice of the said decision.

On December 26, 1891, the motion for review was served upon counsel for the railroad company, and duly filed in the Department.

In answer to the motion to dismiss, it is contended that rules 104 and 105, of practice, are a complete answer. These rules are as follows:

Rule 104: In all cases, contested or ex parte, where the parties in interest are rep-

resented by attorneys, such attorneys will be recognized as fully controlling the cases of their respective clients.

Rule 105: All notices will be served upon the attorneys of record.

It is further contended that:

As we fully controlled the case of our client, and the rules required that notice should be served upon us, we relied upon the office for official notification. We had no knowledge whatever, prior to the Commissioner's letter to us, of 22nd January, that notice of the Secretary's decision had, in September last, been served upon Mr. Bass himself. Doubtless his failure to notify us of the fact was due to a belief on his part that we were giving his case the attention it required. However that may be, no official notice to us, as required by the rules, was given until November, 1891.

In the case of Peterson *v.* Fort (supra), it was held

that the time within which the appeal must be filed commences to run from the date that service is first made, whether it be upon the party himself, or upon his attorney, either local, or resident in Washington.

It will be noticed that rule 105 of practice, on which counsel depends, is merely directory, and not mandatory, and that service upon either client or attorney is sufficient.

Under the rule thus laid down, the motion comes too late, and must be dismissed.

By reason of the motion, however, my attention is directed to the fact that a material allegation was overlooked in the decision of August 24, 1891, in this case—viz: that the settlement alleged by Bass, at the time of making entry of this land, antedates the selection by the railroad company.

In the absence of a motion, this Department, by reason of the supervisory power vested in the Secretary of the Interior by section 441 of the Revised Statutes, is clothed with authority to correct its own mistakes while the subject matter is yet under its jurisdiction.

As held in the case of the Pueblo of San Francisco (5 L. D., 483–494):

When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary whether or not these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the despatch of business, not to defeat the supervision of the Secretary.

This decision was quoted with approval by the supreme court, in the case of Knight *v.* United States Loan Association (142 U. S., 178).

The facts in this case, briefly stated, are as follows:

The tract involved is within the forty miles, or second indemnity belt, of the grant for the Northern Pacific Railroad Company, and was embraced in a list of selections filed in the local office November 7, 1883. This list was rejected, and the company appealed, which appeal is still pending undetermined in your office.

On June 25, 1884, Bass was permitted by the local officers to make homestead entry for the land, and, on December 14, 1886, he made final proof and certificate issued.

In the required affidavit, made by Bass June 23, 1884, upon which his entry was allowed, he alleges that he is residing upon the land;

"that I have made a *bona fide* improvement and settlement thereon; that said settlement was commenced June 28, 1880; that my improvements consist of stable twelve by sixteen, five acres fenced and three acres cultivated, and that the value of the same is $50.00.

In the decision now under review, this allegation of settlement antedating the selection by the company was overlooked, and it was held that:

The homestead entry of Bass was improperly allowed while the appeal of the Northern Pacific Railroad Company was pending before your office from the decision of the local officers rejecting its list of selections; it is accordingly suspended until the final disposition of the company's appeal.

If, upon the final adjustment of the railroad grant in the State of Minnesota, it shall appear that said company is entitled to said tract, the selection will be approved and the entry of Bass canceled.

It will be noticed that the rights of the company under its selection are, under the decision now in question, yet undetermined, and, in view of this allegation of prior settlement made by Bass at the time of making entry, it becomes necessary to determine the true status of the land at the date of selection, and to this end I have to direct that a hearing be ordered with notice to both parties, and the former decision of this Department, in the matter, is hereby recalled.

GRAHAM *v.* LANSING.

Motion for review of departmental decision rendered December 18, 1891, 13 L. D., 697, denied by Secretary Noble, April 30, 1892.

PRACTICE—ATTORNEYS' BRIEF—SCURRILOUS MATTER.

NICKEL *v.* CRAIG.

The Secretary of the Interior, on his own motion, will cause to be stricken from the files a brief that contains insinuations of corruption, or impertinent and scandalous matter reflecting upon the integrity of officers of the Land Department.

Secretary Noble to the Commissioner of the General Land Office, April 30, 1892.

The land involved in this appeal is the NE. ¼ Sec. 9, T. 102 N., R. 52 W., Mitchell, South Dakota, land district.

The defendant Susie Craig appealed from your decision of March 2, 1891, against her, assigning various grounds of error.

The attorneys for August Nickel filed a motion before you which was

transmitted to this Department, to dismiss said appeal on the grounds that the final entry of Stephen Kromizzirski, grantor of Nickel, should be confirmed under section 7, of the act of March 3, 1891 (26 Stat., 1095); and because of contemptuous and offensive matter contained in the brief filed by appellant.

* * * * * * *

As to the other branch of the motion, I do not find in the appeal proper any language that renders it objectionable, hence I do not think the motion should obtain as to the appeal, itself, or the specifications of error attached thereto. I do not understand that, because the brief filed in a case is offensive to the extent of rendering it unworthy of consideration, the appeal, as such, should be dismissed. The proper motion under such circumstances would be to move to have the brief stricken from the files.

This, however, is a matter which requires no formal motion by opposing counsel. I take it that where a brief contains insinuations of corruption or impertinent and scandalous matter, reflecting on the integrity of any of the officers of the Department, it is my duty not to allow the same to pass unchallenged, but, on my own motion, to cause the same to be stricken from the files. (Ware *et al.*, *v.* Judson, 9 L. D., 130).

I should feel obliged to severely rebuke the defendant in this case for her scurrilous attack upon the Commissioner of the General Land Office in her brief filed herein, did I not believe that the attorney who prepared it has in a cowardly manner pushed her forward and shielded himself behind her signature.

The circumstances surrounding this case are peculiar as well as anomalous. In the hearing before you, an ably prepared brief was filed by an attorney of record for the defendant. The appeal and specifications of error, as well as the brief, filed here, (bound together so as to make them one document), bear the unmistakable impress of having been prepared by an attorney who is familiar with the practice before the Department.

It is not argumentative; does not throw light upon the controversy, and the fact that the Commissioner did not arrive at conclusions satisfactory to the defendant does not subject him to base charges of the character imputed to him. If he is in error he is entitled to respectful treatment, and the charge of bribery and favoritism lodged against him is unprofessional and scandalous to such a degree that I can not permit it to remain among the records of the Department. It is, therefore, stricken from the files.

Believing that she unwittingly permitted herself to sign the obnoxious paper, and feeling charitably disposed toward her, and having no disposition to deal otherwise than fairly with her, I will, therefore, allow her sixty days from notice of this decision within which to file a respectful brief upon the merits of her claim, a copy of which she shall serve

on August Nickel, the plaintiff, within the time prescribed by the rules of practice, and thirty days thereafter will be given him to reply. If she does not comply with this order within the time specified, the case will be taken up and disposed of. In the meantime all further proceedings will be suspended. You will cause notice of this order to be served upon Susie Craig whose address is given as Milton, Rock Co., Wisconsin.

PRE-EMPTION CONTEST—RESIDENCE—PRACTICE—AMENDMENT.

NOE *v.* TIPTON.

Residence in good faith in a house believed to be upon the land claimed is constructive residence upon such land.

In a proceeding against a final entry the local office has no authority to allow an amendment of the affidavit of contest, where the additional matter is not related to the original charge but presents a new ground of contest.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 2, 1892.

On December 1, 1882, John W. Tipton made cash entry No. 2553 for the W. ½ NE. ¼ and E. ½ NW. ¼, section 6, T. 11 S., R. 64 W., at Pueblo, Colorado, based upon pre-emption declaratory statement No. 5525, filed January 20, 1880, alleging settlement January 7, 1880.

On November 15, 1887, Jerry R. Noe filed an affidavit of contest against said entry, alleging "that the said Tipton never built a house upon or became a resident of said land, but knowingly and intentionally built and resided upon adjoining land to the west of his said pre-emption claim."

A hearing was ordered for April 11, 1888, to investigate said charge, when the parties appeared and testimony was submitted.

On February 2, 1889, the local officers found that the said contest allegations were not sustained by the evidence, that said contest should be dismissed, and that said entry should be allowed to remain intact upon the records.

An appeal was taken, and by your letter of February 26, 1891, you affirmed their decision and dismissed the contest.

An appeal now brings the case to this Department.

The evidence shows that the entryman by mistake, built his house about two chains west of the west line of his claim. His continuous residence there was not disputed, and his good faith is manifest. Such an occupation has been uniformly held to be a constructive residence upon the land claimed. Kendrick *v.* Doyle, (12 L. D. 67) and cases therein cited.

On April 12, 1888, said Noe filed an amendment to his affidavit of contest alleging as additional grounds of contest that at the date of said Tipton's entry "he was the owner of three hundred and twenty

acres of land in the State of Colorado," and that "he abandoned a residence upon his own land in the State of Colorado to settle on the land embraced in his pre-emption claim."

This amendment was tendered by the contestant after he had submitted his testimony and had rested his case, and during the cross-examination of Tipton. It alleges two separate and additional grounds of contest, materially different from that contained in the original affidavit of contest upon which the contest was ordered by you, either of which would have been sufficient ground for an independent contest. The local officers refused to accept the amendment as properly before them, upon the objection of the defendant, and declined to receive any evidence in support thereof. Their action in this respect was sustained and affirmed by you, upon the following ground:

> The affidavit offered during the hearing of this case was not an amendment to the original affidavit in any particular and the charges therein had no relation whatever to the charges in the original affidavit of contest, upon which a hearing was ordered by this office. This affidavit was to all intents and purposes a new suit requiring new notice as in the case of an original action after said hearing had been ordered by the proper authority. This contest being against a cash entry you had no authority to order a hearing upon the charges of the new affidavit until this office acted upon the same and authorized the hearing.

This decision by you is assigned as one of the errors for which the appeal is taken. The contestant contends that he had a right to amend his original affidavit of contest in the manner proposed.

Your ruling seems to be fully warranted by the Rules of Practice. Rule 2 provides that

> In every case of application for a hearing an affidavit must be filed by the contestant with the register and receiver fully setting forth the facts which constitute the grounds of contest.

An application which sets forth but one of three material and independent grounds of contest does not comply with this rule. Rule 8, subdivision 6, requires that the notice of contest must "briefly state the grounds and purpose of the contest." The manifest object of this rule is that the party against whom charges are made may know what the charges are and may come to the trial prepared to meet them. This rule is obviously just, but would be defeated if such an amendment as this could be allowed.

Rule 5 provides that

> In case of an entry or location on which final certificate has been issued the hearing will be ordered only by direction of the Commissioner of the General Land Office.

This rule requires contestants to submit all substantial grounds of contest to the Commissioner for him to decide whether any or all of them furnish proper grounds for ordering a hearing or not. It is as much beyond the jurisdiction of the local officers to allow an amendment which contains subject matter which would authorize an independent contest, as it would be for them to order an independent con-

test on the same grounds. They have no jurisdiction over the subject matter of such an amendment, and can pass no judgment upon it. They can only accept it for transmission to you.

Your judgment is affirmed.

RAILROAD GRANT—RELINQUISHMENT—STATE ACT OF MARCH 1, 1877.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. *v.* DANELKE.

The governor's relinquishment, under the State act of March 1, 1877, for the benefit of a settler on a listed tract within the primary limits of this grant, divests the company of any title that passed under said grant.

Secretary Noble to the Commissioner of the General Land Office, May 3, 1892.

I have considered the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* John Danelke, involving the fractional NW. ¼ of Sec. 35, T. 131 N., R. 39 W., St. Cloud land district, Minnesota, on appeal by the company from your decision of December 5, 1890, holding for cancellation its list as to said tract.

This tract is within the primary limits of the grant for said company, upon what is known as the St. Vincent Extension of said railway, and has been listed on account of the grant, but no patent or certificate has issued on account of the grant embracing the land here in question.

On June 23, 1880, the governor of the State, acting under the authority conferred upon him by the State law of March 1, 1877, special laws of Minnesota, 1877, p. 257), executed a relinquishment to the United States of all claim to this tract, on account of the grant, in favor of Danelke, the present claimant.

The company in its appeal urges that:

The State is a naked trustee, holding the lands for the specific purposes expressed in the granting act, i. e., the construction of the road, and is prohibited by the express language of the granting acts from applying them to any other purpose. The attempted relinquishment in Danelke's favor is, therefore, a diversion of the tract in question to a purpose not contemplated by the granting act, and, hence, is inoperative and void.

The legislature of Minnesota having accepted the grant and assumed the trust upon the terms and conditions contained in the granting acts, was powerless, in the absence of the consent of Congress, to authorize such a relinquishment. The governor of Minnesota was equally powerless to execute, and the land department of the United States to accept, the relinquishment.

The time for the completion of this road, even under the extension granted by the act of June 22, 1874 (18 Stat., 424), expired March 3, 1876. This time was extended by the State act of March 1, 1877 (*supra*), and, among other conditions imposed by the act, the following is taken from the 10th section:

The Saint Paul and Pacific Railroad Company, or any company or corporation taking the benefits of this act, shall not in any manner, directly or indirectly, acquire

or become seized of any right, title, interest, claim, or demand in or to any piece or parcel of land lying within the granted or indemnity limits of said branch lines of road, to which legal and full title has not been perfected in said Saint Paul and Pacific Railroad Company, or their successors or assigns, upon which any person or persons have in good faith settled and made or acquired valuable improvements thereon, on or before the passage of this act, or upon any of said lands upon which has been filed any valid pre-emption or homestead filing or entry—not to exceed one hundred and sixty acres to any one actual settler.

The entire road was not completed until in November 1878, and, as held (syllabus) in the case of said company against Chadwick (6 L. D., 128):

The company by accepting the terms fixed by the State legislature, in extending the time for the construction of the road, relinquished its claim to lands occupied by actual settlers and authorized the governor of the State to reconvey such lands to the United States.

The supreme court in the case of said company against Greenalgh (139 U. S., 19), referring to the conditions in favor of settlers, imposed by the acts of June 22, 1874 (*supra*), and March 1, 1877 (*supra*), states:

While in this case no specific action was taken by Congress to work a forfeiture of the grant, or by the State, yet the continued possession and use of the property by the company were, in fact, subject to the condition that the rights of settlers upon the lands at the time should not be interfered with, where such settlements had been made in good faith, as was the case in the present instance. And it would be in the highest degree inequitable to allow the company to have all the benefits of the extension of time to complete its road, so as to avoid any forfeiture of its privileges and franchises, without at the same time holding it to the conditions affecting the rights of settlers upon the lands of the company, in consideration of which the extension was made.

The company having failed to build the road within the required time, in extending the time the grantor might impose a new condition. New Orleans Pacific R'y Co. *v.* United States, 124 U. S., 124.

I am clearly of the opinion that by the relinquishment, executed by the governor under the act of March 1, 1877 (*supra*), the United States is re-invested with whatever title might have passed under the act making the grant, and I therefore sustain your decision, and direct that the listing by the company be canceled, as to the tract in question, and such steps taken as will protect Danelke in his rights under his settlement.

TIMBER CULTURE ENTRY—EXCESSIVE ACREAGE.

FRANK EATON.

Where a timber culture entry exceeds one hundred and sixty acres the excess must be paid for in cash, or relinquished.

First Assistant Secretary Chandler to the Commisioner of the General Land Office, May 3, 1892.

The land involved in this appeal is the NW. ¼ of Sec. 2, T. 11 S., R. 21 W., Wa-Keeney, Kansas, land district.

The record shows that Frank Eaton made timber-culture entry of said tract, containing 182.28 acres, November 29, 1878, and offered final proof April 23, 1891, which was rejected by the local officers on the ground that "claimant refuses to make payment for the excess of 22.28 acres, as required by" your letter of March 26, 1880. Claimant appealed, and you, by letter of May 9, 1891, affirmed their decision, whereupon he prosecutes this appeal, claiming that you erred because the timber-culture act permits an entryman to take a quarter-section and does not specifically require him to pay for the excess over one hundred and sixty acres.

The rule is well established that where an entry of a quarter-section exceeds one hundred and sixty acres, the excess must be paid for in cash, or relinquished. This rule is so well settled that it seems to be a work of supererogation to discuss it. The entryman will be required to relinquish one legal subdivision of the land, or pay cash for the excess over one hundred and sixty acres.

Your judgment is modified to this extent.

PRACTICE—MOTION FOR REVIEW.

DRAKE ET AL. *v.* BUTTON (ON REVIEW).

A review will not be granted on the motion of a stranger to the record.

Secretary Noble to the Commissioner of the General Land Office, May 3, 1892.

This motion is filed by Albert E. Robertson, praying for a reconsideration and review of the decision of the Department of January 2, 1892, in the case of E. P. Drake and E. W. Sargent *v.* A. G. Button (14 L. D., 18), so far as it affects the E. ½ of the SE. ¼ of Sec. 34, T. 93 N., R. 48 W., Des Moines, Iowa.

The case sought to be reviewed came before the Department upon the application of Drake to perfect title to certain lands purchased from the Sioux City and St. Paul Railroad Company, under the 4th section of the act of March 3, 1887 (24 Stat., 556). Button claimed part of the land embraced in said application by virtue of the homestead entry, and thereupon a hearing was ordered to determine the rights of the parties to said controversy. It was held that Drake, being a *bona fide* purchaser of said lands from the railroad company after the lands were patented to the State for the benefit of said road, and prior to September 12, 1887, when they were restored to the public domain, had the right to perfect title to the same, and was entitled to have patent issued therefor. The claim of Button was not initiated until March 5, 1888, when he made homestead entry of part of said tracts.

Robertson alleges that he made pre-emption filing September 12, 1887, for the E. ½ of the SE. ¼ of Sec. 34, T. 93 N., R. 48 W., Des Moines, Iowa,

alleging settlement April 21, 1887, and that said land is embraced in the application of Drake. He was not a party to the record in the case of Drake et al. *v.* Button, but, in view of the fact that the decision is in conflict with his claim, he asks that a rehearing may be granted, and that he may have the opportunity of showing the priority and legality of his claim and entry, and the existence of such claim prior to that of Drake

This motion must be denied, for the reason that Robertson is a stranger to the record, and has no right to ask for a review of said decision. Charles Hotaling, 3 L. D. 300. He contends that the hearing was ordered on the application of Button, and was intended only to go to the status of the land claimed by him; that he (Robertson) was not mentioned in the order, and no notice having been given to him, although his filing was of record, it is evident that the Commissioner did not consider him a party to the case. If Robertson was not a party to the record, or was not bound to appear and defend his claim upon the hearing ordered on the application of Button, he would not be bound by the decision. Whether he was bound to appear and defend upon that hearing is not necessary to determine on this motion. If he was not bound by the decision, he has clearly no right to ask for a review of it. Furthermore, he does not show that there was any error in the decision of the Department in the case of Drake *et al. v.* Button.

He states that in promulgating the decision of the Department the local officers were directed to notify him that he would be allowed thirty days within which to show cause why his entry should not be canceled. If he can show that no cause exists his rights can be protected, without reviewing or revoking the decision in the case of Drake *v.* Button.

The motion is denied.

PRACTICE—APPEAL—OKLAHOMA LANDS—TOWNSITE ENTRY.

HENNESSEY TOWNSITE.

An appeal will not be entertained in the absence of notice thereof to adverse parties.

A homestead entry, not made in good faith for a home and for agricultural purposes, but made with the intent to use the whole or a part thereof as a townsite, is invalid in its entirety, and the invalidity can not be limited to particular tracts embraced within said entry, either by a subsequent purchase of a portion of the land under section 21, act of May 2, 1890, or by the relinquishment of the part used for townsite purposes.

Secretary Noble to the Commissioner of the General Land Office, May 4, 1892.

I have considered the case of the townsite of Hennessey involving the SW. ¼ of NE. ¼, the SE. ¼ of the NW. ¼, the NE. ¼ of the SW. ¼, and the NW. ¼ of the SE. ¼ of Sec. 24, T. 19 N., R. 7 W., Kingfisher, Oklahoma, on appeal by John W. Creech, from your decision of October 17, 1891.

The local officers report that due notice of your decision was served on Creech and that he was allowed ten days in which to appeal. The appeal was filed in the local office November 20, 1891. The local officers do not state the date the notice was given, but it is assumed the appeal was filed in time.

On December 21, 1891, T. G. Cutlip, attorney for the townsite occupants, filed a motion to dismiss said appeal on the ground that no notice of the same had been filed on the opposing party. The townsite occupants were opposing parties and were entitled to notice of appeal. As this was not given, said appeal must be dismissed under rules 93 and 99 of the rules of practice.

No appeal has been taken from your findings in relation to the other three forty acre tracts, and the same have become final.

On account, however, of the principles involved, it will be necessary to discuss the case at some length, and during the discussion reference will necessarily be made to the claims of the various parties.

The records show that on April 23, 1889, section 24, T. 19 N., R. 7 W., was covered by the following homestead entries, to wit:

John A. Blair's for the SE. ¼; Canada H. Thompson's for the SW. ¼; Jacob U. Shade's for the NW. ¼; and John W. Creech's for the NE. ¼.

On October 23, 1889, Blair relinquished his entry for the SE. ¼ and on the same day John T. Baldwin made homestead entry for the same tract.

On February 21, 1890, John P. Jones, acting as mayor of the townsite of Hennessey, made application to enter the SW. ¼ of the NE. ¼, the SE. ¼ of the NW. ¼, the NE. ¼ of the SW. ¼ and the NW. ¼ of the SE. ¼ of said section 24, township and range above mentioned. Among the statements made in the application, are the following,

> That the town of Hennessey was first opened for settlement and occupied for purposes of trade and business on June 25, 1889, under the control and management of the Hennessey Town Company, an organization formed for the purpose of speculating in town lots in Oklahoma. . . . . That said company, with the consent of the four original homestead entrymen, caused the land applied for as a townsite to be surveyed into lots and blocks, that it negotiated, through its agent, sales and leases of lots to the amount of about $10,000; that on or about January 1, 1890, the citizens of the town were informed that the town company was an illegal organization and that neither it, nor the homestead claimants could acquire title to the land thus surveyed and sold; they therefore petitioned the mayor and town council to make the townsite application, and refused to in any way further recognize or to be controlled by said company; that Hennessey is on the line of the Chicago, Kansas and Nebraska Railroad and that parties connected with the management of said road are also members of said town company, of which it is believed, the original homestead entrymen are also members, from the fact that they have never objected to the survey and occupation of the land for townsite purposes, and have themselves negotiated sales of lots in said town to divers parties; that said town has a population of over two hundred and that its business and improvements are sufficient to warrant it in making application for the land sought.

The townsite application was rejected by the local officers.

Various affidavits of contest were filed against the homestead entries alleging that the same were illegal and fraudulent; that they were made for speculative purposes and that the entryman had consented to the use of the land for townsite purposes, etc.

In view of the sworn statements contained in the townsite application, and the charges made by the individual contestants, hearings were ordered in each case under instructions from your office, after due notice to all parties in interest.

On the day of hearing, John T. Baldwin appeared and relinquished his claim to the NW. ¼ of the SE. ¼ of said section 24. Said forty acres therefore becomes subject to entry under the townsite law of Oklahoma, and will become subject to the jurisdiction of the proper board of townsite trustees.

After the hearing involving the SW. ¼ of the NE. ¼ of said section 24, embraced in the homestead entry of John W. Creech, the local officers found that the charges preferred that said Creech made his homestead entry for fraudulent and speculative and townsite purposes, and that he consented to the sale of town lots, etc., were true, and recommended that his entry be canceled. You affirmed their action, and by failure of appeal, in due form said decision has become final. I will say, however, that I think the decision was fully justified by the evidence submitted. Said tract of land therefore becomes subject to entry under the townsite laws of Oklahoma and will be subject to the jurisdiction of the proper board of trustees.

So far as the remaining tracts of land, viz., the SE. ¼ of the NW. ¼ and NE. ¼ of the SW. ¼ of said section 24, included in the townsite application, and which are embraced in the homestead entries of Canada H. Thompson and Jacob U. Shade, are involved, it appears that on the day appointed for the hearing, the mayor of Hennessey, by authority of what purported to be the city council, filed a motion to dismiss the hearing, which motion was entertained by the local officers. Certain citizens, however, protested against this action on the part of the town authorities, and a further hearing was ordered with notice to all parties. At this hearing no evidence was submitted in opposition to the homestead entries, but Thompson and Shade introduced evidence in support of their claims.

From the evidence submitted it appears that these entries were legally made; the charges of fraud, illegality, and speculation on the part of Thompson and Shade are not sustained. Said parties have applied to purchase said tracts of land for townsite purposes under the provisions of section 22 of the act of May 2, 1890, at $10, per acre. The local officers recommend that these applications be granted and you approve that recommendation, and your decision on that point is affirmed, and said applications will be duly considered.

The case might properly be closed at this point, were it not for the fact, that in your decision certain propositions are stated, which in my opinion, demand consideration.

It was held in the Orlando Townsite case (13 L. D., 99), that a duly qualified homestead entryman, who was qualified to make final homestead entry and receive a patent for his lands, might enter that portion used for agricultural purposes under the provisions of section 21, of the act of May 2, 1890 (26 Stat., 81), and that portion used for townsite purposes under the provisions of section 22, of the same act.

Thompson and Shade have each made a cash entry for the one hundred and twenty acres not used for townsite purposes, under section 21 of the act of May 2, 1890, and now apply to make another cash entry for forty acres under section 22 of said act. You say—

> In other words, the cash entries, for the one hundred and twenty acres each, of Shade and Thompson, respectively, as completely separate the tracts covered thereby from the respective tracts applied for by them as a part of the townsite of Hennessey, as the above stated relinquishment of John W. Creech separated the one hundred and twenty acres covered thereby from the forty acres still claimed by him and which is a part of said townsite. The invalidity, if such it should be finally found to be, of their respective homestead entries, as the result of using or consenting to the use of a portion of the same for townsite purposes, which invalidity would have extended to the whole of said homestead entries, has, by means of said cash entries, been limited or restricted to the portions of the homestead entries applied for by said entryman as portions of the townsite of Hennessey.

There certainly is nothing in the Orlando townsite decision which justifies, or in any manner sustains such a conclusion, and I am unable to see anything in reason that will justify it.

It was said in the Orlando case:—

> The very foundation of a final commuted cash entry is good faith. This principle is so well established that the statement requires neither the support of an argument, nor the citation of authorities,

and of necessity, in making an entry of various legal subdivisions, the good faith must extend to each and every legal subdivision.

An entry may be valid for one subdivision and invalid for another; this may result from the fact that one subdivision is not subject to entry, or it may result from the fact that the applicant is disqualified from entering one tract, as in the case of a man who is entitled to make an additional entry of forty acres, but who makes an entry of eighty acres, the entry is valid for the one legal subdivision but invalid for the other.

Your proposition is substantially this: That a man who is legally qualified to make a homestead entry of one hundred and sixty acres, can, by violating the law under which he made the entry, disqualify himself from perfecting title to said tract, but that if the acts constituting the disqualification are confined to a legal subdivision, he may perfect title to the remaining subdivisions, or in other words, you hold that, admitting Thompson and Shade had made their entries for speculative purposes and for the purpose of establishing a townsite and had used forty acres for that purpose, the fact that they had been allowed to perfect title to one hundred and twenty acres as agricultural land under section 21 of the act of May 2, 1890, would limit their disqualifications

and disabilities to the forty acres thus illegally entered to be used for townsite purposes. The result of this contention of course, is that the cash entries for the one hundred and twenty acres are legal, whatever might be the finding as to the remaining forty acres. You advance no argument in support of this proposition, and I am unable to formulate any in support of the same.

It is sufficient to say that it can not be admitted as a correct doctrine to govern in the adjudication of cases. Had the charges against the original entries of Shade and Thompson been sustained, their cash entries for the one hundred and twenty acres, would have been illegal.

Upon the relinquishment, by John T. Baldwin, of the NW. ¼ of the SE ¼, the land applied for by the townsite occupants, he was allowed to make cash entry for the remaining one hundred and twenty acres embraced in his homestead entry. Discussing said entry you say,—

> It now remains for me, before concluding this decision, to consider the charges contained in the affidavit of contest filed by Norman R. Frishkorn against cash entry No. 15 of John T. Baldwin. These charges consist first, of an allegation to the effect that the north-west quarter of the land covered by Baldwin's homestead entry was occupied as a part of the Hennessey townsite at the date said entry was made of record October 23, 1889; second, that a few days subsequent to making his cash entry of the remaining one hundred and twenty acres, he subdivided a portion thereof into town lots. The first of these allegations was virtually admitted by Baldwin and he at the same time cured the resulting invalidity of his homestead entry by relinquishing the forty acres thus occupied as hereinbefore stated. The second allegation, if admitted, could in nowise affect Baldwin's cash entry No. 15, unless accompanied by the admission of proof that it was his intention to use the land or some portion thereof for townsite purposes, at the date of making said cash entry.

Frishkorn has taken no steps to set aside your judgment and it is presumed he has acquiesced in your action. But the doctrine announced, and which seems to be the rule of your office, can not be acquiesced in as correct. The validity of Baldwin's cash entry for the one hundred and twenty acres, depends upon the validity, so far as the motive is concerned, of his original homestead entry for the one hundred and sixty acres. His motive in making the original entry and not his motive in making the final cash entry, must control. If he took the original one hundred and sixty acres with the intention of using a portion of it, viz., forty acres for townsite purposes, his entry was illegal and could not be validated by a relinquishment of the said forty acres; and this principle must control in the adjudication of cases. To hold otherwise would be to encourage persons to make illegal entries, with the assurance that if detected, they might relinquish a portion of the entry and perfect title to the balance of the land.

This doctrine is not intended in any way to interfere with the right of a party to relinquish a portion of his entry and perfect title to the balance, provided the entire original entry was made in good faith; the good faith of the entryman in making the original entry, is the test by which the subsequent entry or entries must be judged, and upon which they must stand or fall.

The papers in the case are herewith returned, and you will instruct the proper board of townsite trustees to take the necessary steps to perfect title to that portion of land subject to townsite entry.

SOLDIER'S ADDITIONAL HOMESTEAD—SECTION 7, ACT OF MARCH 3, 1891.

UNITED STATES *v.* COONSY.

The confirmatory provisions of the body of section 7, act of March 3, 1891, extend to a soldier's additional homestead entry based upon service in the Missouri Home Guards.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 4, 1892.

I have considered the motion of John Bratt, transferee, in the case of the United States *v.* Samuel C. Coonsy, asking to have said case disposed of under section 7 of the act of March 3, 1891 (26 Stat., 1095).

The record shows that Coonsy made additional soldier's homestead entry on September 6, 1886, for the tract in question, to wit: N ½ of NE ¼ of Sec. 34, T. 17 N., R. 36 W., North Platte land office, Nebraska, and paid for the land and received final certificate No. 1144 therefor. On the same day he sold and conveyed the tract to Theodore F. Barnes, who in turn sold and conveyed it together with other lands to John Bratt.

On December 8, 1888, said entry was held for cancellation "as illegal, being based upon service performed in the Missouri Home Guards, the members of which organization are not entitled to the benefits of section 2306 Revised Statutes United States."

An appeal was taken from said order to this Department, and was pending here on March 3, 1891, when the act above cited was approved. John Bratt, claiming to be transferee and present owner of the tract, has filed this motion.

It appears from the above statement of facts that the entry in question was made on September 6, 1886, and that the tract was sold after said final entry and prior to March 1, 1888. No fraud has been found against the purchaser. These facts show, *prima facie*, that the case has all the elements required to bring it within the provisions of section 7 of the act of March 3, 1891.

You are therefore directed to call on the transferee to furnish proof as required by the letter of instructions to chiefs of divisions, dated May 8, 1891 (12 L. D., 450). After receiving this proof, you will adjudicate the case in the light of the act and instructions above cited.

SALE OF ISOLATED TRACT—SETTLEMENT RIGHT.

JOHN M. NETTLES.

An order for the survey, and public offering of land as an isolated tract, precludes the allowance of a pre-emption filing therefor, tendered by the applicant for survey, and based upon an alleged prior settlement right.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 4, 1892.

I am in receipt of your letter of July 9, 1891 transmitting the appeal of John M. Nettles from your decision of December 12, 1890 rejecting his application to file pre-emption declaratory statement for lot 3, Sec. 3, T. 37 S., R. 41 E., Gainesville, Florida, land district.

It appears from the record and the affidavits of the applicant, that he went upon this land in October, 1889, cleared a few acres and planted them to bananas. The land is an island in Indian River in said section 3, and contains about forty acres. In April, 1890, he applied to have the island surveyed, and on May 8, 1890, the Secretary of the Interior, on examination of the case, found that this island was about two and one half feet above high water mark; that it contained about forty acres and was fit for agricultural purposes; that there were about five hundred banana plants on it, and a house fourteen by sixteen feet, value about three hundred dollars, made by Nettles, and that notice had been given the owners of the main land opposite the island of said application for survey. Thereupon, you were directed to contract for a survey of the island, and it was directed in said letter (Vol. 91, p. 125, L. and R.) "That when said island has been surveyed it shall be offered at public sale as an isolated tract under section 2455 of the revised statutes."

I do not find in the papers before me any reason for recalling that letter, or revoking the order therein made. The applicant went upon the island, taking the risk of the owners of the main land claiming it. He asked to have it surveyed as an isolated parcel of land. He now says substantially that it is of such value that he is unable to pay for it what others are willing to pay because, inferably, of its great value. None of these reasons will warrant the Department in revoking its former order. This case is similar to that of Luther K. Madison (12 L. D., 397), and under the rule there laid down Nettles' application was properly rejected. Your decision is therefore affirmed.

PRE-EMPTION FILING—MARRIED WOMAN.

BROWN *v.* NEVILLE.

A married woman, living apart from her husband under a voluntary agreement of separation, is not qualified to file a pre-emption declaratory statement.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 4, 1892.

The land involved in the controversy between the parties to this proceeding, is the NE. ¼ of Sec. 3, T. 24 S., R. 9 W., Las Cruces land district, New Mexico.

Brown filed his pre-emption declaratory statement for this tract on the 9th of August, 1887. On the 24th of that month Mrs. Neville filed her declaratory statement for the same tract, alleging settlement on the 17th of October, 1886. A few days after his filing Brown undertook to take possession of the land, and erect a house thereon. This he was prevented from doing by Mrs. Neville. He alleges that she threatened him with bodily injury, and with death. Not wishing to encounter either, he filed an affidavit of contest, alleging that Mrs. Neville was not a qualified pre-emptor at the date of her filing, for the reason that she was a married woman, and that she had previously exhausted her pre-emption rights.

A hearing was thereupon ordered, which took place at the local office on the 17th of January, 1888, at which both parties submitted evidence. This was followed by a decision by the register and receiver, on the 17th of March, 1888, in which they recommended the cancellation of the pre-emption declaratory statement of Mrs. Neville. This decision not being satisfactory to her, she filed a motion for rehearing, which was overruled, and on the 18th of April, 1888, she filed an appeal, specifying all the findings of the local officers as errors, and again asking for a rehearing. There was no evidence of service of this appeal upon the opposite party, and in your decision of the whole case, made on the 25th of September, 1890, you dismissed the same.

While her appeal was pending before you, she applied to make homestead entry for the land. This application was made on the 11th of January, 1890, and was rejected by the local officers, for the reason that the land was covered by soldiers' additional homestead entries. She appealed from such decision and in your decision of September 25, 1890, you sustained the action of the local officers in rejecting her homestead application. An appeal from your decision, brings the case before me for consideration.

The appeal consists of nine statements of fact which she asserts her ability to prove, and concludes with the assertion that your decision is contrary to the law and the evidence. It does not conform to the rules of practice of the Department, but I have nevertheless examined the record in the case, and have concluded to decide it upon its merits.

The record contains certain affidavits by different parties, and letters, or statements in writing, by the register of the land office at Concordia, Kansas. All of these bear date subsequent to the hearing before the local officers at Las Cruces, and can not therefore properly constitute the basis for a decision in the case.

The declaratory statement of Brown was canceled by relinquishment on the 28th of August, 1888, and the appeal of Neville from the decision of the local officers recommending the cancellation of her pre-emption filing, having been dismissed by you, upon the authority of Bundy *v.* Fremont Town Site (10 L. D., 59), the only question before me is as to her right to make homestead entry for the land on the 11th of January, 1890, which depends upon her right as a pre-emptor when she filed for the same, in August, 1887.

From the record it appears that she occupied the land from the time she made settlement thereon, in October, 1886, up to the time that she sought to make homestead entry therefor, and certain soldiers' additional homestead entries, made for the land between those dates, would be held subject to any rights which her pre-emption filing conferred upon her.

The fact was both established by the evidence, and admitted by the defendant, that she was married to James Neville, at Silver City, New Mexico, on the 20th of October, 1886. She also testified that her husband was still living, although they were not living together, they having voluntarily agreed to live separate and apart. It is clear, therefore, that at the time she made her pre-emption filing, she was not a widow, or a single person. As to age and citizenship she was within the rule, but was she the head of a family? If not, she was not a qualified pre-emptor when she filed her declaratory statement. If her filing gave her no rights to the land, it is free from all claims after the cancellation of the declaratory statement of Brown, and her application to make homestead entry therefor, subsequent to the soldiers' additional homestead entries, was properly rejected by the local officers, and their action was properly approved by you.

In Giblin *v.* Moeller's Heirs (6 L. D., 296), it was held that "proof of temporary absences on the part of the husband, and of non-cohabitation for a year, would not warrant the allowance of a timber culture entry to a married woman, claiming the right as a deserted wife and head of a family." In Willard *v.* Hashman (13 L. D., 579), it was laid down as a correct legal proposition, that where the husband is of sound mind, not convicted of crime, nor restrained of his liberty, the law recognizes him as the head of the family. To emphasize that proposition in that case, it was added that should the wife voluntarily leave the home of the husband, and establish for herself a home elsewhere, she would not become the head of the family, even though she took their children with her.

In the case at bar, the proof is that the separation between Mrs. Neville and her husband was a voluntary one. There is no suggestion

of desertion on his part, except her testimony that he did not support her after their agreement to live apart from each other. Neither is there any evidence as to how long such separation was to continue. She is therefore not brought within the rule which allows a deserted wife to make filing or entry for public land, and the doctrine laid down in Willard *v.* Hashman must be applied to the case. The result is, that she was not a qualified pre-emptor when she filed her pre-emption declaratory statement, and she acquired no right to the land by such filing.

After the cancellation of Brown's filing the land was free from all legal claim, and the applications to make soldiers' additional homestead entry therefor were properly allowed, and her subsequent homestead application was properly rejected. The decision appealed from is therefore affirmed.

PRIVATE ENTRY—NON-MINERAL AFFIDAVIT—PAYMENT.

MENDENHALL *v.* HOWELL ET AL.

An application to make private entry should not be accepted, and held, with time allowed for the applicant to examine the land and file the requisite non-mineral affidavit, but, in the absence of any intervening adverse claim such action does not defeat the right of entry.

The non-mineral affidavit may be made by the attorney of the applicant.

The receiver may properly accept as payment a deposit of money in a government depositary, where a large amount is involved.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 4, 1892.

I have considered the case of W. J. Mendenhall *v.* W. A. Howell and Walter D. Jacoway, on appeal from your decision of January 12, 1891, involving the validity of cash entries for the E. ½ of the SE. ¼ and N. ½ of Sec. 6, S. ½ of NE. ¼ and S. ½, Sec. 10, and N. ½ of SE. ¼ and N. ½, Sec. 14, T. 4 N., R. 21 W., Dardanelle land district, Arkansas.

April 29, 1887, Jacoway filed application for a large tract of land including the above described tracts in controversy, but as the applicant did not have sufficient knowledge of the land to execute the non-mineral affidavits for the same, the local officers accepted and held the applications allowing the party ten days to examine the land, make the required non-mineral affidavits and perfect his entries. It appears that on May 9, 1887, W. A. Howell filed in the local office an application to make cash entry for the E. ½ of SE. ¼, and N. ½, Sec. 6, town and range as above, which in view of the fact that the ten days had expired, the register allowed. William D. Jacoway, father of and attorney for the defendant, proceeded to and examined the land, and on the morning of May 13, 1887, the defendant filed the non-mineral affidavits required, made by his father, at the same time on account of the large purchase

amounting to about $30,000 an arrangement was made that the money be paid into the First National Bank of Little Rock, Arkansas, a government depositary, to the credit of the receiver.

On May 14, 1887, duplicate receipts were issued to Walter D. Jacoway who made endorsement thereon in favor of one Logan H. Roots, and left them in the hands of the receiver for delivery to Roots. On the following day the receiver, to assure himself that the money had been properly deposited, visited Little Rock and after ascertaining that the proper amounts had been deposited in said bank by Roots, as also said Howell, he delivered to them the duplicate receipts.

On May 14, 1887, W. J. Mendenhall, the contestant, made application to enter the lands in question, which was rejected on the 21st of the same month by the local officers, on the ground that the lands were already embraced in the entries of Howell and Jacoway, whereupon the contestant appealed and at the same time forwarded to you a petition asking for a hearing alleging that he was the first legal applicant for the land, that the receiver was a relative of one of the defendants, and was allowed to file non-mineral affidavits, executed by his attorney and that the receiver issued final receipts to Jacoway and Howell, without receiving the money in payment.

Under date of June 30, 1888, you directed that a hearing be allowed with due notice to all parties and in view of the charge of favoritism shown on account of the relationship of the receiver to one of the defendants, that the testimony be taken before some qualified officer not connected with the local office.

John B. Crownover, a notary public in Dardanelle was designated to take the testimony, and after several postponements, all parties consenting thereto, the hearing was concluded January 19, 1889, and on the 24th of the same month, the local officers decided adversely to the contestant and so advised all parties in interest. Contestant appealed and under date of January 12, 1891, you affirmed the decision below. Contestant again appeals, and alleges error in holding that the local officers were justified in allowing applicant Jacoway ten days from date of filing to complete entry; 2d, That non-mineral affidavit could be made by any person other than the applicant; 3d, That money deposited in a bank used as a United States depositary is a sufficient tender of money in payment of government lands; 4th, That you, after deciding that the local officers had no authority to allow ten days, etc., still allowed the rule to stand in this case.

The record in this case shows that the defendant Jacoway made application for these lands April 29, 1887; that not being prepared to make the non mineral affidavit, he was allowed ten days to examine the land, furnish the necessary affidavit and complete the entries. Although I do not think that such a practice should be established by the local officers, yet in the case under consideration the non-mineral affidavits were filed and the entries completed before the Mendenhall application was made. The only objection I can see to the ten days' rule adopted

by the local officers, is that during that period it withheld the land from entry by other legal applicants, which is an unfair advantage, but in the case under consideration, Mendenhall did not make his application until several days after the ten days limit had expired, therefore he was in nowise harmed by the rule; furthermore, it does not appear that the local officers gave to Jacoway any undue preference outside of the rule referred to, as on May 9, 1887, after the ten days had expired and prior to the completion of the Jacoway entries, W. A. Howell made a cash application for a portion of the land in question which was promptly allowed.

In relation to the question of depositing the money in a bank instead of paying the same direct to the receiver, I am satisfied that under the circumstances and in view of the large amount involved ($30,000), the course of the receiver was eminently a proper one to pursue, especially when we take into consideration that the bank in question was a government depositary; furthermore, it is shown that the receiver did not turn over the duplicate receipts for said entries until he had been assured that the money in question had been properly deposited subject to his order.

Regarding the 2d specification of error, Jacoway, the applicant, appears to have been ignorant of the lines of survey and it would have been somewhat difficult for him to have informed himself thereof, hence under these circumstances, I know of no reason why the non-mineral affidavit should not be furnished by his father, who was also his attorney in the case and as it appears was well acquainted with the lands in controversy.

Again as these lands were open to private entry by any qualified person and there is no restriction in law as to quantity or evidence required as to what use the purchaser intends to make of the lands, I see nothing wrong in the fact that Jacoway purchased these lands for the use and benefit of Logan H. Roots, who if he had so desired, could have made the entries himself. I fail to find anything in the record of this case that sustains even a suspicion against the official integrity of the receiver, and I am satisfied that both officers have conducted the transaction with a spirit of fairness towards all concerned.

With this view of the case your decision is affirmed.

SIOUX INDIAN LANDS—ALLOTMENT.

INSTRUCTIONS.

Where selections have been received in the local office under the provisions of section 13, act of March 2, 1889, and there are no prior valid claims thereto, the lands should be duly allotted, and in the event of the allottees death, prior to the approval of the allotment, patent should issue thereon in accordance with section 8 of said act.

Secretary Noble to the Commissioner of Indian Affairs, May 5, 1892.

I acknowledge the receipt of your communication of 15th ultimo, in which you request to be advised as to whether allotments should be

made to Indians of the Sioux Nation who had died since complying with the provisions of the 13th section of the Sioux act of March 2, 1889 (25 Stat., 888), as to election and filing their applications in the local land office.

In response thereto, I transmit herewith copy of an opinion of 28th ultimo from the Honorable Assistant Attorney General for the Department of the Interior, wherein it is held "that where selections of land have been received in the local land office under the provisions of said section thirteen of the act of 1889, and there is no prior valid claims thereto, the same should be duly allotted and in case of the death of the allottees prior to such approval patents should issue as required in section eight."

Concurring in the views of the Hon. Assistant Attorney General, I have to direct that the same be carried into effect by appropriate action.

OPINION.

Assistant Attorney General Shields to the Secretary of the Interior, April 28, 1892.

I have the honor to acknowledge the receipt, by reference from the Hon. Acting Secretary Chandler of the 18th instant, of a communication from the Acting Commissioner of Indian Affairs relative to allotments upon the Sioux Indian reservation under the provisions of section 13 of the act of Congress approved March 2, 1889 (25 Stat., 888, 892).

In said communication it is stated that certain Indians of the Sioux Nation recorded their elections with the United States Indian agent of the proper agency to take allotments within the ceded Territory and applied to have certain tracts of land allotted under said act; that said applications were filed in the proper local land office, and the register thereof duly certified that said lands were free from any prior adverse rights or claims; that on March 22, 1892, the special allotting agent advised the Indian Office that two of said applicants had died since complying with the provisions of said act and the parents of said children demanded that said allotments should be made for their use and benefit.

The attention of the Department is called to its communication, dated August 21, 1889, relative to the general allotment act of February 8, 1887, (24 Stat. 388) in which the opinion was expressed that said act did not intend that allotments should be made to members of any class "not in being at the time the allotments are actually made," and the Acting Commissioner requests "to be advised as to whether deceased Indians of the Sioux Nation who belonged to the class herein referred to should have allotments made to them upon the ceded lands of the Sioux Reservation."

By said reference my opinion is asked "on the matter herein presented."

The first section of said act of 1887, provides among other things that "To each other single person under eighteen years now living or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation one sixteenth of a section." This provision is carried into section eight of said act of 1889, *totidem verbis.*

Section 11 of said Sioux act of 1889, provides (*inter alia*),

That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, and patents shall issue accordingly.

By Section 13 of the same act it is declared,

That any Indian receiving and entitled to rations and annuities at either of the agencies mentioned in this 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 one year from the time when this act shall take effect, and within one year after he has been notified of his said right of option in such manner as the Secretary of the Interior shall direct by recording his election with the proper agent at the agency to which he belongs, 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, such allotments in all other respects to conform to the allotments hereinbefore provided.

In the case presented it appears that the Indians made their applications as required by law, which were received by the local officers who certified that there were no valid prior rights thereto. The Indians had done all that was required of them, and the fact of their decease after the acceptance of their selections cannot, in my judgment militate against the right of their heirs to the land selected by them. Besides said section eleven expressly provides for the issuance of patent upon an allotment where the allottee has died after the allotment and prior to the issue of patent thereon. The trust patent is for "the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs, and after the expiration of the trust, a patent is to be issued "to said Indian or his heirs as aforesaid in fee."

Nor is this view in conflict with the departmental decision referred to relative to allotments under the act of 1887. In that case, there had been no selections made, and no applications filed in the local office as required by law, and the Acting Commissioner in his letter of August 20, 1889, says "Heads of families and single persons over 18 are re.

quired to select for themselves, and to do this must be alive. No provision is made for the selections of persons not alive, and I see nothing in the act which contemplates such selections." In the case presented, the selections have been made, and it only remains for the Department to carry out the wishes of those authorized to make the same to secure to the heirs of the applicants the use of the lands so selected.

I am therefore of opinion, and so advise you, that where selections of land have been received in the local land office under the provisions of said section thirteen of the act of 1889, and there are no prior valid claims thereto, the same should be duly allotted, and in case of the death of the allottees prior to such approval, patents should issue as required in said section eight.

TIMBER CULTURE ENTRY—PRELIMINARY AFFIDAVIT.

WADE *v.* SWEENEY.

The preliminary affidavit made by a timber culture entryman must be executed before an officer within the district where the land is situated, and an entry defective in this particular must be canceled if attacked for that reason.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 5, 1892.

December 4, 1891, this Department made the following decision in the above entitled action (L. and R. press copy book No. 232, page 30.

It appears from the record in the case of William W. Wade against James Sweeney, that the latter on July 26, 1878, made timber-culture entry for the SE. ¼ Sec. 28, T. 102 N., R. 56 W., Yankton, now Mitchell, South Dakota.

March 1, 1888, Wade filed an affidavit of contest against the same, the final hearing of which commenced April 2, 1888. The affidavit of contest as finally amended alleges, among other things, 'that said timber-culture entry is illegal from its inception in that the said claimant, James Sweeney, did not in person subscribe and swear to the affidavit upon which said timber-culture entry was made, within the territory of Dakota, and within the Yankton land district, within which the land covered thereby was at the date thereof situated.'

July 30, 1888, the local officers found in favor of the claimant, Sweeney, and 'dismissed' the contest.

Wade appealed, and you by your decision of April 8, 1890, affirmed the local officers, dismissed the contest, and held Sweeney's entry intact. In your said decision you find that the claimant has shown his good faith by his 'honest efforts to secure a suitable growth of trees,' although it is shown that after ten years from the date of the entry, during five of which there had been a contest pending, only five trees were growing on the land.

Without at this time expressing an opinion as to the sufficiency of claimant's cultivation, or attempts at cultivation, of trees, I find that one important matter, which may possibly control the decision of the Department, has escaped your notice, or at least is not considered in your said decision.

The instructions of this Department, construing the act of June 14, 1878 (20 Stat., 113), provide that 'all affidavits required under the timber-culture laws must be

made before the register or receiver, or the clerk of some court of record, or officer authorized to administer oaths, *in the district where the land is situated;*' that 'timber-culture affidavits executed or signed outside of the district in which the land is situated . . . . . are illegal.' (Gen. Cir. 1889, page 32). See also Section 2 of the act of June 14, 1878, *supra.*

One of the allegations of contest is to the effect that this affidavit was not made within the district in which the land was situated, which allegation seems to have been ignored in your said decision.

It is true the local officers in their decision allege that 'the charge of not personally subscribing and swearing to the entry' was practically abandoned throughout the hearing, but an examination of the evidence submitted at the hearing, I think, clearly contradicts this finding. On page 115 of the record, after the close of contestant's oral testimony in chief, I find the following:

'Counsel for contestant calls attention to the following records as a part of the record in the case.' . . . . . The original application and affidavit and original receiver's receipt upon which that entry 1332 is based;' thus showing that the affidavit in question was introduced by the contestant to sustain the charge in relation thereto.

Counsel for contestant, in their argument before the local officers, insist strenuously upon this point and quote the statute, *supra,* in support of their argument, and say: 'Sweeney's entry affidavit *purports* to have been made before a notary public then authorized to administer oaths only in Minnehaha county, which was then in the Sioux Falls district and not in the Yankton district, where the land was situated.'

This point is also insisted upon in argument of contestant's counsel before you, in which he says: 'What purports to be Sweeney's affidavit is admitted on all hands to have been sworn to at Sioux Falls in Minnehaha county. It is shown by the affidavit itself to have been sworn to before a notary public in that county,' etc.

In the brief filed in this Department the same point is raised by counsel for contestant, in which he charged, as though it was not disputed, that the affidavit was made before a notary public in Sioux Falls, etc.; thus showing that all the way through the trial of this case the illegality of the entry has been forcibly and continuously insisted upon.

The local office and your office have ignored it, and counsel for claimant has attempted to withdraw attention from it by uncalled for and unfounded abuse of the contestant and his attorneys.

The affidavit itself is not with the record, nor is there any sufficient evidence showing when or before whom the affidavit was made. The only evidence in relation to the matter is found in the deposition of Sweeney himself and one Garland, his brother-in-law and his agent in the tree culture. Sweeney says, in answer to the question: 'If you made said tree claim entry, state where you were and who, if any one, was present?' 'I made said entry at the United States Land Office. Mr. E. B. Garland and the officers and some men were working there, whom I took to be clerks at the time I made my filing.'

Garland, in his deposition, says: 'I was present at the time of filing. The attorney Hitchcock, James Sweeney, the receiver and clerks in the land office were all that I know to be present. The names of the receiver and clerks I never knew. My recollection is that it was sworn to at the land office. The attorney Hitchcock made out the papers.'

This testimony was not taken at the hearing, but in pursuance of a commission to take their depositions.

From all these facts I am forced to the conclusion that the affidavit was among the papers at the time of the hearing, although not now with the record before me. This evidence is necessary to a proper determination of the controversy, because Sioux Falls was never within the Yankton district. The records of the local office will afford no light as to the contents of the affidavit, nor the place at which it was

made. You will therefore direct that a hearing be had at the Mitchell land office (with notice to both parties), to determine by the best evidence obtainable, where and before whom the entry affidavit was made.

The decision of this Department will be reserved until the evidence taken at the hearing ordered is transmitted to this Department. (See Matthiessen and Ward *v.* Williams, 5 L. D., 180).

In obedience to said judgment, a hearing was ordered by the local office for March 16, 1892.

On said day a search was made, and the missing affidavit was found among the records of the local office, which dispensed with the necessity of a further hearing.

Said affidavit was, by your letter of April 15, 1892, transmitted to this Department, and is now before me.

It shows that the timber-culture affidavit was sworn to and subscribed before a notary public, at Sioux Falls, Minnehaha county, which was not within the Yankton district, in which the land in controversy is situated.

In accordance with the said decision therefore, Wade's contest is sustained, and you will direct that the timber-culture entry of Sweeney be canceled.

PRE-EMPTION—FINAL PROOF—SECTION 2269 R. S.

RAFFERTY *v.* TEMPLETON.

The right of an heir to submit pre-emption proof under section 2269, R. S., is not defeated by the fact that such heir may have sold his interest in the land.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 5, 1892.

In November 1879, Michael Rafferty, who was a naturalized citizen of the United States settled upon the SE. ¼ of section 17, T. 16, S. R. 3 E., San Francisco, California, and soon thereafter made application to file a pre-emption declaratory statement for said land. The application was not allowed by the local land officers, the tract at that time being supposed to be railroad land, however, by a decision of yours, dated August 31, 1885, the claim of the Southern Pacific Railroad Company to the tract was denied and Rafferty was allowed to make a filing which he did on June 18, 1886, alleging settlement November 17, 1879.

On May 24, 1886, Charles S. Templeton made a pre-emption filing for a part of the land in question, to wit: the E. ½ of the NE. ¼ of said section, together with the E. ½ of the SE. ¼ thereof claiming settlement from November 21, 1885.

Final proof was tendered on each of these filings on January 16, 1888. Rafferty having died in 1886, final proof was made for the heirs by Patrick Rafferty, his brother, who appears as plaintiff herein. The South-

ern Pacific Railroad Company, also appeared at this hearing and protested against the acceptance of the proof of either Rafferty or Templeton.

On December 13, 1888, after considering the case the register and receiver found in favor of Rafferty and held Templeton's filing for cancellation in so far as it conflicted with that of plaintiff.

The Southern Pacific Railroad Company and Templeton appealed from said finding to you and on April 11, 1889, you decided that the railroad company had no interest in the land in question and dismissed its appeal; from this action, said company has not appealed, hence your judgment as to its alleged claim to the tract has become final.

On March 11, 1891, you considered the case as between Rafferty and Templeton on the appeal of the latter and reversed the finding of the register and receiver and held the filing of Michael Rafferty for cancellation. An appeal has been taken from said judgment to this Department.

It is shown by the evidence in the record that Michael Rafferty resided on this land continuously from November 17, 1879, until his death in August 1886. He had a house there twelve by fourteen feet in which was a bedstead and bedding, table, benches, a stove and cooking utensils; house worth about $60. He had placed fencing on the tract worth about $100 and had fifteen or twenty acres of the land under cultivation, which he seems to have cropped each year. The balance of the land was used for grazing his stock and that of others, whose stock he permitted to run there. He persistently sought to show his right to take the land from the time of his settlement until he secured a judgment of your office allowing him to make filing therefor; his good faith was amply shown during his lifetime, in continuing his residence on the land and by improving the same. The attempt was made at the trial to show that he held the tract for one Kelly but the proof in my judgment, signally fails to show it.

He had fully complied with the pre-emption law and had in fact done everything required of him to secure a patent to the tract, except the making of proof of what he had done.

Section 2269 of the Revised Statutes provides that,

Where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of his heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned.

It is shown that Rafferty left surviving him several heirs; his personal estate consisting of about $2500 was distributed by the probate court among certain heirs under a will, and it appears in said distribution that the tract of land in question or such interest as was possessed

by him at the time of his death should become the property of his brother, Patrick Rafferty, plaintiff herein.

The proof shows that Rafferty, deceased, left a number of heirs aside from those mentioned in his will. He did not attempt to dispose of this tract by will; in fact he could not legally do so. After the death of Michael Rafferty, his brother moved on the land, built an addition to the house and lived there several months, then sold the land to Kelly; all of this before proof was made on the filing. Templeton, who settled on the land long after Rafferty, now claims that the plaintiff as heir of his brother, having sold the tract has no right to make proof. In other words that he has no interest in it.

The section of the Statute above quoted, allows either the executor or administrator "or one of his heirs" to make proof and provides that "The entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned." It contemplates that one of the heirs may make proof not alone for his own benefit but for the benefit of all the heirs who may be able to show their heirship.

The record does not show sufficient data upon which this Department can determine who all the heirs are. In fact it is not the province of the Department to even attempt to determine that question; that should be left to the court and the section cited expressly provides that the entry "shall be made in favor of the heirs." This Department only looks to see whether the pre-emption claimant, during his lifetime complied with the law, this may be shown by proof made by either one of the heirs or the administrator of the estate. Patrick Rafferty was an heir of Michael Rafferty. Just what he inherited or received by will or what particular interest he received by reason of the death of his brother, is of no concern to this Department. Michael Rafferty having complied with the law during his lifetime and proof having been made by "one" of the heirs, showing said compliance an entry should be allowed and the land patented.

Templeton's claim of right to make entry must be denied, because the claim of Rafferty is prior. It is claimed that proof was not made in time by Rafferty. This is error, because the filing was made June 18, 1886, and proof submitted January 16, 1888, which was within the thirty months allowed after the filing was made.

You will accept the proof of Rafferty and allow entry to be made.

The proof of Templeton is rejected as to the tract in conflict with that claimed by Rafferty.

Your judgment is accordingly reversed.

CONTEST—EVIDENCE—CROSS-EXAMINATION.

GIBSON *v.* CHANEY.

A contested case should not be adjudicated upon testimony submitted without opportunity of cross-examining the witnesses.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 5, 1892.

The land involved in this appeal is the S. ½ of NE. ¼ and lots 2 and 3, of Sec. 9, T. 15 S., R. 3 W., S. B. M., Los Angeles, California, land district.

The record shows that Edward W. Chaney made timber-culture entry of said tract July 7, 1887. On July 28, 1888, Guilford G. Gibson filed an affidavit of contest, alleging that said section of land is not naturally devoid of timber, but has had and now has a great amount of native timber growing thereon. In said affidavit it was alleged that the witnesses by whom contestant would prove his case lived more than one hundred miles from the land office, and asked that the hearing be had before the county clerk at San Diego, near the land. Personal service was had on claimant in San Diego on August 20, 1888. The notice served concludes as follows:

> The said parties are hereby summoned to appear at this office on the 14th day of December, 1888, at 10 o'clock a. m., to respond and furnish testimony concerning said alleged failure. The testimony to be taken before the county clerk of San Diego county, on the 30th day of November, 1888.

On November 30, 1888, contestant and his witnesses appeared before the county clerk at San Diego and their testimony was taken. There was no appearance for claimant.

On December 3, 1888, claimant filed an affidavit in the local office at Los Angeles, dated December 1, setting up that he and his attorney thought the testimony was to be taken at San Diego on December 14, 1888, and had so informed his witnesses; that he had learned that day, for the first time, that contestant had offered his testimony on November 30; that he had a meritorious defense to said contest and requested to be allowed to be heard. His attorney also made affidavit to the effect that he was under the impression that the hearing was set for December 14, and so had it marked on his docket. So far as the record shows contestant had no notice of this application, and it is not shown satisfactorily whether the local officers took any formal action on it. They permitted claimant, however, to offer his testimony before them at Los Angeles, and this entry is made in the caption of the record, viz:

> Edward W. Chaney appears in person and by counsel . . . . . and calls the attention of the court, 1st, To the application to take testimony before the clerk of the court in San Diego, filed December 3, 1888, which was denied by the register and receiver.

Of this action contestant had no notice, and did not, of course, appear.

The local officers, on the testimony taken in this irregular way, found for the contestant. Claimant appealed, and you, by letter of March 25, 1891, reversed their decision. You also considered all the testimony taken. The contestant presents this appeal and the only assignment of error I shall consider is the irregularity in which the proceedings were had below.

To consider the testimony before me is manifestly unfair to either party. Parties have the undisputed right to be present at the hearing and cross-examine the witnesses. (Rule 40, Rules of practice).

Both sides were deprived of this right in this case. While the notice commanded the parties to appear before the register and receiver at their office on December 14, it also required them to appear before the county clerk and submit their testimony on the 30th of November, 1888. Strict attention to the notice ought not to have been misleading, but it appears to have confused the entryman to such a degree that he did not appear and cross-examine the contestant's witnesses, nor offer testimony in his own behalf, and the contestant relying upon the fact that all the testimony was to be taken on said 30th of November, did not appear at the local office on the 14th of December, following, to cross-examine entryman's witnesses. Confused as the parties appear to have been, I think a further examination should be had. It is therefore ordered that the case be remanded, and the local officers directed to order a new hearing, with due notice to all the parties in interest. At said hearing the testimony heretofore taken on direct examination, may be used provided the witness giving the same appears at the trial and submits himself to cross examination.

They will then adjudicate the case and let it take its usual course.

Your judgment is thus modified.

HOMESTEAD ENTRY—MILITARY SERVICE—RESIDENCE.

OWEN *v.* LUTZ.

The provisions of section 2308 R. S., are not intended to include persons serving in the regular army since the close of the rebellion, and such service can not be held as equivalent to actual residence on a tract under the homestead law, or to relieve the entryman from the statutory requirements with respect to settlement, residence and improvement.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 6, 1892.

On the 29th of June, 1885, John E. Lutz made homestead entry for the E½ of the NW¼ of Sec. 15, T. 8 S., R. 3 W., San Francisco land district, California.

On the 9th day of May, 1887, H. S. Owen initiated a contest against said entry, alleging abandonment and failure to settle upon and cultivate said tract as required by law.

The hearing which followed resulted in a decision by the register and receiver on the 26th of January, 1888, in which they recommended the cancellation of said entry. Upon appeal to your office that decision was affirmed by you on the 8th of October, 1890, and the entry of Lutz held for cancellation. A further appeal brings the case to the Department for consideration.

From the record in the case it appears that at the time of his entry, and for several years prior to that time, Lutz was in the revenue marine service of the United States. From March 13, 1885, until September 18, of that year, he was on "waiting orders." On the latter date he was assigned to duty on the revenue steamer Wolcott, stationed at Port Townsend, Washington Territory, where he reported for duty on the 5th of October following, and he has ever since been in active duty in said revenue marine service, on board said steamer. After his entry he went upon the land and commenced to dig a well, but abandoned his labor before striking water, and did not establish his residence thereon before being ordered to duty on board the Wolcott. He possessed the qualifications of a pre-emptor or homesteader required by section 2289 of the Revised Statutes, and bases his right to the land upon section 2308 of said statutes, which reads as follows:

> Where a party at the date of his entry of a tract of land under the homestead laws, or subsequently thereto, was actually enlisted and employed in the army or navy of the United States, his services therein shall, in the administration of such homestead laws be construed to be equivalent, to all intents and purposes, to a residence for the same length of time upon the tract so entered. And if his entry has been canceled by reason of his absence from such tract while in the military or naval service of the United States, and such tract has not been disposed of, his entry shall be restored; but if such tract has been disposed of, the party may enter another tract subject to entry under the homestead laws, and his right to a patent therefor may be determined by the proofs touching his residence and cultivation of the first tract and his absence therefrom in such service.

Lutz was not present at the hearing, but was represented by counsel, who presented the facts and the law in behalf of his client. On the part of Owen the fact was established that Lutz never established a residence upon or cultivated the land, but that he (Owen) had resided upon and cultivated the tract since December, 1885.

While the Department has frequently held that service in the United States army or navy is equivalent to residence under a homestead entry, it has never held that such service could be accepted as a fulfillment of all the requirements of law. Section 2305 of the statutes, which provides that the time which the homestead settler has served in the army, navy, or marine corps shall be deducted from the time heretofore required to perfect title, expressly provides that no patent shall issue to any homestead settler who has not resided upon, improved, and cul-

tivated his homestead for a period of at least one year after he shall have commenced his improvements.

All the questions involved in the case at bar were considered by the Department in the case of General Jefferson C. Davis, decided on the 5th of April, 1879. (26 L. and R., 342.) In that case all the acts of Congress relating to the subject of soldiers' entries are cited and commented upon, and it is said that section 2308 of the statutes was enacted for the purpose of restoring to those persons who had made entries before or after their enlistment into the service, and subsequently lost their land by reason of absence in the service, the right of having the original entry re-instated with credit for their military services as an equivalent for actual residence; and also the further privilege of making a new entry for other land in case the land covered by the original entry had been disposed of by the government.

The decision in that case concludes by saying:

> I am of opinion that section 2308 has reference only to entries made by persons before or after enlistment into the service during the war of the rebellion, and whose rights were sacrificed by reason of their absence in said service, and that said section was not intended to include persons who have served in the regular army since the close of the rebellion and that such service cannot be construed as equivalent to actual residence on a tract of land.

Counsel for Lutz, in his argument upon his appeal to the Department, insists that his client may perform the requirements of the statutes relating to a year's residence upon the land, after his service in the navy has expired, and he is restored to the privileges of a civilian, and that in the meantime the land should be reserved for him.

In this he overlooks the requirements of the statute as to the time of making final proof in the case of homestead entries. The statute provides that proof may be made at the expiration of five years after the date of entry, and must be made within two years thereafter, but the provisions of law as to residence, etc., must be complied with during the five years immediately succeeding the time of the entry.

More than five years have elapsed since Lutz made his entry, and he has not yet established his residence upon the land. It is impossible, therefore, for him to show a compliance with the law, even if the rules of the Department allowed him to show a year's residence and cultivation at any time during the five or the seven years after entry. It would seem that under the rule laid down in the case of Paulus Kundert (7 L. D., 362), this might be done, where no adverse claim had intervened. In that case, it was said:

> No adverse claim having intervened the claimant will be permitted, within the statutory period of two years following the expiration of five years from the date of his entry (Section 2291, Revised Statutes) to furnish proper evidence of citizenship, together with proof showing compliance with the law.

In cases of contest, however, a different rule prevails, and the entryman must show compliance with the law, or expect that the cancellation of his entry will follow his default.

In the case of Shannon *v.* Hoffman (4 L. D., 399), where the entryman was an officer in the regular army when he filed his declaratory statement, made his entry and proof, it was held that this fact did not prevent the commutation of the entry so made, he having shown full compliance with the law in the matter of settlement, residence and improvement. That case did not relieve the entryman from the statutory provisions as to settlement, residence and improvement, because he was in the military or naval service at the time he made his entry and proof, but it simply allowed him to commute his homestead to a cash entry upon showing compliance with the law. It is therefore in harmony with the provisions of the statutes cited, and has never been questioned or overruled.

I do not find that the Department has ever adopted any rule upon the subject of soldiers' and sailors' entries different from the views expressed in the case of General Davis to which I have already referred, and as I concur in the views contained in the extract from that decision herein quoted, the decision appealed from is affirmed.

ESTOPPEL—SETTLEMENT RIGHTS—AMENDMENT OF PATENT.

ROBERTS ET AL. *v.* GORDON.

One who fails to assert any claim to a tract of public land which is in the adverse possession of another, and remains silent, though knowing that the adverse occupant continues to claim, occupy and improve the land, is estopped thereby from subsequently denying the good faith of said occupant and asserting a right of priority in himself.

Settlement rights can not be acquired by trespass, nor constructive possession of such land by settlement on an adjacent tract.

A patentee may be permitted to relinquish a portion of the land covered by his patent, and take in the place of the land relinquished a tract which through mistake was not included in the original entry nor in the patent issued thereon.

Secretary Noble to the Commissioner of the General Land Office, May 6, 1892.

I have considered the case of Henry C. Roberts, Frederick Roberts and Edwards Roberts against John T. Gordon, on appeal from your decision of December 4, 1890 in which you reject the application of Henry C. Roberts, to amend his entry for certain lands so as to allow him to enter lot No. 6 in Sec. 22, T. 1 N., R. 10 W., S. P. M., Los Angeles, California, land district and dismiss the protest of Henry C. Roberts, Frederick Roberts and Edward Roberts against the final proof of Gordon on his homestead entry for said lot, and allow him to perfect his claim to the same.

The history of this case is tedious, and much of it unimportant. It will suffice to say that in 1875, before the survey of the land, Henry C. Roberts filed a homestead declaration under the State law of California,

and placed the same on record for a strip of land lying between the east boundary of the Azusa rancho and the base of the mountain, extending north to the Azusa dam, and south to a certain red hill. It is shown by the official survey that this strip of land is 4.99 chains wide east and west at the south line of section 22, and that its west line bears a few degrees west of north to the centre of the section, thence a little east of north 19.50 chains to the north corner of said rancho. The surveyors cut this strip by lines east and west where the quarter mile lines would cross, and numbered these parcels as lots 4, 5 and 6. No. 6 contains 11.39 acres. South of section 22 a fractional part of section 27 was also cut off by the line of the Azusa rancho, and this lot was numbered two in section 27. It contains about ten acres. The evidence shows that the red hill mentioned is located so that the line between lot 6 of section 22 and lot 2 of section 27 runs over it.

It appears of record that on April 18, 1876, Roberts made a pre-emption filing for the N. ½ of the NW. ¼ and SW. ¼ of NW. ¼ of Sec. 23, and for lots 4 and 5 of Sec. 22, T. 1 N., R. 10 W., and on April 1, 1878, he transmuted it to a homestead entry, alleging settlement May 28, 1859, and made final proof thereon on the same day. Patent was issued for this land March 20, 1882.

On December 5, 1887, Gordon made homestead entry for lot 2 of section 27, lot 6 of section 22, and NW. ¼ of the SW. ¼ and S. ½ of the SW. ¼ of Sec. 23, same township and range.

It further appears that Gordon applied to make this entry September 18, 1884, but his application was rejected by the local office on account of the land in sections 23 and 27 being within the grant to the Southern Pacific Railroad Company, but the case having been brought before this Department, it was finally, on June 7, 1887, determined that he could make entry for the same. In this controversy, lot No. 6 of section 22 was not involved.

On October 2, 1885, Roberts filed an application in the local office, supported by affidavit, asking to be allowed to surrender his patent for the land he held, and that he be allowed to relinquish his claim to the NE. ¼ of the NW. ¼ of section 23, and that he be allowed to amend his entry to include lot 6 of section 22. He sets forth in this application that he had theretofore filed his declaratory statement in accordance with the State law to homestead certain land embracing lot No. 6; that when he made his entry and proof, he thought it embraced said lot; that he did not discover the mistake until September 30, 1885 when certain parties who were tracing the line of the Azusa rancho called for his patent and compared it with the township map, and informed him that lot No. 6 was not included in his patent. He makes a lengthy statement of facts in his application, among other matters, that he has cultivated lot No. 6, clearing it of brush and stone, and planting orange and other valuable trees upon it; that he and his sons have continuously cultivated it since 1859; that it was comparatively worthless when they took it, and that

they have added to its value $7,500. He states that when he went to the land office to enter the land he told the officers he wanted to file for the land on which he was living, to take the fractions along the Azusa rancho in section 22, and as much of the NW. ¼ of section 23 as would complete a pre-emption filing; that Wm. Haverstick, receiver, made out the papers and he signed them, believing that lot No. 6 was in the description. His house was then on lot No. 4. He says he did not examine the papers or records of the office, and never knew, even when his patent came, that the lot No. 6 was not included in it. He says Gordon was trying to secure some railroad land, and that he (Roberts) never knew, nor had an intimation that he (Gordon) was trying to get a title to lot No. 6. He denies that Gordon ever had any possession or control of said lot, and while he was trying to purchase of the railroad company the portions in sections 27 and 23, he had homesteaded the same, although it was not subject to homestead, but was included in the railroad grant; that he (Roberts) was cultivating lot No. 6 all this time, etc., etc. The local officers rejected this application to amend, and Roberts appealed to your office. Your decision being adverse to him he appealed to this Department, and the Department, on November 24, 1888, ordered a hearing upon the matter.

In the meantime, Gordon had given notice of his intention to offer proof on February 11, 1888, upon his entry, and on said day, came Henry C., Frederick and Edward Roberts and protested the same in so far as it related to or included said lot No. 6. They charged that Gordon's proof was fraudulent and illegal, in this that the application of Henry C. Roberts to amend his entry to include said lot was then pending before the Secretary of the Interior; secondly, that Frederick Roberts was living on the land, and that the protestants had made valuable improvements thereon, and had been in possession, and that Gordon had never had any possession of nor made improvements on said lot in controversy; that the protestants had placed over $8,000 worth of improvements on the said lot; that Gordon was living on land he had applied to purchase of the Southern Pacific Railroad Company, and that the said lot No. 6 was no part of it, it being in section No. 22; that Gordon had never asserted or made known that he had any claim to said lot until Frederick Roberts offered to file thereon; that said Robertses, father and son, had cultivated said land for more than twenty-five years; that owing to the unsettled boundary of the Mexican grant, "Rancho Azusa," and the land being unsurveyed, he could not enter the land sooner, etc. They charge that certain parties have conspired to cheat and defraud them of the land and of the fruits of years of toil, etc., etc.

A hearing was had upon this protest, and on August 20, 1890, the local officers decided against the protestants and recommended the acceptance of Gordon's proof, from which action the protestants appealed.

On February 16, 1889, counsel for Gordon filed a motion for review of departmental decision of November 24, 1888, directing the hearing on H. C. Roberts' application. This motion came on to be heard on August 18, 1889 (Press Copy Book, 184, p. 27, L. & R. R.), and in passing upon the case it was said:

pending the appeal to this Department from the decision of your office the local officers permitted Gordon to make final proof and on protest of Roberts a hearing was had. This testimony was sent up from your office on request of Gordon's counsel, that it might be considered in passing upon the motion for review, but as notice thereof was not served upon Roberts, the same has not been considered by me. Such hearing was prematurely allowed by the local officers, being in violation of rule 53 of practice.

The hearing ordered by the departmental decision of November 24, 1888 will proceed, but so much of the testimony taken at said premature hearing upon the protest of Roberts against Gordon's final proof may be considered as the parties or their counsel may agree upon.

At the hearing, it was stipulated that the testimony taken in said case be accepted, to be used as if taken at this hearing. Thus the cases became consolidated.

On the testimony being closed, the local officers found the issues, thus joined, in favor of Gordon, rejected Roberts' application to amend, dismissed the protest and said "as the final proof of said Gordon is regular and sufficient we are of the opinion that it should be received and accepted, and this contest should be dismissed." From this decision the protestants and Roberts appealed, and on December 4, 1890, your office passed upon the case, and substantially affirmed the action of the local officers, from which decision appeal was taken to this Department.

The testimony shows substantially the following: Mr. Roberts as witness repeated substantially the matters set forth in his application to amend, and in the protest against Gordon's final proof. He stated that when he went to the land office to file for the land he took a map or plat showing about what land he claimed to be occupying, but it had no numbers on it; that he told the receiver, Haverstick, that he wanted to file for the land he lived on, and for enough in section 23 to make a pre-emption filing. He says an old Mexican named Manjarez, who had married his (Roberts') wife's mother, had been working for him and living on his land, and he took him to the office with the idea of having him file for the lot lying south of his land, the lot now held by Gordon. They told the receiver about this; they then went away and returned to the office the next day. The papers had been prepared; they signed such papers as they were directed to sign, and went home. He made no examination of the record, and paid no attention to the description in his papers. He states that when he went to transmute his filing to a homestead, he did not make any examination. He says:

Never did I know until about October, 1885 that lot 6 was not embraced in my patent . . . . The improvements on lot 6 are worth to-day over $10,000, and not one dollar has been expended by J. T. Gordon or any other person except myself

and those in my employ, and with my consent. Gordon was living on the Rancho Azusa at the time of the public survey of these lands. J. T. Gordon has seen me continually improving lot 6, from the time of his residence on the Azusa up to October 1, 1885, and never by any word or intimation (notified me) that he had any claim to the land.

He explains how he came to learn of the mistake. He says his sons had worked and helped make the land valuable, and that he had intended lot 6 for Frederick, and they had built a house on it about the time he came of age (about 1884), and Frederick had moved onto the land and was living on it when he (Roberts) discovered that it was not included in his patent. The day after he learned of the mistake he and Frederick went to Los Angeles, consulted an attorney, and went to the land office, where Frederick applied to homestead the lot, but this was rejected by the local officers when the lawyer prepared the papers to amend his (Robert's) entry by surrendering the patent and filing for lot 6, omitting the NE¼ of NW¼ of section 23. This was also rejected. They both appealed. All they did was on the advice of their attorney. A number of witnesses were called to corroborate Roberts as to his improvements, their value, and the fact that Gordon had never had any possession of the lot in controversy. One witness says he once spoke to Gordon about the orange orchard, and Gordon said it was Roberts' land.

The minutes of the proceedings of an association of settlers organized to resist the claims of one Dalton who had purchased a portion of the Azusa grant, were introduced in evidence. It appears by these papers that Gordon was secretary of the association from its organization in 1878 until about 1881, when he withdrew. Originally this association assessed its members according to their holdings in the disputed territory. Gordon listed ten acres, and paid on this amount of land, being lot 2 in section 27. Roberts listed eighty acres, and paid on this amount, being lots 4, 5 and 6. Afterward, about 1881, the association decided to assess the members *per capita* instead of on their "holdings." Gordon thereupon withdrew because he did not think it fair to have to pay as much on his small lot as others would pay on larger tracts. Several witnesses are called upon this point, and it appears to be well established. One witness says Gordon disclaimed any title to lot 6, and claimed only the lot in section 27, on which he lived.

A witness who was present when the patent of Roberts was compared with the township map, and it was pointed out to him by the surveyor that his patent did not include lot 6, says he (Roberts) "turned pale, was greatly distressed, said it must be an error committed by the land office, and that he would forthwith go to Los Angeles and have it rectified." He went the next day, and applied to amend the entry. Witnesses who worked for Roberts were called, and persons who hauled orange trees for him from Los Angeles, showing the extensive outlay and labor to raise the trees.

Mr. Gordon, on cross-examination, on his final proof testimony says his house is on lot 2, section 27; that he has never improved lot No. 6;

says Roberts planted the trees; they are valuable; never gave Roberts any notice that he (Gordon) claimed the land. He says he applied to the State in 1876 to locate "Lieu warrant" for lot 6, but it was rejected because there was a question about the over issue of "Lieu warrants." He was then residing on the Azusa grant. He says when he settled on lot 2 Juan Manjarez was claiming lot 6.

Question. When contestants were putting out their orange orchard on lot 6 in controversy did you at any time notify them that you claimed the land.

Answer. I can't answer that question exactly. I never knew that there was any numbers. I never knew any contestant putting out trees there except Henry C. Roberts and I did not notify him.

The former receiver, Haverstick, who made up the declaratory statements for Roberts and Manjarez says they were in the office together. His better impression is that Roberts interpreted for Manjarez. Of this he is not entirely certain. He thinks that he prepared the papers as directed; were not very busy that day. There is nothing showing that he had any object in writing in a wrong description. Roberts says he has no recollection of interpreting for Manjarez; thinks it was another man—Jenkins, special agent,—and the receiver says the agent was about there a good deal, and he will not be positive on the point. Manjarez was called as witness and says when Roberts and he made their filings, Roberts had him file for lot No. 6, and Roberts paid the money (fees); that he lived on the lot a while, four years going on five; that he cleared some part on 6, and part on Gordon's lot; that he planted a few trees, about thirty, some figs, some orange, and other kinds; was on the land on Roberts' account; Roberts never spoke to him about taking up land before they came to the land office; spoke about helping him get title to it; planted trees on it with consent of Roberts; had cultivated some land about "two yards" on the tract Gordon claimed, and he let Gordon have it; he went away from the land because his work at Rose's was too far away; left the land with the house he lived in; where he "squatted was close to the land (in controversy) in the land, it is not there now." He was asked if he had not talked with Cabot (attorney for Gordon). He denied having had any conversation with him; afterward, said they did converse about the land, "but we didn't know what kind of a case it was, or who it belonged to, Mr. Roberts or Mr. Gordon." He was asked about certain statements which it was claimed he had made to the effect that Cabot had promised if he would come and testify against Roberts, he should have half the land if Gordon gained it. This he denied. "I haven't said a word to anybody. I couldn't tell because I don't remember, because I just live like a beast. I don't know the year. I don't know how to read and write."

Two witnesses were called who say Manjarez told them a few days before the trial, to one he told on two occasions, that Cabot had promised him half the land if he would come and testify against Roberts and they should gain the case. Mr. Cabot was not called as a witness.

The evidence shows that the house of Manjarez was near the line, but on the Azusa grant, near the west corner, between lots 2 and 6, and that he cleared a little in both lots. He was hired by Roberts at times to help cultivate the orange trees, and he worked for persons in the neighborhood. He went away in 1880 or 1881.

It is in evidence that the base of the mountain runs nearly north and south at this point, and the line between sections 22 and 23 lies along the foot of the mountain, and that the lots in section 23 are mountainous and of little value.

In your decision you state that the testimony of Manjarez "controverts Roberts' contention." You find that Roberts asserted no claim to said lot 6 as public land until after Gordon had applied to enter the same.

I find that the only testimony reflecting upon Roberts' good faith is that of Manjarez, and he is quite effectually contradicted, if not impeached by other witnesses, and by his own contradictory and confused statements, It seems strange that an intelligent man who could read and write would make a pre-emption filing for land in fractional lots; that two years later he would transmute to a homestead entry, and four years later receive his patent, and then not learn until three years after this that the most valuable lot in his holding was not mentioned in any of his papers, nor in his patent, and it is still more strange that a like intelligent man would go upon a tract of land, clear it of brush and stone, dig it over and cultivate it, purchase orange trees, plant, water and cultivate them, working himself and family day after day and year after year for more than twenty years; then build a house upon it and locate his son there that it might be a home for him and his, when he knew all the time that he had no title of record, and that any comer could pre-empt or homestead the land at any time. It is also strange if Roberts knew that lot 6 was not included in his papers or patent, but had been filed on by Manjarez, and that Manjarez had gone away in 1880; that he did not then take steps to secure it. Again, if he knew he had no title to the land, when he built the house and located his son, Frederick, on the lot, intending some time to deed it to him, when he came to divide his estate, why did he not have Frederick make entry for it?

There is a well settled principle of equity which applies with peculiar force to this case. He, who will not speak when he should speak, will not be heard when he would speak. Gordon stood by while secretary of the Settlers' Association, and saw Roberts pay from time to time the assessment levied on this land, he (Gordon) disclaiming ownership. He stood by and saw Roberts and his sons and hired men working cultivating, planting their land to orange trees, knowing that they could reap no immediate return as from grain crops; saw the land growing more and more valuable each year under their hands, by their toil; saw them erecting a house for a home for the son, and saw him take up his residence therein—this fro n 77 till 1885—yet he spoke no word,

did no act indicating in any way that he expected to disturb their possession in his own good time, and reap the fruits of their toil. He is estopped now to deny the good faith of Roberts, and to assert his own.

Gordon's application to enter was made while Frederick was living on the land, under what he supposed was a good title, and the land was thoroughly cultivated. In Atherton *v.* Fowler (96 U. S., 215–219) it was said:

> The right to make a settlement was to be exercised on unsettled land; to make improvement on unimproved land. To erect a dwelling did not mean to sieze some other man's dwelling. It (the law) had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicide and other crimes of less moral turpitude.

Gordon did not go upon this land, but upon land in an adjoining section, and claims constructive settlement upon and possession of lot No. 6. To have broken the close and gone upon the cultivated land of Roberts would have constituted him a trespasser, and settlement rights could not have been acquired thereby. He can not do indirectly what he would not be permitted to do directly. He can not acquire constructive possession of land of which he could not take actual possession without violence. He never had possession of, or settlement upon lot No. 6 of section 22. He never cultivated it, and his proof itself, in its operation and effect, excludes this lot.

Counsel for Gordon quotes a portion of section 2369, Revised Statutes, to show what he calls "a condition precedent to relief," etc. He omits, however, the first sentence in the section, which limits the provisions of the section to "purchasers of public lands at *private sale*," and from section 2370, a part of which he quotes, he omits the first sentence which restricts its operation to cases which come within "the provisions of the preceding section." Section 2371 extends the provisions of the two preceding sections to lands upon which land warrants have been located. It is insisted that as Roberts has not surrendered his patent with a relinquishment thereon, he cannot maintain his claim. This proposition is based upon the sections of statute above cited, which are wholly inapplicable to the case. Beside, this is not an action for specific performance wherein the party plaintiff should tender a deed before he could have an action for purchase money conditioned upon such deed. This is simply an application to the government for permission to convey to the government the NE¼ of the NW¼ of Sec. 23, and that he be allowed to enter lot 6 in Sec. 22. He could not even surrender his patent without authority of the Department, and while he should not be allowed to enter lot 6 unless he reconvey to the government the tract mentioned, it would be idle to make a deed to the government unless the proper authorities see proper to direct it and to accept it. I have examined the various authorities cited by counsel, but find no case on all fours with the case at bar. I find no case where the party making the improvement was lulled into a sense of security

by the conduct of his adversary, as was Roberts; none where the party occupying had the same reason to believe that his adversary was seeking other land than that in controversy, as had Roberts, for it will be borne in mind that Gordon had no filing of record until December 5, 1887, and was contesting the right of the railroad company during 1884–5–6 and 7, and saying nothing to any one, especially to Roberts, about wanting Lot No. 6, and it was not until October, 1885 when Roberts went to the office to have his entry amended that he learned that this lot was included in the application of Gordon. I do not find in the decision of the case of Gordon *v.* Southern Pacific R. R. Co. (5 L. D., 691) any order that his entry should revert back to his application September 14, 1884, but if it did, even then Roberts had on record, under the State law, a notice to the world that he claimed the land under the homestead law of the State, and his improvement and cultivation for more than fifteen years was notice of his claim. It is insisted that Roberts assisted Manjarez to file on lot 6 that he might hold it for him (Roberts). This is upon the theory that he wanted the tracts in section 23 and could not file for these and include lot 6. Had he desired the mountainous land in 23, why did he not put the Mexican on one of these "forties," instead of on the lot upon which he (Roberts) was expending so much labor and money? It would have resulted the same, would have been as easily done, and certainly it would have been more natural, as he cared nothing about improving the land in section 23.

You consider Roberts guilty of negligence in not ascertaining the boundaries of his claim. The truth is he had the boundary from Azusa dam to the red hill, and a number of witnesses say this includes lot No. 6. He occupied the boundaries undisturbed. He was mistaken in the papers and the patent. When he learned of the mistake he acted promptly. If Gordon knew that lot 6 was not in the patent, he also knew Roberts was occupying it, and thus he knew of the mistake, but did not apprise Roberts of it. Roberts' mistake has cost Gordon nothing except the expense of trying to take the orange orchard. If it goes to Gordon, this Department takes about $9,000 or $10,000 from Roberts, and simply presents it to Gordon, for the Department has no jurisdiction to order that he pay for the lasting and valuable improvements.

Gordon's proof was improperly offered. It was protested as to lot 6. For this reason, among others, the protest should have been sustained. The proof as to lot 6, section 22, is therefore rejected, and the entry as to this lot is canceled and being satisfied that, however negligent Roberts may have been in not examining his papers, he was honestly mistaken, and it would be a great wrong to take his labor and expenditure of a quarter of a century for nothing. He will therefor be allowed to reconvey to the government the NE. ¼ of the NW. ¼ of section 23, if the same stand in his name, unencumbered and may amend by making entry for lot No. 6, section 22, as prayed for in his petition. Your decision is modified accordingly.

RAILROAD GRANT—WITHDRAWAL—COAL LAND—SETTLEMENT.

NORTHERN PACIFIC R. R. CO. *v.* COLLINS.

The settlement of an alien on coal land affords no claim thereto under the coal land acts of July 1, 1864, and March 3, 1865, as against the withdrawal of such land on general route under the grant to the Northern Pacific.

Lands withdrawn for the benefit of said grant are not subject to settlement, or purchase under the coal land law.

Secretary Noble to the Commissioner of the General Land Office, May 7, 1892.

I have considered the case of John Collins *v.* Northern Pacific Railroad Company, upon the amended application of Collins, involving lots 1 and 4, the NE. ¼ of NW. ¼ and NW. ¼ of NE. ¼, Sec. 29, T. 23 N., R. 6 E., Olympia land district, Washington, on appeal by the company from your office decision of July 21, 1884, rejecting its claim to the tract and awarding to Collins the right to purchase the same under the coal land law.

Said decision states that the land in question is within the limits of the withdrawal for the Northern Pacific Railroad Company (main line) under the act of July 2, 1864 (13 Stat., 365), which became effective August 13, 1870; that it is also within the limits of the withdrawal, made August 15, 1873, for the Cascade branch line, and of that made June 11, 1879, for the amended branch line; that the main line has been constructed to New Tacoma, about two townships south of this land; that the branch line opposite this line was definitely located March 26, 1884; that the township plat was filed in the local office August 5, 1873, by letter of transmittal from your office, where it had been sent by surveyor-general's letter of July 28, 1873; that one Richard Richards, in December, 1869, settled upon the land while it was yet unsurveyed, and abandoned the same in September, 1870; that after two or three intervening settlements, which were in turn abandoned, Collins, on the 27th of June, 1881, applied to purchase the land under section 2347 of the Revised Statutes as coal land, and his application was refused by the local office, because "the land applied for is reserved for the benefit" of the railroad company.

Upon the final location and construction of the branch line of said road, the tract in question falls within the primary, or granted, limits, and, unless the claim of Richards was such as would defeat the withdrawal attaching under the 6th section of the granting act, upon the filing of the map of general route, this tract has been continuously withdrawn since August 13, 1870, the date of the filing of the map of general route of the main line of said road.

On the 17th of November, 1883, your office ordered a hearing to determine the status of the land in dispute at the date of the withdrawal of August 13, 1870. Hearing was had February 6, 1884, and upon the testimony taken the register and receiver rendered their joint

decision adverse to the railroad company. From this the company appealed to your office, and from your office decision sustaining that of the local office said company's appeal is now before me for consideration.

The decision appealed from finds as fact that "from the first date of settlement, viz: December, 1869, to the present time, the land covered by Richards' settlement has been occupied and improved by parties intending, in good faith, to obtain title to the same under the laws of the United States governing the public domain;" and, as conclusion of law, it finds "that the tracts covered by Richards' settlement were excepted from said withdrawals."

Richards testified at the hearing that he was a native of England; that he had lived in Washington Territory since 1869; that between January 1, 1870, and October 1st of the same year, his family was in Seattle; that he spent a good deal of his time on Cedar river; that in 1869 one Boblet and himself went up Cedar river, with some others, to hunt a claim, and hunted up and down the river; that coming home one time he looked down into the river and saw a large piece of coal; that they went up the river and found more coal, and located there, taking a claim including this coal, Boblet locating on one side of the river and he on the other. The land was then unsurveyed. He described, as nearly as possible, indicating on a map or plat the land claimed, and stated to what points they measured for their lines and corners, running as nearly as they could a half mile up and down the river. He intended to take as nearly as possible a square tract. In answer to the question, "How much time between the first of January, 1870, and the time you left these claims did you and Boblet spend on them?" he answered: "Well, we were up there every once in two or three weeks." As to the nature and extent of improvements, he testified: "I commenced a log house, and slashed considerable on the claim; we worked all the time we were there on the claims. I would work with Boblet and then he would work with me on my place." In answer to the question, "What was your intention in regard to claiming and getting title to this land under the laws of the United States?" his reply was: "Our intention was to take it any way we could acquire it, get title to it. I hardly knew how, but our intention was to get it just as the government would let us have it." When asked why they selected this land, he answered: "the coal that was on it; we would not have selected it for anything else; there might have been a little of it fit for garden—enough for a small garden probably." In testifying as to his abandonment, he speaks of being "on the way home" from the mine at the time he told McCallister he could have it. He had already testified that his family was in Seattle.

It is quite clear that he never established, or pretended to establish, a residence upon the tract.

I find from the evidence that the extent of his settlement and improvement was the partial erection of a log cabin, and some slashing on the tract. When he abandoned said land in September, 1870, he gave whatever right he had to John S. McCallister—this without consideration, and without writing of any kind.

McCallister testified that when he went on the land, he found the log cabin which Richards had partly built; also near it a tree blazed, and thereon a notice, either with a pencil or cut in, that Richards had taken that land. He further testified: "I followed the river up and down, and found where he had driven a stake above and below his claim;" further, that he (McCallister) took the claim for his son-in-law, Charles McCallister, and took what was known as the Boblet claim across the Cedar river opposite the land in question for himself; that soon thereafter he was away for a few days, and when he returned one Hiram Wilson had jumped the claim which he had intended to hold for his son-in-law; that this occurred before his son-in-law got to the land; that no attempt was made to put Wilson off; that "he (the son-in-law) just took the claim opposite mine."

Charles McCallister, the son-in-law, testifies that he never attempted to make any claim to the land in question, nor to occupy it. There was a break of several weeks between the occupancy of Richards and that of Wilson, and was no privity between them.

The evidence further shows that Wilson claimed the land from October, 1870, to about May 10, 1871, when he sold to Thaddeus Hanford. The latter sold to Collins, the appellee, June 27, 1881, and on the same day Collins applied to enter under the present coal-land law—sections 2347 to 2352 of the Revised Statutes. The improvements made by the different parties during all these years were very limited and consisted mainly in slashing some of the timber on the tract.

Though it was known at the date of Richards' settlement that the land was coal land, and it has been known as such ever since, he and all those who came after him having occupied it for that reason, yet it does not appear that anything has ever been done in the direction of operating the mines, or in any way developing the same.

On the other hand, the evidence is quite conclusive to the effect that nothing has ever been done, or attempted.

The only laws in force at the date of Richards' settlement, relative to coal lands, were the act of July 1, 1864 (13 Stat., 343), and the act of March 3, 1865 (id., 529). The first provided:

> That when any tracts embracing coal beds or coal fields, constituting portions of the public domain, and which as 'mines' are excluded from the pre-emption act of 1841, and which under past legislation are not liable to ordinary private entry, it shall and may be lawful for the President to cause such tracts, in suitable subdivisions, to be offered at public sale to the highest bidder, after public notice of not less than three months, at a minimum price of twenty dollars per acre; and any land not thus disposed of shall thereafter be liable to private entry at said minimum.

The supplemental act of 1865 provided:

That in the case any citizen of the United States, who, at the passage of this act, may be in the business of bona fide actual coal-mining on the public lands, except on lands reserved by the President of the United States for public uses for purposes of commerce, such citizen, upon making proof satisfactory to the register and receiver to that effect, shall have the right to enter, according to legal subdivisions, a quantity of land not exceeding one hundred and sixty acres, to embrace his improvements, at the minimum price of twenty dollars per acre.

Richards in his testimony at the hearing states indefinitely that it was his intention to take the land any way he could acquire it—that is, just as the government would let him have it.

Did his occupancy of the land give him any color of right or title thereto?

Under what law, if any, did he acquire any right by his settlement? It is clear that he could get no benefits under the pre-emption or homestead laws, for those laws specifically except from their operation lands on which there are known mines.

The coal act of 1864, cited *supra*, conferred no rights by virtue of settlement, nor until after public offering under authority from the President. This land has never been offered. The act of 1865, in a sense pre-emptive in its character, conferred upon him no benefit or right, for two reasons:

First, he had not at the date of the act engaged in the business of coal mining on the tract, nor did he at any time so engage.

Second, he was not at the time of his occupancy a citizen of the United States, as is shown by his own testimony at the hearing.

Had the land been offered at any time subsequent to his settlement, as provided by the act of 1864, such settlement would under the act have furnished him no protection and given him no right whatever.

In such case the land would have gone to the highest bidder, and he could have secured it only by being the highest bidder.

There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law, purporting to transfer to him the title, or to give to him the right of possession. And there can be no such thing as good faith in an adverse holding, where the party knows he has no title, and that, under the law, which he is presumed to know, he can acquire none by his occupation. Supreme Court of United States, in case of Deffebach *v.* Hawke, 115 U. S., 392.

In view of the foregoing, I am unable to conclude that there was, on August 13, 1870, any appropriation of the land which could be recognized, or that Richards' mere temporary settlement and squatter's claim on known coal land, which he shortly afterward abandoned without having made any substantial improvement, and to which no right or color of right attached under the law by virtue of said settlement, or otherwise, constituted a claim or right within the meaning of section 3 of the grant to the railroad company.

If it did not, then the tract was public, unreserved land, and as such

was subject to and included in the withdrawal of August, 1870, for the benefit of the railroad company.

This view deprives neither Richards nor any following him of any equity. None could be claimed for him since he voluntarily abandoned, without consideration from any source, such claim as he may have asserted. None could be claimed on the strength of his settlement for any who followed him as occupants of the land, for between him and them there was no privity.

Applying the strictest rule of construction against the grantee, I find nothing in the letter or reason of the law which would justify the exception of the tract in question from the withdrawal of 1870, under the grant which expressly provided in section 3 thereof, excluding mineral lands, "That the word 'mineral' when it occurs in this act shall not be held to include iron or coal."

The tract not having been excepted from the withdrawal for the benefit of the company, on account of Richards' settlement, it becomes necessary to inquire what effect, if any, did the subsequent settlements and claims have upon the grant?

As stated in your office decision, the withdrawal of August 13, 1870, for the main line of road was followed by the withdrawal of August 15, 1873, for the branch line, and by that of June 11, 1879, for the amended branch line, for the benefit of the same company.

The land in question is within the limits of each and all of said withdrawals.

The main line of road as finally constructed terminated at New Tacoma, before it reached a point opposite said tract, but this was not effected until May, 1874. Since the withdrawals of 1873 and 1879 intervene and embrace the tract, it follows that it has been continuously withdrawn from August, 1870, to the present time, the restoration of September 1, 1879, applying to and taking effect only upon such lands as fell *without* the withdrawal for the branch line. This being true, the conclusion must be that neither the settlement of Wilson, in 1870, subsequent to the withdrawal of the same year, nor that of Hanford, in 1871, can avail to appropriate the land or except it out of the withdrawal for the benefit of the company; nor can the application of Collins to enter under the coal-land law of 1873 (now sections 2347 to 2352 of the Revised Statutes) be properly recognized.

For the reasons herein given, I must reverse the decision appealed from, and hold that the tracts covered by Richards' settlement were not excepted from said withdrawals for the benefit of the Northern Pacific Railroad Company.

HOMESTEAD ENTRY—RESIDENCE—MINERAL LAND.

SANDERSON *v.* TAYLOR.

The sufficiency of residence under the homestead law is not affected by the fact that the entryman's house was on a part of the entered land that was subsequently adjudged to be mineral and excluded from the entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 7, 1892.

On the 27th of December, 1881, Edwin Taylor filed his pre-emption declaratory statement for the W½ of the SE¼ and the E½ of the SW¼ of Sec. 26, T. 6 N., R. 13 E., Sacramento land district, California, alleging settlement on the 13th of that month. On the 26th of July, 1882, he made homestead entry for the land, asking the benefit of his residence thereon under his pre-emption filing.

He had resided upon the land for several years prior to his pre-emption filing, and on the 24th of May, 1884, he submitted final proof, claiming the benefit of such residence. When he made his final proof he relinquished his claim under his entry to a part of the NE¼ of the SW¼, which was in conflict with the quartz mine of one Reynolds. After such relinquishment there were about twenty-three acres of said quarter section included in the homestead entry of Taylor, which was designated as lot No. 2.

His proof was protested by one Burt *et al.*, and after a hearing the protest was dismissed. Upon an appeal to your office, you decided on the 4th of January, 1887, that the W½ of the NW¼ of the SE¼ was mineral land, and not subject to entry under the homestead law. You also held that his settlement under his homestead entry dated from December 13, 1881, and that his proof made in May, 1884, was prematurely made, and could not be accepted. As sufficient time had expired at the time of your decision, you stated that he would then be allowed to make final proof for the land in such decision adjudged to be non-mineral.

From that decision an appeal was taken to the Department where it was affirmed on the 1st of September, 1888, Taylor being allowed to make new final proof, within the life of his entry, for that portion of the land not relinquished by him, and not found to be mineral by you. Such proof was made on the 15th of January, 1889, which was accepted, and final certificate issued.

On the 27th of May, 1889, Sanderson petitioned for a hearing, to be allowed to make proof that Taylor had not resided upon the land included in his final certificate. You granted such petition, and on the 12th of February, 1890, ordered a hearing which took place on the 3d of April, 1890, resulting in a decision by the local officers adverse to Taylor. An appeal was taken to your office, and on the 31st of March, 1891, you reversed the decision of the local officers, accepted the final

proof of Taylor, and held his final certificate intact. An appeal from such decision brings the case to the Department.

The fact that the residence and buildings of Taylor were upon the twenty acres of his entry decided by you to be mineral land, is not disputed. It is also true that on the 4th of January, 1887, when you rendered such decision, he had resided upon the land covered by his entry for more than five years. The further fact that in your decision of the date last stated, as also in the decision of the Department upon appeal therefrom, he was expressly allowed to make final proof for the land adjudged to be non-mineral, I think disposes of all questions relating to the validity of Taylor's entry.

As soon as he received notice of that decision of the Department, he initiated proceedings to acquire title to the land adjudged to be mineral, under the laws relating to mineral lands, and also gave notice of his intention to make final proof, in pursuance of such decision. He did not, however, remove his house from the mineral to the non-mineral land, he having already resided upon and cultivated the whole tract, for the full period required by law, before any portion of it was adjudged to be mineral.

The case of Darragh *v.* Holdman (11 L. D., 409), presented a similar question. In deciding that case you held: The evidence shows that Darragh resided on the land continuously, and having shown good faith, the fact that his residence was on that portion of the land shown to be mineral, would not of itself defeat his rights, and his final proof should not have been rejected. In that case the local officers had rejected it as in the case at bar, and upon appeal the Department sustained your decision. I see no reason for adopting a different course in this case, and the decision appealed from is therefore affirmed.

HOMESTEAD APPLICATION—IRREGULAR ALLOWANCE.

CALHOUN *v.* DAILY.

The irregular allowance of a homestead application for land covered by the entry of another, and subsequent compliance with law on the part of such applicant gives him a right that will attach on the cancellation of the prior entry to the exclusion of one who then applies to enter but alleges no prior right or equity.

Secretary Noble to the Commissioner of the General Land Office, May 7, 1892.

On the 20th of December, 1881, Charles A. Janzig made pre-emption cash entry for the SE ¼ of Sec. 15, T. 62 N., R. 14 W., at the Duluth land office, Minnesota, which entry was held for cancellation by you on the 21st of October, 1886, upon a report of a special agent.

Upon the application of the Minnesota Iron Company, transferee, a hearing was ordered, on the 20th of January, 1888, which took place on

the 26th of November, of that year. As a result thereof, said entry was canceled by you on the 17th of September, 1889, which fact was entered on the records in the local office, on the 20th of the month. From that decision, the Minnesota Iron Company did not appeal.

On the 31st of October, 1888, Frank A. Daily filed in the local office a quitclaim deed, executed by Janzig, as grantor, to said Daily, as grantee, for the said quarter section, and made application to make homestead entry therefor. The local officers treated such deed as a relinquishment by Janzig, and endorsed thereon "canceled by relinquishment, Oct. 31, 1888," and minuted that fact upon the record in their office, and accepted and allowed the application of Daily to make homestead entry for the land, writing across the face thereof the words: "subject to claim of Minnesota Iron Company, transferee."

The claim of that company to the land, as transferee, was disposed of by your judgment canceling Janzig's entry, rendered on the 17th of September, 1889, from which no appeal was taken.

On the 20th of September, 1889, the day on which your judgment of cancellation was received at the local office and entered upon the records thereof, but previous to such receipt and entry, Maria A. Calhoun presented her application to make homestead entry for the land, which was rejected by the local officers, on account of the pending cash entry of Janzig, and the prior homestead entry of Daily. Later in the same day, but after the cancellation of the Janzig entry had been noted on the record, her application was again presented, and again rejected on account of Daily's prior entry. From this action on the part of the local officers, she appealed to your office, and on the 29th of August, 1890, you rendered decision in the case, in which you said to the local officers: "Your action in rejecting the application of Calhoun is hereby affirmed, subject to the usual right of appeal. No allegation of fraud is brought against Daily's entry. Should Calhoun desire to contest the entry on that ground, she is at liberty to do so, in accordance with the rules of practice." No such contest was initiated, but an appeal, by Calhoun, from your decision, brings the case to the Department for consideration.

In her appeal to your office from the action of the local officers, the principal ground of error specified is as follows:

> The action of the register and receiver, in accepting the relinquishment of Charles A. Janzig of a cash entry, and the acceptance of a filing on said land on the same day by Frank A. Daily, was an error of law, and was wrong and reprehensible.

In her appeal to the Department from your decision, it is alleged that you erred in affirming the decision of the register and receiver, and in recognizing the entry of Daily as an appropriation of the land, claiming that such entry was null and void, and that Calhoun, being the first to apply to make entry for the land after the cancellation of Janzig's entry by your order, was the first legal applicant therefor.

Daily was allowed to make homestead entry for the land on the 31st

of October, 1888, and such entry was followed by due compliance with law on his part, in the matter of residence, improvements, and cultivation. This, I think, placed him in a different relation to the land, than he would have occupied had his application been rejected, and he had done nothing upon the land required of a homestead entryman. Had his application been rejected, he could have obtained no relief by appeal, unless he could show that the land was subject to entry at the date of his application. This was held by the Department in the case of Goodale *v.* Olney (13 L. D., 498). In the case of Maggie Laird (ibid, 502), it was held that where an application to make entry for land covered by the existing entry of another was rejected, an appeal from such action would not have the effect to cause the application to attach on the cancellation of the previous entry. These cases lay down the rule to be followed where an improper application to enter is *rejected.*

A different rule seems to prevail in cases where an improper application to enter is *accepted.* In the case of Richard Griffin (11 L. D., 231), where an entry had been erroneously allowed for land within the Sioux Indian reservation, it was said: "I see no good reason why his homestead entry should not be allowed to remain intact, and take effect from the date when the land covered thereby became subject to settlement," and such was the disposition made of the case.

In the case of Thomas *et. al. v.* Spence (12 L. D., 639), where an improper entry had been allowed for land embraced within an existing swamp selection, such entry was allowed to stand, and take effect on the cancellation of such selection. It was therein said: "After the cancellation of the State's selection, the question as to the validity of an entry made while the land is so appropriated, is one solely between the government and the entryman, and the entry may be allowed to remain intact, subject to future compliance with law, unless the allowance of such entry would be in derogation of the rights of adverse claimants." Upon the proposition that "a contestant will not be heard to question the validity of such entry upon the ground that it was invalid when allowed, unless he shows that the allowance of the entry would be in violation of his rights, or would defeat a prior right or equity," the case of Meyers *v.* Smith (3 L. D., 526) is cited in Thomas *v.* Spence.

The case of Schrotberger *v.* Arnold (6 L. D., 425), held that "during the existence of an entry the land covered thereby is not subject to appropriation by another," but it also held, that "an entry though made when the land was not subject to appropriation, on removal of the bar, may be allowed to stand intact."

Applying the doctrine of the cases cited, to the one at bar, and I think the conclusion reached is, that the allowance by the local officers of the application of Daily to make homestead entry for the land, followed by due compliance with law on his part, in the matter of residence, improvements, and cultivation, constitute a claim which attached

on the cancellation of the prior entry of Janzig, to the exclusion of the right of Calhoun who subsequently applied to make entry therefor, and that she will not be heard to question the validity of such improperly allowed entry, unless she shows that the allowance of said entry is in violation of her prior right or equity.

There is no such showing in the case, as she claims no right or equity in the land whatever, prior to the presentation of her application to make entry therefor, on the 20th of September, 1889. This was three days after the rendition of your judgment of cancellation of Janzig's entry which was made on the 17th of that month, and took effect that day, as was held in Perrott *v.* Connick (13 L. D., 598), "without regard to the time when such judgment is noted of record in the local office."

There are no disputed questions of fact in the case, and the good faith of Daily is not in issue, nor are any acts of bad faith on his part alleged or established. For the reasons stated, and in view of the authorities cited, the decision appealed from is affirmed.

PRACTICE—RULE TO SHOW CAUSE, ETC.—DESERT ENTRY.

WILLIAM S. POWELL.

Under a rule to show cause why an entry should not be canceled, time should not run as against the entryman while the local office is closed.

Equitable action may be taken on a desert entry made on final proof submitted after the expiration of the statutory period, where the delay is satisfactorily explained, and no adverse claim exists.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 7, 1892.

On the 27th of August, 1886, William S. Powell made desert land entry for lot 2, the N ½ of the SW ¼, the SE ¼ of the NE ¼ and the SE ¼ of Sec. 7, and the N ½ of the NE ¼ of Sec. 18, T. 15 N., R. 16 E., Helena land district, Montana.

On the 13th of October, 1890, you advised the local officers that the statutory period for the reclamation of the land had expired, and directed them to give notice to Powell, and other parties similarly situated, under circular of August 28, 1880, and in accordance with circular of October 28, 1886.

On the 13th of November, 1890, the local officers advised you that on the 29th and 31st of July, 1890, the parties in said letter named, one of whom was Powell, had been notified to show cause within ninety days, why their entries should not be canceled for failure to make final proof and payment within the statutory period.

On the 26th of November, 1890, you advised the local officers that the entry of Powell had been canceled that day, and directed them to note

the same on their records. From that direction and decision Powell appeals to the Department.

He bases his appeal upon the ground that the cancellation was made before the expiration of the ninety days from the date of service of notice upon him. In explanation of this he shows that the United States land office at Helena was closed on October 15, 1890, for all business from the new Judith land district, in which Powell's claim was located, and the office at Lewistown, in such district, did not open until November 26, 1890.

He attempted to "show cause" at the new office within the ninety days, as required, but was unable to do so, owing to the fact that the commission of the receiver had not been received, and the office was not then legally opened. He made his showing the first day the office was open for business, and he insists that the time between the closing of the office in Helena, and the opening of the office at Lewistown should not be included in the ninety days allowed him by the notice.

The cause shown by him was in the form of a corroborated affidavit, in which he stated that the reason final proof on said entry was not made within the required time was because the entire seasons of 1889 and 1890 were so extremely dry that all the streams in that section were greatly diminished in the volume of their water flow, and many of them entirely dried up. He also showed that he had constructed a main ditch, eight miles in length, from the Judith river, at a cost of fifteen hundred dollars, and lateral ditches covering each and every legal subdivision, and that the main and lateral ditches are of a capacity sufficient to thoroughly irrigate and reclaim the land included in his entry. That he has water rights in the waters of the Judith river sufficient for that purpose, but that since July 1, 1889, he has only been able to secure one hundred inches of water from that source, when he was entitled to five hundred inches, which was an abundance to thoroughly irrigate and reclaim the land.

Upon this showing he asked for further time within which to make his final proof and payment. This application was forwarded to you by the local officers, from the Lewistown office on the 28th of November, 1890, with the recommendation that he be allowed more time in which to make proof.

On the 15th of December, 1890, you informed the local officers that the entry of Powell had been canceled by you before the receipt of his application, and you directed them to inform him that you were not authorized by law to grant an extension of time for the reclamation of the land, and as the entry had already been canceled, you could afford him no relief in the matter.

I am clearly of the opinion that the time during which there was no land office open before which Powell could make his showing, should not be included within the ninety days allowed him for showing cause

why his entry should not be canceled. After the 15th of October, 1890, he could not make such showing at the Helena office, and the office at Lewistown was not opened for business so that he could make it there within the required ninety days. He applied there within that time, and made his showing at the earliest possible day thereafter. Deducting the time during which there was no office open before which he could show cause, from the ninety days allowed him for that purpose, and it is seen that he was in time, and that the decision of cancellation was rendered prematurely.

In the case of George W. Mapes (9 L. D., 631), it was said: "It is true that there is no authority for granting an extension of time in making final proof in desert land entries, but the Department will, in the absence of an adverse claim, give an equitable consideration to final proof submitted after the expiration of the statutory period, if the delay is satisfactorily explained." In support of this position the cases of Richard A. Ballantyne (3 L. D., 8) and Oscar Cromwell (8 L. D., 432) are cited. The same views were expressed in Alexander Toponce (4 L. D., 261) and in Riley Garrett (7 L. D., 79).

It seems to me that the facts set out in Powell's affidavits of November 3, 1890, and the one which accompanies his appeal, both of which are duly corroborated, show that he made his entry in good faith, and that he endeavored to comply with the law, and was only prevented from doing so by the extreme and unusual dryness of the seasons of 1889 and 1890. Having expended so much money in attempting to reclaim this tract, it seems harsh and inequitable to arbitrarily hold his entry for cancellation. Only the government and the entryman are interested and justice indicates that he should be given a fair chance to comply with the law.

The rules 29 and 30 of the additional rules of equitable adjudication of April 28, 1888 (6 L. D., 799) provide for the submission of the final proof in certain cases to the board of equitable adjudication after the expiration of the statutory limit. This seems to be a case provided for by such rules, and

> I think, therefore, that the said entry, there being no adverse claim, should be reinstated, and that the local officers be directed by your office to allow the claimant, within ninety days notice hereof, to make payment for the land and proof of reclamation of the lands covered by his entry, and also proof bringing said entry within the purview of rule 30, aforesaid, when the same will be submitted for confirmation to the board of equitable adjudication. See case of Joseph Himmelsbach (7 L. D., 247).

That was the language used in concluding my decision in the case of George W. Mapes, *supra*, and I make it a part of my decision in the case at bar, and modify the decision appealed from accordingly.

PRACTICE—APPEAL—INTERLOCUTORY ORDER.

PUESCHELL *v.* COWGILL.

An appeal will not lie from an interlocutory order of the General Land Office.

Secretary Noble to the Commissioner of the General Land Office, May 7, 1892.

I am in receipt of a motion to review departmental decision of December 5, 1891 (unreported), in the case of Edward A. Pueschell *v.* C. C. Cowgill and to re-instate and promulgate the departmental decision of October 21, 1891, in the same case recalled by the decision of December 5, 1891.

The tract involved in this case is the S.W. $\frac{1}{4}$ of section 6, T. S. 30, R. 29 E., Visalia, California, and the motion above mentioned is made by counsel of Cowgill.

The necessary facts to the determination of the questions raised by the motion are as follows:

One Thomas A. Means made a timber culture entry for the tract in question in 1876.

On October 28, 1887, Herman C. Pueschell who was a brother of the plaintiff in this case initiated a contest against said entry and applied to make timber culture entry for said land; a hearing was had and it was adjudged that Means had not complied with the law.

The entry was held for cancellation by you on December 1, 1888; contestant died on February 11, 1888. Before the entry had actually been canceled in accordance with your judgment of December 1, 1888, Means' relinquishment was presented by Cowgill and he was allowed to enter the tract; on the same day Edward A. Pueschell applied to enter the tract; his application was rejected because subsequent to that of Cowgill. He appealed from said rejection to you and on May 21, 1890, you affirmed the action of the register and receiver which was adverse to Pueschell and he did not appeal from such judgment. Among other things in said judgment you instructed the local officers as follows:

> You will advise the heirs of Herman C. Pueschell, or such of them as may be known to you, that upon their presenting an application to enter, in lieu of the one which is lost, and making the necessary affidavit and payment, that Cowgill will be called on to show cause why his entry should not be canceled for conflict therewith—

Cowgill appealed from this portion of your judgment, and on December 5, 1891, it was dismissed because the order from which he appealed was held to be an interlocutory order resting in your discretion and not a final judgment from which an appeal will lie to this Department under rule 81 of the rules of practice.

Cowgill did not appeal from your judgment of May 21, 1890, but only from the order made in connection therewith; that order was clearly interlocutory in character; it did not dispose finally of any of his rights,

in fact your judgment was favorable to him and your order directing the local officers to notify certain heirs how they might yet get their alleged claims passed upon by the proper authorities was one from which he was not entitled to appeal. The motion before me has been examined and duly considered; it must be and is hereby denied for the reasons above given.

INDIAN LANDS—ACT OF JANUARY 14, 1889.

MILLE LAC LANDS.

The lands formerly occupied by the Mille Lac Indians are not subject to disposition under the general land laws but under the special provisions of the act of January 14, 1889.

Secretary Noble to the Commissioner of the General Land Office, April 22, 1892.

By letter of March 12, 1892, you ask to be instructed as to the disposition of the lands formerly occupied by the Mille Lac Indians calling attention at the same time to departmental letter of January 21, 1891, stating that "the Mille Lac lands should be disposed of as other public lands under the general laws," and to the decision of September 3, 1891, in the case of Northern Pacific R. R. Co. *v.* Walters (13 L. D., 230), wherein it was held that said lands were to be disposed of under the provisions of the act of January 14, 1889 (25 Stat., 642).

Under date of January 20, 1891, your office submitted an estimate of the cost of completing surveys within the Chippewa Indian Reservations in Minnesota and included therein an item of $4,000 for the Mille Lac lands. As to this item it was said in that report:

> In reference to the views of the Hon. Secretary of the Interior expressed in his decision of the 9th instant, case of Amanda J. Walters *et al.*, and G. W. M. Read *et al.*, a doubt is suggested as to whether the lands in the Mille Lac reservation are to be disposed of under the provisions of the act of January 14, 1889 (25 Stat., 642), or as other public lands under the general laws. If the latter, the amount estimated therefor in the foregoing may be omitted, and in reference to this point I request that I may be specifically instructed.

The answer made to this request by said letter of January 21, 1891, is as follows:

> In reply you are informed that as the departmental decision of 9th instant held,
> "that the lands upon which the Mille Lacs have enjoyed the favor of residence, so long as they should not interfere with the whites, is equivalent to a declaration that this favor or license did not amount in effect to a 'reservation' of these lands upon which the Mille Lacs could take allotments," etc.,
> the Mille Lac lands should be disposed of as other public lands under the general laws, and consequently will not be surveyed under the act of January 14, 1889.

Afterwards the question as to the status of the lands within the former Mille Lac Indian Reservation came up in the case of Northern Pacific R. R. Co. *v.* Walters, *supra*, and was quite fully discussed in

the decision rendered in that case. This decision is not only the later expression of the Department, but was rendered in a case where the status of these Mille Lac lands was the specific question presented to be decided. This later decision must prevail, and you will therefore be governed thereby in the disposition of said lands.

RUCKER ET AL *v.* KNISLEY.

Motion for review of departmental decision of January 28, 1892, 14 L. D., 113, denied by Secretary Noble, May 2, 1892.

APPLICATION TO ENTER—SECTION 5, ACT OF MARCH 3, 1887.

STEBBINS *v.* CROKE.

The pendency of an application to enter, at the passage of the act of March 3, 1887, does not except the land embraced therein from the operation of said act.

The right to perfect title under section 5, act of March 3, 1887, is intended for the protection of those who have in good faith paid their money for a title believed by them to be good, and the mere fact that a purchaser holds under a quit claim deed does not exclude him from the benefits of said section.

Secretary Noble to the Commissioner of the General Land Office, May 6, 1892.

I have considered the case of Lorenzo D. Stebbins *v.* Thomas B. Croke, involving the NW. ¼ of Sec. 33, T. 2 S., R. 67 W., Denver, Colorado, on appeal by Stebbins from your decision rejecting his application to make homestead entry for said land.

Counsel for Stebbins moved to dismiss the case for the reason,

1. That no jurisdiction has been obtained in this cause by reason of failure to serve all parties in interest.

2. That it does not appear from the record that the original settler, William Purcell, who filed his pre-emption declaratory statement for said land, the same being number 2098, has been notified to assert his rights within a reasonable time fixed by the Secretary of the Interior as prescribed by the third section of the act of March 3, 1887.

Section 3 of the act of March 3, 1887 (24 Stat., 556) is as follows:

That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any *bona fide* settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to *bona fide* purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to *bona fide* settlers residing thereon.

The records show that William Purcell filed a pre-emption declaratory statement for the tract April 14, 1866, alleging settlement January 14, 1866.

There is no evidence that he ever was a *bona fide* settler on the land, his filing was never canceled either erroneously or otherwise, and in the absence of evidence to the contrary, it is but reasonable to assume, that if he ever was a settler on the land his abandonment of the same was voluntary, hence there is no ground for assuming that Purcell falls within the term of the statute. Neither he nor any one claiming under him, nor any one representing him is a party to the present proceeding.

The motion is accordingly denied.

The material facts in the case are as follows: The tract of land involved is situated within the limits of the grant to the Denver Pacific, now known as the Union Pacific Railway Company, which grant took effect August 20, 1869; said tract of land was, however, excepted from the operation of the grant by the pre-emption filing of William Purcell.

On June 15, 1885, George C. Cook made application to enter the tract under the timber-culture law. This application was rejected by the local officers for the reason that the tract was within the limits of the grant to the railroad company. Cook appealed, and pending the same, Thomas B. Croke filed a protest against the application of Cook, alleging that he was a purchaser of the land under title from the railroad company, and that he should either be allowed to enter the land under the general land laws, or purchase it under the act of January 13, 1881.

On October 15, 1888, you held that the tract was excepted from the grant to the company by reason of the pre-emption filing of Purcell, and that should said decision become final, the respective applications of Cook and Croke would be duly considered. On appeal by the company this decision was affirmed by the Department on June 24, 1890. In the meantime, on April 4, 1889, Lorenzo D. Stebbins applied at the local office to make homestead entry for said tract, and on the rejection of his application by the local officers, he appealed; and on February 1, 1890, Thomas B. Croke made application to purchase the land in question under the provisions of the fifth section of the act of March 3, 1887. On March 22, 1890, George C. Cook executed a relinquishment of his right, title and interest to the tract in question under his timber-culture application and withdrew the same and dismissed his appeal from its rejection by the register and receiver, and this relinquishment was filed in the local office September 29, 1890.

After a hearing at the local office as to the respective right of Stebbins to enter the land under the homestead law, and of Croke to purchase under the act of March 3, 1887, the local officers rejected the application of Stebbins; on appeal you affirmed their decision and allowed Croke to purchase.

Stebbins has appealed.

Croke bases his application to purchase upon the fifth section of the act of March 3, 1887 (24 Stat., 556), which provides:

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

It has been finally determined by this Department that the tract in question was excepted from the operation of the railroad grant.

At the hearing Croke established the fact that the tract in dispute was coterminous with the constructed parts of the road; that it was sold by the company as a part of its grant in 1869 or 1870, to Amos Bissell under whom he (Croke) claims; that at the date of the sale to Bissell, and at the date of the sale to Croke the tract was not in the *bona fide* occupancy of adverse claimants under the pre-emption or homestead laws; that it was not settled upon subsequent to December 1, 1882, and prior to March 3, 1887, by any person or persons claiming the right to enter the same under the settlement laws; that he (Croke) was a native born citizen of the United States, and finally that Bissell, under whom he claims, was a *bona fide* purchaser from the company, and I think the evidence is also satisfactory that Croke himself, was a *bona fide* purchaser from Bissell, as that term is employed in the act in question.

Thus under the law and the instructions issued thereunder by this Department (8 L. D., 348), it would seem, the right of Croke to purchase the the tract in dispute, must be recognized.

It is earnestly contended, however, by counsel for Stebbins, that said tract of land was excepted from the operation of the act of March 3, 1887, by the application of George C. Cook, made June 15, 1885, to enter the same under the provisions of the timber-culture law, which application was pending on appeal at the date of the passage of said act, and segregated the tract from the mass of the public domain, so that the act could not be construed to embrace or operate upon it.

This proposition is based upon that well established principles of law

That whensoever a tract of land shall have once been legally appropriated to any

purpose, from that moment the land thus appropriated becomes reserved 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.

In the leading case of Wilcox *v.* Jackson (13 Peters, 498) and in the other cases cited by counsel, the facts were that the tracts of land under consideration, had been expressly appropriated for a specific purpose under a law of Congress, or in accordance with law.

In the adjustment of claims which arise under the administration of the public land laws, this Department holds,

That an application to enter pending an appeal is equivalent to an entry only so far as the rights of the applicant are concerned. Richards *v.* McKenzie (13 L. D., 71).

The enforcement of this principle is necessary in order that there may be an orderly and correct disposition of the various claims which are presented to the Department for adjudication under the various existing laws providing for the disposal of the public domain; but never has it been asserted that a mere application to enter a tract of land, which application was subsequently withdrawn, could operate to segregate a tract of land from the mass of the public domain or exclude said tract from the operation of a law of Congress passed during the pendency of such application.

An entry creates a segregation of land by operation of law, and while thus segregated, no law can operate upon it. An application to enter preserves the rights of the applicant, to the tract applied for, and to the end that these rights may be thus preserved, the Department rules that said tract of land shall be reserved from other appropriation by any opposing applicant, in this sense only is a reservation or segregation created by an application. I am of the opinion therefore, that the contention of counsel, that the tract in question was not subject to the operation of the act of March 3, 1887, can not be successfully maintained.

It is contended that Croke, who purchased the land in 1886, was not a *bona fide* purchaser as contemplated by the statute. He purchased from Bissell, while the question of the title of the railroad company was pending before this Department. He paid a valuable consideration, nearly $1,500, for the land, which was considered a fair price at that time, and he has expended large sums in improving the same.

Bissell, who purchased from the railroad company, transferred the land to Croke by quit claim deed. On this point he (Bissell) testifies, that his deed from the railroad company was not a warranty deed; that he had no patent for the land, and that he wanted to give the same title that he had received; he says: "I told Croke I wanted to give you the same title that I got from the railroad, if I had a warranty deed, I would give you a warranty deed."

Croke testifies as follows:

Q. At the time you purchased this land from Mr. Bissell had you any knowledge or information leading you to believe that the lands had not been purchased by him in good faith from the Denver Pacific Railroad?

A. No, sir.

Q. If you had had any knowledge or information that the road did not have the title would you have bought these lands?

A. No, sir; I most assuredly would not.

Q. Did you know or had you heard at the time you bought these lands that land grant lands were involved or the title of the railroad, by any decision of the Department?

A. No, sir; but I learned soon afterwards though.

In support of his contention that a "holder under a quit claim deed can not claim as a *bona fide* purchaser," counsel for Stebbins cites the case of Baker *v.* Humphrey (101 U. S., 494).

The material facts in that case are these. Scott conveyed the premises to Chapman, taking from him a mortgage for the amount of the purchase money, $3,500. Chapman did not take possession of the premises. Scott afterwards assigned the mortgage to Sammons. Sammons conveyed the premises, with warranty to Belote. From Belote there was a regular sequence of conveyance down to Baker, the complainant. Chapman lived near the property for years and knew that Sammons and others were in adverse possession and claimed title but never claimed or intimated that he had any title himself. Baker entered into a contract with Hurd and Smith to sell and convey the premises to them for the sum of $8,000. Baker employed Wells S. Humphrey, an attorney, to draw the contract. Hurd and Smith took possession under the contract, and employed the same attorney Humphrey, to procure an abstract of title, who in examining the title found there was no deed from Chapman. He therefore sought out Chapman and by representing to him that the object was to protect the title of clients, procured Chapman to execute a quit claim deed of the premises to George P. Humphrey, a brother of the attorney, for the sum of $25. George P. Humphrey, the grantee, knew nothing of the transaction until some time afterwards. An action of ejectment was instituted in his name to recover the property. Baker tendered him $25, the amount he had paid for the deed and offered to pay any expense incurred in his procuring it and demanded a release. He declined to accept or convey. The prayer in the bill was, that the deed to George P. Humphrey be decreed to be fraudulent, and to stand for the benefit of Baker.

It was with these facts before it that the supreme court, speaking through Justice Swayne, used the following language:

> Chapman conveyed by a deed of quit-claim to the attorney's brother. The attorney procured the deed to be so made. It was the same thing in the view of the law as if it had been made to the attorney himself. Neither of them was in any sense a *bona fide* purchaser. No one taking a quit-claim deed can stand in that relation May *v.* Le Claire (11 Wallace, 217).

It will be observed that the court held that the deed which was procured by the person who held the position of confidential attorney both to the grantor, and to the party for whose benefit the deed was represented to have been made, although in the name of his brother, was the same as though it had been made in his own name, and it was well said

that he was not a *bona fide* purchaser, and the further statement that, "No one taking a quit-claim deed can stand in that relation," was certainly true as applied to this transaction; but is there good reason to think that this detached sentence was adopted by the court as an unqualified legal proposition? The authority cited by the Associate Justice in support of the proposition announced was May *v.* Le Claire (11 Wallace, 217), and in said case the decision of the court was announced by the same justice nine years before.

In this case the court say:

> On the 27th of July, 1859, Dessaint conveyed by a deed of quit-claim to Ebenezer Cook. The evidence satisfies us that Cook had full notice of the frauds of Powers and of the infirmities of Dessaint's title. Whether this were so or not, having acquired his title by a quit-claim deed, he cannot be regarded as a *bona fide* purchaser without notice. In such cases the conveyance passed the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey. Cook occupied the same relations to the property as Dessaint, his grantor.

The authority cited for this proposition was Oliver *v.* Piatt *et al.* (3 Howard, 363), and we must turn to that case as the foundation for these decisions. The unanimous opinion of the court, in the last cited case, was announced by Justice Story with that clearness of statement, and careful regard for the meaning of words and of phrases, which so distinguish the writings of that profound jurist.

The material facts which led up to the discussion are these: Williams, who had purchased certain premises by quit-claim deeds from Oliver, alleged that he (Williams) was a *bona fide* purchaser for a valuable consideration without notice. The court found that Oliver held the premises in question in trust for others, and that if Williams did not actually know this fact (which was more than probable) that he was, from the knowledge he did possess, put upon inquiry in relation to the matter; the court say:

> And the only reasonable conclusion seems to be that he was in as full possession of all the facts as were his partners, Oliver and Baum. Another significant circumstance is, that this very agreement contained a stipulation that Oliver should give a quit-claim deed only for the tracts; and the subsequent deeds given by Oliver to him accordingly, were drawn up without any covenants of warranty, except against persons claiming under Oliver, or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title and interest in the property; and under such circumstances, it is difficult to conceive how he can claim protection as a *bona fide* purchaser, for a valuable consideration, without notice against any title paramount to that of Oliver, which attached itself as an unextinguished trust to the tracts.

I am clearly of the opinion that the true doctrine on this point is thus clearly stated by Justice Story, and in effect, followed in the case of May *v.* Le Claire, *supra.*

One who holds under a quitclaim deed, takes all the interest his grantor had, and may be a *bona fide* purchaser, as against all who do not claim by a title paramount to that of his grantor. This definition

is, I think, fully sustained by the language of the court in the case of Dickerson *v.* Colgrove (100 U. S., 578), in which it is said:—

> Chauncy conveyed to the plaintiff in error by deed of quitclaim. He is not, therefore, a *bona fide* purchaser. Morton and the defendants were in possession. For both these reasons, he took whatever title he acquired subject to all the rights, legal and equitable, of Morton and of the defendants who deraigned their titles from the latter.

Applying this rule to the case at bar, we find that Croke took all the interest of Bissell; that no one claims by any title paramount to that of Bissell; that in the absence of the provision contained in the act of March 3, 1887, neither Bissell nor Croke can claim any right or title to the land, but by the provisions of that act, Bissell (who was without the shadow of a question a *bona fide* purchaser from the railroad company), or his grantee, Croke, has the right to purchase the land in question in the absence of an adverse right created by statute, and no such adverse right exists in the present instance.

The homestead claim of Stebbins was not initiated until April 4, 1889, hence he is not protected by the second proviso of the fifth section of the act of March 3, 1887, (Chicago, St. Paul, Minneapolis and Omaha Railway Company, 11 L. D., 607).

It was evidently the intention of Congress, by the act of March 3, 1887, to protect those parties who had, in good faith, purchased land of the railroad company believing that the company had, by virtue of the grant made by Congress, the right to sell said land.

All of the lands embraced within the provisions of the act, were lands to which adverse claims existed at the time the grant took effect and were therefore excepted from the operation of the grant, and the railroad company had no right to sell the same, it had no title to convey; hence if we apply the strict rule of *caveat emptor*, if we hold that in order to be a *bona fide* purchaser one must have made due inquiry as to the validity of the title of the company to the tract sold which inquiry carried to its full extent would have disclosed the fact that the tract sold was exempted from the grant and did not pass to the company, we must hold, as a logical result of the contention, that there could be no such one as a *bona fide* purchaser. Such a result would be equivalent to asserting that the act of March 3, 1887, was an absurdity, and without meaning. This can not be assumed. On the contrary, it must be assumed that Congress intended to accomplish what a fair and reasonable interpretation of its language will accomplish, viz., the protection of those, who had in good faith, paid their money for a title which they believed to be good. In the case at bar I think there can be no question as to the right of Bissell to purchase under the act. But is there anything to indicate that it was the intention of Congress that the right to purchase must be confined to the one who had originally purchased from the company?

The use of the words heirs and assigns clearly negatives such an idea.

It was the intention that one who stood in the place of the original purchaser, either by heirship or by assignment, should have the same right.

After a very full and careful consideration of the case, I am of the opinion that your decision is correct and the same is affirmed, and the papers in the case are herewith returned.

TOWN SITE PLAT—SECTION 22, ACT OF MAY 2, 1890.

CANADA H. THOMPSON ET AL.

A townsite plat submitted for approval under the second proviso to section 22, act of May 2, 1890, should show accurately the size of all lots, the width of streets and alleys, the correct measurement and location of parks and reservations, and the exterior boundaries should be indicated in conformity with the lines of the public survey.

In case of an addition to a townsite the streets must conform to the streets already established, and this fact must be stated in the surveyor's affidavit.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 9, 1892.

I am in receipt of your letter of March 24, 1892, transmitting plats in triplicate filed by Canada H. Thompson and Jacob U. Shade, showing a portion of the public domain which each one applied to enter as a portion of the townsite of Hennessey, Oklahoma, under the provisions of the second proviso to section 22 of the act of May 2, 1890, entitled "An act to provide a temporary government for the Territory of Oklahoma, etc. Also the evidence filed in support of their respective applications.

You recommend that the plats be approved.

The evidence filed in support of the application, appears to be sufficient, but in my opinion, neither of the plats is correct.

It is of the utmost importance that all plats of townsites or portions of townsites, should be strictly correct and accurate. The size of each and every lot should be stated, and if the lot is irregular in shape, the width at each end should be indicated; the width of each street and alley should be marked, and the correct measurement of the reservations and parks indicated; the exterior boundaries should be indicated and said boundaries must conform to the lines of the public surveys.

The plats before me are more or less defective in all the above mentioned particulars.

Whenever an addition is made to a town already in existence, as in the present instance, the streets must conform to the streets already established, and this must be stated in the affidavit of the surveyor. The affidavit of the surveyor should also contain a statement of what

tract of land is surveyed as the townsite or portion of the townsite, also that the tract reserved as a public park, contains the requisite amount of land. In a word, the affidavit of the surveyor should contain a full, correct and intelligent statement of what is shown on the plat.

The affidavit of the party applying to make the entry should embrace the statement that the application to enter the described tract of land as the townsite, or as a portion of, or addition to, the townsite of ——— is made under the provisions of the second proviso to section 22 of the act of May 2, 1892, entitled "An act to provide a temporary government for the territory of Oklahoma," etc., that all streets, alleys, parks and reservations are dedicated to public use and benefit, and that the plat is correct according to the survey made by the proper surveyor.

The plats in question are herewith returned to be corrected as above indicated, and you will inform the local officers of the requirements necessary in plats to be filed in the future.

LAMB *v.* SHERMAN.

Motion for the review of departmental decision of September 3, 1891, 13 L. D., 289, denied by Secretary Noble, May 9, 1892.

LOCAL OFFICE—CONTEST—SIMULTANEOUS APPLICATIONS.

NICHOLS ET AL. *v.* DARROCH.

No rights are acquired under an affidavit of contest presented while the local office is closed for the transaction of all business requiring the joint action of the officers.

The right to proceed against an entry should be awarded to the highest bidder where two applications for such privilege are filed simultaneously.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 10, 1892.

I have examined the appeals by Josephine Nichols and Michael J. Barrett from your decision of February 6, 1891, holding that the right to contest the timber-culture entry of Johnson K. Darroch for the SW. ¼ Sec. 14, T. 140 N., R. 64 W., Fargo, North Dakota, should be awarded to the highest bidder.

It appears that the contest of Mrs. Nichols was first presented June 4, 1890, but no business was then transacted, because the register had been directed to keep office open for information only, and to transact no business requiring the joint action of both officers, the receiver having become insane. On July 28, 1890, when the office was again opened for business, the affidavit was again presented, simultaneously with the

affidavit of contest against the same entry by Barrett. The local officers issued notices upon both affidavits, but held that the affidavit of contest of Mrs. Nichols, having been presented June 4, 1890, while the office was closed for business, was superior to that of Barrett's. You reversed their decision, holding that Mrs. Nichols could acquire no right by the presentation of her affidavit while the local office was not open for business, requiring the joint action of both officers, and being presented simultaneously with the affidavit of Barrett after the office was open for business, the right of contest should have been awarded to the highest bidder.

There was no error in this ruling. See Johnson *v.* Velta, 14 L. D., 316.

Your decision is affirmed.

HOMESTEAD CONTEST—RESIDENCE—MILITARY SERVICE.

ROSIN *v.* STARKS.

Proof of abandonment covering a period subsequent to the term of residence required of a homesteader does not warrant cancellation of the entry; and, in determining whether the charge of abandonment will lie, the claimant's military service may be computed as forming a part of the requisite residence.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 11, 1892.

On June 22, 1885, Joseph B. Starks made homestead entry of the NE. ¼ of Sec. 13, T. 123, R. 74, Aberdeen land district, South Dakota.

On March 28, 1890, John Rosin filed affidavit of contest against said entry, on charge of abandonment for six months before date of said affidavit—also abandonment for one year prior to said date.

Notice was given by publication, but defendant did not appear at the date set for the hearing. The local officers found, from the evidence adduced by the contestant, that the entry "had been abandoned by the claimant for more than six months since the date of said entry and next prior to the service of notice herein," and recommended that the entry be canceled.

A registered letter containing a notification of the decision was sent to the entryman's last known address, but was returned "uncalled for." The record in the case was transmitted to your office, whereupon, you reversed the judgment of the local officers, upon substantially the following ground:

In an affidavit filed with his entry papers he showed that he had served in the federal army one year, seven months, and twenty-four days. He was, therefore required to show residence on the tract for three years, four months, and six days—which period expired October 28, 1888. The contest affidavit filed March 28, 1890, alleging abandon-

ment for one year next prior to that date, would cover a period commencing March 28, 1889. As he was under no legal obligation to reside upon the tract after October 28, 1888, the proof of his abandonment afterward was not considered sufficient ground for the cancellation of the entry.

The contestant appeals to the Department, upon numerous allegations of error, accompanied by corroborated affidavits setting forth that the entryman never at any time resided upon or cultivated said tract.

It is not necessary to state what the decision might be if the contest affidavit had contained the allegations found in the affidavits accompanying the appeal; but the decision must be based upon what was alleged in the affidavit of contest and proved at the hearing; and as nothing was proved or alleged that constituted sufficient cause for cancellation, your decision of April 13, 1891, dismissing the contest is affirmed. (Davis *v.* Fairbanks, 9 L. D., 530.)

This does not preclude the filing of another affidavit of contest, if sufficient basis should be found for the same.

STORAGE RESERVOIR—NATURAL LAKE.

JAMES M. HOGE.

A natural lake can not be appropriated for reservoir purposes.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 11, 1892.

I am in receipt of your letter of April 30, 1892 transmitting the map in duplicate of the "Haley and Hoge Storage Ditch," and also the map in duplicate of James M. Hoge's three storage reservoirs, filed in the local land office at Cheyenne, Wyoming.

It appears that this ditch extends from a point on the east bank of the Big Laramie River in the NW ¼ of SE ¼ of Sec. 28, T. 14 N., R. 75 W., from which initial point the section corner common to sections 21, 22, 27 and 28 bears N. 78 35 E., 1730 feet distant, thence to a point on the line between NW ¼ SE ¼ and SW ¼ NE ¼ of Sec. 17, T. 15 N., R. 73 W., 6th P. M., from which terminal point the corner common to sections 17, 18, 19 and 20 bears S. 49 25 W. 4246 feet, the length of said ditch being 21.44 miles.

The survey, map and field notes of this ditch seem to be in all respects in conformity to law and the regulations of the Department, and the same, excepting the location of the reservoir sites, is approved, as you recommend, subject to existing rights, that Mr. Hoge may avail himself of the provisions of sections 18 to 20, inclusive, of the act of March 3, 1891 (26 Stat., 1095). The three storage reservoirs appear, so far as the map and field notes are concerned, in all respects correct. But you state

that these are "natural lakes" noted on the township plat as Lake Creighton, Lake George, Lake Hutton, and I notice on the ditch map that the surveyor has noted on the margin of Lake Hutton a "boat house." You do not recommend that these reservoir sites be approved.

In Colorado Land and Reservoir Co. case (13 L. D., 681) it was held that "a person or corporation could not by running a boundary line around a natural lake that is already a source of water supply thereby become the proprietor of it." Under this ruling, and I see no reason for changing it; this map of the reservoirs will not be approved.

PRE-EMPTION ENTRY—EXTENSION OF TIME FOR PAYMENT.

CHARLES H. MCCUNE.

The joint resolution of September 30, 1890, providing for extension of time for payment, does not require the pre-emptor to wait until on or about the expiration of his filing to make final proof and application for time.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 12, 1892.

I am in receipt of your letter of July 2, 1891 transmitting the appeal of Charles H. McCune from your action of May 9, 1891 in which you reject his application for time to make payment for the NW¼, Sec. 22, T. 154 N., R. 63 W., Grand Forks, North Dakota, land district, also transmitting his final proof and said application for time to make payment. You rejected this application because his time to make proof did not expire until March 11, 1891, and he made proof October 20, 1890.

You held that he should not have made proof and application until "on or about the expiration of his filing," and you say "It is not contemplated that he shall, five months or more, before the time prescribed, make proof and allowing the same to remain in abeyance for several months apply for the relief in question."

In this case the applicant, by his corroborated affidavit, shows that his crops on the land have been very nearly a total failure, by reason of frost and drouth; that he had arranged to borrow money to make payment, and advertised to make proof, expecting the money of Moen and Connolly who did a loan business; that they had assured him they would furnish it when he had completed his proof; that they told him afterward that they did not have it then, but would furnish it, and that after repeated promises and disappointments, he was compelled to ask time to make payment under the joint resolution of Congress of September 30, 1890 (26 Stat., 684). This he did in March, 1891. His proof was made in October. His time for making it would expire in March. During the intervening time he could raise no crop. I do not

find anything in the resolution which justifies your ruling that the pre-emptor must wait until "on or about the expiration of his filing," to make proof and application for time, and under the circumstances, the seasons of the year at which proof was made, and at which the time would expire, etc. I do not consider it unreasonable to ask the extension as he did. His proof was approved, but as he could not pay the money, no final certificate was issued, but the proof and his affidavit and application for time were forwarded to your office as per circular letter of October 27, 1890 (11 L. D., 417). I consider his application sufficient, and it should have been allowed. Your rejection of it is set aside, and the papers in the case are returned to you for such action as may be proper in the premises.

TIMBER CULTURE ENTRY—MARRIED WOMAN.

BOYD *v.* WORTH.

A married woman is disqualified from making an entry under the timber culture law unless she is the head of a family.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 12, 1892.

Ann M. Worth has filed an appeal from your decision of December 2, 1890, holding for cancellation her timber-culture entry for the NE. ¼ of Sec. 22, T. 6 S., R. 64 W., Denver, Colorado, upon the ground that she is a married woman, and therefore disqualified from making a timber-culture entry.

Said appeal alleges the following grounds of error:

1. Error in holding from the evidence that Ann Maria Worth at the date of said timber-culture entry was a married woman.

2. Error in holding that a married woman who is supported by her husband could not make a timber-culture entry.

The qualifications of all persons applying to make entries of the public lands must affirmatively appear, and an application failing to show such qualification is defective.

Besides, it appears from the record that Mrs. Worth is a married woman, and I find no evidence that she was not married at the date of the entry, nor is it so claimed by counsel in his argument.

A married woman is disqualified from making entry under the timber-culture law, unless she is the head of a family. Mary E. Lockwood, 1 L. D., 127; Glaze *v.* Bogardus, 2 L. D., 311; see also Giblin *v.* Moeller's Heirs, 6 L. D., 296.

Your decision is affirmed.

SWAMP LAND—TRANSFEREE—NOTICE.

L. B. APPLEGATE.

A transferee, claiming under the swamp grant, who has given due notice to the Land Department of his interest, is entitled to receive notice of subsequent proceedings affecting the validity of his title.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 13, 1892.

List 5 of swamp lands has often been before this Department for action.

The provisions of the swamp land grant of 1850, were extended to the State of Oregon by act of March 12, 1860 (12 Stat., 3).

The question now before me arises on the appeal of L. B. Applegate from your judgment of April 3, 1890, rejecting the claim of the State of Oregon to the W. ½ of the S. W. ¼ Sec. 17, T. 38 S. R. 10 E., N. W. ¼ of the N. W. ¼ Sec. 20, T. 38 S. R. 10 E., W. ½ of the N. E. ¼ Sec. 18, T. 38, S. R. 10 E., S. E. ¼ of the N. E. ¼ Sec. 18, T. 38 S. R. 10 E., E. ½ of N. W. ¼ Sec. 18, T. 38 S. R. 10 E., N. ½ of S. E. ¼ Sec. 18, T. 38 S. R. 10 E., all of which lands had long before that time been purchased by him.

After this swamp land grant was extended to the State of Oregon, it was agreed between the State and your office with the consent of the Secretary, that the rights of the State under said act should be determined through an examination in the field by two agents, one to be appointed by each party.

The agents thus appointed (3 L. D., 334) reported that the lands embraced in list 5, amounting to 97,641.24 acres, including the tracts in question, were swamp lands. On September 16, 1882, the report was approved by this Department, and the approval was certified to said State. Subsequently, charges having been brought against the correctness and honesty of said report on January 20, 1887, the Secretary of the Interior laid a rule on the State to show cause why the list should not be canceled (5 L. D., 374). After considering the showing made by the State on December 27, 1888, the Department revoked the certification of the lands embraced in said list and canceled the list (7 L. D., 572).

A new report was made by Special Agent Shackleford and under this report 11,962.38 acres were patented to the State as "unquestionably swamp," 20,000 acres were restored to the public domain and 58,000 acres were declared doubtful and Special Agents Armington and Roe were detailed to examine these doubtful lands.

The tracts now claimed by Applegate were included within this doubtful list for re-examination. These last named agents, after an examination in the field, made a report and after considering the same, you rejected the claim of the State to some 5,000 acres and approved to

it 37,742.67 acres; about 16,000 acres were also reported by these agents as swampy in character, but you did not approve them to the State because of the claim of settlers on whose claims you ordered hearings to determine the character of said lands.

The tracts in question were included in the 5,000 acres, the State's claim to which, was rejected by you. It did not appeal, neither did Applegate, its transferee, but the State attempted to appeal from your order directing hearings to determine the character of the 16,000 acres claimed by settlers. You rejected its application to appeal and it and the grantees brought the matter before the Department on a writ of certiorari.

The writ was granted as prayed for (12 L. D., 64) and the record was transmitted to this Department.

On September 10, 1891, your order directing hearings on the applications of alleged settlers as to the 16,000 acres was revoked by the Department (13 L. D., 259).

It was stated in said decision that,

> Since the papers in this case were transmitted to this Department, application has been filed here, in behalf of L. B. Applegate, claiming as assignee of the State, for a re-examination of certain lands, in respect to which, under the report of the special agents, you have rejected the claim of the State. For the reasons heretofore stated, as to the other contestants, I must deny the hearing asked for in behalf of Mr. Applegate.

Said Applegate filed a motion for a review of said decision and on January 16, 1892, after considering the motion (Press-Copy Book No. 233, P. 382) it was denied, but it was held that Applegate was entitled to notice of your judgment rejecting the claim of the State to the land claimed by him because of the fact that prior to that time he had placed on file in your office, notice of his claim. You were accordingly directed to serve him with a notice of your judgment and allow him to appeal therefrom. He has appealed from your judgment to this Department, alleging errors numbered from 1 to 13 inclusive.

In substance he alleges that notice of his ownership of these tracts was on file in your office in 1887, and since that time, and that he was entitled to notice of departmental decision of December 27, 1888, (7 L. D., 572) revoking and cancelling the certification made on September 16, 1882, to said State and that had he received such notice he should have appeared before Agents Armington and Roe and furnished evidence to prove that the tracts claimed by him were swamp lands in 1860, and that they had been reclaimed by him since his purchase thereof by the State. It is asserted in his assignment of errors that your judgment is incorrect for numerous other reasons; these alleged errors have been considered and it is found that you committed no error unless it be the one above assigned. It is shown by the record that the tracts in question have been three times examined by agents in the field since the selection of list five was made by the State.

They were reported as being swamp in character by the first agent who examined them. The second agent, Charles Shackleford, reported in 1887, that the two first described tracts were "dry grass land. Ditch at the end of valley has reclaimed these tracts." As to the third tract described he says, "This tract all under water June 16, 1887, bears tules and swamp grasses, miry and inaccessible on account of water." As to the remaining tracts, he says: "These tracts similar to the last described. All in one common basin with no outlet for the water, which comes from surrounding hills at break of winter and floods the basin until the last of June or middle of July."

In October, 1889, Special Agents Armington and Roe examined the tracts and report as to the N.W. ¼ of the S.W. ¼ of Section 17, which is the first tract described herein, that, "Grasses of various kinds grow on all this selection. It is situated in Meadow Lake, a basin in the mountains without any natural outlet. It overflows in early spring from small mountain streams, but recedes in time to allow a crop of hay to be cut. Dry."

As to the remaining tracts, under date of October 28, 1889, they report them as "dry". With the two first reports before you, you placed the tracts in question in the doubtful list to be re-examined by the last two agents named.

By the decision of this Department of December 27, 1888, 7 L. D., 572, you were directed to detail two trustworthy agents, to carefully and thoroughly examine these tracts with a view to determining their true condition at the date of the granting act, 1860.

In making this examination you were directed to give to the State and her grantees an opportunity to be represented in accordance with the usage on that subject.

In 1887 L. B. Applegate filed in your office, a notice of his claim to this land, describing it and stating that he held title by purchase from the State of Oregon. With this notice thus filed he was entitled to receive a notice of the time when his land should be examined by the special agents, in order that he might be afforded an opportunity as contemplated by the decision to show that the lands claimed by him were swamp in character in 1860, and that their dry condition in 1889, was due to the fact that he had reclaimed said land from its swampy condition.

In the record are found a number of affidavits from people who assert that they are well acquainted with the land and have been since 1865, and that the land originally was swamp land, but that it had been reclaimed by the efforts and labor of Applegate.

Having received no notice as contemplated by the departmental decision of December 27, 1888, he should now be accorded the right to prove, if he can, the condition of the land prior to his reclamation thereof.

You will therefore direct the register and receiver, after giving due

notice to Applegate, to fix a day for a hearing at which he may have an opportunity to submit proof tending to show that said tracts were originally swamp in character. You will also detail a special agent of office to attend said hearing and represent the government.

After said evidence is received the local officers will forward the same to you, together with their opinion thereon; thereupon you will adjudicate the case. The papers in the case are herewith returned, and your judgment, in so far as it rejected the claim of the State, to the tracts claimed by Applegate, is modified.

RESERVOIR SITE—WITHDRAWAL—ACT OF MARCH 3, 1891.

GEORGE A. CRAM.

The protection provided for settlement claims by section 17, act of March 3, 1891, as against the location of reservoir sites extends only to lands occupied by actual settlers at the date of such location.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 16, 1892.

On the 8th day of July, 1890, George A. Cram made homestead entry for the SW¼ of the NE¼, the SE¼ of the NW¼, the NE¼ of the SW¼, and the NW¼ of the SE¼ of Sec. 9, T. 14 N., R. 13 E., Helena land district, Montana, alleging settlement on the 10th day of June of that year.

On the 17th of November, 1890, you advised the local officers that the land embraced in said homestead entry had been selected as a site for an irrigating reservoir, and withdrawn from entry or filing by Secretary's order of March 13, 1890, and instructed them to notify the claimant of the condition of his entry, and that it was held for cancellation, subject to his right of appeal.

The case is brought to the Department by an appeal from your decision, in which it is alleged that the land was not withdrawn in accordance with the provisions of the act of October 2, 1888; that said lands were not selected as a site for a reservoir in accordance with the provisions of said act; that said lands could not be withdrawn from settlement prior to being selected or designated by a United States survey for reservoir purposes, and that no such survey was made prior to the issuance of the Secretary's order; that your holding of said entry for cancellation was contrary to the provisions of the act of August 30, 1890; and that said entry came within the provisions of the last named act, the reservation not having been made in accordance with the act of October 2, 1888.

The act reserving lands for reservoirs, canals, ditches, etc., for irrigation purposes, passed October 2, 1888 (25 Stat., 526), reserved from

sale as the property of the United States, all such lands as should there after be designated or selected for such purposes, until further provided by law.

The act of Congress, approved August 30, 1890, (26 Stat., 391), repealed so much of the act of October 2, 1888, as provided for the withdrawal of the public lands from entry, occupation, and settlement, and allowed settlement and entries to be made upon said lands "in the same manner as if said law had not been enacted," adding however, "Except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law."

On the 8th of January, 1890, reservoir site number 36, was selected. This site embraced the land in question. On the 13th of March, 1890, an order was issued from this Department, recommending that all public lands within the limits of sections 1 to 24, township 14 N., range 13 E., be withdrawn as provided by the act of October 2, 1888. In a letter dated July 8, 1890, you sent a copy of that order to the local officers at Helena, and instructed them to suspend from all manner of disposal the lands enumerated in said list, until further advised by your office. On the 17th of November, 1891, you restored all the lands in section 9 to the public domain, except the lands covered by the homestead entry of Cram.

Section 17 of the act of March 3, 1891, (26 Stat., 1095), entitled "An act to repeal timber culture laws and for other purposes," provides:

> That reservoir sites located or selected and to be located and selected under the provisions of the act of October 2, 1888, and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs.

Cram was not an actual settler upon the land for which he made entry, at the date of the location of reservoir site number thirty-six, nor until several months thereafter. He is not, therefore, included in the list of persons enumerated in section seventeen of the act of 1891, just quoted, while in addition to this fact, the lands embraced in his entry are "actually necessary for the construction and maintenance of reservoir" number thirty-six, in the Helena, Montana, district, according to your letter of March 29, 1892, with which you transmitted to the Department a list of such necessary lands.

The selection having been made in conformity with the acts of Congress, the Department is without authority to afford relief to persons who made entries and filings upon land which was selected for reservoirs, canals, ditches, etc., for irrigation purposes after the passage of the act of October 2, 1888, and prior to the passage of any act modifying its provisions. This includes the case of Cram, and the decision appealed from is therefore affirmed.

RESERVOIR SITE—UNSURVEYED LAND.

RIO COLORADO RESERVOIR.

A survey of a reservoir site on unsurveyed land should be so connected with the government surveys, or if that be impossible, with some well defined natural monument, that it may be accurately and readily located, and that notice of such location may be given the public.

First Assistant Secretary Chandler to the Director of the Geological Survey, May 16, 1892.

The lands designated by you as necessary for reservoir site No. 9 (Rio Colorado) New Mexico, are all unsurveyed, and since you have not connected the survey of this site with any corner of the public surveys or with any established or natural monument, and have not given even the courses and distances of the boundary lines of said site, it is impossible from the information afforded by the plat you have submitted to make such notations on the records of the General Land Office or of the local land office as would give intending settlers upon the public lands in that neighborhood notice of what land has been selected for the purposes of said site. Where a reservoir site is upon unsurveyed land the survey thereof should be so connected with the government surveys, or if that be impossible, with some well defined natural monument as that it may be accurately and readily located, and that notice of such location may be given the public. In such cases too field notes of the survey giving the courses and distances of the boundary lines of the site should accompany the plat. On account of the impossibility of determining what land is included within your selection in this instance, I herewith return the plat heretofore submitted, together with the report of the Commissioner of the General Land Office, so that you may cause the facts herein, and by the Commissioner's report, indicated as necessary in the premises to be supplied.

PROCEEDINGS ON FINAL PROOF—MEANDERED LAKE.

BOORD *v.* GIRTMAN.

One who offers final proof in the presence of an adverse claim must abide the result of such proceedings.

Ownership of an adjacent tract is essential to the right of adjoining farm entry.

A purchaser of meandered land lying on the border of a lake takes title to the shore line of the lake.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 13, 1892.

I have considered the case of Henry A. Boord *v.* John W. D. Girtman on appeal by the former from your decision of September 6, 1890,

dismissing his contest against the homestead entry of the latter for lot No. 3, Sec. 19, T. 21 S., R. 28 E. Gainesville, Florida, land district.

The history of the case is somewhat peculiar, but it is necessary to an understanding of the controversy. This land was surveyed in 1848, the survey being approved May 15, of that year. The official plat and field notes show that Lake Apopka covers the western side of this section from north to south, cutting off about two hundred acres of it.

The north and south lines of the section were run from the north-east and south-east corners of the section to the lake shore. The surveyor represented that he had run a meander line along the shore, and he gives the "field notes of meander of Apopka Lake, beginning at meander post on west boundary of section seven . . . . . to meander post on s. boundary of s. 18 (thence) S. 5 W. 20 (chs.) to *point*. S. 8 30 E. 61 to post on S. boundary S. 19." He notes the north line as 58.06 chs. long from NE. corner and the south line as 49.85 chains from SE. corner. Half section corners are noted on the north and south lines forty chains from the north and south corners. The plat filed and approved shows that the shore line of the lake comes to the meander line as run, and the parcel of land lying between the middle line of the section and the shore line of the lake was divided by an east and west line from the center of the section to the meander line, thus dividing it into two lots, the north one containing seventy-three acres, being numbered "one," the south containing 57.68 acres, being numbered "two."

These lots were selected by the State of Florida under the act of September 14, 1841 (5 Stat., 453) which selection was approved April 15, 1851 on list "A." By an act of the State legislature entitled "An act to facilitate the construction of the St. Johns and Indian River Canal," approved July 1, 1857, these lots, with other lands, were transferred to the commissioners of said canal, and in 1860, were by them sold and transferred to one Speer, who also by like purchase, became the owner of the SW. $\frac{1}{4}$ of NE$\frac{1}{4}$ and W$\frac{1}{2}$ of SE$\frac{1}{4}$ of said section.

It appears from the records and affidavits before me that Speer divided these tracts owned by him into lots extending from the middle line of the E$\frac{1}{2}$ of the section to the west line of lots 1 and 2 on the lake shore, and sold them to sundry persons.

It appears that in 1885, one Cummins owned forty-six acres being 13.42 chains wide north and south lying immediately south of the north line of lot No. 2; south of this the wife of Girtman owned a lot of the same size; next on the south, Mrs. Jones owned thirty acres, and south of this tract J. N. Johnson owned thirty acres; while north of Cummins' tract Daniel Hackney owned thirty-seven acres, and still north McLeod owned twelve acres, and all of these occupants had controlled and cultivated the land down to the shore line of the lake, their orange groves and banana fields rendering the land very valuable.

It appears that prior to 1885, a settler built a hut on the land lying between the line run as a "meander line" and the shore line of the

lake, and claimed that the several tracts owned by the persons named, stopped at the said meander line, and that the parcel along the lake shore west of said line was public land open to settlement. It is stated that this settler was persuaded to go away, and thereupon the several occupants, Girtman and his wife joining therein, applied to the Commissioner of the General Land Office to have said parcel of land surveyed that they might secure title to the parts thereof lying between their deeded land and the lake, and such proceedings were had thereon that on March 12, 1885, Secretary Lamar considering the exhibits and evidence before him found that these lands were "erroneously omitted in the original survey. . . . That they are timbered and of such elevation as to preclude the possibility of their having been covered with water at the date of the original survey," and upon the recommendation of Commissioner McFarland, he was authorized to direct a resurvey "to embrace the tracts referred to." These tracts were in sections 7, 18, 19 and 30.

Survey was accordingly made and approved, which showed that there was a strip of land bounded on the east by a straight line about fifty-seven chains in length, and on the north, west and south by an arc of a circle quite regular in its form, the lot containing 20.71 acres. This was numbered lot 3. It occurred to the occupants of this land that the State of Florida might claim the land under a swamp land grant to her, and they thereupon entered into an arrangement, Girtman and his wife joining, to have Johnson contest the right of the State, and proceedings were initiated for this purpose. The State made no claim but allowed the contest to go by default, and upon the decision by the register and receiver against it, took no appeal. It appears that the occupants then agreed with McLeod by which agreement he was to homestead the lot, and upon securing patent, to deed to each according to their former possession and cultivation, but this could not be done, and it is alleged upon the oaths of the several occupants, but denied by Girtman, that he agreed to make an adjoining farm homestead entry for the land, the occupants to pay the expense, and upon patent being issued, he was to deed to them as McLeod had agreed to do, and that they did actually contribute to the expenses. After his adjoining farm entry was made, he notified the occupants to keep off the grounds, and at proper season began gathering the oranges and bananas. The occupants resisted this and insisted on gathering their own fruit. Girtman brought suit in a State court in Orange county and obtained a temporary injunction against them, but on appeal this was dissolved. Thereupon, the occupants brought suit in the United States district court for the northern district of Florida, and procured against Girtman a perpetual injunction and a decree holding his entry null and void. In the meantime, Boord had bought Cummins' land and begun a contest proceeding against Girtman's entry, but Girtman gave notice of intention to make final proof on April 8, 1890 before the clerk of the circuit court

of Orange county, Florida. Boord appeared at the time and filed a protest against the entry, and after Girtman had submitted his own testimony he was cross-examined by Boord's attorney, when it appeared that he was not the owner of any land, and that his affidavit made to secure the entry was false. The cross-examination developed such a state of facts that the clerk in his report and supplemental report to the local officers says:

> Mr. Girtman became angry, seized the papers containing his evidence and tore them up—the evidence on his cross-examination being in Mr. Bryan's hands was not destroyed.

Girtman, it appears, went away, and although the case was continued from day to day for several days, he did not return to complete his proof, but afterwards appeared and asked to be allowed to abandon his adjoining farm entry and make homestead entry for the lot. He filed an affidavit April 16, in which he says, among other things, that "seven years ago he found a piece of valuable, wild and unsurveyed land now known as lot No. 3." He speaks of the improvements on the lot, some of which he claims to have placed there; recites a history of his effort to secure the lot by an adjoining farm entry, and says it was an error. He asks that his entry be canceled, and that he be allowed to make a regular homestead entry *nunc pro tunc*. He states under oath that "affiant never attempted to make any proof whatever of his entry before the clerk, and there is no entry to contest as he claims nothing under it," etc. In this affidavit he describes his wife's land as 46.96 acres beginning at a point 13.42 chains south of north-east corner of NW. ¼ of SE. ¼ of Sec. 19, T. 21, R. 18, running thence south 13.42 chains, thence west 35.42 chains *to the old meanderings of Lake Apopka*, thence north to a point opposite the initial point, thence east thirty-seven chains to the beginning. Upon this affidavit you held that it was not necessary to take any action; that an adjoining farm entry and an ordinary homestead were essentially the same, except that the latter required residence on the land, and you said as he has yet sufficient time in which to establish residence, he may do so and complete his entry as a homestead, and you directed the dismissal of the contest as the allegation in the affidavit could not affect a homestead entry. From this action Boord appealed.

While the case was pending before you, Hackney, administrator of D. Hackney, deceased, Jones, Johnson and the other occupants applied to be allowed to intervene, setting forth fully a statement of the case and their occupancy of and improvement of said lots. They say *inter alia*:

> Your petitioners and their grantors have been the owners of said lots 1 and 2 of said section and have been in possession thereof for the past twenty years, and that lot 3 is really part of said lots 1 and 2 and that your petitioners and said Girtman have been in possession of said lot 3 either personally or by their grantors for over twenty years last past, and that said lot three has been cultivated and improved by

your petitioners for the past ten or twelve years; that said lot is wholly improved; that it has valuable banana orchards and orange groves in full bearing thereon, and is at the present time of the value of from $15,000 to $20,000.

They recite a full history of the transactions connected therewith which it is unnecessary to refer to further. You returned this paper that service might be made on the adverse parties, which appears to have been done.

You say in your decision that "Girtman declined to submit his proof, but filed in your (the local) office his petition requesting the cancellation of his adjoining farm entry," etc. The fact, however, is that he went to the office with his witnesses and was himself sworn, and the clerk certified that after explaining to Girtman and his witnesses the statute relating to perjury, he asked Girtman the several printed questions in the form, all of which he answered, and it was not until the cross-examination developed the falsehood of his statements that he declined farther to submit his proof.

An entryman can not be allowed to trifle in this way. The fact that he tore up the papers and makes oath that he "never attempted to make any proof whatever of his entry before the clerk" does not alter the case, nor change the facts. His cross-examination signed by himself is before me. He attempted to make proof in the face of an adverse claimant to a portion of the land, and he must stand or fall by it. But for the contest and protest of Boord, it is very probable the proof would have been made so complete that the local officers and your office would have allowed it.

Girtman's additional farm entry was fraudulent when made, and an affidavit before me alleges that he well knew the land belonged to his wife; that he had so claimed to avoid certain judgments in a court of record, and not only so, but that when he took her deed to the local office to make entry, he successfully secreted the christian name of his wife in the deed and deceived the register and receiver. The entry will be canceled. This leaves the land in controversy free from claim except the several claims of the occupants of the several parcels of lot 3 and of Boord's preference right of entry. I am satisfied that there was no line traced on the ground as represented in the survey of 1848. The lake shore was the only marked or known line, and the line called a "meander line was simply drawn on the paper. An inspection of the two surveys, the latter of which is undisputed, shows that if the former line was run as noted, the lake shore has changed by accretion along the southern part of the section, and very materially changed by erosion at the northern part. First, starting at a point 58.06 chains west of the northeast corner of the section and running S. 5° E'. 20 chains would throw the "point" mentioned in the survey of 1848 about eight chains in the lake, west from the shore line opposite that point; secondly, had that "point" been on the shore in 1848, the line running thence S. 8° 30′ E. 61 chains would end in the

margin of the lake a few links west of the present shore line according to the meander post set by the surveyor in 1885. Not only is this true, but according to the description of Mrs. Girtman's strip of land, the south-west corner lies about 3.60 chains west of where said "old meander line" would have run, and the north-west corner over three chains west of said line. The date of this deed is not given, but the west line is "the old meanderings of the margin of Lake Apopka, and being the west line of lot 2," etc.

This evidence was introduced by Girtman. While it is true that this land lies high and bears timber, it appears from all the evidence in the case that there has been some accretion along the southern line, and some erosion at the north part. It is apparent that the shore line has been considered the same as the meander line, and the lands have been occupied and bought and sold with the understanding that the lake shore was the west line of the several tracts.

It was said in Railroad Co. *v.* Schurmeir (7 Wall., 272) and quoted in Hardin *v.* Jordon (140 U. S., 371)

> In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows to a demonstration that *the water course* and not the meander line, as actually run on the land, is the boundary.

In the case of James H. May (3 L. D., 200) it was said:

> It is not clear whether Lake Union is a navigable body of water or not, but this fact, in my opinion, can make no difference as the riparian owners in either case would take to the water's edge if no further. Counsel for the intervenors insist that under the patents issued to them for the adjacent lands, they own all lands lying between the government meander line and the water. In this view of the law, I concur.

In the case of Reuben Richardson (11 C. L. O., 284), Secretary Teller said:

> The grants made by the government of the lands lying on the lake are not limited by the meander line, but extend at least to the permanent waters of the lake.

I am, therefore, on a full consideration of this case, satisfied that neither in law nor equity can the government claim this land and resell and convey it. For over twenty years, it has been occupied and cultivated by the various owners under the belief that they owned to the water's edge. The parcels now in controversy have become valuable by the labor and money of the occupants under their several contracts of purchase from time to time, and whether the excess in lot 2 has been made by accretions, and the deficiencies in lot 1 have been made by erosion, can not be now determined. If the government survey and plat of 1848 was at all correct, this must have occurred. Probably a portion of it did so occur, but in any event when the government ceded the land to Florida, and the State sold it to Speer, he had a right to rely upon the official plat and survey, and if there was an error in the amount of land, it was so small as not to be easily detected, and the mistake was in no way occasioned by the purchasers who have from time to time purchased and cultivated the land in good faith. I,

therefore, find that by the law as well as the equity of the case, that the several purchasers by their purchases took the land to the shore line of the lake, and that the government has no land betwen said pretended "meander line" and the lake shore to sell or dispose of.

Your decision is accordingly reversed, and the entry of Girtman will be canceled.

SOLDIERS' ADDITIONAL ENTRY—MISSOURI HOME GUARD.

JOSEPH RUSH ET AL.

A soldier's additional homestead entry, based on service in the Missouri Home Guards, may be confirmed under section 7, act of March 3, 1891, for the benefit of a *bona fide* purchaser.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 16, 1892.

I have considered the appeal by E. S. Johnson, transferee of Joseph Rush, from your decision of May 19, 1891, holding for cancellation soldier's additional homestead entry No. 4344, final certificate No. 1564, made March 30, 1881, for lot No. 2, Sec. 1, T. 5 N., R. 6 W., lots 2 and 3, Sec. 24, T. 10 N., R. 9 W., and the NE. ¼ of NW. ¼, Sec. 34, T. 24 S., R. 8 E., in the name of Rush, for the reason that the military service, on account of which the right to make the entry is based, was performed in the Missouri Home Guards, the members of which organization are not entitled to the benefits of section 2306 of the Revised Statutes.

On September 26, 1883, Elijah S. Johnson made affidavit that he was the owner of said tract through purchase from Rush, and it was through his appeal that the case is now brought before me.

Your decision refused to confirm this entry under the 7th section of the act of March 3, 1891 (26 Stat., 1095), for the reason that the entry is void *ab initio*.

Said section provides that—

> All entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry to bona fide purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or incumbrance.

In the case of the United States *v.* Samuel C. Coonsy (14 L. D., 457), it was held that the confirmatory operation of section 7 of the act of March 3, 1891 (*supra*), extends to soldier's additional homestead entry, based on service in the Missouri Home Guards. No fraud has been

found on the part of the purchaser. You are therefore directed to call upon the transferee to furnish proof as required by the circular of May 8, 1891 (12 L. D., 450), and upon receipt of the same you will re-adjudicate the case in the light of the above decision.

SUCCESSFUL CONTESTANT—SCRIP LOCATION—PREFERENCE RIGHT.

McGEE ET AL *v.* ORTLEY ET AL.

The successful contestant of a scrip location is entitled to a preference right of entry, if qualified to exercise such privilege.

The qualifications of the applicant must appear at the time he applies to exercise the preferred right of entry secured by a successful contest.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 16, 1892.

In 1883 John F. McGee made application for a homestead entry for the E. ½ of N. E. ¼ section 34 T. 154 N. R. 64 W. At the same time Sarah D. Keys applied to make a timber culture entry for the W. ½ of said N. E. ¼ of said section and Emmett Orr applied to make a homestead entry for the S. ½ of S. W. ¼ and N. E. ¼ of S. W. ¼ of section 35, T. 154 N. R. 64 W., and George H. Stokes applied to make a timber culture entry for the N. W. ¼ of S. W. ¼ of said section 35.

All of these applications were made at the Devils Lake land office, North Dakota, but were rejected by the local land officers, because each of said tracts applied for was covered by the location of certain Sioux half breed script.

Appeals were taken by all of said applicants and upon allegations made by them a hearing was duly had at their expense, the result of which was that all of said scrip locations were finally canceled by the judgment of this Department of February 18, 1889. Thereupon the applications were returned to you for appropriate action and by your letter of February 28, 1889, you promulgated the departmental decision and directed the register and receiver to allow said applications as of the date when offered. On March 6, 1889, the local land officers allowed John F. McGee to make entry for the E. ½ of N. E. ¼ of section 34, T. 154 N. R. 64 W., and on the same day they allowed Orr and Stokes to enter the respective tracts applied for by them but no entry was made by Sarah D. Keys.

On February 21, 1889, before the register and receiver had been notified of the decision of this Department of February 18, 1889, cancelling the scrip locations, George H. Locke applied to make homestead entry for the N. E. ¼ of said section 34. His application was rejected because of the scrip locations.

On March 5, 1889, he renewed his application but it was rejected on the following day "for the reason that land is covered by Hd. 2600 of John F. McGee."

Locke filed an appeal purporting to be taken from the rejection of February 21, and that of March 6, but as the appeal was not taken in time from the first order of rejection it was considered by you as having been taken only from the rejection of March 6, 1889. On March 18, 1889, Sarah D. Gifford, formerly Sarah D. Keys, renewed her application made in 1883, for the W. ½ of the N. E. ¼ of section 34, T. 154 N. R. 64 W., which was rejected on March 23d following, "for the reason that applicant is not qualified to make timber culture entry."

On the same day George J. Juergens was allowed to enter said tract under the homestead law.

On March 9, 1891, you considered the appeal of Locke, holding that the local land officers were right in rejecting his application and that McGee was entitled to the preference right to enter the E. ½ of the N. E. ¼ of said section and that his entry therefor on March 6, 1889, segregated the land. You also stated that, as to the W. ½ of the N. E. ¼ of said section, also claimed by Locke, you had received from the attorney of Sarah D. Keys, now Mrs. Sarah D. Gifford, a protest against Juergens' homestead entry and claiming as the contestant of the scrip location, a preference right to enter the land.

You also held that "until the appeal of Locke is finally disposed of, the matter of disputed claim to W. ½ of N. E. ¼ of said section 34 as between the present entryman Juergens and the claimant Keys and possibly Locke, will be suspended."

You also suspended the entries of McGee and Juergens.

Locke has appealed from said judgment to this Department.

On March 11, 1891, McGee relinquished his claim to the E. ½ of the N. E. ¼ of section 34, the tract entered by him on March 6, 1889. This action left Locke alone the claimant of said tract and he might now be allowed to enter the same were it not for the fact that on May 25, 1891, he also relinquished any claim he might have to said tract, but expressly provided in said relinquishment that he still claims the right to enter the W. ½ of the N. E. ¼ of section 34, the tract entered by Juergens and claimed by Keys. These relinquishments remove from the controversy all question concerning the disposition of the E. ½ of the N. E. ¼ of said section 34. The scrip location for the W. ½ of the N. E. ¼ of section 34, T. 154, N. R. 64 W., was canceled, as we have seen, on February 18, 1889, by judgment of this Department and Sarah D. Keys, if qualified, would be allowed thirty days from notice thereof, in which to exercise her preference right of entry. The application of Locke made on February 21, 1889, would then be subject to whatever rights she may have had as a successful contestant. I think there can be no doubt but that the location of scrip on this tract was in the nature of a pre-emption entry and that after successfully contesting the validity of said location and procuring its cancellation, at her expense, Miss Keys was entitled to a preference right of entry under the law, provided always that she was qualified to make it.

The fact of her being qualified to make entry in 1883, when she applied to enter the tract is not material now since in 1889, when the tract was finally cleared from the scrip locations, and when for the first time it might have been entered by her she is found not qualified by reason of her marriage. No entry can be allowed of the public lands unless two conditions meet. One is that the land be subject to entry and the other is that the party be qualified to make entry. In 1883, when Miss Keys applied to enter the tract she was qualified to make entry but the land was covered by scrip location and was not then subject to entry; it was first made subject to entry in 1889, when said locations were canceled by competent authority and at that time Miss Keys was a married woman and hence disqualified, as it is not claimed that she is the head of a family. Her claim to enter the land is therefore rejected.

Locke applied for the whole of the N. E. ¼ of section 34 on February 21, 1889, and again on March 5, 1889.

McGee as successful contestant against the scrip location was entitled to a preference right of entry for the E. ½ of said tract and Keys as successful contestant was entitled to a preference right of entry for the W. ½ thereof, but as Locke was the first applicant for the tract his entry should have been allowed and held to be subject to the rights of McGee and Keys.

Keys waived her preference right of entry by becoming the wife of Gifford, or rather by so doing she disqualified herself from making the entry, hence Locke as the prior applicant is entitled to make entry for the W. ½ of the N. E. ¼ of Section 34, T. 154 N. R. 64 W.

You will therefore reject the claim of Sarah D. Gifford and call on Juergens to show cause within sixty days why his entry should not be canceled and the application of Locke to enter the land be allowed.

Your judgment is accordingly modified.

RAILROAD GRANT—WITHDRAWAL—INDEMNITY SELECTION—FORFEITURE ACT.

HANSE *v.* NORTHERN PACIFIC R. R. CO.

Lands reserved under withdrawal on general route for the benefit of the Northern Pacific main line are not subject to selection as indemnity for lands lost along either the main or branch line.

The rejection of a homestead application for lands thus withdrawn does not preclude the settler from making entry thereof on their subsequent restoration by the forfeiture act of September 29, 1890.

Acting Secretary Chandler to the Commissioner of the General Land Office, May 16, 1892.

This record presents the appeal of the Northern Pacific Railroad Company from your decision of October 27, 1887, in the case of John

Hanse against said company, involving the SE. ¼ of Sec. 11, T. 4 N., R. 15 E., Vancouver, Washington.

You state that—

> Said tract is within the limits of the withdrawal upon the filing of map of general route of the main line of the Northern Pacific Railroad, held to have become effective August 13, 1870, also within the indemnity limits, as defined upon the map filed June 29, 1883, purporting to show the definite location of the branch line of said road opposite this tract.

On June 12, 1886, Hanse, alleging a *bona fide* settlement "commenced May 20, 1872," and improvements valued at $1500, applied to make homestead entry for the land. This application was as shown by endorsement rejected at the local office for the reason that the land was withdrawn as stated in August, 1870, and for the further reason that it was May 18, 1885, selected as indemnity for loss along the company's branch line "from a point near Ainsworth . . . to Yakima City."

Hanse appealed, and reviewing the case you found that by making said indemnity selection the company abandoned "all claim as to this tract under the main line;" that its claim thereto was therefore based upon such selection and that Hanse by reason of his prior settlement and improvement had the better right. You accordingly held the company's selection for cancellation and Hanse's application for approval.

The company appeals from this action.

When it filed its map of general route, the land within the primary limits of its grant became withdrawn from settlement and entry by operation of law. Buttz *v.* Northern Pacific Railroad Company (119 U. S., 55); Northern Pac. *v.* Vaughn (6 L. D., 11).

The effect of this withdrawal was to hold the land embraced therein in reserve until the grant acquired precision by the line of the company's road being, in accordance with the terms of the granting act of July 2, 1864 (13 Stat., 365), "definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office." Being thus, at the date of said selection, reserved solely for the benefit of the grant along its main line, the land in question could not, as a matter of course, be properly taken by the company as indemnity lands lost along either main or branch line. Its selection of the same was therefore improperly allowed and must accordingly be canceled.

By the act of September 29, 1890 (26 Stat., 496), it is provided that

> there is hereby forfeited to the United States and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain.

The company's said main line of road opposite the tract in question, was not completed at the passage of the said act and the same was thereby restored to the public domain.

As it could only acquire the land through the grant along the main line, the company's claim thereto is, by the forfeiture act of September, 1890, *supra*, necessarily concluded, and being thus eliminated from the case, the question is between Hanse and the government. It is true that when presented in June, 1886, Hanse's said application was then properly rejected for conflict with the withdrawal referred to. If, however, Hanse was an actual settler and otherwise duly qualified at the date when the forfeiture act became effective, whereby the withdrawal was terminated, I can see no reason, if there be no intervening right, why he should not now be allowed to enter the land.

Your judgment approving the said application of Hanse is modified accordingly.

MILITARY RESERVATION—SCHOOL SECTIONS.

JAMES VINE.

Modified, 14 L. D. 622

Sections sixteen and thirty-six embraced within an abandoned military reservation are not subject to a subsequent school grant, but must be disposed of under the special provisions of the act of July 5, 1884.

A preferred right to purchase the land on which improvements are situated is conferred by said act of 1884 upon purchasers of such improvements prior to the passage of said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 17, 1892.

I have considered the case of James Vine on appeal from your decision of March 26, 1891, rejecting his application to purchase the NW ¼ of SW ¼ of Sec. 16, T. 15, R. 73 W., Cheyenne, Wyoming, land district.

It appears by the record that this land was included in the Fort Sanders military reservation.

On September 29, 1882, the War Department having decided to abandon said reservation, the buildings on the land were sold by the quarter-master department, and Vine purchased the house used as officers' quarters, also a barn, and another person purchased the ammunition magazine and sold it to Vine. So he became and was the owner of all the buildings on said land at the date of his application to purchase the same.

The act of Congress passed July 25, 1868 (15 Stat., 178) providing a temporary government for the Territory of Wyoming reserved sections sixteen and thirty-six in each township for school purposes, but the land was not surveyed until 1886.

On July 5, 1884 (23 Stat., 103) an act of Congress was passed entitled "An act to provide for the disposal of abandoned and useless military reservation." After providing for the transfer of such land to the

Department of the Interior for disposal, it provides the manner of such disposal by survey, appraisement and sale.

The first section of the said act of July 5, 1884 provides that whenever in the opinion of the President of the United States any lands included within the limits of any military reservation have become useless for military purposes he shall cause the same, or so much thereof as he may designate, to be placed under the control of the Secretary of the Interior for disposition, "as hereinafter provided," etc. Second section provides that the Secretary may cause the lands so placed in his control to be surveyed into tracts less than forty acres or subdivided into town lots, these tracts or lots to be appraised, etc. On September 6, 1884, the President ordered that Fort Sanders military reservation be placed under the control of the Secretary of the Interior for disposal under the provisions of said act. (Land Office Report, 1890, p. 165–166). The War Department had previously had the right to dispose of the improvements on abandoned reservations, but by this act the improvements were to pass to the Department of the Interior, and

> The Secretary of the Interior shall cause any improvements, buildings, building material, and other property which may be situate on any such land . . . . not heretofore sold by the United States authorities to be appraised . . . . and shall cause the same, together with the tract or lot upon which they are situate to be sold at public sale, etc.: . . . *Provided,* That where buildings or improvements have heretofore been sold by the United States authorities, the land upon which any such buildings or improvements are situate, not exceeding the smallest subdivision or lot provided for by this act upon the reservation on which such buildings are situate, shall be offered for sale to the purchaser of said improvements and buildings at the appraised value of the lands, etc.

The lands thus released from the former order creating the reservation did not become a part of the public domain, but it was specifically provided what disposition should be made of them.

The third section of the act of Congress relating to Indian reservations in California (13 Stat., 39) contains a similar provision as to the survey and sale of abandoned Indian reservations as is contained in the act relating to abandoned military reservations, and in the case of P. D. Holcomb (13 L. D., 733) who applied to make entry for a tract in the Klamath Indian reservation (abandoned) it was held that the lands were not restored to the public domain, but that they must be disposed of as directed by the act of Congress. In the act relating to abandoned military reservations, there was no exception as to sections sixteen and thirty-six, and an exception cannot be interpolated into the act.

The State of Wyoming was created by act of Congress July 10, 1890, and the act of admission granted her sections sixteen and thirty-six in each township for school purposes, but the fourth section of the act provided that where sections sixteen or thirty-six or any parts thereof have been sold or *otherwise disposed of* by or under the authority of any act of Congress, other lands equivalent thereto may be selected in lieu thereof, and it may be said that this is a common provision in acts granting school lands to the States.

On June 5, 1890, you passed upon this case and held that Vine had the preference right of purchase, but as the tract had not been appraised, the application would be held "awaiting appraisement of the land." Your later decision, from which appeal is taken, reversed that decision because the land had been granted to the State for school purposes.

I conclude that your latter decision was erroneous; that the right of Vine to purchase the tract was secured to him by act of Congress. Your decision of March 26, 1891, is therefore reversed, and the case will be governed by your decision of June 5, 1890.

SUCCESSFUL CONTESTANT—PREFERENCE RIGHT.

KEYES *v.* POWERS.

The failure of a successful contestant to exercise the preference right of entry within the statutory period cannot be excused by the fact that during such period he was imprisoned for a criminal offense.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 17, 1892.

On February 1, 1889, George D. Powers applied to make pre-emption filing upon the N. E. ¼ section 15, T. 104, N. R. 59 W., at Mitchell, South Dakota.

The local officers rejected said filing upon the ground that Ephraim H. Keyes was entitled to a preference right of entry upon said tract by virtue of a former contest, but was then unable to exercise such right by reason of being confined in the penitentiary at Sioux Falls, South Dakota. Upon appeal by Powers you ordered by letter of March 13, 1890, his filing to be placed of record as of date when first presented, subject to any rights which Keyes might have. Thereupon Powers filed declaratory statement No. 24,858, April 7, 1890, for said tract, to take effect from February 1, 1889. Ephraim H. Keyes made homestead entry No. 28,901 upon the same land November 11, 1889.

On April 19, 1890, Powers published notice of his intention to make final proof in support of his claim before the local officers on May 31, 1890, at which date the parties appeared and Keyes filed a protest against the acceptance of said proof. Evidence was submitted, and the local officers dismissed the protest and allowed said final proof of Powers.

On appeal by Keyes by your letter of March 17, 1891, you reversed the decision of the local officers, held the filing of Powers for cancellation and allowed the entry of Keyes.

An appeal now brings the case before me.

Specifications of error are assigned as follows:

1. In deciding that said Ephraim H. Keyes had the preference right to enter said tract of land under and by virtue of a former contest of Keyes *v.* Bloss.

2. In deciding that the said Ephraim H. Keyes made entry of said land within thirty days from the time he was notified of his rights to the same.

3. In not approving the entry of said George D. Powers for patent.

It appears that Keyes was convicted of an attempt to commit rape and sentenced to the penitentiary December 31, 1886, for three years and six months, and was discharged therefrom November 7, 1889.

The final decision of this Department in the contest of Keyes *v.* Bloss was made July 16, 1888 (unreported) and the entry of Bloss was canceled as of that date.

On motion for review, this Department on February 26, 1889 by decision of that date (unreported), reaffirmed its former decision.

On July 31, 1888, notice of the decision of July 16, 1888 was sent to E. H. Keyes in care of D. S. Glidden, warden of Sioux Falls penitentiary, Sioux Falls, Dakota Territory, informing him of the successful termination of his contest and of his preference right of entry. Keyes does not contend that he did not receive this notice. It was received by the warden who had him in custody.

If it be assumed that Keyes had a preference right of entry by virtue of the successful termination of his contest with Bloss, the question arises whether he properly exercised that preference right by making his entry November 11, 1889, more than one year and three months after the cancellation of Bloss' entry.

The act of May 14, 1880 (21 Stat. 140) provides that—

> In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands.

The inference from the language used in the last clause of this provision is that the successful contestant shall not be allowed more than thirty days from the date of such notice to make his entry.

The contention on behalf of Keyes is that because he committed a crime while his contest against Bloss was pending for which he was convicted and sent to prison, the statutory period within which he is required to exercise his preference right of entry, will be extended until such time as he may be set at liberty. If this proposition be correct it would follow that the more atrocious the crime, and the longer the term of the imprisonment, the greater would be the favor extended to the convict, and in an extreme case it might involve an extension of the statutory period for exercising the preference right from thirty days to thirty years.

The crime committed by Keyes was his voluntary act, in violation of law, which imposed the penalty of imprisonment which incapacitated

him from exercising his preference right. He cannot be heard therefore to plead the result of his own infamy as any excuse for his noncompliance with the law.

The ruling made in the case of Gore *v.* Brew (12 L. D. 239) is applicable to the present case. To hold that Keyes "could reserve this land from entry until he had answered the claims of violated law, would be to offer a premium for crime and to establish a precedent repugnant to reason and justice." It would give the criminal an advantage over the law abiding citizen. When the statute fixes and limits the period for the exercise of a right absolutely to a specified number of days this Department cannot extend that period, especially where the rights of a third party have attached, as in this case. Bonesell *v.* McNider (13 L. D. 286).

But it is contended that inasmuch as the law of Dakota, (Revised Codes Vol. 2 Sec. 763) provides that "A sentence of imprisonment in the territorial prison for any term less than for life suspends all the civil rights of the person so sentenced, . . . during the term of such imprisonment," the exercise of his preference right by Keyes was not only suspended, but also kept alive, till he was discharged. This construction would make the act extend the rights of the prisoner rather than suspend them, but it is unnecessary to discuss the scope of this enactment. It is enough to say that the law of Congress is "the supreme law of the land," (Art. 6 Constitution United States) and the legislature of a state has not the constitutional power to extend it or affect it by any legislation whatever.

I am of the opinion that the entry of Keyes should be canceled and the filing of Powers should remain intact.

Your judgment is reversed.

APPLICATON TO ENTER—QUALIFICATIONS.

HALZENBACH *v.* SCHABEN.

An application to make entry that does not show the applicant's qualification to enter may be properly rejected, and a defect in such respect cannot be cured by subsequently calling attention to another record.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 17, 1892.

I have considered the appeal of Otto Halzenbach from your decision of June 1, 1891, rejecting his application to make entry of the NE. ¼ of Sec. 27, T. 19 S., R. 21 W., Wa Keeney, Kansas, and holding that Peter Schaben should be entitled to make entry of said land as the first legal applicant.

It appears from the record that Gottlieb Kneffer filed a contest against the timber-culture entry of John Mertes for the tract in controversy,

and before the date fixed for a hearing, Peter Schaben also filed a contest against the said entry—alleging charges similar to those of Kneffer—which was held to await action on his contest.

On February 23, 1891, the day fixed for the hearing, at 9:30 A. M., A. H. Blair, attorney for Kneffer, filed a motion for a continuance, for the purpose of obtaining testimony, supporting it by an affidavit of Kneffer, showing that owing to sickness in his family he was unable to attend at the trial. The motion was refused, and Kneffer, by his attorney, excepted to said ruling, but in a short time thereafter, at 10:10 A. M., of the same day, he filed a relinquishment by John Mertes of said entry, and at the same time presented the application of Otto Halzenbach to enter said tract, which was rejected by the local officers, for the reason that there was no evidence of his qualification to enter the land, and for the further reason that the jurat to the affidavit, required under the act of August 30, 1890, was not signed by the notary.

Halzenbach's application was executed February 13, 1891, and Gottlieb Kneffer, the contestant, was the person who identified Halzenbach to the notary.

On the day that Halzenbach's application was rejected, Schaben also filed application to make timber-culture entry of the tract, which was rejected on account of the pendency of Halzenbach's application. Both applicants appealed. Kneffer was notified of the cancellation of the entry, but has made no application to enter.

On March 3, 1891, Halzenbach filed a certified copy of his declaration of intention to become a citizen of the United States.

On June 9, 1891, you rejected the application of Halzenbach, and allowed Schaben to make entry of the tract. From this decision Halzenbach appealed, assigning the following grounds of error:

> First. Because appellant was the first applicant for said land, and was legally qualified to make timber culture entry therefor, on February 23, 1891.
>
> Second. Because a duly certified copy of appellant's declaration of intention to become a citizen of the United States was on file and in the custody of the local office on February 23, 1891, and at the time he first presented his application for said land.
>
> Third. Because the decision of the Honorable Assistant Commissioner is based upon clerical errors and technicalities, and is not sustained or warranted by fact as shown by the record of said case.

It is contended by Halzenbach that a certified copy of his declaration to become a citizen of the United States was on file in the local office at the time when his application was first presented—to wit, February 23, 1891. It is stated, however, in the argument, that the copy referred to is a copy filed in the local office with his pre-emption declaratory statement for another tract of land, July 24, 1890. This was not sufficient. His application to enter was properly rejected, if it did not in itself present a complete record, showing his qualification to enter the land, and if defective in this respect, such defect could not be cured by subsequently calling attention to another record. His ap-

peal from the action of the local officers rejecting his application merely preserved his rights. If his application was properly rejected, the application of Schaben, which was presented before Halzenbach cured the defect, was the first legal application, and should therefore be accepted.

Your decision rejecting the application of Halzenbach, and holding for allowance that of Schaben, is affirmed, and the papers are herewith returned.

While this case was pending before the Department on appeal, Schaben was allowed to make timber-culture entry of the tract. While this entry was improperly allowed, pending the appeal of Halzenbach, yet it may be allowed to stand, it now appearing that he was the first applicant shown to be legally entitled to make entry.

SWAMP LAND CLAIM—WAIVER.

CEDAR COUNTY, MISSOURI.

Before final action is taken on a swamp land claim the waiver required by the regulations of September 19, 1891, must be furnished.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 18, 1892.

There are now pending before me three cases in which indemnity is claimed; in the first by Cedar county, Missouri, the second by Vernon county and the third by Harrison county, in said state.

The claim in Cedar county is for cash indemnity for one hundred and fifty-nine tracts claimed to be swamp lands but which were disposed of by the United States.

The claim of Vernon county in said state is for cash indemnity for one hundred and sixty-eight tracts of land claimed to be swamp lands but which were sold by the United States and the claim of Harrison county Missouri for cash indemnity for three hundred and sixty tracts claimed to be swamp lands but which were sold by the United States.

The respective claims made by the counties above named are made under the provisions of the act of Congress of March 2, 1855 (10 Stat., 634) and the act of March 3, 1857 (11 Stat., 251).

All of these cases are here on appeals from your judgment, rejecting in each case the claim of said state.

Before passing on the merits of these cases I desire to call your attention to certain rules and regulations relative to the presentation and adjustment of claims under the swamp land laws promulgated since your judgments in these cases were made (13 L. D., 301).

The sixth section of these regulations provides—

Before final action is taken on the claim of a State for swamp lands in place or cash or land indemnity, a certificate should be required of a duly authorized agent of the State reciting that the lands selected in each and every township involved in the

selection list constituting the claim represents the full and final claim of the State to lands under the swamp land acts in the said townships, and that the State waives all claims or rights, under the said acts, if it have any, to all other lands not selected in the said townships. Such a certificate will be accepted as evidence that the claim of the State to swamp-lands in the particular townships to which it applies is final and complete; and it will be recorded in a book kept for that purpose, and as far as practicable all such completed claims will be acted upon as promptly as possible and in the order of their completion.

The seventh and eighth sections provide as follows:

In the case of cash and land-indemnity claims, now pending or which may hereafter be presented for the benefit of counties, a certificate of a duly authorized agent of the county of the character and effect of that provided for in the 6th section of these instructions, relating to claims of States, will be required of county agents, covering the entire area of the county.

Waivers must be unconditional, and a copy of the authority from the State legislature or from the county authorities to act for the State or the county and to make certificates of waiver must be filed in this office by the State and county agents.

You will on receipt of this communication require the waivers mentioned in the sixth, seventh, and eighth sections to be filed by the proper authorities and when received you will forward them to this Department.

The cases now pending here will be suspended to await the receipt of properly executed waivers as contemplated by the sections above quoted.

PATENT—REISSUE—JURISDICTION.

THADDEUS MCNULTY.

Where a patent issues in conformity with the entire record the Department is without authority to accept a surrender thereof, for the amendment of the record and reissue of patent in accordance with the record as amended.

Secretary Noble to the Commissioner of the General Land Office, May 18, 1892.

I have considered the appeal by Thaddeus McNulty from your decision of May 4, 1892, refusing to correct a patent issued April 16, 1892, in the name of A. P. K. Jones, for lands designated as Sec. 2, T. 95, R. 1 E., Alabama.

McNulty claims title to this land through purchase from the heirs of Commodore Thomas Ap Catesby Jones, who, he claims, was the original settler, and that the existing patent erroneously describes the settler and does not convey title to the proper person, and he therefore requests its correction.

The claim of the settler to this tract is based upon section 3 of the act of March 3, 1819 (3 Stat., 530), which provides:

That every person, or his or her legal representative, whose claim is comprised in the lists, or register of claims, reported by the said commissioners, and the persons

embraced in the list of actual settlers, or their legal representatives, not having any written evidence of claim reported as aforesaid, shall, where it appears, by the said reports, or by the said lists, that the land claimed or settled on had been actually inhabited or cultivated, by such person or persons in whose right he claims, on or before the fifteenth day of April, one thousand eight hundred and thirteen, be entitled to a grant for the land so claimed, or settled on, as a donation: *Provided*, That not more than one tract shall be thus granted to any one person, and the same shall not contain more than six hundred and forty acres; and that no lands shall be thus granted which are claimed or recognized by the preceding section of this act.

Your refusal is based upon the grounds that Commissioner Crawford reported upon this claim and entered it in his list of actual settlers in the name of "A. P. K. Jones," as number 165, which report was forwarded to Congress, and pursuant to the act of March 3, 1819 (*supra*), the land claimed in this case was surveyed in the name of "A. P. K. Jones," in March, 1844.

On October 17, 1857, patent certificate No. 37, new series, issued in the name of "A. P. K. Jones."

The complete record describes the settler as A. P. K. Jones, and the question arises can the patent issued in accordance with the record be returned, the record changed, and another patent issued upon the amended, or changed, record?

As stated in the case of Frank Sullivan (14 L. D., 389),

where a patent has issued which fails to conform to the record upon which the right to a patent rests, and has not passed out of the control of the Department, it is not only the right, but the duty of the Commissioner to withhold the delivery of such patent, and to issue one *in conformity with the record.*

But, as before stated, the patent in this case conforms with the record, and, further, has passed beyond the control of this Department.

The right of the present holder to surrender the outstanding patent is not shown, and this Department is not invested with proper machinery to make the investigation necessary to a proper determination of that question. But even were the right clearly established, yet I am of the opinion that this Department can not afford the relief desired.

The claims confirmed by the act of March 3, 1819 (*supra*), were those comprised in the lists reported by the commissioners.

Commissioner Crawford's report, then before Congress, contained the claim of A. P. K. Jones, and in that name all acts necessary to establish the right to a patent for the land in question have been performed, and the patent has issued in accordance with the record as made.

The duties of this Department are at an end.

Your action in refusing to correct, or issue a new patent, is sustained.

PRIVATE CLAIM—SECTION 7, ACT OF JULY 23, 1866—RAILROAD GRANT.

NAPHTALY *v.* BREGARD ET AL.

The right of purchase under section 7, act of July 23, 1866, is not defeated by the fact that the legal title to the land in question, at the date of said act, is held by one not a purchaser for a valuable consideration, where the owner of the equitable title at such time is not thus disqualified.

The right of purchase under said section existing at the date when the grant to the railroad company became effective excepts the land covered thereby from the operation of said grant.

Secretary Noble to the Commissioner of the General Land Office, May 18, 1892.

In the decision rendered by this Department in the case of Naphtaly *v.* Bregard *et al.* (12 L. D., 667), it was stated that James W. Tice was a purchaser of the land involved for a valuable consideration, and that he, on April 5, 1861, conveyed the title to his mother Urhetta Tice, the consideration being love and affection, and her better support maintenance and protection. It was further held that Urhetta Tice, not being a purchaser for a valuable consideration, was not a qualified purchaser under the seventh section of the act of July 23, 1866, and consequently that Naphtaly, who derived title through her, was not qualified to thus purchase.

It was, however, said that,

> If the conveyance to Urhetta Tice was simply a deed of trust for the benefit of the other members of the family, and in the nature of a mortgage as security for a claim against the estate, a different rule might govern, and it may appear that the equitable title remained in the son, who was a qualified purchaser under the statute.

It was further stated that by deed dated May 13, 1868, Urhetta Tice, A. J. Tice, S. P. Millett and wife, conveyed the land to D. P. Smith and that by deed dated April 1, 1869, James W. Tice conveyed the land to Martin Clark.

It thus appeared that seven years subsequent to the date of an instrument which purported to convey an estate in fee to Urhetta Tice, she together with all the heirs except J. W. Tice, her grantor, conveyed by deed, and that eight years after said purported conveyance in fee to Urhetta Tice, her grantor conveyed the same premises by deed absolute to another party. These facts could not fail to excite comment, and to raise a doubt as to whether the estate held by Urhetta Tice was an estate in fee, or a conditional estate. It was largely in view of these facts, supported by the statement of Naphtaly that "Mrs. Tice was holding the title only in trust for the other parties in interest and especially as security for the interest she and her husband had in the ranch" that it was deemed necessary that a further hearing be ordered, in order to ascertain, if possible, the real facts in the case, that justice to all parties might be done.

This recital is made for the purpose of showing that the contention of counsel for Bregard *et al.* that "the hearing was granted on the uncorroborated affidavit of the claimant himself, an affidavit not even based on his own knowledge, but on mere hearsay, of the most indefinite and uncertain character," is in no way sustained by the record.

At the rehearing all parties were fully represented by counsel and evidence, both record and parol, was introduced. That evidence is now before me for consideration.

The first question to be determined is this: Was the deed given by James W. Tice, dated April 5, 1861, to his mother Urhetta Tice, and acknowledged October 21, 1863, an absolute conveyance in fee, or was it in the nature of a deed of trust for the benefit of the other members of the family, and in the nature of a mortgage as security for a claim against the property?

On its face the deed was an absolute conveyance of the premises in controversy.

In the case of Russell *v.* Southard (12 Howard, 139), the court, in inquiry as to whether a conveyance was a sale or mortgage, took into consideration the condition and relation of parties, the amount of consideration, etc., and held that, "Parol proof is admissible to show a deed absolute on its face to have been intended as a mortgage."

In the case of Hughes *v.* Edwards (9 Wheaton, 489), the court say:

> A court of equity looks at the real object and intention of the conveyances; and when the grantor applies to redeem, upon an allegation that the deed was intended as a security for a debt, that court treats it precisely as it would an ordinary mortgage, provided the truth of the allegation is made out by the evidence.

In the case of Henly *v.* Hotaling (41 Cal., 22), the court say:

> When the intention of the parties to a deed, absolute in form, is sought to be ascertained, not in the usual way, by reading and construing the instrument, in connection with evidence to identify the subject matter, the parties etc., but by evidence to establish an equity beyond and outside of the deed, and thus to convert the deed into a mortgage, the evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage, otherwise the intention appearing on the face of the deed ought to prevail.

With these rules for our guidance, the evidence submitted must be examined with a view to ascertain, if possible, the real object and intentions of the conveyance by J. W. Tice to Urhetta Tice, dated April 5, 1861.

The records show that on December 26, 1862, nearly two years subsequent to the deed of gift, J. W. Tice executed a mortgage of the premises in question to secure the payment of a note for $1500, given by him and his father, James M. Tice.

On December 20, 1861, several months subsequent to the deed of gift, J. W. Tice by James M. Tice, his attorney in fact, entered into a contract with J. B. Crockett, an attorney at law, by which he agreed to convey to said Crockett, with covenants only against the acts of said

grantor, for services rendered by said Crockett, an undivided one-eighth interest in the premises in controversy, with the exception of certain specified tracts.

James M. Tice, the attorney in fact, was the husband of Urhetta Tice.

The only explanation that can be given of his action is, that he considered the equitable title, at least, to be in J. W. Tice, and did not recognize the deed of gift as divesting him (J. W. Tice) of the title to the land.

It will be observed that these instruments were executed prior to the date of acknowledgment of the deed of gift, and of recording the same, and in my opinion they clearly indicate what was in the mind of the grantor; they indicate that he regarded himself as the owner of said premises, that the title was in him.

The conveyance, dated April 5, 1861, was not recorded until April 1, 1867. On said deed is the endorsement that it is recorded at the request of Urhetta Tice. At the trial of this case D. P. Smith testified that the grantor J. W. Tice had the deed recorded. However this may be, under date of April 25, 1867, J. W. Tice gave to Lloyd Tevis a mortgage of the premises in question as security for the payment of $4400 borrowed money; and on April 1, 1869, said J. W. Tice gave to Martin Clark a deed absolute for the premises in controversy.

The conveyance would certainly indicate that J. W. Tice considered that he had title to the land, which had not been divested by the deed of April 5, 1861, to his mother.

In what light did the grantee, Urhetta Tice consider this transfer?

On April 30, 1868, she entered into a contract with D. P. Smith to convey to him all the lands described in the above-mentioned deed of April 5, 1861. In this contract she agrees,

> that she will procure and deliver to said party of the second part a deed to him from Andrew J. Tice, James W. Tice, S. P. Millett, and Pauline V. Millett his wife, of all their right, title and interest of every kind legal and equitable, of, in and to all the land or lands hereinbefore described.

The consideration for this contract was $2000 to be paid to Urhetta Tice, and in addition to said sum, Smith agreed to pay the $4400 borrowed by J. W. Tice, from Lloyd Tevis, to secure the payment of which said Tice had executed a mortgage of the premises in question to Tevis, on April 25, 1867. On May 13, 1868, Urhetta Tice, Andrew J. Tice, S. P. Millett and Pauline V. Millett, executed a deed conveying the premises to D. P. Smith, consideration $7000. In the body of the deed the name of James W. Tice appears as one of the grantors, but he did not sign the deed.

It is not reasonable to suppose that had Urhetta Tice believed that the fee to the land in question was in her by virtue of the deed of April 5, 1861, and that she had the right to convey the same, that she would have agreed to procure deeds from other members of the family, neither

is it reasonable to suppose that the various grantees would have united in a conveyance had they not considered that they had some rights to convey. The consideration, $7000 in round numbers, was the $4400 borrowed by J. W. Tice, and which Smith agreed to pay, and the $2000 which appears to have been the interest of Mrs. Tice, the mother, in the property.

Thus the evidence would indicate that neither the grantor nor the grantee, nor the other members of the family, considered the deed ot gift, a deed absolute.

Is there anything in the record to indicate in what light the deed in question *should* be regarded?

The Tice family, consisting of father, mother, two sons, a daughter and son-in-law, occupied the property in common; it was their home and the ranch was carried on by them.

There is nothing to indicate that it was the intention of the various members of the family to surrender to the mother, or to transfer to her, all their property interest in this home, and which appears to have been the common property of them all.

The only member of the family who testified at the rehearing, was the daughter, formerly the wife of of S. P. Millett, and who, with her husband, was an occupant of the ranch, before and at the time, and subsequent to the conveyance dated April 5, 1861. She testified that the deed "was made to mother to secure us all."

Q. What do you mean by "secure us all?"

A. Because we were all interested in it, my brother was getting reckless and we wanted the property out of his hands.

She further testified that her father could not take the deed in his own name on account of his indebtedness.

She was asked "whether the two thousand dollars to be paid to your mother, Urhetta Tice, upon making the deed by her and other members of the family, was paid to her?"

The deed in question was the one dated May 13, 1868, before mentioned. She testified that $1500 was paid her at the ranch, and the balance in the city of San Francisco.

She also testified that after the death of her husband she (the witness) received the portion due her, as her interest in the ranch, also that J. W. Tice received the amount due for his interest in the property, and by reference to the deed of May 13, 1868, it will be seen that there was expressly reserved from the property transferred, the one hundred and sixty acres occupied by A. J. Tice, the other son; this was presumably a portion, at least, of his interest in the estate.

This evidence is clear and explicit and in connection with the other, throws much light upon the financial transactions of the Tice family, and the relations they held to one another financially. It shows that the deed of gift was not only for the protection of the mother of her interest, but was for the protection of the other members of the family.

Lloyd Tevis, who had taken the mortgage from J. W. Tice to secure the payment of the $4400 borrowed, testified that when he discovered that the deed of gift had been placed on record just prior to the execution of the mortgage held by him, he had an interview with Mrs. Tice and made inquiry concerning said deed, and Mrs. Tice told him that "the deed was only intended to secure her for the payment of two thousand dollars."

The contract dated April 30, 1868, and the deed dated May 13, 1868, is certainly strong corroborative evidence of the truth of this statement.

Moses G. Cobb, a lawyer who was employed to bring the foreclosure suit in 1868 on the mortgage given by Tice to Tevis in 1867, testified that J. W. Tice the grantor and Urhetta Tice the grantee in the deed of gift, both told him that the deed was given simply by way of security, and that for a limited amount, he thinks about $2000.

James W. Tice, the grantor in the deed of April 5, 1861, and the one, who above all others, could have given evidence as to the true intent of said conveyance, is dead. The grantee, Urhetta Tice, though living, refused to appear at the trial, or to give her evidence by deposition, although both parties swear that they endeavored to have her appear and testify.

The evidence shows that on June 28, 1891, five days subsequent to the departmental decision ordering a further hearing in the case, three men, acting in the interest of Naphtaly, had an interview with Mrs. Tice at her home near San Francisco, and in conversation with her in relation to the character of the deed dated April 5, 1861, she made and subscribed to the following statement:

> That at the time of my receiving from my son James William, a deed to the Tice ranch, that there was due and owing to me the sum of $2500 and the reason of the giving to me said deed was to secure me from any loss as to said $2500.

It is shown that this statement in substance was made in the absence of undue influence. After the evidence in relation to this statement was submitted at the hearing, Urhetta Tice, after an interview with Josiah S. Smith, one of the contestants, made the following affidavit:

> I, Urhetta Tice, being duly sworn, depose and say, that I am the same Urhetta Tice named in a certain deed made by my son, James W. Tice, on the 5th day of April, 1861, for love and affection and better maintenance and support; that said deed was not made to secure the payment of $2500, or any other sum of money due me from my son James, nor was my said son indebted to me when said deed was made, but said deed was made for my sole use and benefit, and the same was intended to be and was an absolute conveyance to me of the property, and was made for the express purpose of securing me a home, and not otherwise.

This was purely an *ex parte* affidavit taken without notice to the opposite party and with no opportunity for cross-examination. Objection was made to its introduction, and it can not be taken as evidence; but even if it could be received, it simply demonstrates that the party will,

either with or without a full understanding of the import of her words, make statements directly at variance with each other on the same subject, under different circumstance, and her evidence is of little or no value, on either side.

The only parties who appeared as witnesses for the contestants, were D. P. Smith and Josiah S. Smith both claimants adverse to Naphtaly.

An attempt is made to throw discredit upon the testimony of Mrs. Remington, formerly Mrs. Millett, the daughter, by asserting that she had made statements different from those made under oath. Thus, on December 15, 1891, Josiah S. Smith testified that on the day before he had an interview with Mrs. Remington who said to him, referring to the deed of April 5, 1861, that said "deed was given from her brother to her mother for a home for her mother and the children." On the same day D. P. Smith testified that on the day before he had an interview with the witness, who said referring to the deed of April 5, 1861, that "it was deeded to the old lady to keep the boys from spending the money during her life time." I think it is evident from these varying statements, that these witnesses give their interpretation of what Mrs. Remington said, rather than what she actually did say, and their testimony did not impeach her clear and positive evidence.

D. P. Smith testifies that he was the agent who attended to the business of Mr. Tevis in his transaction with the Tices when the $4,400 was borrowed, that he was interested in having the agreement of April 30, 1868, perfected, that he visited Mrs. Tice in company with Tevis and he states that in that interview nothing was said about the deed of April 5, 1861, "being intended to secure a loan of $2,000 from James W. Tice to his mother," further on he states that at that interview nothing was said about said deed being intended simply as a security for a loan of $2,000, or any other amount. When this evidence is analyzed in connection with the other evidence in the case, it will be found that it does not amount to a contradiction of the evidence submitted by Naphtaly. No where in the record is there any evidence that the deed of April 5, 1861, was made as a security for a loan, no where is there any attempt made to show that the mother had loaned money to the son, and had taken this deed as security.

The evidence of John A. White throws much light upon this transaction.

The deed from Pujol and Sanjurjo to James W. Tice was made February 14, 1855. Mr. White testifies that in the spring of 1855 he was a partner of James M. Tice (the father) under the firm of Tice and White, that the firm purchased the interest in the Romero ranch. His testimony is as follows:

When we purchased that place, it was purchased for James Tice and myself. The consideration was from $3,000 to $3,500. We gave our note for that amount, and took possession of the place. But the deed was first made to J. M. Tice and White, then his family came out here; then J. W. Tice came out here about that time. Then

J. M. Tice and myself had some business trouble, and I said to him: "I prefer to give it to your son J. W. Tice, and give me my note." We took our note up and let Sanjurjo take James W's note. I told him it was better for them to take up our note, and take J. W. T's and have our note made to him. My name was crossed out of the old deed and it was transferred to James W. Tice, and it was afterwards paid. That was the way it was done, and James W. Tice took possession of the ranch. It was paid out of some property that originally belonged to Mr. James M. and myself. I told him he could have the ranch. After getting back the note I told him he could have the ranch, and I would have nothing to do with it.

Thus the original payment is accounted for; it was made with the property of the father, James M. Tice. This was in 1855, and from that time until April 5, 1861, not only had the father labored to increase the value of the property, but the two sons, the son-in-law and the daughter had united their efforts to promote the same end. Owing to the action of the member of the family in whom the title was vested, the other members including the father, who had paid the original purchase money, but who could not, on account of financial trouble hold the title in his name, desired security for their interests, and this was given by means of the deed in question absolute on its face, for a good, but not for a valuable consideration.

This deed was given for the security of an interest in the estate, or in other words, a debt against the estate, and this interest in the estate had been obtained, and the debt against the estate incurred, by means of the payment of money and by means of labor extended.

In the case of New Orleans Banking Association *v.* Adams (109 U. S., 211), the court say:

While it may be conceded that no precise form of words is necessary to constitute a mortgage, yet there must be a present purpose of the mortgagor to pledge his land for the payment of a sum of money, or the performance of some other act, or it can not be construed to be a mortgage.

Applying this rule to the facts in the case at bar, there can be no doubt that it was the intention of James W. Tice, by the deed of gift to pledge the estate to secure the interests of all parties entitled to protection.

In the case of Peugh *v.* Davis (96 U. S., 332), the court say:

It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction, and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That can not be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice.

The object of the deed dated April 5, 1861, between J. W. Tice and Urhetta Tice being shown, it is the duty of the Department to give it such an interpretation as will carry out the intention of the parties, and promote justice.

If the question of the right of the grantees of both Urhetta Tice and J. W. Tice, was entirely eliminated, and the question was resolved to that of the rights of Urhetta Tice and the other members of the family, in reality the joint owners of the estate under the deed in question, there can be no doubt but that a court of equity would decree the instrument to be a mortgage for the security for the payment of each interest, and not a deed absolute, which would deprive the various ones interested of their rights, as to thus hold would be to work oppression and injustice.

In view of all the evidence in the case, and in view of the rule of law pointing out the construction to be given to conveyances, I am of the opinion, that the deed of April 5, 1861, must be held to have been a conveyance, in the nature of a mortgage, given for the security of claims against the estate, and that on July 23, 1866, the equitable title to the land in controversy, was in James W. Tice and was by him on April 1, 1869, conveyed to Clark, and that Naphtaly is a qualified purchaser under the 7th section of the act of July 23, 1866.

In the decision of this case, by the local officers, certain tracts applied for by Naphtaly were awarded to the Western Pacific Railroad Company. In the decision by your office the question of the right of the company was left to future adjudication, and in the Departmental decision of February 4, 1889 (8 L. D., 144), no disposition of the claim was made.

The company claims under the third section of the act of July 1, 1862 (12 Stat., 489), which granted to it the alternate sections, designated by odd numbers, within ten miles of each side of the road, "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." The road was definitely located opposite the land in controversy subsequent to the date of the passage of the act of July 23, 1866, under which Naphtaly claims, thus at the time the grant took effect by the definite location of the road, the land was occupied and in the possession of one entitled to purchase under the act of July 23, 1886, and this legal right, which was founded upon an equity which existed long prior to the date of the granting act, reserved the land from the operation of said grant.

This principle is in accordance with the ruling of the Department in the case of the Northern Pacific Railroad Company *v.* Killian (11 L. D., 596), and cases cited therein.

Departmental decision of February 4, 1889, is herewith recalled, and you will dispose of the case in accordance with the views expressed in my decision of June 23, 1891, and in this decision.

MINING CLAIM—MILL SITE—REPAYMENT.

HUDSON MINING COMPANY.

The first clause of Section 2337, R. S., contemplates the allowance of a mill site entry only where the land is used or occupied for mining or milling purposes at the time the application for patent is made.

An entry allowed on insufficient proof, submitted without fraud or concealment, is "erroneously allowed" within the meaning of the act of June 16, 1880, providing for repayment.

Secretary Noble to the First Comptroller, May 18, 1892.

I am in receipt of your letter of April 21, 1892, submitting for my review and reconsideration

the claim of the Hudson Mining Company, per General Land Office report No. 55451, for repayment of the purchase money paid by said company for five acres of non-mineral land for a "mill site" entered in connection with the mineral entry No. 1579 (Combination Lode and Mill Site) at Helena, Montana, on October 3, 1887, viz., five acres at $5, per acre.....$25.

You express the opinion that the claim should not be allowed, and cite the case of Arthur L. Thomas (13 L. D., 359).

The act of June 16, 1880 (21 Stat., 287), under which the application is made provides that in the event that an "entry has been erroneously allowed and can not be confirmed," repayment shall be made.

In the Thomas case, *supra*, it was held that his entry

was not erroneously allowed so far as either the law or the records of the land office show, and neither the law nor the government interposed any obstacles to the confirmation of said entry by the performance of the acts necessary to confirm the same.

Section 2337, Revised Statutes, provides that, "Where non-mineral land, not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes," the same may be entered as a mill site.

The act clearly contemplates that at the time the application for a patent is made, and the entry allowed, the land in question is used or occupied for mining or milling purposes. The act does not contemplate the performance of conditions subsequent, or the future compliance with law. No mill site entry should be allowed unless it is shown that the conditions of the law have been complied with.

Upon the examination of the papers in the case before me, I find that the evidence submitted to the register and receiver, in support of the application, discloses the fact that the mill site in question was not used or occupied as contemplated by law.

Thus the deputy surveyor in his field notes stated that "There are no improvements upon mill site."

Neither the applicant, nor any of his witnesses, stated that the mill site was used or occupied in any way, the applicant merely stated that he

was in the actual, quiet and undisturbed possession of the premises. With these facts before them, it was the duty of the local officers to reject the application.

In the general circular issued by the Land Department, February 6, 1892, page 85, it is said:

> Definition of "erroneously allowed." This can not be given an interpretation of such latitude as would countenance fraud. If the records of the Land Office, or the proof 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.

In the case of Oscar T. Roberts (8 L. D., 423), it was said:

> If, however, the entry is allowed by the local officers upon testimony which they deemed sufficient, but which was rejected by the Commissioner and the Secretary, on appeal, such entry was erroneously allowed and the entryman would be entitled to the return of the purchase money, if there was no concealment or false swearing in his final proof and no evidence of bad faith on his part.

Also see case of Minerva A. Widger (6 L. D., 694).

Applying these rules to the case at bar, I think it must be held, that the entry was erroneously allowed and that it was not allowed as the result of fraud or misrepresentation. I am therefore of the opinion, that the application for repayment is within the provisions of law.

RAILROAD GRANT—CONFLICTING LIMITS—WITHDRAWAL.

THUNIE *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The grant for the St. Vincent extension of the St. Paul, Minneapolis and Manitoba railway is a new grant, later in date to that made for the main line, and lands withdrawn for the benefit of the latter, as indemnity, are excepted from the subsequent operation of the grant for the branch line.

An entry, irregularly allowed, of land withdrawn for railroad purposes may be permitted to stand as of the date when such land is restored.

Secretary Noble to the Commissioner of the General Land Office, May 18, 1892.

I have considered the case of Peder P. Thunie *v.* St. Paul, Minneapolis and Manitoba Railway Company, involving the NE. ¼ of SW. ¼, NW. ¼ of SE. ¼, and lot 2, Sec. 13, T. 128 N., R. 41 W., St. Cloud land district, Minnesota, on appeal by Thunie from your decision of May 26, 1890, holding for cancellation his homestead entry on account of the grant for said company. The land in question is within the twenty miles indemnity limits of the grant made by the act of March 3, 1865 (13 Stat., 526), to aid in the construction of the main line of the St.

Paul, Minneapolis and Manitoba Railway—i. e., the road to Breckinridge.

The 7th section of said act provides:

> That as soon as the governor of the said State of Minnesota shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said road and branches, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act.

The withdrawal of lands along this portion of the line was ordered by letter of August 14, 1868, but this letter does not appear to have been received at the local office of the district in which this land was then situated, but was included in the withdrawal by letter of April 12, 1869, received at the local office at Alexandria April 22, 1869. This withdrawal was not revoked until May 22, 1891 (12 L. D., 541), under the authority of section 4 of the act of Congress approved September 29, 1890 (26 Stat., 496), which provides:

> That section five of an act entitled 'An act for a grant of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State,' approved May seventeenth, eighteen hundred and sixty-four, and section seven of an act entitled 'An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes,' approved March third, eighteen hundred and sixty-five, and also section five of an act entitled 'An act making additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said State,' approved July fourth, eighteen hundred and sixty-six, so far as said sections are applicable to lands embraced within the indemnity limits of said grants, be, and the same are hereby, repealed.

No selection of the land has been made on account of said main line, but the company's claim to the same is based upon the ground that the land inured to it under the grant made on account of the St. Vincent Extension of said road. Upon the definite location of that line, filed and accepted on December 19, 1871, the land herein involved falls within the primary, or granted, limits.

In the case of this company against the Hastings and Dakota Railway Company (13 L. D., 440), it was held that:

> The grant for the St. Vincent Extension was made by the act of March 3, 1871 (16 Stats., 588), and in considering the question as to the plan to be followed in the adjustment of the grants for the Manitoba Company, it was held by this Department, June 10, 1891 (13 L. D., 349), and again upon review, October 1, 1891 (13 L. D., 353), that the grant for the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba Railway is a new grant, made by act of Congress, subsequent in date to those by which the original grant was made for the 'main line,' and it therefore follows that the grant for said extension should not be adjusted in connection with the other grants as an entirety.

The grant for this line being a new grant, to be adjusted separately from the "main line," the question arises: Does the reservation for indemnity purposes, on account of the main line, serve to defeat the grant for the branch line? I am of the opinion that it does.

The act of March 3, 1871 (16 Stat., 588), provides as follows:

> That the St. Paul and Pacific Railroad Company may so alter its branch lines that,

instead of constructing a road from Crow Wing to St. Vincent, and from St. Cloud to the waters of Lake Superior, it may locate and construct, in lieu thereof, a line from Crow Wing to Brainerd, to intersect with the Northern Pacific Railroad, and from St. Cloud to a point of intersection with the line of the original grant at or near Otter Tail or Rush Lake, so as to form a more direct route to St. Vincent, with the same proportional grant of lands to be taken in the same manner along said altered lines, as if provided for the present lines by existing laws.

It is unnecessary here to recite all of the facts bearing upon the history of the grants made to aid in the construction of the several lines owned and operated by the St. Paul and Pacific, now the St. Paul, Minneapolis and Manitoba Railway Company; suffice it to say, that these grants were made by the acts of March 3, 1857 (11 Stat., 195), March 3, 1865 (*supra*), and March 3, 1871 (*supra*).

The 3d section of the act of March 3, 1865 (*supra*), is as follows:

That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved, and excepted from the operations of this act, except so far as may be found necessary to locate the route of said road through such reserved lands, in which case the right of way shall be granted, subject to the approval of the President of the United States.

The grant made by the act of March 3, 1871 (*supra*), for the St. Vincent Extension, is "the same proportional grant of lands to be taken in the same manner along said altered lines, as is provided for the present lines by existing laws." This grant, therefore, carried the condition above quoted taken from the act of March 3, 1865 (supra).

In the case of the Wisconsin Central Railroad Company (10 L. D., 63), it was held that lands reserved, by executive order, for indemnity purposes, under the grant of June 3, 1856 (11 Stat., 20), are by the express terms of section 6, act of May 5, 1864 (13 Stat., 66), reserved and excluded from the grant made by section 3 of said act.

The language of section 6, here referred to, is identical with section 3 of the act of March 3, 1865 (*supra*), before quoted, and while in the Wisconsin Central case the withdrawal was but an executive order, in the present case it was directed by the act making the grant, and required congressional action before the withdrawal could be revoked.

It is urged by the company that the grant for its main and branch lines is an entirety and indivisible; hence, the withdrawal on account of one line can not be held to be a reservation against the other, but it has already been decided that the grant made by the act of March 3, 1871 (*supra*), is a new grant, referring to but distinguishable from the grant for the "main line," and I do not think that the fact that one company succeeds to several grants gives that company greater privileges under the same than might have been enjoyed by several companies.

This land having been reserved by Congress to satisfy one grant would not be included in a subsequent grant, even though in terms

there had been no exception made of it. Wilcox *v.* Jackson, 13 Pet., 498.

This tract was listed by the State as swamp land, in 1876, but said list, it appears, was canceled upon the application of Thunie, and, on August 11, 1886, he made homestead entry of the land.

A large portion of the argument on both sides is devoted to the question as to the effect of the claim made on account of the swamp grant upon the railroad grant, but without passing upon that question, it being unnecessary to the determination of this case, I am of the opinion that this company has no claim to this tract on account of the grant for its main line, not having made selection thereof, and that having been excepted from the grant for the St. Vincent Extension by reason of the reservation created under the provisions of the act of March 3, 1865 (*supra*), it was, upon the revocation of said withdrawal and the restoration of the lands, subject to entry as other public lands. Prior to this time, however, Thunie had been permitted to make homestead entry of the land.

This was error, but having been allowed, it will be permitted to stand as of the date of restoration, and your decision holding the same for cancellation is reversed. Mudgett *v.* Dubuque and Sioux City R. R. Co., 8 L. D., 243.

INDIAN HOMESTEAD ENTRY—ACT OF JUNE 10, 1872.

AISH-KA-BWAW *v.* SCHLUTTENHOFER.

An Indian homestead entry made under the act of June 10, 1872, improperly canceled on a charge of abandonment should be re-instated, the intervening adverse claims excluded, and opportunity given to show additional compliance with law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 18, 1892.

On November 1, 1872, Mary Aish-ka-bwaw made homestead entry (No. 5329) for the S. E. ¼ of the S. W. ¼ section 9, T. 34 N. R. 6 W., at Traverse City, (now Grayling) Michigan. She held a certificate dated August 30, 1872, signed by Indian Agent George I. Betts, that she was a member of the tribe of Indians known as the "Ottawas and Chippewas of Michigan," that she was of full age, had never made a selection or purchase of land under the treaty of July 31, 1855 (11 Stat., 621), and that she was entitled, under the provisions of an act of Congress, approved June 10, 1872 (17 Stat., 381), entitled "An act for the restoration to market of certain lands in Michigan" to a homestead entry upon the lands covered by said treaty and undisposed of. This certificate was sufficient to support the entry in its inception. (See Indian Homesteads 4 L. D., 143, 1 C. L. L., 709). Said township 34, north of

range 6 west, was a part of the land covered by said treaty and withdrawn from sale for the benefit of said Indians (11 Stat., 621, Art. 1 Par. 4). By the act of June 10, 1872, all the lands remaining undisposed of in the reservation made by said treaty were to be restored to market by proper notice, under the direction of the Secretary of the Interior, Section 2 of said act provided as follows:

That said unoccupied lands shall be open to homestead entry for six months from the passage of this act by Indians only of said tribes who shall have not made selections or purchases under said treaty, including such members of said tribes as have become of age since the expiration of the ten years named in the treaty; and any Indian so entitled shall be permitted to make his homestead entry at the local office within the six months aforesaid of not exceeding one hundred and sixty acres, or one-quarter section of minimum, or eighty acres of double minimum land, on making proper proof of his right under such rules as may be prescribed by the Secretary of the Interior.

Under this provision Mary Aish-ka-bwaw, within six months from the passage of said act, made the entry of said forty acres, which had the effect to continue said land in reservation and prevent it from being restored to market as enacted in section 5 of said act, which provides:

That immediately after the expiration of said six months the Secretary shall proceed to restore the remaining lands to market by public notice of not less than thirty days, and after such restoration they shall be subject to the general laws governing the disposition of the public lands of the United States.

It is evident that the land so entered by the above named Indian was not subject to settlement under "the general laws governing the disposition of the public lands," and therefore not subject to contest by anyone claiming to be a settler under said "general laws."

Nathan J. Tracy, however, contested said entry on the ground of abandonment and on May 20, 1875, the local officers advertised that a hearing would be held before them on July 28, 1875, with a view to the cancellation of said entry. The hearing was had and two witnesses were produced and sworn on behalf of the contestant, going to show such abandonment. No evidence appears to have been produced on behalf of the Indian, and the entry was canceled for abandonment on December 24, 1875.

On July 8, 1876, Liberty J. Ingalls made homestead entry (No. 7434) for said land, which was canceled on relinquishment December 1, 1876. On January 2, 1877, David J. Cook made homestead entry (No. 7951) for said tract, and on April 5, 1878, commuted the entry to cash by military bounty land warrant No. 1378, register and receiver No. 600, and transferred the land the next day (April 6, 1878) by warranty deed to Mary A. Schluttenhofer, the present party contesting said Indian entry.

By the act of March 3, 1875, (18 Stat., 516) the act of June 10, 1872, was amended so as to authorize the Secretary of the Interior—

to cause patents to issue to three hundred and twenty members of the Ottawa and Chippewa Indians of Michigan, for the selections found to have been made by them,

but which were not, prior to the passage of said act regularly reported and recognized by the Secretary of the Interior, and Commissioner of Indian Affairs and the remainder of said lands not disposed of, and not valuable mainly for pine timber, shall be subject to entry under the homestead laws for one year from the passage of this act.

The name of Mary Aish-ka-bwaw does not appear in this list of three hundred and twenty Indians, but her entry seems to come within the spirit and letter of said act, as the land covered by her entry was thereby "disposed of," and therefore not "subject to entry under the homestead laws", as therein provided. The act of May 23, 1876, (19 Stat., 55) again amended the act of June 10, 1872, by providing that "the remainder of said lands not disposed of, and not valuable mainly for pine timber, shall be subject to entry under the homestead laws."

It thus appears that it was the policy of Congress to protect the lands "disposed of" from the application of the homestead laws.

On March 14, 1877, this Department directed a suspension of action upon certain contested Indian homestead entries in Ionia and Traverse City districts in Michigan upon complaint and representation that advantage was being taken of the ignorance of the Indians as to the requirements of the land laws. (4 L. D., 143).

Subsequently special agent E. J. Brooks, investigated the present and other contested Indian entries, and by reason of his report of December 27, 1877, a bill was introduced April 21, 1879, in Congress to confirm said entries. It did not however, become a law and on September 7, 1885, this Department recalled the former suspension and directed "a fair examination of the pending cases upon the merits of each as it shall be reached." (4 L. D., 144).

Under these instructions the entry of this Indian was reinstated and by your letter of October 10, 1887, you directed that she be advised that she would be allowed to submit final proof in support thereof. Her final proof was submitted June 15, 1888, and transmitted to you. By your letter of February 10, 1891, you held "she had complied with the homestead law as to residence and cultivation, from the date of her entry until its cancellation, a period of three years, one month and twenty-four days," and you directed that she should be advised "that when she can show further residence and cultivation of the land in question for such a period of time as will, with the time already shown, make a period of five years as is required by law, she may submit supplemental proof of such residence and cultivation" and held the entry of said Cook for cancellation.

An appeal has been taken to this Department.

By the treaty of 1855, it was made the duty of the Indian agent to make lists of "the names of all persons entitled to land under its provisions. By some oversight or neglect the name of Mary-Aish-ka-bwaw with others, was omitted from the list, and she was prevented from making a selection of land under the treaty. If she had been listed and had made a selection of land thereafter the United States would

have held the same "in trust" for her; and a certificate would have been issued "guaranteeing and securing" to her the "possession and an ultimate title to the land."

This shows that the United States was to act the part of a trustee for these wards of the nation in respect to their lands, and this relation should be sustained to those who were not included in the lists that were provided for by the treaty as well as to those who were included in such lists. It was no fault of this Indian that she was not allowed a selection originally.

The act of 1872, should be construed liberally, as a remedial statute to secure the rights of those Indians whose rights were overlooked or neglected by the omission of their names from said list. There is evidence in the record going to show that this Indian was driven from her claim and her house torn down, that she could not speak English, and was ignorant of her rights, and knew not how to protect them and was poor and friendless.

The homestead law when applied to an Indian should be construed with reference to their known state and condition in life, and not with the strictness applied to the civilized white settler, (Indian Homesteads 4 L. D. 144). The transferee in this case bought a doubtful claim at best and took the risk of its being adjudged to this member of her own sex, who, though uncivilized, is not here to be allowed to be dispossessed of any of her rights.

Your judgment is affirmed.

DESERT LAND APPLICATION—AMOUNT OF ACREAGE.

ELLEN B. VAN KLEECK.

A desert land application for six hundred and forty acres, made in good faith, and accepted prior to the issuance of the circular of August 9, 1890, under the arid land act, though irregular in the matter of the accompanying payment and not acted upon for that reason, is within the protecting provisions of the act of August 30, 1890, and not subject to the limitation of acreage imposed by said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 19, 1892.

On July 18, 1890, Charles B. Eddy, of Eddy, New Mexico, as the agent of Mrs. Ellen B. Van Kleek of Denver, Colorado, forwarded to the receiver of the local land office at Roswell, New Mexico, the desert land application of Mrs. Van Kleeck for the E. ½ of section 2, and the W. ½ of section 1, T. 25, S. R. 28 east, also her check for $160 drawn on the "First National Bank of Denver, U. S. Depository," made payable to her own order, and certified across the face of said check "Good when properly endorsed.

THOS. KEELEY, *Teller.*"

Said check was afterwards endorsed "Pay to the order of Frank Lesnet, Receiver, U. S. Land Office. Ellen B. Van Kleeck," and was so certified and endorsed when forwarded to the receiver.

The application is endorsed as "Filed Aug. 1, 1890," by the register and stated the post-office address of Mrs. Van Kleeck. Said check was deposited in the bank of Roswell to the credit of said Frank Lesnet, receiver, on August 2, 1890, and appears, by the endorsement thereon, to have been actually paid by the bank upon which it was drawn on August 9, 1890. On August 25, 1890, the said receiver was paid $160 in satisfaction of said check by the cashier of said bank of Roswell.

On August 16, 1890, the local officers were notified by the circular of August 9, 1890, (11 L. D., 220) of the withdrawal of all arid lands from settlement. On September 13, 1890, the local officers were notified by circular of September 5, 1890, (11 L. D., 296) that said lands were reopened to settlement to the extent of three hundred and twenty acres for each entry, under the act of August 30, 1890 (26 Stat., 391).

On October 27, 1890, the said receiver addressed a letter to Mrs. Van Kleeck enclosed in a letter to said Eddy in which he says,

> Your desert application for (the said land) was received at this office August 19, (1) 1890, with your check on Denver bank for the amount required, but the check being on a foreign bank, the filing could not be received and put to record until the bank here had certified to the validity of the check. During that time a circular of the General Land Office reduced all filings to the amount of three hundred and twenty acres, and your entry will therefore have to be cut down to that amount. The office holds your filing for you to select such part of it as you may want, and $80 will be refunded to you as soon as this office is notified of your exact address, or the whole amount will be refunded you, if you so desire.

This letter does not appear to have been sent to her by said Eddy.

Mrs. Van Kleeck makes affidavit that not hearing anything from her application, she, on December 17, 1890, wrote a letter to said receiver, inquiring whether her application and check had been received, and in reply received a letter dated December 23, 1890, enclosing a draft for $160 in payment of the money received on said certified check, and informing her that the local office could "not issue receipt or put filings on record until the payment therefor is made in lawful money of the United States."

On February 12, 1891, $160 "in lawful money of the United States" was tendered to the receiver on behalf of the applicant and request made for the issuance of a receipt upon said application, but said application was formally rejected.

An appeal was taken, and by your letter of April 23, 1891, to the local officers, you affirmed their decision, holding that,

> When the application was presented without the actual money necessary to make the payment and to make the application valid, you should have rejected it. You should not hold applications in abeyance under such circumstances.

An appeal now brings the case to this Department.

The said act of August 30, 1890, provides that so much of the act of October 2, 1888,

as provides for the withdrawal of the public lands from entry, occupation, and settlement, is hereby repealed, and all entries made, or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted.

The question arises whether under this provision there was a "claim initiated" to the land in dispute on behalf of the applicant in good faith, before August 30, 1890, the date of the passage of said act which would have been "valid but for said act" of October 2, 1888.

The act of March 3, 1877, (19 Stat., 377), provides

that it shall be lawful for any citizen of the United States, ... upon the payment of twenty-five cents per acre, to file a declaration under oath, with the register and receiver of the land district, ... that he intends to reclaim a tract of desert land, not exceeding one section, by conducting water upon the same within the period of three years thereafter.

The applicant in this case forwarded by mail to the local office such a declaration accompanied with said certified check in payment.

The application bears the indorsement, "Filed Aug. 1st, 1890. W. S. Cobean, Register," and the check is indorsed "For deposit in the Bank of Roswell, N. M. to the credit of Frank Lesnet, Rec'r," and it was deposited in said bank to the credit of said receiver, as directed, and was paid August 9, 1890 by the bank upon which it was drawn. These facts show that the local officers actually received the check as payment, otherwise they had no right to allow the declaration to be filed. The payment is to precede the filing by the terms of the act of March 3, 1877, above cited.

It is evident that the local officers waived the irregularity in the mode of payment. They did not insist upon lawful money in payment at that time. The proper course for them to have pursued was to have rejected the application and to have notified the applicant, in which event she would have been able to have made payment in lawful money before August 16, 1890, when the circular was received withdrawing arid lands from settlement, and thus could have perfected her entry. The local officers did not take this course, however. They accepted the check and filed the declaration, and the question now is not whether the local officers complied with the strict letter of the law, for they did not, but whether Mrs. Van Kleeck

"initiated a claim in good faith and valid but for said act" before August 30, 1890. The local officers ruled in effect that she did initiate a claim in good faith when the question was before them for decision on August 1, 1890. Was it a claim "valid but for said act."

The circular of August 9, 1890 (11 L. D., 220–222) instructed the local officers as follows:

You will, therefore, permit no entry or filing of any lands lying within the arid regions that may be included in your land district, on any condition whatever, but will promptly reject any application that may be made for such an entry or filing, with the usual right of appeal.

The application in question had been made and accepted August 1, 1890, or before this circular was issued, and therefore did not come within its inhibition which was prospective in its operation. It was an application not to be made, but which had been made. This circular, therefore, did not affect it.

On September 13, 1890, the local officers received the circular of September 5, 1890, (11 L. D., 296) which embraced the enactment of August 30, 1890, and they were notified that the circular of August 9, 1890, was rescinded. Certainly upon the receipt of this circular the local officers could properly have "recognized" and "perfected" said claim "in the same manner as if said law (of October 2, 1888) had not been enacted."

I am of the opinion that the application as received, for six hundred and forty acres, should be passed to entry, upon the receipt of the money therefor which has been tendered. Your judgment is reversed.

RAILROAD LANDS—ACT OF MARCH 3, 1887—RESIDENCE.

FLETCHER ET AL. *v.* BRERETON.

The right of a settler to perfect title under the proviso to section 5, act of March 3, 1887, defeats the claim of a purchaser from the railroad company under the body of said section.

Prior to the allowance of a homestead entry the applicant is not required to maintain residence on the land covered by his application.

Secretary Noble to the Commissioner of the General Land Office, May 19, 1892.

On June 15, 1885, Stephen W. Brereton applied to make homestead entry of NW ¼, section 15, T. 2 S., R. 67 W., at Denver, Colorado.

The local officers rejected this application because said land is in an odd-numbered section, and within the primary limits of the grant to the Union Pacific Railway Company by the act of July 1, 1862 (12 Stat., 489), as enlarged by the act of July 2, 1864 (13 Stat., 356).

An appeal was taken by Brereton July 8, 1885, and by your letter of May 3, 1887, you held that said land was excepted from the grant to said company, and on appeal therefrom this Department, by decision of November 1, 1888 (unreported), affirmed your judgment.

On November 26, 1888, your office returned Brereton's homestead application to the local office, with instructions to allow his entry.

On December 19, 1888, Brereton made homestead entry (No. 1352) for said tract, and on July 13, 1889, he gave notice of his intention to make commutation final proof on September 2, 1889, to establish his claim to said land.

On May 11, 1889, Donald Fletcher and Albert F. Welch filed in the local office a notice of their intention to establish their right to said

land by virtue of the fifth section of the act of March 3, 1887 (24 Stat., 556), and under instructions of February 13, 1889, of the General Land Office, under said act. (8 L. D., 348)

On September 1, 1889, said Fletcher and Welch filed a motion that they be allowed to submit testimony that they were *bona fide* purchasers of said land and had a prior right thereto, and also a protest against the allowance of the final proof of said Brereton.

On September 2, 1889, Brereton submitted his final proof and the hearing was adjourned to September 6, 1889, when he and his witnesses were cross-examined by the protestants, who also put in documentary evidence in support of their rights as above alleged.

On October 31, 1889, the local officers gave their opinion that said protest should be sustained and that Brereton's entry should be canceled. An appeal was taken, and by your letter of October 7, 1890, you reversed said decision. An appeal now brings the case before me.

Both parties claim the land under the fifth section of the act of March 3, 1887, which is as follows:

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

The protestants claim the right to purchase said tract from the United States under the body of said section, as purchasers from said company through intermediate conveyances, while Brereton claims to be entitled to prove up and enter said land under the settlement laws of the United States, under the second proviso to said section.

If Brereton's contention is sustained, and he is found to have initiated a right to the land which is recognized and protected by the terms of said second proviso, then the body of the section has no application to the case, as expressly provided, and the title to the tract derived by the protestants from said railway company is unaffected by the act and therefore invalid, because the company had no title to convey, as already decided. Has then Brereton a right to the land which is protected by said proviso? If he has, it ends the contest.

In the case of the Chicago, St. Paul, Minneapolis and Omaha Ry. Co. (11 L. D., 607, 611), this proviso was construed as follows:

> Said proviso applies only to the case of lands, which at the date of the passage of the act had been 'settled upon' subsequent to December 1, 1882, by parties claiming in good faith a right to enter the same under the settlement laws, in ignorance of the rights or equities of others in the premises.

Brereton tendered his application to make homestead entry on June 15, 1885, and testified at the hearing that he made a personal settlement on the land June 5, 1885, by hauling lumber and brick upon the land and laying a foundation for a house thereon, with the intention of making it his home. These acts were sufficient to give notice to the world that he had "settled upon" the land, with the intention of making it his home under the settlement laws of the United States. Franklin *v.* Murch (10 L. D., 582); Bowman *v.* Davis (12 L. D., 415).

The laying of a foundation for a house was a very appropriate and significant mode of giving notice that he intended to make his home there. He afterwards followed up this initiatory step by making improvements, which at the date of the hearing he estimated to be of the value of $2,200. In 1885 he used the land for grazing purposes. In 1886 he enclosed it with a fence. In March 1887 he built a stable for his cattle. In 1888 he built a house twenty-eight by forty-seven feet, and moved into it on November 19, 1888, and moved his household furniture and family there December 26, 1888, and they have lived there continuously ever since. He further testified that he did not know that any one, other than said railway company, claimed the ownership of this land till July 1889. He had at the date of hearing a barn, a well, a hundred acres in crop, with irrigating ditches, and had been in continuous possession of the land from June 1885.

The protestants purchased the land November 3, 1887, but did not put their deed upon record till July 18, 1888. Prior to the date of their purchase you had decided that this land was excepted from the grant to said railway company, and that Brereton should be allowed to enter it. He had tendered his application for it, had fenced it, and put a foundation of his house upon it; all of which was notice to them of his claim, and his case was then pending before this Department for adjudication. They bought the land subject to litigation, and took the risk of an adverse decision. The equities are strongly on the side of the entryman.

Prior to the passage of the act of March 3, 1887, neither said railway company, nor their assigns, had any title to this land, as it was excepted from said grant. As Brereton initiated his claim to the land in June 1885, prior to the passage of the said act, he was only obliged to follow up his initiatory step by compliance with the homestead law in order to be entitled to prove up and enter said land. It is contended that he did not comply with the law because he failed to reside upon the land while his case was pending for decision, but it is well settled that he was not

bound to reside there after the local officers had rejected his application, until the question whether it would be allowed or not should be finally determined. Goodale *v.* Olney (12 L. D., 324); Rice *v.* Lenzshek (13 L. D., 154).

In a contested case like this the law does not require the entryman, after his application has been rejected, to spend his money and labor for naught, as would be the result if his application should be finally rejected and he had resided upon and improved the land. Brereton did more than enough to show that he claimed the land.

Said proviso specially provides that parties claiming to enter lands under the settlement laws "shall be entitled to prove up and enter as in other like cases." Brereton has shown his good faith by his continuous claim to the land in face of a long litigation, by his tenacious defense of his rights, his continued possession, and his valuable improvements. In my opinion he has sufficienly complied with the law to bring his case within the terms of said proviso, and his final proof should be accepted, and his entry passed to patent.

Your judgment is affirmed.

THROCKMORTON *v.* WORMOUTH.

Motion for the review of departmental decision of October 24, 1891, 13 L. D., 448, denied by Secretary Noble, May 20, 1892.

PRIVATE CLAIM—RE-SURVEY—PATENT.

RANCHO AUSAYMUS.

The Department has no authority to order the re-survey of a patented private claim while the patent therefor is outstanding.

Secretary Noble to the Commissioner of the General Land Office, May 20, 1892.

The appeal of M. Malarine from your decision of February 26, 1890, in the matter of the resurvey of the Rancho Ausaymus Y San Felipe situated in California, brings the case before this Department for consideration.

Said rancho was originally granted by the Mexican authorities in 1836; confirmed by the board of land commissioners for California, July 5, 1853, and by the United States district court, October 10, 1855, which action became final in the absence of an appeal; was surveyed by Deputy Washington in April, 1858, and patented September 18, 1858.

A few months after the survey of the rancho the same deputy run the south boundary of township 10 S., R. 6 E., which practically closed

the public survey on the grant lines where the same coincided; the northeast corner thereof marked F. P. No. 3, on the grant plat being a common corner. In 1877 Deputy Benson surveyed a portion of the boundary of said township and re-established the corner F. P. No. 3 in accordance with the calls of Washington's two surveys. In 1879 Deputy Herrman surveyed township 11 S. R. 6 E., which survey was approved. This survey indicated that those formerly made located the eastern line of the grant too far to the west.

When and how the grant claimant first asserted a right to the strip of about three hundred acres thus found to be east of the eastern line of the grant, as surveyed by Washington, and asserted to belong to it by Herrman, does not clearly appear. But it seems that a protest against such right was made by parties claiming as settlers. Upon an investigation made by your office into the matter, the surveyor general of California was advised, on January 25, 1884, that F. P. No. 3, or the northeast corner of the grant, is properly located by the surveys of Washington and Benson; that F. P. No. 2, or the southeast corner of the grant as located by Washington, is approximately correct, though not exact; that the bearing of the south boundary is incorrect and should be further north; and, it was said, that said corners should be re-established in strict accordance with Washington's original surveys. Subsequently the surveyor general was directed to carry out the expressed views of your office and to cause the lines of the public surveys to be closed upon the grant boundaries, if found expedient. Accordingly a contract was made with F. P. McCray to mark and establish all lines necessary for a resurvey of the east boundary of the rancho and the closing of the public surveys thereon.

Upon the survey and report of McCray, it was found that the northeast corner of the grant as surveyed by Washington, and the same corner as established by him in his township survey were not identical, and therefore that the public surveys could not be closed upon the grant ines in accordance with instructions. Thereupon on February 21, 1888, your office in a letter to the surveyor general held that the rancho survey made by Washington, having been approved and carried into patent "has precedence under the law," and that the large preponderence of evidence indicated that the northeast corner, of F. P. No. 3, is correctly located on said survey, and should be so accepted. Instructions were given to run the line of the east boundary from said point south 5, 57 west, to the southeast corner, or F. P. No. 2, to the intersection of the south boundary of the Rancho; in regard to the correct running of which line instructions are given, which need not be here recited.

With the report of McCray was transmitted a suggestion that a new line be adopted as the eastern boundary of the grant, which would divide nearly equally the strip in controversy. This compromise, it was stated, would be satisfactory to all parties interested; that is, settlers and grant owners. Your office authorized the surveyor general "to en-

ter into negotiations with the parties in interest" as suggested and as he might deem that "the best interests of the government call for under the circumstances," and to report the results to your office.

On May 7, 1889, the surveyor general reported that he had thought it best to have a meeting of all parties in interest, when the matter might be freely discussed; and he notified said parties to attend at his office on February 15, 1889. On the day of meeting only Mr. Malarine and his attorney appeared, it being stated by the former that the other parties had agreed to withdraw all opposition to the line as surveyed by Herrman. An agreement to this effect was filed and also a statement from Malarine asserting his claim to the whole strip, as located by the survey of township 11, made by Herrman; but agreeing to waive said claim and accept a line parallel to the Herrman line, dividing the contested strip in half.

Upon receipt of said letter and papers your office, on February 26, 1890, stated that it had found no reason to justify a change in the conclusions reached as to the correctness of the east line of the grant as fixed by Washington, and that no authority was known by which to change the lines of said survey "upon which patent was issued under the act of Congress."

A motion for review of said decision was filed in behalf of Malarine, which was denied by your office on December 16, 1890, whereupon the appeal was taken which is now being considered.

The specifications of error are seven in number.

The first alleges error in holding that the eastern boundary of the grant was properly located by the patent survey instead of accepting of line of Herman as the true one:

Second. Error in rejecting the compromise line assented to by both parties, under the sanction of the authority conferred on the surveyor general:

Third. That after having encouraged the parties to believe that a compromise line would be accepted it was unjust and inequitable to reject the same.

Fourth: Because the effect is to withhold from the grant claimant the area called for in his patent.

Fifth. Because the east line of the grant as patented was accepted prior to the objections filed by the settlers, which objections have not been withdrawn.

The answer to the first specification of error is that the lands within the grant as surveyed by Washington, having been patented by the United States, this Department no longer has jurisdiction over the same, and consequently has no authority so long as said patent is outstanding, to change the survey on which the same is based.

The second and third specifications relate to the rejection of the compromise after the same was authorized. It is sufficient answer to say that the record does not show that your office authorized any compro-

mise; but shows that it merely empowered the surveyor general to "enter into negotiations" as suggested, and to report the result to your office; and that upon the receipt of the report of the proposed compromise it was promptly rejected.

To the fourth specification of error the answer is complete when it is said that your decision does not, and cannot, withhold from the grant owner any lands called for by his patent, for the all sufficient reason, before stated, that title to the same has passed out of the United States and this Department has no jurisdiction or control over the same.

The fifth specification is not very clearly expressed. It seems to charge error on the part of your office in not dismissing the objections filed by the settlers to the east boundary of the grant, as theretofore accepted by your office and patented. From the record before me I fail to learn that such objections have been filed. As I understand the case, the protest or objections of the settlers were in opposition to the attempted establishment of the new or Herrman line as the eastern boundary of the grant, instead of the patented line. Against this attempt the settlers on what were supposed to be public lands, did protest, as they had a right to do, and their protest was properly received. No reason is now seen why said protest should not remain on your records. If, however, the protest is against the east line of the grant as patented, it would be utterly futile, as the Department cannot under present circumstances, for the reasons before stated, interfere with or change those lines, and the protest cannot prejudice the rights of the grant claimants, if retained by you.

On a full consideration of the matters presented by the record, I find no reason which will justify the reversal of your judgment. The same is hereby affirmed.

ENTRIES OF PUBLIC LAND FOR PARK AND CEMETERY PURPOSES.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 23, 1892.

Registers and Receivers, United States Land Offices.

GENTLEMEN: The act of Congress entitled "An act to authorize entry of public lands by incorporated cities and towns for cemetery and park purposes," approved September 30, 1890 (26 Stat., 502), provides—

That incorporated cities and towns shall have the right, under rules and regulations prescribed by the Secretary of the Interior, to purchase for cemetery and park purposes not exceeding one-quarter section of public lands not reserved for public use, such lands to be within three miles of such cities or towns: *Provided,* That when such city or town is situated within a mining district, the land proposed to be taken under this act shall be considered as mineral lands, and patent to such land

shall not authorize such city or town to extract mineral therefrom, but all such mineral shall be reserved to the United States, and such reservation shall be entered in such patent.

Pursuant to the foregoing, I have prepared the following rules and regulations for your observance and guidance, to wit:

1. The right of entry under said act is restricted to *incorporated* cities and towns, and such cities and towns shall be allowed to make but one entry of contiguous tracts of unreserved and unappropriated public land, not exceeding a quarter-section in area, all of which must lie within three miles of the corporate limits of the city or town for which the entry is made.

2. If the public surveys have not been extended over the land sought by any city or town under the provisions of said act, it shall first be necessary for the proper corporate authority to apply to the surveyor-general of the district in which the tract in question is located, for a special survey of the outboundaries of such tract. The application should describe the character of the land sought to be surveyed and, as accurately as possible, its area and geographical location. Tracts covered by such special surveys must be as nearly as practicable in square form, and entries of the same will not be allowed until after the surveys shall have been approved by the surveyor-general and accepted by the Commissioner of the General Land Office. The current appropriation for "surveying the public lands" being applicable to the survey of "lines of reservations," as well as to the extension of the ordinary lines of the system of public-land surveys, the cost of the surveys of all unsurveyed lands selected under the provisions of said act of September 30, 1890, will be paid for out of said appropriation, the same as the special surveys of the outboundaries of town sites and for like reasons (see case of Fort Pierre, 18 C. L. O., 117), and the deputies employed by the surveyor-general to execute such special surveys will report whether the land is either mineral in character or within an organized mining district.

3. An entry for the purposes indicated herein can only be made by the mayor of an incorporated city or town, or, if in any instance there be no such officer, then the entry may be made by the board of town trustees. And in all cases such entries will be made and patents issued to the corporate authorities of the towns taking advantage of the provisions of said act, in trust for the use of such town, for the specific purpose or purposes mentioned therein, as the case may be.

4. The land must be paid for at the government price per acre, after proof has been furnished satisfactorily showing—

First. Six weeks' publication of notice of intention to make entry, in the same manner as in homestead and other cases.

Second. The official character and authority of the officer or officers making the entry.

Third. A certificate of the officer having custody of the record of in-

corporation, setting forth the fact and date of incorporation of the city or town for which entry is to be made, and the extent and location of its corporate limits.

Fourth. The testimony of the applicant and two published witnesses to the effect that the land applied for is vacant and unappropriated by any other party, and as to whether the same is either mineral in character or located within an organized mining district.

Fifth. In case the land applied for is described by metes and bounds as established by a special survey of the same, that the applicant and two of the published witnesses have testified from personal knowledge obtained by observation and measurements, that the land to be entered is wholly within three miles of the corporate limits of the city or town for which entry is to be made.

5. Entries under this act will receive the current number of the cash series of entries, and, in all cases, the cash certificate (Form No. 4–189.) should contain the full name of the entryman or of each member of the board of entrymen, with the official designation as the case may be, and the last clause thereof should be modified so as to guarantee to the entryman or board of entrymen a patent in this wise:

Now, therefore, be it known, that on presentation of this certificate to the COMMISSIONER OF THE GENERAL LAND OFFICE, the said ——— ———, Mayor of ———, ——— (or ———, ——— and ———,Board of Trustees of———, ———, or other qualified corporate authorities, as the case may be), shall be entitled to receive a patent for the tract above described, in trust for the use of the occupants of ——, ——, for park and cemetery purposes (or either purpose as the case may be), as authorized by the act entitled "An act to authorize entry of public lands by incorporated cities and towns for cemetery and park purposes," approved September 30, 1890 (26 Stat., 502).

6. If any land covered by a cash certificate issued under the foregoing provisions, is either mineral in character or within an organized mining district, the above-indicated modification of the last clause of such certificate shall be enlarged by adding to the close thereof the following exception, to wit:

Provided, That no title shall be hereby acquired to any mineral deposits within the limits of the above-described tract of land, all such deposits therein being reserved as the property of the United States.

Very respectfully,

THOS. H. CARTER,
Commissioner.

Approved, May 23, 1892:
JOHN W. NOBLE,
Secretary.

MINING CLAIM—PUBLICATION OF NOTICE—EQUITABLE ACTION.

ALABAMA QUARTZ MINE.

Where the published notice of application is not sufficiently explicit in the matter of description, but the posted notice is in due form, the defect may be cured by equitable action in the absence of protest or adverse claim.

The case of Hoffman *et al. v.* Venard *et. al.* cited and distinguished.

Secretary Noble to the Commissioner of the General Land Office, May 23, 1892.

I have considered the appeal of the Waterloo and Oro Grande Mining Companies, applicants for patent for the Alabama Quartz mine, from your decision, dated August 10, 1891, requiring claimants to republish, under direction of the register, a supplemental notice of their appplication for patent for the period required by law, because the plat and field notes describe said claim as connected with the corner to sections, 22, 23, 26, and 27, T. 10 N., R. 1 E., S. B. M., Los Angeles, California, by a line bearing south, 13 degrees, 27 minutes, west 105.59 chains from corner No. 4, and the published notice of application for patent describes the claim as connected with the corner common to said sections by a line bearing south 18 degrees, 27 minutes, west 105.59 chains from said corner No. 4.

The appellant alleges error in not holding that said notice was sufficient to place parties on their guard who have adverse interests.

It appears that the notice of the intention to apply for patent and a diagram were duly posted on said claim and no adverse claim was filed, and I can see no good reason why said entry should not be sent to the board of equitable adjudication for its consideration under the rulings of the Department in the cases of New York Lode and Mill Site Claim, 5 L. D., 513, Newport Lode, 6 L. D., 546, Buena Vista Lode id., 646, Mimbres Mining Company, 8 L. D., 457, Nil Desperandum Placer, 10 L. D., 198, Silver King Quartz Mine, 11 L. D., 234, Oro Placer Claim id., 457.

In the case of Hoffman *et al. v.* Venard *et al.* (14 L. D., 45), the Department held (syllabus) "An application for a mineral patent cannot be allowed, where the description of the claim in the published notice of application is not in accordance with the field notes of survey." But in that case the discrepancy was much more marked than in the case at bar, and there were protestants who had been allowed to appeal from the decision of your office dismissing their protest against the issuing of patent to said claimants for the Sanders Lode Claim. It certainly was not intended in said case to overrule the former settled rulings of the Department relative to the incomplete description in the application for patent in the absence of protest or adverse claimants.

The decision of your office is accordingly modified and you will transmit said entry for the consideration of the board of equitable adjudication.

SECOND TIMBER CULTURE ENTRY—APPLICATION.

L. A. DORRINGTON.

A second timber culture entry may not be made by one who relinquishes the first because it does not cover the land selected, and fails to show that the alleged error can not be corrected.

The right to make a second timber culture entry will not be considered in the absence of an application to enter in due form of law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 18, 1892.

L. A. Dorrington has appealed from your decision of April 2, 1891, rejecting his application to make a second timber-culture entry, in place of that made by him on June 1, 1885, for the S. ½ of the NW. ¼ and the N. ½ of the SW. ¼ of Sec. 26, T. 31, R. 49, Valentine land district, Nebraska.

He makes affidavit that upon selecting the tract he desired to enter, he attempted to obtain a correct description of the same. The corners were not marked by stakes or stones—the stakes originally put up at the corners having been destroyed by prairie fires. The country was new, and the settlers few, and he was compelled to rely upon the information those few settlers could give. About three months after the entry, and as soon as he could do so, he procured a survey to be made, which showed that the tract which he had selected had been erroneously described, and that the description furnished him applied to a tract a mile distant from the one which he had selected. Moreover, the description applied to a tract in a section containing considerable young pine timber, by reason of which it was not subject to entry under the timber-culture act. He therefore relinquished the same to the government, and asks to be allowed either to amend his entry or to make a second entry.

Although he states that the S. ½ of the NW. ¼ of Sec. 26 was the *incorrect* description of the tract he desired to enter, he does not state its *correct* description. And while he has relinquished the tract which he had not selected yet he does not state what has become of the tract he selected, nor does he show that anything has prevented him from having the error in the description corrected. The tract he asks to be permitted to enter—i. e., the S. ½ of the SE. ¼ and the S. ½ of the SW. ¼ of Sec. 4, T. 28 N., R. 41 W.—is manifestly not the one he originally intended to enter, for it is between forty-five and fifty miles distant from the one described in his receiver's receipt. In short, he appears to have abandoned *both tracts*—the one described in his entry-papers, which he had not selected, and the one a mile from the preceding, which he had selected but that was not described in his entry. His application can not be considered as one to amend his entry, because he does not ask for the tract he claims to have originally intended to enter;

and he does not make such a showing as would warrant the Department in permitting him to make a second entry. Moreover, while he mentions a certain tract as being the one which he now desires to enter, this is not equivalent to an application, "in due form of law," for the same (W. H. Miller, 7 L. D., 254).

Your decision rejecting the application is affirmed.

DESERT LAND ENTRY—ACT OF MARCH 3, 1891.

INSTRUCTIONS.*

The limitation, in section 8 of the desert land act as amended by the statute of March 3, 1891, of the right to make desert entry to resident citizens of the State or Territory in which the land is situated, requires that the applicant should make the requisite showing in this respect both at the date of filing the declaratory statement and at the date of final proof.

Acting Secretary Chandler to the Commissioner of the General Land Office, April 27, 1891.

By letter of April 4, 1891, you re-transmitted the draft of a proposed circular of instruction in relation to the provisions of sections 1 to 6 inclusive, of the act of March 3, 1891, (26 Stat., 1095) entitled "An act to repeal timber culture laws and for other purposes." Upon examination, I find the changes suggested by departmental letter of March 31, 1891, have been made, both in the circular and in the blank forms accompanying it, except, as mentioned in your letter of transmittal, the change suggested in the form of the deposition of the applicant in the matter of final proof in desert land claims, to make it contain an interrogatory as to his citizenship.

In explanation of this, you say that the inhibition in section 8, of the desert land act as amended, contained in these words: "no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located" applies to the allowing of entry and not to the making of final proof. This construction would be equivalent to saying that a claim under this law initiated by a resident might be completed by a non-resident. This would offer a great incentive to non-residents to procure the filing of claims by residents for the very purpose of evading the restrictions evidently attempted to be imposed by the words quoted above, and I do not think a construction that would bring about this condition ought to be adopted unless the language used precludes any other conclusion. That condition does not obtain here. Parties seeking to obtain title under the provisions of this act must show this required qualification at the date of the final proof as well as at the filing of the declaration.

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* See 12 L. D., 405.

I have caused to be added immediately after the word "born" in question 2 of the deposition of applicant in desert land final proof, the words "and where do you now reside."

The circular as now submitted, and the forms accompanying it, amended in the particular here indicated, seem sufficent and proper to carry out the aims of the statute, and are herewith returned with my approval.

RAILROAD RIGHT OF WAY—GRAVEL BED—CONSTRUCTION.

GREAT NORTHERN RY. CO.*

The use of material under the general right of way act of March 3, 1875, and the special act of February 15, 1887, is limited to construction, and does not include the repair or improvement of a railroad. The period of original construction ceases when the road is open to the public for general use.

Assistant Attorney General Shields to the Secretary of the Interior, May 13, 1892.

I have the honor to acknowledge the receipt by reference by the First Assistant Secretary, of the papers in the matter of the application of the Great Northern Railway Company for appraisal of certain gravel beds in the Fort Peck Indian reservation which it desires to appropriate under the provisions of the act of February 15, 1887 (24 Stat., 402) granting the right of way through the Indian reservations in northern Montana and north-western Dakota, with a request for my opinion upon the question presented. Sections three and four of said act, which define the rights given said company and under which the present application is made, read as follows:

That the right of way hereby granted to said company shall be seventy-five feet in width on each side of the central line of said railroad as aforesaid; and said company shall also have the right to take from said lands adjacent to the line of said road material, stone, earth, and timber necessary for the construction of said railroad; also ground adjacent to said right of way for station-buildings, depots, machine-shops, sidetracks, turnouts, and water-stations, not to exceed in amount three hundred feet in width and three thousand feet in length for each station, to the extent of one station for each ten miles of its road.

That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid the Indians for such right of way, and provide the time and manner for the payment thereof, and also to ascertain and fix the amount of compensation to be made individual members of the tribe for damages sustained by them by reason of the construction of said road; but no right of any kind shall vest in said railway company in or to any part of the right of way herein provided for until plats thereof, made upon actual survey for the definite location of such railroad, and including the points for station-buildings, depots, machine-shops, sidetracks, turnouts, and water-stations, shall be filed with and approved by the Secretary of the Interior, and until the compensation aforesaid has been fixed and paid;

*This opinion was adopted by the Secretary of the Interior, May 17, 1892.

and the surveys construction and operation of such railroad shall be conducted with due regard for the rights of the Indians, and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision.

It is further provided in section six as follows:

That the right granted herein shall be lost and forfeited by said company unless the road is constructed and in running order within two years from the passage of this act.

In the application filed, it is said:

An essential step for the complete construction of every railroad, and particularly for the complete construction of any railroad running over the soft and spongy earth found in the valleys of Western Dakota and Northern Montana is the ballasting of the same with gravel, or other similar porous material. This step in construction must follow track-laying and the commencement of operation of the railway, as gravel is usually found deposited in beds at considerable intervals apart, sometimes amounting to many miles, and must consequently be moved by train.

The provisions of the act under consideration as to the right of the company to take from the public land material for the construction of the road is the same as that found in the right of way act of March 3, 1875 (18 Stat., 485). Paragraph one of the circular of instructions issued under said general act on August 25, 1885 (4 L. D., 150) and now in force reads as follows:

1. Such provisions refer exclusively to roads in the process of construction. No public timber or material is permitted to be taken or used for the repair or improvement of a road after its original completion. The right to take such timber or material ceases when the road is open to the public for general use.

This rule should be observed in considering the claim of this company under the special act in question. The application does not state when that portion of the road upon which it is desired to use the material in question was put in operation by being opened to the public for general use, nor does it state definitely upon what part of the road it is desired to use this material, whether within or outside the boundaries of the reservation. In his report upon this application, the Commissioner of Indian Affairs makes the following statement:

The map of definite location of the right of way of said road over and across the Fort Peck Indian reservation in Montana was approved by the Honorable Acting Secretary of the Interior May 26, 1887, and the road has long since been completed and in operation to Great Falls in western Montana.

I think it clear from this statement and the whole tenor of the application that the road has been built and put in operation past this reservation. It is, as remarked by the Commissioner of Indian Affairs, not always an easy matter to determine just when the work of construction ends. The work of construction in the sense of making the road bed more perfect and the whole line more complete may be said to have no end. The oldest lines may still be making and carrying into execution plans for a more perfect road bed. For the purposes of these laws some point must be fixed as the end of the work of construction. The Department has fixed this at that point where the road is

thrown open to the public for general use. This determination seems a logical and just one, and I find no good reason for departing from it in this instance. There is force in the suggestion of the Commissioner of Indian Affairs that the provision of section six of this act quoted above is of assistance in determining the right of the company in this act. If this road is now "constructed and in running order" so that the rights conferred by said act are not subject to forfeiture under said section six, it must be held to be constructed in the sense of that term as used in section three. The company itself would be the last to admit that it is so in default in the matter of construction as to leave its rights under said act subject to forfeiture as to that portion of its line over which it is running its trains and transacting the business of the public. It cannot be heard to assert the construction of its road under one section of this act to avoid a forfeiture thereunder and at the same time the non-construction thereof under another section for the purpose of securing further benefits thereunder. For the reasons therein set forth, I am of the opinion, and so advise you, that there is no authority in said act of Congress for granting the application in question.

HOMESTEAD ENTRY—ALIEN—NATURALIZATION.

PHILLIPS *v.* SERO.

The right of an alien homesteader who submits proof and receives his final certificate relates back to the date of his settlement, where, prior to the intervention of any adverse claim, he is subsequently naturalized.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 23, 1892.

On January 15, 1877, Joseph Sero made homestead entry No. 96, under the provisions of the act of June 8, 1872 (section 2304 Revised Statutes), for the W. ½ of the NW. ¼ and the NE. ¼ of the NW. ¼ of the NE. ¼, Sec. 8, T. 2 N., R. 12 E., The Dalles, Oregon.

He submitted final proof May 23, 1882, and on the same day final certificate No. 281 was issued.

It appears that he enlisted in Company "D," 1st Regiment, Oregon Infantry Volunteers, on November 23, 1864, and was honorably discharged therefrom on the 16th day of January, 1866, having thus served about fourteen months.

It further appears that he was not a citizen of the United States at the date when final certificate was issued (May 23, 1882). He first declared his intention to become a citizen on October 10, 1883, and on September 8, 1884, he was naturalized, as evidenced by a certified copy of the order filed with the papers and affidavits, as to the identity of the Sero so naturalized as being the same person who made said entry. On or about May 1, 1888, he sold the land to the three brothers, Charles J., Edwin U., and Robert E. Phillips. A part of the purchase price

was paid, and notes, amounting to $800, were given for the residue secured by a mortgage on the land. On November 30, 1888, Sero sold the mortgage to one John Baldwin, and soon thereafter died.

In June, 1890, the notes given for the deferred payments fell due, and the Phillips brothers undertook to borrow money to pay off the notes, offering as security a mortgage on the land. It appears that they failed in negotiating the loan upon the security offered, because no patent had been issued for the tract, and, on their failure to pay the notes, then amounting to $1000, Baldwin, the holder of the mortgage, began foreclosure proceedings.

The value of the land and improvements thereon are estimated at $4000.

On March 15, 1890, William O. Phillips filed his affidavit of contest against the entry, corroborated by R. Emmet Phillips (presumably Robert E., one of said brothers), asking for a hearing, with a view to the cancellation of said entry, on the grounds above set forth—namely: that at the time the entry was made, the said Sero was not a citizen of the United States, and that the same was fraudulent and in violation of the homestead laws, etc.

On April 24, 1890, you denied the application to contest, "the charges not being deemed sufficient to warrant an investigation of said entry."

Phillips has appealed from that judgment.

Under the facts above given, Sero might have become a citizen of the United States under section 2166 of the Revised Statutes, "without any previous declaration of his intention to become such."

While his proof was made when he was an alien, yet the defect of alienage was cured by his becoming a citizen before any adverse claim or contest was initiated, and in such cases the Department has ruled that the right of the claimant relates back to the date of his settlement. Kelly *v.* Quast, 2 L. D., 627; Mann *v.* Huk, 3 L. D., 452; Ole O. Krogstad, 4 L. D., 564; Jacob H. Edens, 7 L. D., 229; Paulus Kundert, *id.*, 362; Rougeot *v.* Weir, 13 L. D., 242; Lyman *v.* Elling, 10 L. D., 474.

The decision appealed from is accordingly affirmed;

HOMESTEAD ENTRY—PAYMENT FOR EXCESS.

JAMES L. KENNEDY.

A timber culture entryman who pays cash for an excess in acreage and subsequently relinquishes his entry and applies for the land under the settlement laws is not entitled to credit for the payment made under the former entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 26, 1892.

The land involved in this appeal is the E. ½ of NW. ¼ and lots 1 and 2, of Sec. 18, T. 135 N., R. 74 W., (containing 166.76 acres) in Bismark, North Dakota, land district.

The record shows that James L. Kennedy made timber culture entry on said tract in May, 1884, and paid $16.90 for the excess over 160 acres. In May, 1888, he relinquished the same and filed his pre-emption declaratory statement for the land in question, alleging settlement April 10, 1888, and on October 9, 1890, applied to transmute his pre-emption filing to a homestead entry, under Sec. 2, of the act of March 2, 1889. The local officers rejected this application "for the reason of an excess of 6.76 acres, which applicant refuses to pay."

Kennedy appealed, and you by letter of December 5, 1890, affirmed their decision, whereupon he prosecutes this appeal, assigning as error that you have misconstrued the law and rulings relative to excess.

Counsel for appellant argues that inasmuch as his client paid the excess under his timber-culture entry, he should not be required to pay it again for his homestead entry. This position is not tenable. He voluntarily relinquished to the government the land under the timber-culture entry. His subsequent entry bears no relation whatever to the former, no more than if he were a stranger to the land, or than if he had sought to take another tract. In other words, when the government again became vested with the title to the tract, it was subject to the entry under the law and regulations by the first qualified applicant, regardless of what may have been done by the former entryman.

Your judgment is therefore affirmed.

HOMESTEAD ENTRY—DIVORCED WOMAN—JUDGMENT.

LEONARD *v.* GOODWIN.

In determining the rights of third parties, set up as against the homestead entry of a divorced woman, it is competent for the Department to inquire into the good faith of the divorce proceedings.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 28, 1892.

The land involved in this appeal is the SW. ¼ of Sec. 30, T. 96 N., R. 66 W., Yankton, South Dakota, land district, formally in the limits of the Ft. Randall military reservation.

The record in this case shows that Martha Goodwin made homestead entry for said tract September 9, 1885, under section 2289 (R. S., 419), and the act of July 5, 1884 (23 Stat., 103), alleging settlement April 17, 1883. On August 27, 1886, she submitted final commutation proof which was accepted and cash entry made September 7, following.

Much of the subsequent history of the case is immaterial and for the sake of brevity, will be omitted. Suffice it to say, that the final proof shows that the applicant had been divorced from her husband on the ground of desertion, and by letter of October 25, 1886, you required proof of this to be furnished, and also required Amy H. Leonard, to file

formal charges, if she desired to contest the entry, within sixty days. Accordingly, Leonard on January 12, 1887, filed an affidavit of herself and two corroborated witnesses, including twenty pages of manuscript, the substance of which is that she settled on and claimed the W. ½ of the SW. ¼ of said described land (and others) September 14, 1883; that the claimant Goodwin, was not a qualified homestead entryman for the reason that the divorce proceeding was fraudulent and collusive between the claimant and her husband; that the object and purpose of said divorce proceeding was simply to permit the claimant to secure said land, because the husband had exhausted all his rights under the land laws.

On May 3, 1887, the contestant presented her homestead application for the W. ½ of the NW. ¼ and W. ½ of the SW. ¼, said section, township, and range, which was refused for partial conflict with the defendant's cash entry.

By letter of February 21, 1887, you ordered a hearing, which was had before the local officers, and as a result they held that the claimant was not qualified to make said entry. On appeal, you by letter of May 29, 1889, reversed that decision. A motion for a rehearing was made on the ground of newly discovered evidence. By letter of August 8, 1889, said motion was denied, but on your own motion, on September 6, following, you ordered a new hearing "to determine contestant's charge of disqualification and fraud of contestee." After several delays, hearing was finally had before the local officers, and as a result thereof they held that there was no evidence of fraud on the part of the claimant and recommended that her entry be allowed to stand. Contestant appealed, and you, by letter of April 25, 1891, affirmed their decision, whereupon contestant prosecutes this appeal, assigning as error your action in not finding that the divorce was procured through fraud and collusion between husband and wife, and was a mere sham to enable the wife to enter the land as a *feme sole*.

It is a well settled principle of law that the judgment of a court of competent jurisdiction is conclusive between the parties and can not be attacked collaterally or by a stranger to the record, yet, I take it, where the rights of third parties are imperilled and it is shown that by fraud and collusion a decree of divorce is obtained and by reason thereof the wife is enabled to do, as a *feme sole*, that which her husband or herself could not do while the marital relation existed, the Department may inquire into the *bona fides* of the judgment, and if it is found that for the purpose of acquiring title to public lands, it was procured by fraud and collusion, the entry may be canceled. It is only on this theory that this divorce proceeding will be considered.

The testimony shows that James Goodwin, with his wife, the claimant, and five children, settled on the land in controversy in April, 1883; that in February, 1885, James left his family for a short time, went away again in June, and remained away permanently; that on March 10,

1886, claimant filed her complaint asking for a divorce from her husband on the grounds of desertion on February 10, 1885, and failure to support herself and children; asked for the custody of the three youngest children, and for the possession of all the personal property alleging that the same was bought with her own money and by the minor children. On June 23rd following, the defendant being in default, the district court granted the divorce as prayed for.

Fraud is rarely susceptible of direct proof and courts must rely largely upon circumstances that are inconsistent with fair dealings, honesty, and the ordinary conduct of individuals in the transaction under consideration, to arrive at a conclusion, and every case must be governed by the facts surrounding that particular case. I take it, however, that to annul the effect of a judgment properly rendered on the ground of fraud, the evidence must be of such a positive nature as to carry conviction with it.

The circumstances relied upon by the contestant in this case are, in my opinion, wholly insufficient to establish the truth of the charges.

I think it will be conceded that the evidence shows that the husband, James, had exhausted all his rights under the land laws prior to his settlement on this land; that after he abandoned his family, both prior and subsequent to the judgment in the divorce proceeding, he was at the house of his wife on several occasions; that he stayed over night a few times, in the house, occupying the room of his oldest sons, sleeping with one of them; that he lived in the neighborhood at various places, working for different parties, sometimes for his son on the farm, receiving pay therefor the same as any other hired help; that he was at the house frequently, was seen to be holding one of the younger children. These are all the circumstances relied upon by the contestant to defeat this entry. She does not show that he exercised any right of ownership or superintendency in any manner, directly or indirectly, over the management of the farm or the stock; that he contributed anything whatever, after the time he left his family finally, to their support; that there was any intention on the part of either the husband or wife to ever assume again the marital relations or any admission on the part of either, prior or subsequent to their separation, that it was done for the purpose of allowing this entry to be made.

On the contrary, it is shown by claimant that during the twenty years or more that she had lived with her husband, he had dragged herself and little family over five or six different states and territories of the West, and that they never had any permanent abiding place; that he had been a drunkard, profligate in his habits, spending the money that she earned by washing and other labor outside of her family duties, and money she had inherited from her relatives. In addition to this it is shown that he was a man of violent temper, often abusing his children, and that the evening prior to his final departure from his home, he had a violent fight with his oldest sons.

The claimant swears positively that this divorce was procured in good faith, without any intention of ever assuming the marital relations again; that she has taken this land for the purpose of making a home for herself and children, and all the testimony goes to show that, so far as her improvements and the industry of herself and children are concerned, she has carried out this intention with the utmost good faith. Under such circumstances I do not feel justified in disturbing the opinion of the register and receiver concurred in by you. Believing your judgment is right, it is, therefore, affirmed.

SWIMS *v.* WARD.

Motion for review of departmental decision of December 16, 1891, 13 L. D., 686, denied by Secretary Noble, May 28, 1892.

SOLDIER'S ADDITIONAL HOMESTEAD—SECTION 7, ACT OF MARCH 3, 1891.

JESSE W. FINCH ET AL.

An entry is confirmed by section 7, act of March 3, 1891, where at the date of said act the land is held by a transferee, who is entitled to confirmation, and is subsequently purchased by another in good faith.

Secretary Noble to the Commissioner of the General Land Office, May 28, 1892.

On December 5, 1878, soldier's additional homestead entry No. 263 was made at Colfax, in the name of Jesse W. Finch for the S. ½ of the SE. ¼ of Sec. 4, T. 16 N., R. 43 E., Walla Walla, Washington.

On May 27, 1885, you held the entry for cancellation because based on service in the Missouri Home Guards. It seems that notice of said decision was not properly given, or rather there is no evidence that it was given to the entryman at all.

On May 11, 1891, you again held the entry for cancellation, and the case is now brought here on appeal, and a motion has been made, asking that the case be considered and passed to patent, under the provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095), being as follows:

All entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry to bona fide purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or incumbrance.

The abstract of title, filed with the record, shows that on December 6, 1878, Jesse W. Finch and wife sold and conveyed the tract to A. A. J. Frye for $277.00, and on August 21, 1882, Frye sold and conveyed the same to James Bleecker for $850, and on March 18, 1891, he sold and conveyed the same to the present holder, H. S. Hollingsworth, together with other land for $5200.

The final entry in question was made on December 5, 1878, the tract was thereafter, and before March 1, 1888, sold for a valuable consideration to A. A. J. Frye, and by reason of mesne conveyances it is now owned by Hollingsworth, who asks for confirmation. He is not shown to have had any knowledge of any fraud, if there was any in connection with the making of said entry. No adverse claim originating prior to final entry exists.

At the date of the passage of the confirmatory act of March 3, 1891 (supra), the land was held by James Bleecker, under his purchase made on August 21, 1882.

There seems to be no question as to the *bona fide* character of said purchase, and Hollingsworth, the present holder of the land, is entitled to claim any benefits that might have been accorded Bleecker under said act, there being nothing to indicate that his purchase was otherwise than in good faith.

In Bleecker all the conditions of the act are met, and the entry is confirmed.

The abstract of title is brought up to January 6, 1892, and on the same date Hollingsworth made affidavit to the fact that he was still the owner of the land, and that he had not transferred it to the entryman or any other person.

Your decision holding the entry for cancellation is reversed, and the papers are herewith returned, and you are directed to issue patent upon the entry involved.

DECISION OF THE GENERAL LAND OFFICE—JURISDICTION.

PURCELL *v.* NORTHERN PACIFIC R. R. CO.

After the expiration of the time allowed for appeal from a decision in a case it is too late for the Commissioner of the General Land Office to take action therein on his own motion, as the case is then removed from his jurisdiction, and further action can only be taken by the Department in the exercise of its supervisory authority.

Secretary Noble to the Commissioner of the General Land Office, May 28, 1892.

With letter of January 15, 1892, you forwarded a petition for a writ of certiorari, filed on behalf of W. E. Purcell, in the matter of his contest with the Northern Pacific Railroad Company, involving his right

to make entry of the NE. ¼ of Sec. 11, T. 132 N., R. 48 W., Fargo land district, North Dakota.

Said tract is within the indemnity limits of the grant for said company, and was included in the list of selections filed by said company May 19, 1883.

On July 17, 1885, Purcell applied to enter this tract, and the local officers rejected the same for conflict with the indemnity selection of May 19, 1883.

His appeal was considered in your letter of March 14, 1888, in which it is stated:

> The list of selection shows that the tract described was selected in lieu of land in section 29, town 49 N., range 17 W., Minn., said section being included in the Fond du Lac Indian reservation. The Department has already decided that the company has no right to select lands in Dakota for lands lost in an adjoining state or territory, and this question is now before the Hon. Attorney General for his opinion. Apart from the above decision, however, it may be asked "Is the company entitled to indemnity for lands lost by reservations created prior to July 2, 1864? The joint resolution of May 31, 1870, limits the right to receive lieu lands to losses sustained within the granted limits, by reason of sales, reservations, etc., between July 2, 1864, and the final location of the lines of road. The language is "subsequent to the passage of the act of July 2, 1864." The Fond du Lac Indian reservation was set apart and reserved for the Indians by treaty of September 30, 1854, it was in reservation at and during the period above mentioned, and none of the odd sections therein fall within the category of lands for which indemnity can be allowed. I therefore reverse your decision, hold the homestead entry of Purcell for allowance, and the company's selection for rejection, subject to appeal within sixty days.

On April 17, 1888, the resident attorney for the company asked that final action upon the case be suspended, awaiting the opinion of the Attorney General on the question as to the right of the company to select lands in one State for losses in another.

October 13, 1888, the request for suspension was granted, and the local officers advised.

No further action appears to have been taken until January 17, 1891, when you advised the local officers that the decision of March 14, 1888, "is accordingly relieved from suspension, and you will at once proceed to give it effect, allowing the usual sixty days for appeal."

February 3, 1891, the following telegram was sent the local officers:

> Take no action under office letter of January 17, 1891, in matter of application by W. E. Purcell to enter northeast quarter of section 11, township 132 north, range 48 west, until further advised.

Purcell then moved that the case be relieved from suspension, and on December 12, 1891, you dismissed the motion and adhered to the position as expressed in the telegram. Thus the case remains suspended.

The object of the present petition is to relieve the case from suspension and to carry into effect your decision of March 14, 1888.

Under the rules of practice, an appeal from your decision must be filed within sixty days from the date of the service of the notice of such decision, otherwise the same will become final. After notice has

been given of your decision, the time will continue to run, unless stopped by the filing of a motion, or by your action *sua sponte.*

In case there is a motion filed for the review of, or recommendation of, your decision, the time within which an appeal must be filed will be stopped from running, until notice is given of your decision upon such motion.

After the expiration of the time allowed for appeal, it is then too late for action *sua sponte*, and that case is as far removed from your jurisdiction as though an appeal had been filed. Further action can only be taken by this Department under the exercise of its supervisory authority.

In the present case, your predecessor in office rendered a decision, dated March 14, 1888, adjudging the company's selection invalid, and holding Purcell's application for allowance. The company might have sought a review of that decision, in accordance with the rules governing the practice before your office and this Department, or it could have appealed within the time allowed for that purpose. It failed to take advantage of either of these remedies, but in a letter addressed to your office stated that it believed that your office decision was inadvertently made, and asked that it be suspended.

This can in no wise be considered as a motion for review, as it comes too late, and no notice thereof was ever given Purcell.

The company waived its legal remedies and rested its case upon its request for suspension, a matter resting in the discretion of the Commissioner.

This discretion was not exercised until October 13, 1888, seven months after decision had been rendered and long after the time for appeal had expired.

I am clearly of the opinion that the suspension was made without authority, and that it should not longer be continued.

L. D. 64

Dec 19

CHIPPEWA SCRIP—ASSIGNMENT—CONTEST.

HYDE ET AL. *v.* WARREN ET AL.

(15 L. D. 415)

The right to select eighty acres of land conferred upon the mixed bloods of the Chippewas by the seventh clause of section 2 of the treaty of September 30, 1854, is personal and not assignable; and any attempt of the Indian to sell, or of any person to purchase the certificate of such right, or to acquire any right thereunder by means of two powers of attorney, one to locate and the other to sell the land after location, is without authority of law.

The subsequent ratification of acts performed under a double power of attorney, executed for the purpose of effecting a transfer of the Indian's right of selection, does not operate to give validity to a location and sale made thereunder.

A contest may be properly entertained to determine the validity of a scrip or certificate location.

Secretary Noble to the Commissioner of the General Land Office, May 31, 1892.

By your letter dated May 10, 1890, are transmitted the papers in the

case of Thomas W. Hyde, *et al. v.* James H. Warren, on the appeal of the former from the decision of your office dated October 16, 1889, sustaining the latter's location, allowed by the local office on October 15, 1885, R. R. No. 79, of lot 7, and the NE ¼ of SW ¼ of section 30, T. 63 N., R. 11 W., 4th P. M., Duluth, Minnesota, under the provision of the seventh clause of article two of the treaty of September 30, 1854 (not 1885 as stated in said decision), with the Chippewa Indians (10 Stat., 1110), and overruling the several applications to contest said location and enter the land covered thereby.

The record shows that one Joseph H. Chandler on February 23, 1889, applied to locate Valentine scrip No. 51 E, 40 A, on said NE ¼ of the SW ¼, and on March 23 following, one Jesse G. Barrick applied, by his attorney in fact, to make soldiers additional homestead entry of said lot 7, and also of lot 8 in the same section, and that both applications were rejected by the local officers for conflict with Warren's said location; that from said rejection said parties duly appealed to you; that on May 23, 1889, counsel for said Chandler and Barrick filed with you affidavits of contest against said Chippewa location, and on June 14th of same year other affidavits of contest were filed in the local office against Warren's said location upon substantially the same grounds as those filed with you; that on March 11, 1889, prior to the filing of said affidavits in the local office, one Emil Hartman applied to the local office to locate Porterfield scrip certificates Nos. 46 and 117, issued under the provisions of the act of April 11, 1860 (12 Stat., 836), upon said tracts, which were rejected because of said prior Chippewa scrip location, and separate appeals from said action were filed in the local office by said Hartman on March 19th following, together with affidavits of contest against said location by Warren.

You held that the Chippewa scrip location by Warren was valid and segregated the land, and affirmed the action of the local officers rejecting said applications of Chandler, Barrick and Hartman, to enter said land. You also held that the rights of Chandler and Barrick as contestants, attached on June 14, 1889, the day when their said affidavits were filed in the local office, and that their rights must be held to be subject to the prior right of Hartman, because the latter's affidavit of contest was first filed in the local office as required by the sixth rule of practice (4 L. D., 37), and that Hartman's affidavit of contest, and the affidavits in support thereof, do not present allegations sufficient, if true, to require you to order a hearing.

On November 13, 1889, counsel for Hartman filed a motion for a reconsideration and review of your said decision, and on the 19th of same month counsel for Joseph H. Chandler filed a motion to strike said motion for review from the record, because no copy thereof was served on him as required by the rules of practice.

On March 13, 1890, you considered said motions, and held that the motion of Chandler must be granted. Thereupon appeals were filed

from said decision of October 16, 1889, and by stipulation of counsel an oral argument was had on October 19, 1891, at which counsel were heard in behalf of Warren's said location, the right of Hartman, Chandler and Barrick to enter said land and to contest the validity of said location; also in support of the claim of Thomas W. Hyde for the NE ¼ of the SW ¼ of said section 30, whose claim was not mentioned in either of your said decisions.

It is alleged in the brief of counsel for Hyde, filed at the oral argument, that he applied on April 10, 1886, to contest said Warren's location on the ground that he had a prior pre-emption right to the land claimed by him; that you, on December 22, 1888, directed the local officers to order a hearing upon said application and afterwards, to wit, on March 8, 1889, revoked said order without notice to him; that in July of the same year Hyde filed a motion to set aside said order of March 8, 1889, which motion has not yet been acted upon by you; that on February 23, 1889, he filed another application in the local office to obtain, under the pre-emption law, the said NE ¼ of the SW ¼, and also to be allowed to contest the said Warren location; that on October 29, 1889, Hyde again made application to contest said Warren location and filed, in support thereof, his own and the affidavit of two other persons; that you on October 16, 1889, held that the Warren location was valid and "utterly overlooked and ignored the claim of Hyde." It is further alleged in said brief that Hyde, as a successful contestant, on April 2, 1891, applied at the local land office to enter under the homestead laws three tracts of land in said section involved in the case of Hyde *et al. v.* Eaton *et al.* (on review) 12 L.D., 157, upon which application a hearing was ordered before the local office and is still pending. It is quite evident that if said Warren scrip location be sustained, the claims of the other parties must fail, and the first question to be determined is, are the allegations of the contestants, or either of them, sufficient to require either a hearing to determine the validity of said Warren's location, or, upon the conceded facts, should the Chippewa scrip location be canceled and the land awarded to the first legal applicant? The Warren location having been presented to and allowed by the local officers, prima facie segregated the land covered thereby. Hartman appealed from the action of the local office rejecting his said application to locate said land with Porterfield scrip, and alleged that said Warren location did not legally appropriate the land because it was "fraudulent and void," and for other reasons specifically set out in the contest application, to which reference is made.

It is alleged in said contest application that said Porterfield scrip was wrongfully rejected, because the land applied for was not "legally appropriated," and that said Warren location should be cancelled by you for certain reasons which may be summarized as follows:

(1) That said Warren was not legally entitled to make a location of said land, and said location was not made by him or for his benefit.

(2) That prior to the date of said location, said Warren had for a valuable consideration parted with said certificate, and for the purpose of evading "the express prohibition of the law, and aid and permit his vendees to accomplish by circumlocution and subterfuge, a fraud and imposition upon the officers of the law, had signed and acknowledged certain powers of attorney, one to locate the land, and the other to sell the same after its location;" and said powers of attorney are illegal and void because no name was inserted therein, nor was the land described in either of them, the same being contrary to law and the rules of this Department.

(3) That prior to said location, the Warren scrip was "in the open market for sale at Duluth, Minnesota, by C. d' Autremont, Jr., a resident of Duluth, and the business associate or partner of the said J. H. Sharp, the pretended attorney in fact of said James H. Warren," who knew, at the time said location was made, that said Warren "had no interest in the said certificate of scrip and was to get no interest whatever in the lands which he attempted to locate in said scrippee's name with said scrip."

(4) That the contestant has been informed that said Warren was Secretary of the Home Missionary Society, living in San Francisco about the time said location was made, and "was under the 7th clause of the 2nd article of the treaty of September 30, 1854, entitled to 80 acres of land;" that said location was illegal because "the certificate of identity, or so called scrip . . . . upon its face expressly declared that any assignment, sale, pledge, or mortgage, of the same would not be recognized as valid by the United States, nor any right accruing under it," which condition was wholly disregarded, and the location was made in the interest and for the benefit of Fred. F. Huntress, and three others, and not for the benefit, either present or prospective of said Warren.

(5) That said location has not been sanctioned by the President of the United States, and the right to locate said land being purely personal was not asserted by said Warren for his benefit, nor by any person duly authorized to make the location for the exclusive use of said Warren. Hartman filed with his said contest affidavit, the affidavits of two other persons, and each swears "that he has heard read the foregoing petition of Emil Hartman, and knows the contents thereof, and that the same is true, except as to those matters therein which deponents believe to be true." The subsequent applications of contest contain substantially the same allegations as to the invalidity of Warren's location as those in Hartman's contest affidavit.

On June 12, 1889, counsel for Hartman filed with you the affidavit of James H. Warren, made at Los Angeles, California, on April 1st, 1889, alleging that he was married in 1850 to Emily A. Churchill, and has never been "married but once;" that on September 30, 1854, he was a clergyman of the Congregational Church and lived at Nevada City,

California; that under the Chippewa treaty of September 30, 1854 (*supra*), he was entitled to scrip, and in the year 1884 he received "a letter of identity" showing that he was a beneficiary under said treaty; that in the year 1884, or 1885, he sold said certificate to some person whose name he does not recollect; that when he sold said scrip he parted with all of his right, title and interest, without any reservation whatever of any interest in the land which might be located with said scrip; that at the time of said sale, he signed a power of attorney in connection with said scrip, but is unable to recollect the name of the person inserted in said power of attorney, or whether any name was inserted therein; that according to his recollection there was no description of the land in said power of attorney, nor in any papers signed by him at the time of said sale; that he has never had any acquaintance with Kristian Kortgaard, Fred F. Huntress or Samuel C. Brown, or had any business acquaintance with either of them; that he never appointed either of said persons his attorney to locate for him any land in township 63 N., of range 11 west, 4 P. M. Minnesota, nor did he ever personally locate any lands in said State or elsewhere under said scrip; that he never had any interest in any part of lot 7 and the NE ¼ of the SW ¼ of section 30, T. 63 N., R. 11 W., 4 P. M. in Minnesota; that he does not know and never had any business relations with "J. H. Sharp or Charles Dautremont."

In his appeal from your decision Hartman alleges nineteen specifications of error, which may be condensed as follows:

(1) In holding that said Warren's location was a valid appropriation of said land, and that the allegations of contest and showing made were not sufficient to overcome the presumption in favor of its validity, and

(2) That if said allegations be true they would not warrant the cancellation of said Warren's location.

(3) In deciding that said Chippewa scrip, with the accompanying powers of attorney, authorizes the sale and transfer of the right of said Warren to select eighty acres of land under the provision of said treaty, because said certificate contains no words restraining such sale or transfer, and if such right be not assignable, any attempted transfer would be invalid but would not affect the validity of said location.

(4) In deciding that if a patent issued on said location, it would inure to the benefit of said Warren, and no other person had a right to object to said location as it was made in the name of said Warren.

(5) In not deciding that the right under said treaty, being purely personal and inalienable, is not different in its nature from Sioux half-breed scrip, and is, therefore, controlled by the departmental decision in the case of Allen, *et al.*, *v.* Merrill, *et al.* (8 L. D., 207), on review (12 L. D., 138).

(6) In holding that said location, although made in the name of said Warren but not for his use, by one acting under a power of attorney, given for the purpose of selling the right of the scrip claimant to locate

said land, can be made valid by a subsequent ratification by said Warren, especially in the case of an adverse claim; and finally,

(7) In rejecting the application of Hartman to enter the land covered by said Warren location, and not ordering a hearing to determine the matters at issue between said parties.

Chandler and Barrick also severally appeal from your decision of October 16, 1889, upon the ground that Warren's location was absolutely void, and that it was error to reject their several applications for the land, and also upon the further ground, that Hartman's application to contest was not corroborated as required by the regulations of this Department and should have been rejected, and their applications to contest said Warren's location should have been received. Hyde appealed on the ground that he was a prior pre-emption claimant for the NE ¼ of the SW ¼ of section 30, and, therefore, Warren's location of the same was invalid.

The first question to be determined is, whether the Warren scrip, or certificate of identity, is assignable, for, if this question be answered affirmatively, then the only conflicting claim to be determined is that of Mr. Hyde.

On September 30, 1854 (10 Stat., 1109), a treaty was concluded at La Pointe, in the State of Wisconsin, by the United States, with "the Chippewa Indians of Lake Superior and the Mississippi," by which the Indians ceded to the United States "all the lands heretofore owned by them in common with the Chippewas of the Mississippi" lying east of a certain boundary therein described. By the second section thereof, certain reservations were set apart for the Chippewas of Lake Superior and, in the 7th clause of said section, it was agreed that,—

> Each head of a family or single person, over twenty-one years of age at the present time, of the mixed bloods, *belonging* to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which shall be secured to them in usual form.

The contemporaneous construction of said clause by the Department is fully set out in the report of the Commissioner of Indian Affairs dated March 8, 1872, and the decision of Mr. Secretary Delano dated March 19, 1872 (in House Ex. Doc. 193, 42nd Congress, 2nd Session, p. 4–18 and 316–318, inclusive). In said report it appears that on February 17th, 1856, the Indian Agent, then in the city, suggested to the Indian Office "the propriety of issuing certificates to persons entitled to land, under the 7th clause of the second article of said treaty, and enclosed a form which he proposed for such certificates," which letter was referred to Commissioner Hendricks, of the General Land Office, who, on the 23rd of the same month, reported that in his opinion, "the issue of certificates or scrip in any form" was not provided for in the treaty, nor authorized by any law, and that "the plan, if adopted even temporarily, would be fraught with many evil results." In his opinion "the treaty contemplated ownership and possession by the Indians

personally, and was designed to guard against any transfer of his rights before the issuing of the patent."

On March 3, 1856, the papers were referred to the Indian Office, with the following endorsement by the Secretary: "Sec'y remarks 'Let mem's be given In's as proposed, but with clause expressly and decidedly vs. any transfer, mortgage &c. Patent be issued to the Indians, not in any wise to inure to the benefit of any one but the Ind. and his heirs.'"

On March 12, 1856, the Indian Office reported to the Department that it was impossible for the Indian agent to make the locations provided for in said clause of the treaty, because the Indians were so widely scattered, and "recommended the issuance of scrip" in the form submitted, as the most practicable method of disposing of the half-breed claims. The form was approved by Secretary McClelland, and after reciting said clause, prescribes the form of certificate of the Indian agent, that the person therein named is one of the beneficiaries of said treaty and is entitled to eighty acres of land as therein provided, which certificate required the approval of the Secretary of the Interior.

The certificate also contains the following:

It is expressly understood and declared that any sale, transfer, mortgage, assignment, or pledge of this certificate, or of any rights accruing under it, will not be recognized as valid by the United States; and that the patent for lands located by virtue thereof shall be issued directly to the above named reservee, or his heirs, and shall in no wise inure to the benefit of any other person or persons.

On July 8, 1856, in a report to the Secretary, the Indian Office construed said clause to include only such "mixed bloods of Chippewas of Lake Superior as resided among or contiguous to the various bands of those Indians, as distinguished from the Chippewas of Michigan and the Chippewas of the Mississippi," and the Secretary, upon consideration of said report, having directed the Indian Office to be as liberal in the construction of said clause as its terms would warrant, the Indian Office thereupon rejected the applications of all parties who did not come within said construction as stated in said report.

On July 23, 1858, Acting Secretary Kelley advised the Indian Office that "the proper construction of said clause was distinctly before the Department at the date of office report of July 8, 1856, and that he regarded it as having been settled by the Secretary's decision of July 10, 1856, and the practice of the Office of Indian Affairs under it."

This construction continued until May 18, 1863, when it was changed by Secretary Usher, and scrip was continued,—

to be issued to other half-breeds without regard to their residence, the only requirement being satisfactory evidence that they were half-breeds or mixed bloods belonging to the Chippewas of Lake Superior and the Mississippi, and were twenty-one years of age or the head of a family at the date of the treaty.

On June 9th, 1865, Mr. Secretary Harlan decided that said treaty "does not contemplate the issuing of 'scrip,' but patents, for the land

to which the half-breed or mixed blood Chippewa may be entitled." And the Commissioner of Indian Affairs was directed to instruct the Indian agents "so that no more 'scrip' may issue to any of said half-breeds."

On October 28, 1867, Mr. Secretary Browning advised the Indian Office that he concurred in said decision of Mr. Secretary Usher, relative to the persons entitled to the benefits of said 7th clause, and also re-affirmed said decision of Mr. Secretary Harlan that said treaty did not authorize the issuance of scrip, but that the land must be selected under the direction of the President, and secured to the party by patent.

The Commissioner of Indian Affairs also recites in said report the action of his office and the Department relative to the appointment of a Commission to investigate the alleged fraudulent issue of scrip under said 7th clause, and its report thereon, and he concludes that Mr. Secretary Usher's decision of May 18, 1863, was wrong and ought to be reversed; that said treaty did not contemplate the issuance of "scrip in any form or in any sense;" that the scrip or certificates of identity already issued,—

> have vested no rights in any claimant, and can, therefore, constitute no objection to any action which the Department may deem is desirable to take to carry out the provisions of the treaty of 1854, through any other form of procedure.

On March 19, 1872 (H. Ex. Doc., *supra*, p. 316), Mr. Secretary Delano concurred in the view expressed by Commissioner Walker, and overruled said decision of Mr. Secretary Usher, which, as he states, "had resulted in extensive and systematic frauds, by which scrip has been issued to fictitious persons and many others not embraced in said seventh clause, and apparently for the benefit only of those who had contrived this scheme for the purpose of private gain and speculation." Secretary Delano also directed that the unpatented entries, with certain exceptions, should be canceled, and that,—

> hereafter any persons claiming the benefits of the seventh clause of the second article of the treaty aforesaid, shall be required, first, to appear before an Indian agent within whose jurisdiction he resides, and make proof under the sanction of an oath, to the satisfaction of said agent, that he or she, at the date of said treaty, was the head of a family or a single person over twenty-one years of age, of the mixed-bloods belonging to the Chippewas of Lake Superior at that date. When such proof is made, said Indian agent, if satisfied that the applicant is entitled to locate land under said seventh clause, shall deposit the same with the register of the land office within whose district the land is situated to which the beneficiary under said treaty is entitled, giving with it a certificate of his opinion in writing that the person applying is entitled to eighty acres of land under the treaty aforesaid; whereupon said person shall be entitled to enter, by proper description, the tract which he desires.

On January 20, 1874, the Commissioner of Indian Affairs reported to the Secretary that he had received the claim of said Warren, through Hon. T. W. Ferry, who filed a communication from him dated San Francisco December 18, 1874, to be allowed to make proof that he was entitled to enter eighty acres of land under the provision of said 7th

clause. The Commissioner recommended that on account of the distance to the nearest Indian agent,—

before whom Mr. Warren can make proof as required by departmental order of March 19, 1872, and as he is personally known to Senator Ferry and myself, as being a mixed-blood Chippewa of Lake Superior, and entitled to the benefits of the treaty of 1854, said order be so far modified in this case as to permit the substitution of the certificate of the Commissioner of Indian Affairs for the action required to be taken before the local Indian agent, which shall entitle him to locate land under said seventh clause of said second article of the treaty of 1854, and enter by proper description the tract he may desire.

On January 21, 1875, Secretary Delano approved said recommendation and directed the Commissioner of Indian Affairs to advise the Commissioner of the General Land Office of said action. and request him to notify the registers of the proper land offices accordingly.

It is earnestly contended in behalf of Warren that this was an adjudication that he was a mixed-blood Chippewa, and had a right to enter eighty acres of land under the provisions of said clause. On the other hand, it is insisted that the order of the Secretary was not made upon a full presentation of all of the facts, and that Secretary Delano did not intend to, and did not, change his former. decision of March 19, 1872, in which he expressly held that the former ruling of the Department was erroneous, and that "no one is entitled to the benefits of said 7th clause unless he belonged to the Chippewas of Lake Superior at the date of the treaty;" and, at that date, resided with them or contiguous thereto. It is evident from the foregoing that the papers presented to Secretary Delano did not state or intimate that at the date of the treaty Mr. Warren did not reside with the Chippewas of Lake Superior, or near by, and it will not answer to say that the Secretary intended to award him the right to enter eighty acres of land under said clause if, in fact, he was not entitled to the same under the decision of the Secretary of March 19, 1872, (*supra*). The Commissioner's report upon which said decision was based, shows that the Indian agent, on November 21, 1855, under instructions from the Indian Office, transmitted a list containing two hundred and seventy-eight names of "persons entitled to claim land" under said 7th clause, which he said had "been prepared with much care, and contains no names but such as in my (his) judgment, are clearly entitled to the benefit of the provisions referred to. Some have, doubtless. not yet reported; but the list cannot be very materially increased." Notwithstanding this statement of Agent Gilbert, it appears that prior to Secretary Delano's decision one thousand one hundred and sixty-eight pieces of scrip or certificates were issued under said clause, of which eight hundred and sixty-seven were located, and five hundred and fifty-eight patented, and also five other patents were issued "out of one hundred and seventeen personal applications made and received for land." This large illegal over-issue was occasioned, according to Secretary Delano's decision, by the erroneous ruling of Secretary Usher, that "proof of

actual residence among or contiguous to the Chippewas of Lake Superior and the Mississippi at the date of the treaty was no longer required of claimants under said seventh clause."

It is evident, to my mind, that the construction of said treaty prior to said decision of Secretary Usher, which was reversed by Secretary Delano, was correct. The Chippewas of Lake Superior are mentioned in said 7th clause in their tribal capacity, and like other tribes who have made treaties with the United States, they were anxious to make some provision for the mixed-bloods "belonging" to them, living with them, or in close contiguity. It was never intended that said clause should be so extended as to embrace those who had abandoned their tribal relations, and perhaps have become members of other tribes or communities. And this conclusion is reached by me independently of the act of December 19, 1854 (10 Stat., 598), authorizing the President to negotiate with the Chippewa Indians for the extinguishment of their title to all lands in Minnesota and Wisconsin, which contains a restriction upon the power of alienation without the consent of the President; or, of the act of June 8, 1872 (17 Stat., 340), authorizing the purchase "with cash or military bounty land warrants," of lands located under said 7th clause by "innocent holders of the same."

It being now alleged that said Warren was not residing "among or contiguous to the Chippewas of Lake Superior and the Mississippi at the date of the treaty" and, therefore, not entitled to eighty acres of land thereunder, it is proper that the charge should be investigated.

But if it be conceded, *arguendo*, that said Warren was a beneficiary under said treaty, yet it must be held, I think, that his right of location was not the subject of sale prior to the issue of patent. It will be observed that the selections of the half-breeds are to be made "under the direction of the President, and which shall be secured to them in usual form;" that prior to the issue of patent the President may issue directions, through the Secretary of the Interior, which will be as binding as if issued under his own hand. Wilcox *v.* Jackson (13 Peters, 498), and that under the uniform decisions of all of the Secretaries of the Interior upon the question, the scrip or certificate was not assignable. And it was usually stated on its face that any sale, mortgage, or pledge thereof, "or of any right accruing *thereunder* will not be recognized as valid by the United States." It can hardly be seriously contended that the certificate issued to Mr. Warren, even if it did not on its face have said restriction, was therefore assignable.

No reason appears for making Mr. Warren an exception, and it is not stated in his certificate that it is assignable, and that he is excepted from the repeated and uniform ruling of the Department. Besides, your circular dated March 15, 1873, to the registers and receivers of the United States Land Offices, paragraph 8, distinctly says, "this scrip is not assignable, transfers of the same being held void (C. L. L., p. 708). It is, however, asserted that although the scrip or certificate is not

assignable, yet the property right in the land is the subject of sale, and that the supreme court has so expressly ruled in the following cases, Dole *v.* Wilson, 20 Minn., 356; Doe *v.* Wilson, 23 Howard, 457; Crews *v.* Burcham, 1 Black, 352; Prentice *v.* Stearns, 113 U. S., 435.

These cases have all been examined and, in my judgment, they do not warrant the contention claimed by counsel. They all arose after patents had been issued, and it does not appear that in the cases of Doe *v.* Wilson and Crews *v.* Burcham that, either in the treaty, or by the Department, there were any express restrictions against the right of alienation.

In the case of Dole *v.* Wilson (*supra*), which arose under said 7th clause, the court in effect held that the delivery of certain certificates of identity with agreements to convey, was a sufficient consideration to support the defendant's promise to pay. In its opinion, the court said,— "the privilege of each half-breed to select eighty acres of land was a personal right, and, therefore, the scrip issued as the evidence of the right was not assignable," citing as authority the case of Gilbert *v.* Thompson (14 Minn., 544).

This latter case was persistently pressed upon the Department in the case of Allen, *et al. v.* Merrill, *et al.* (8 L. D., 207), on review (12 L. D., 138), as authority for the contention that although the Sioux half-breed scrip was not assignable, yet the property right in the land located with said scrip and attempted to be assigned, was the subject of sale, and therefore the location made in the name of the half-breed should be sustained. But the Department refused to accept this view, and held in the original decision in said case, that as the transfer of Sioux half-breed scrip is prohibited by statute, the Department will not recognize the right of location in one claiming such right by two powers of attorney, one to locate said scrip, and the other to sell the land covered by the location. It was also held that the various departmental circulars issued relative to the location of said scrip were valid, and, having existed since 1872, parties can not justly complain of their enforcement, for they must have known of them when they attempted to evade their provisions. On review (12 L. D., 138), the case was again very fully considered, and it is stated that,—

> It is perfectly plain to my mind, as a matter of original construction, that by the act of Congress the scrip in question was intended to be the evidence of a purely personal right in the half-breed to locate and receive patent for the number of acres of land therein called for. That this is true is clearly shown by the declaration in the act that no transfer or conveyance of the scrip shall be valid. If the scrip could not be legally transferred or assigned, it must necessarily follow that it could not be used as a means to acquire title to lands by any person other than the half-breed himself, or by his agent or attorney. It was, therefore, obviously intended for the sole benefit of the half-breed. It could be lawfully located only by him in his own proper person, or for his sole use and benefit, by his legally constituted agent or attorney. These propositions will scarcely be seriously questioned. They are the result of the clear and unambiguous provisions of the statute.

With reference to the case of Gilbert *v.* Thompson (*supra*), it is said, (p. 153)—

> The controlling points in the case, as decided by the court, plainly were, (1) that a simple power to sell, executed by a half-breed, such as the one there considered, would extend to lands subsequently acquired by means of scrip, if within its terms, and (2) that parol proof of an intent coincident with the creation of the power to transfer the scrip, could not be received to defeat the power.

It is further stated that,—

> no question relative to the admissibility of evidence, such as that considered by the court, can possibly arise in this case, for the simple reason that the government is here a party interested, whereas the controversy in that case was between contending claimants for the land after the government had parted with its title.

It was further said, concerning the departmental regulations cited therein—"Not being in conflict with the statute, these regulations have all the force and effect of law. Hessong *v.* Burgan (9 L. D., 353), and cases cited."

Since the regulations issued relative to the selection of land under said 7th clause, not being in conflict with the treaty, or any existing law, must be held to have the force of a statute, any attempt of the Indian half-breed to sell, or of any person to purchase his certificate, or *to acquire any right thereunder* by means of two powers of attorney, one to locate, and the other to sell the land after location, must be held to be illegal and in violation of law. It is no answer to say that third parties are not concerned, for the government is an interested party, and the Secretary of the Interior is in duty bound to see that the disposition of every part of the public domain is in accordance with law, and the regulations of his Department. (Witherspoon *v.* Duncan (4 Wallace, 218); Lee *v.* Johnson (116 U. S., 48); Williams *v.* United States (138 U. S., 48).

In Knight *v.* United Land Association, *et al.* (October Term, 1891), Mr. Justice Lamar, speaking for the court, said,—

> The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands.

The alleged ratification by Warren of the acts of Sharp, in the location and sale of said land, can avail nothing if the original transaction was tainted with illegality. "If the location of the scrip was illegal and invalid, then the deed of ratification could not give it vitality—could not vitalize that which had not in it the germ or essence of legal vitality." Hyde, *et al. v.* Eaton, *et al.* (*supra*).

The question who will be entitled to a preference right of entry of the lands covered by said Warren location does not arise in this record, and cannot be determined until the validity of said location shall have been finally determined by the Department, and an application is filed for the land, claiming a preference right of entry by reason of the cancellation of the location through the efforts of the applicant. Saunders *v.* Baldwin (9 L. D., 391); Hyde *et al. v.* Eaton *et al.* (12 L. D., 157).

There can be no question of the right of any person to initiate a contest against a scrip or certificate location, upon sufficient showing being made, in accordance with the rules of practice (4 L. D., 38).

Rule 1, provides—Contest may be initiated by an adverse party, or other person, against a party to any entry, or *other claim* under laws of Congress relating to the public lands, for any sufficient cause affecting the legality or validity of the claim; and the second rule provides—In every case of application for a hearing an affidavit must be filed by the contestant with the register and receiver, fully setting forth the facts which constitute the grounds of contest.

And by rule three, one or more affidavits must accompany the affidavit of contestant where an entry is of record.

Rule 5 provides that—"In case of entry or *location* on which final certificate has been issued, the hearing will be ordered only by direction of the Commissioner of the General Land Office"; and rule 6 declares that—Applications for hearings under rule 5 must be transmitted by the register and receiver, with special report and recommendations to the Commissioner for his determination and instructions.

From the record before me, I am satisfied that the contest affidavit of Hartman, having been first filed in the local office and sufficiently corroborated, must be held to take precedence of the other applications for contest. From his own showing, the contest application of Hyde, corroborated by the affidavits of Powers and McDonald, was not filed until October 29, 1889, long subsequently to the applications of Hartman, Chandler and Barrick, and it appears that the hearing ordered upon his application of April 10, 1886, was revoked by you for the reason that the Department held in Hyde *et al. v.* Eaton *et al.* on February 18, 1889, and affirmed on review (12 L. D., 157), that Hyde's pre-emption claim for said tract was illegal. Besides, Hyde's motion to set aside said order was not made until July 6, 1889, and his application to contest, supported by affidavits, was not filed until October 29, 1889, and therefore cannot be considered until the prior contests shall have been decided. Durkee *v.* Teets (4 L. D., 99); Woodward *v.* Percival *et al.* (idem 234); Conly *v.* Price (9 L. D., 490).

In addition to the foregoing it may also be observed that according to his own showing, Hyde is now seeking to enter three other tracts under the homestead law. He cannot have two settlement claims for different tracts at the same time.

Upon a careful consideration of the whole matter, I conclude that the allegations set forth in Hartman's contest affidavit are sufficient to require a hearing to be had to afford him an opportunity to prove the same; that the other applications of contest must be held to await the result of said contest; that Hyde can claim nothing by virtue of his pre-emption claim for said NE ¼ of SW ¼, as against the government, because it has been decided by the Department that his said settlement claim was illegal, which decision was affirmed on review.

The decision of your office is therefore reversed, and you will direct a hearing to be ordered in accordance with the rules of practice upon Hartman's said allegations of contest.

INDIAN RESERVATION—HOMESTEAD ENTRY—EXECUTIVE ORDER.

MATHIAS EBERT.

An executive order establishing an Indian reservation does not take effect upon lands embraced within a homestead entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 1, 1892.

Mathias Ebert, on August 28, 1884, filed pre-emption declaratory statement for certain lands in T. 29 N., R. 16 W., Santa Fe land district, New Mexico.

A few months afterward he applied to transmute the same into a homestead entry, and was allowed to do so (on February 25, 1885).

At a later date he made application for an amendment of his entry—which was allowed.

On June 29, 1886, Special Agent E. S. Bruce, of your office, reported that the entryman had failed to reside on the tract as required by law.

Thereupon you, on March 21, 1887, held the entry for cancellation. The entryman appealed to the Department where on September 29, 1888, the decision appealed from was formally affirmed, upon the basis of the departmental decision in the case of Hugh A. Carmon, of the same date.

Said decision was informally returned, in view of the fact that the tract in question was therein described in accordance with the description in the original pre-emption filing, when it should have been in accordance with the description in the *amended* homestead entry.

A careful re-examination of the papers disclosed the fact that it was impossible to determine from the record transmitted the exact description of the tract actually entered; and the Department, on September 16, 1890, returned said papers with a request for a correct description, for information as to whether any of said tract, and if so how much, was situated outside of the Navajo Indian reservation, and by what executive order the land claimed by Ebert, or any portion thereof, had been withdrawn from settlement and entry.

I am now in receipt of your letter of November 30, 1891, enclosing a report from Special Agent A. F. Leach, of your office, containing the information requested.

From said report and your letter it appears that the entry, as finally amended, covered the SW. ¼ of the SE. ¼, and the E. ½ of the SE. ¼, of Sec. 3, and the SW. ¼ of the SW. ¼ of Sec. 2, T. 29 N., R. 16 W., in said land district; that it includes land lying on both sides of the San Juan river, without regard to its meanderings; that 25.95 acres of the tract lie on the north side, and the remainder on the south side, of said river—the latter being *now* embraced in the Navajo Indian reservation.

The executive order of January 6, 1880, enlarged the Navajo reser-

vation so as to embrace certain lands including T. 29 N., R.'s. 14, 15, and 16 W., New Mexico, lying south of the San Juan river.

Executive order of May 17, 1884, exempted from the operation of the order of January 6, 1880, so much of T. 29 N., R.'s. 14, 15 and 16 W., as lies south of said river; and according to the records of your office, and a notation on Ebert's filing papers, the tract was restored to settlement and entry June 20, 1884.

It was while this land south of the river was thus exempted from the operation of the executive order of earlier date, and open to settlement and entry, that Ebert (on August 24, 1884, *supra*,) filed his pre-emption declaratory statement, which he was afterwards allowed (by your letter of February 25, 1885), to transmute into a homestead entry.

Executive order of April 24, 1886, set apart as an addition to said reservation so much of township 29 N., ranges 14, 15 and 16 W., as lies south of San Juan river—being the same land reserved by order of January 6, 1880, and exempted by order of May 17, 1884, and including all of Ebert's (amended) homestead entry except 25.95 acres.

Both Agent Bruce and Agent Leech report that Ebert complied with the law as to cultivation and improvements, and would have done so as to residence if he had not been compelled to leave by the Indians. All the improvements, amounting in value to $1,200 or $1,500, are on the south side of the river—within (what is now) the Navajo reservation.

Your decision of March 21, 1887, holding the entry for cancellation does not explicitly state whether you so held because the entryman has failed to reside on the tract according to law, or because a portion of it was included in the Navajo reservation.

In my opinion the facts, as reported by the special agents, do not justify the cancellation of the entry on the ground of failure to maintain residence on the tract.

It is clear from the foregoing recital that at the time Ebert made his homestead entry, the land in question was subject to the same, and said entry segregated the tracts from the mass of the public domain, hence the well-known principal of law announced in the case of Wilcox *v.* Jackson (13 Peters, 513), applies

> That whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale would be construed to embrace it, or to operate upon it, although no reservation were made of it.

The executive order or proclamation dated April 24, 1886, did not embrace the tracts of land included in the entry of Ebert, and said entry should remain intact so far as said reservation is concerned.

Your decision is therefore reversed. This decision, however, is not intended to interfere in any way with any proper action which should be taken in relation to this entry in the future.

This entry embraces land on each side of a meandered stream, and

under the present ruling of the Department, would be subject to cancellation. The case, however, seems to come under the rule announced in the case of Matilda Strohl (8 L. D., 62) as Ebert made his settlement and filing prior to October 28, 1884, the date of the departmental decision in the case of Olof Landgren, in which the instructions of your office forbidding such entries were recognized.

Departmental decision dated December 8, 1891, in this case is hereby recalled. The case cited in support of said decision, viz., Hugh A. Carmon (7 L. D., 334), involved a pre-emption filing, which, under the established ruling of the land department, does not create a segregation of the land.

RAILROAD GRANT—WITHDRAWAL—INDEMNITY LANDS.

NORTHERN PACIFIC R. R. CO. *v.* PETTIT.

An executive withdrawal of lands for indemnity purposes does not take effect until received at the local office, and the land then embraced in a private cash entry is excepted from the operation of such withdrawal.

The decision of the Supreme Court of the United States in the case of the St. Paul and Pacific Railroad Company *v.* the Northern Pacific Railroad Company is not authority for holding that title can be acquired to indemnity lands prior to the selection thereof.

Secretary Noble to the Commissioner of the General Land Office, June 2, 1892.

I have considered the case of the Northern Pacific Railroad Company *v.* Curtis H. Pettit, involving the SW. ¼ of SW. ¼, Sec. 5, T. 52 N., R. 13 W., Duluth land district, Minnesota, on appeal by the company from your decision of February 14, 1891, awarding the land to Pettit under his private cash entry, made July 17, 1882.

It appears that this tract was without the limits of the withdrawal upon the map of general route filed by said company, but comes within the first indemnity belt, as shown by the limits adjusted to the line of definite location, delineated upon the map filed by the company July 6, 1882, and was included in the withdrawal made upon said location, the order for which was received at the local office June 22, 1883, unless excepted therefrom by the entry in question.

The company's claim to this tract is:

> That it became apparent immediately upon the filing of the map of definite location that there were not enough lands within the indemnity limits in the State of Minnesota to satisfy the grant, consequently all the indemnity lands were *eo instanti* appropriated to the satisfaction of the grant without selection or reservation, and being so appropriated, that appropriation operated as a reservation of the land from any entry whatsoever.

In support of this contention, the case of the St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (139 U. S., 1,) is referred to, in which the court uses the following language:

> As to the objection that no evidence was produced of any selection by the Secre-

tary of the Interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated.

The doctrine that until selection is made as required by the act making the grant, no title vests in the company to lands within the indemnity limits, has been too well settled by the numerous decisions of the supreme court to need more than a passing reference. Wisconsin Central Railroad Company *v.* Price County (133 U. S., 496), and cases therein cited.

In the case of the Northern Pacific Railroad Company *et al.v.* Walters *et al.* (13 L. D., 235), in referring to the case of St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (*supra*), it was stated:

In that case it was held that, there not being a sufficient quantity of lands in Minnesota to meet the requirements of the Northern Pacific company, the lands there in question (being those which were in the granted limits as shown by the map of general route, and withdrawal thereunder, and within the indemnity limits on definite location) were so appropriated as to come within the terms of exception in the subsequent grant and that as to those lands no selection was necessary to preserve said company's rights as against the subsequent grantee. That case did not involve any questions as to when title to lands, appropriated when the rights of the grantee company would otherwise have attached but subsequently becoming subject to selection as indemnity vested, nor was any rule as to such lands attempted to be laid down. That case does not control the question here involved.

In the case of the United States *v.* Missouri, Kansas and Texas Railway Company (141) U. S., 376), the attention of the court was called to the language used in the case of the St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (*supra*), and, after referring to the numerous cases in support of the doctrine before outlined, it is stated:

As to the exception to this rule, noticed in the St. Paul and Pacific Railroad *v.* Northern Pacific Railroad, 139 U. S., 19, it is sufficient to say that it has no application to the facts of this case.

The land here in question having been regularly offered, was subject to private cash entry, until withdrawn or otherwise reserved from such entry.

No such reservation was made until the order of withdrawal was received at the local office, June 22, 1883, nearly a year after Pettit's entry.

There is nothing in the act making the grant for this company that directs the withdrawal of indemnity lands, and all such withdrawals have been revoked.

I am therefore of the opinion that the entry was properly allowed, and that the decision in the case of the St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (*supra*) has no bearing upon the case under consideration.

Your decision is therefore affirmed.

Overruled, 17 L.D. 414

OKLAHOMA LANDS—HOMESTEAD ENTRY. FLC WMW

TAFT *v.* CHAPIN.

One who is lawfully within the Territory of Oklahoma at the passage of the act of March 2, 1889, and so remains until the lands are open to settlement and entry, but does not take advantage of his presence, as against others, to enter upon and occupy land, is not, by such presence in said Territory, disqualified to enter land therein.

Secretary Noble to the Commissioner of the General Land Office, June 3, 1892.

I have considered the case of Frank A. Taft *v.* John G. Chapin upon the appeal of the latter from your decision of February 4, 1891, involving his homestead entry for lots 1 and 2 and the S. ½ of the NE. ¼ of Sec. 2, T. 17 N., R. 7 W., Kingfisher, Oklahoma.

The record shows that on May 26, 1890, Chapin made homestead entry for said tract. On July 2, 1890, Taft filed an affidavit of contest against Chapin's entry, upon which you ordered a hearing, after which on September 11, 1890, Taft dismissed his contest; thereupon Chapin filed an affidavit in support of his proof submitted July 31, 1890, and on the same day the local officers approved the same and issued final certificate for said tract.

You, by letter of February 4, 1891, upon these facts, dismissed Taft's appeal and protest and closed the case.

By the same letter you found from the evidence that

Chapin entered said territory in 1882, in the employ of an Indian trader, and remained with said trader about two years; that about 1882, buildings were erected on this land and it became a trading post, stage station, etc.; that said Chapin obtained from the Commissioner of Indian Affairs, May 11, 1888, for the term of one year a license authorizing him to carry on the business of trading with the Cheyenne and Arapahoe Agency Indians, and in carrying on said business. Chapin lived on said land and was occupying the same at the time of the passage of the act of March 2, 1889, and lived upon and occupied said land continuously from March 2, 1889, to April 22, 1889, and thereafter, to the time of final proof July 25, 1890, and now occupies and lives upon the same. The license to trade did not expire until May 12, 1889, and on May 16, 1889, he first applied for entry. . . . . At the time he offered final proof, July 25, 1890, Chapin claimed benefit for three years seven months and fourteen days military service in the war of (the) rebellion, and from sworn testimony that appears to have been his period of service.

Respecting the validity of Chapin's entry, you say:

It seems to me that the Department, in its ruling, October 1, 1890, in the case of Townsite of Kingfisher *v.* Wood *et al.*, 11 L. D., 330, has construed the act of March 2, 1889, so clearly and fully that said entry must be acted upon in accordance with said decision. The case appears to be analogous to that of Mr. Wood in said decision, and said Chapin, though permissibly in the territory, must, in my opinion, be considered from the fact of his occupying the land as above stated as having taken advantage of his position to seize upon said land 'in anticipation of the advent of those who had been held back,' and further, by his presence there at the arrival of

others from without the territorial limits, it must be held that he deterred them from entering said land, and that his occupying was in violation of the act of March 2, 1889.

Thereupon you rejected his final proof and held his final certificate for cancellation.

He appeals.

In passing upon this branch of the case it is only necessary to notice the third, fourth, fifth and sixth grounds of alleged error. They are as follows:

3rd. Because of error in holding that said appellant was not a qualified homesteader at the time of making said entry.

4th. Because of error in holding that the fact that appellant was in the territory at the time said lands were opened to settlement disqualified him from making homestead entry.

5th. Because in finding that there was an intention on the part of the appellant to take advantage of his presence in the territory as regards entering the public lands and thus prevent others from taking the land claimed by him.

6th. Because of error in finding that his presence in the territory and his settlement and entry were not so separated as to render it impossible to reasonably conclude that the one was the result of the other.

In my judgment, these errors, as applied to the facts in this case as found by you, are well taken and must be sustained.

Section 13 of the act of March 2, 1889 (25 Stat., 1005), provides among other things:

But until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

Under these prohibitory terms it was held in the case of the Townsite of Kingfisher *v.* Wood *et al.* (11 L.D., 330), upon which you base your judgment, that Wood came within the letter and spirit of the statute and that under the facts in that case Wood sought to take advantage of his presence in the territory by virtue of his special employment; that he sought to use such advantage to defeat the equal operation of the law. The military force of the United States had been required to protect the land in said territory from illegal seizure; Wood's presence in the territory as an employé connected with that force was required in order to carry out the law and the President's proclamation respecting the disposition of the lands in said territory; the territory was opened to settlement at noon on the 22nd day of April, 1889; Wood made his settlement on that day and on the next day April 23, made homestead entry for the tract he claimed. There was no question but what Wood as a matter of fact did take advantage of his presence there in charge of a military train to make claim to the land, for it appears that on the *same day* he settled upon the tract it was occupied by townsite settlers for the purposes of trade.

In the case at bar the facts are totally different. Chapin entered the territory under lawful and proper authority long before the act of

March 2, 1889, was passed; he was living there under the sanction of law when the act was passed; his license to remain there would not expire until May 10, 1889, eighteen days after the territory was opened; he offered his homestead application for the tract on the 1st day of June, 1889; from noon on the 22nd day of April, up to that time, the land was open to settlement and entry by any qualified person, without let or hindrance on the part of Chapin. To hold that under these circumstances the statute prohibited him from making the entry, would be to give it a construction not warranted by the language used, nor in harmony with the intention of Congress in enacting it, and certainly contrary to reason as well as the well settled rules of construction. United States *v.* Kirby (7 Wallace, 482).

In the case of Guthrie Townsite *v.* Paine *et al.*, (12 L. D. 653), it was held that the entry of one who is lawfully within said territory prior to noon, April 22, 1889, but takes advantage of his presence therein to secure a settlement right in advance of others, is in violation of the statute. It was further held that the intention of the act was to place all citizens and claimants on an absolute equality in respect to lands within said territory. On page 656 it is said:

> Had Payne declined to make any act of settlement until after sufficient time had elapsed for those waiting on the border to reach the point in controversy, and thus placed himself on a par with other claimants, a far different state of facts would have existed and a different rule have applied in the consideration of his case.

In case of Oklahoma Townsite *v.* Thornton *et al.* (13 L. D., 409), page 412, it is said:

> The construction put upon the act in question by the Department, is, that no person who entered within the limits of the territory prior to the time for opening the lands to settlement and remained therein up to and after the hour fixed for said opening, and who took advantage of that presence to enter upon and occupy land, shall be permitted to obtain title to the same, even though he was lawfully within the limits of the territory prior to the hour of opening.

Chapin's occupancy of the land for the purpose of trading with the Indians, was lawful, and prior to the passage of the act opening said territory. It is not necessary to determine what effect said act would have upon his rights under the license to trade, because no adverse claim was made covering any part of the time it was to run. His occupancy for such purpose was no bar against the entry of the land by any qualified person. Your decision is therefore reversed.

With the papers in the case you transmitted without taking any action thereon, the affidavit of William Dunlap, filed in the local office February 12, 1891; affidavit of contest of A. L. Craven, filed in the local office February 27, 1891; affidavit of George W. Allen, filed March 9, 1891 (the same being supplemental to the affidavit of A. L. Craven); protest of Samuel E. Newkirk *et al.* townsite claimants; applications of Samuel E. Newkirk *et al.*, asking for the consideration of all contest cases against Chapin's entry, filed March 23, 1891. These papers are herewith returned for proper action to be taken thereon by you under the rules of practice, together with the papers in the case.

DESERT LAND ENTRY—ACT OF MARCH 3, 1891.

ROSA DORE.

A statute is operative from its date, if no time is fixed when it shall become effective.

A desert land entry allowed subsequent to the act of March 3, 1891, limiting the right of entry to resident citizens of the State or Territory in which the land is situated, and in violation of such restriction, must be canceled, though allowed by the local officers before they had learned of the passage of said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 4, 1892.

On March 17, 1891, Rosa Dore, a resident of Ashland county, Wisconsin, made desert land entry No. 1474 of the S.E.¼ and the S.½ of the N.E.¼ of section 33, and the W.½ of the S.W.¼ of section 34, T. 1 S. R. 37 E., at Blackfoot, Idaho.

By your letter of August 28, 1891, you held the entry for cancellation on the ground that the entry was made subsequent to the passage of the act of March 3, 1891, (26 Stat., 1096) which restricts the right to make entries of desert lands to resident citizens of the state or territory in which the land lies which is sought to be entered.

An appeal has been taken to this department.

It is contended that as the entry was allowed by the local officers in ignorance of the act of March 3, 1891, it should be protected and allowed to stand intact.

The known rule as to the date when a statute takes effect is "that a statute for the commencement of which no time is fixed commences from its date." Mathews *v.* Zane (7 Wheat., 211).

This rule applies to the act of March 3, 1891, which is silent as to the date when it shall take effect. The second section of that act amends the act of March 3, 1877 (19 Stat., 377) entitled "An act to provide for the sale of desert lands in certain states and territories," by adding thereto five sections, numbered from section 4 to section 8, and the latter section provides that "no person shall be entitled to make entry of desert land except he be a resident citizen of the state or territory in which the land sought to be entered is located." This provision withdrew the power from the land officers at Blackfoot, Idaho, on March 3, 1891, to allow such an entry as the present one.

The case of the appellant may be a hard one, but it is not within the power of this Department to furnish relief.

She is not entitled under the law to the land she claims, and the ignorance of the local officers that said act had been passed cannot affect its operation.

Your judgment is affirmed.

SALT LANDS AND SALINES—MINERAL ENTRY.

SOUTHWESTERN MINING CO.

The settled policy of the government in the disposition of salt lands and salines has been, and is now, to reserve the same from general disposal.

Deposits of rock salt are "salines," and not subject to entry under the statutes authorizing the acquisition of title to mineral lands.

Secretary Noble to the Commissioner of the General Land Office, June 4, 1892.

I have considered the appeal of the Southwestern Mining Company from your decision of February 14, 1891, rejecting its application for a patent under the United States mining laws, for the South Division Mormon lode claim, being mineral entry No. 776, made July 3, 1888, Eureka, Nevada, land district.

It appears that claimant located the South Division Mormon lode claim in St. Thomas mining district, Lincoln county, Nevada, under the mining laws. It is described in the location certificate and in all of the subsequent papers as "a mine of rock salt," in rock in place. Said mining company made application for patent and final entry of the same, and when the matter reached you, in due course of business, you, by letter of February 14, 1891, rejected the application, holding that "such land is not subject to entry under the United States mining laws."

From your decision, applicant appeals, and claims that you erred in refusing its application because the South Division Mormon lode of rock salt does not belong to the class of claims known as saline lands.

Your rejection of this application was based upon the doctrine announced in Salt Bluff Placer (7 L. D., 549). That case arose upon an application under the act of May 10, 1872 (17 Stat., 91), for a patent to a tract of land in Utah, chiefly valuable for its salt deposit, as a placer mine. In that case it was held that such land was not subject to entry as a placer mine. In passing upon the matter it was said:

> As before stated, the real question presented in this case is as to whether lands belonging to the United States, which are saline in character, are subject to entry and patent under the act of May 10, 1872; and as bearing directly upon this question, we are led first to inquire whether there has been any settled policy on the part of the government in dealing with such lands, as distinguished from other lands, made subject to entry and patent under the general land laws. If there has been, and still exists, a separate and distinct policy in reference to such lands, it follows that they are not subject to entry and patent under the provisions of said act of May 10, 1872, and the question, as to whether salt is a mineral within the meaning of said act, is therefore immaterial.

And the judgment therein announced is as follows:

> In view of the foregoing, and after a careful consideration of the whole subject, I am satisfied that no authority exists for the disposal of saline lands or salt springs belonging to the United States, except under the provisions of said act of January

12, 1877, and that the policy of the government is, and has been from the earliest date, to *reserve* all salines, and to dispose of them only by specific acts of Congress. The act of January 12, 1877, not applying to the Territory of Utah, it follows that there is no authority for the disposal of the lands in question in any manner, and the entry thereof made by claimants, as stated, must therefore be canceled.

The State of Nevada is not covered by said act of January 12, 1877. (Circular G. L. O., January 1, 1889, page 42.)

Counsel for appellant contends that the Salt Bluff Placer decision is not an authority in the case at bar, because:

First, the policy of Congress of reserving saline lands was never extended to Nevada, a fact which though true as to lands in Utah, was either not considered or if considered, was misapprehended in considering that case; Second, the lands in controversy in that case were within a Territory respecting which Congress had not spoken or had occasion to speak as to a grant of salines to any State that might be formed out of it, which as to the lands in the pending case Congress had withheld from the State a grant of saline lands; Third, the secretary held in that case that there must be shown not only a separate and distinct policy of reservation in the past, but then existing, and Fourth, that neither the policy of reservation or of grant was ever extended to Nevada and that the former policy of reserving salines as it elsewhere applied has been abolished.

It is admitted that all salines were reserved from sale down to and including the Louisiana purchase, but counsel claim, that it did not extend to the latter acquisitions from Mexico; that the admission of California and Nevada, of North and South Dakota, Montana and Washington, and of Idaho and Wyoming, without grant of salines is expressive of the legislative intent not to regard it as the "settled policy" of the government to reserve this class of lands, and inasmuch as salines in these States can not be purchased under the act of January 12, 1877, and as their purchase is expressly prohibited by the preemption and homestead laws, the applicant should be permitted to purchase under the mining law.

I can not assume that my predecessor was not fully informed as to the action of Congress in not reserving salines in Utah, when he had that case under consideration, and from my own investigation of the matter, I am inclined to believe that it was and is the settled policy of the government to reserve this class of lands. We have the expression of the highest judicial tribunal in support of this theory. In Morton *v.* Nebraska (21 Wall., 660), the court says in the opening paragraph on page 667:

The policy of the government since the acquisition of the North West Territory and the inauguration of our land system, to reserve salt springs, from sale, has been uniform. The act of 18th of May, 1796, (*supra*) the first to authorize a sale of the domain ceded by Virginia, is the basis of our present rectangular system of surveys. That act required every surveyor to note in his field-book the true situation of all mines, salt licks, and salt springs.

Again in Cole *v.* Markley (2 L. D., 847), it was held that,

The law reserves generally 'land on which are situated any known salines,' and it has been the policy of the government from the earliest date to reserve salines from settlement and entry, and to dispose of them by act of Congress.

A brief summary of the acts of Congress upon this subject may throw light upon the issue.

The act of May 18, 1796 (1 Stat., 464), expressly reserved every salt spring which might be discovered "for the future disposal of the United States." That act related to the public lands north of the Ohio, and above the mouth of the Kentucky river. Said act was amended by the act of May 10, 1800 (2 Stat., 73), and by section 4, excluded from sale, the sections reserved by the act of 1796.

The act of March 3, 1803 (2 Stat., 229), provided for the disposal of lands south of Tennessee and required the performance of similar duties of the surveyor-general as were required of that officer for the northwest territory.

The act of March 26, 1804 (2 Stat., 277), extended the powers of the surveyor-general for the northwest territory to the Mississippi River and likewise reserved the several salt springs in said territory, "for the future disposal of the United States."

The act of March 2, 1805 (2 Stat., 324), as amended by the act of April 21, 1806, (2 Stat., 391), providing for the disposal of lands in the territory of Orleans and the district of Louisiana contained the exception of salt springs, and lands contiguous thereto, which by direction of the President of the United States, might be reserved for future disposal.

The act of March 3, 1811 (2 Stat., 662–665), providing for the sale of the public lands in the territories of Orleans and Louisiana authorized the President of the United States, whenever he thought proper to direct the sale of said land, but expressly reserved section sixteen in each township for the support of schools, also a tract reserved for the support of a seminary of learning, "and with the exception also of the salt springs, and lead mines, and lands contiguous thereto."

The act of July 22, 1854 (10 Stat., 308), establishing the offices of surveyor-general of New Mexico, Kansas and Nebraska, and for the disposition of the public lands therein, by section 4, provided: "That none of the provisions of this act shall extend to mineral or school lands, salines, military or other reservations, etc."

This language, it seems to me, shows that Congress intended to treat salines as being reserved, the same as school lands, and military and other existing reservations. By the 12th section of said act all lands in Nebraska and Kansas, to which the Indian title had been extinguished were made "subject to the operations of the pre-emption act" of September 4, 1841, "and under the conditions, restrictions, and stipulations therein mentioned."

The 10th section of the pre-emption act of 1841, forbids the acquisition of any pre-emption right to lands; "included in any reservation, by any treaty, law, or proclamation of the President of the United States, or reserved for salines, or other purposes" and that "no lands on which are situated any known salines or mines, shall be liable to entry under and by virtue of the provisions of this act."

It will be noticed that the language here used shows that Congress intended to exclude any right of pre-emption for such lands as were included in any reservation, whether made by treaty, by proclamation of the President, or "reserved for salines." It seems clear that Congress treated salines, as being reserved—in a state of reservation prior to and at the date of the act—the same as other existing reservations under the authority of law. One reason for this conclusion is found in the fact that in the first reference to salines in said section, salines are coupled with the other reservations named, and later on in the section, it is said that, "No lands on which are situated any known salines or mines, shall be liable to entry under and by virtue of this act." The noun "salines" is used in said act in the plural number, which must mean any and every tract of land that is saline in character, whether the saline it contains is found in beds, or rock, or in water flowing out of or found in the ground, which is saline by reason of having percolated through a saline bed or beds of earthy and rocky formations or otherwise.

It will also be noticed that these references invariably refer to *salines*. This seems to me to be of some importance in arriving at a proper conclusion in the case, in the light of the history of the times in which the several acts of Congress were passed. In the earlier settlement of the country, certain salt springs were discovered, and also in certain low and marshy places animals would lick the dirt because of its salty character; such places were called "salt licks." Afterwards, notably in Nebraska and Kansas, salt was found to exist in earthy formations; and it seems to me fair to conclude that in view of these facts Congress, in pursuance of its uniform practice of reserving saline or salt springs from disposition or sale, used the broader and more comprehensive term "salines," which would precisely cover not only salt springs, but all salt lands of every character; and by thus using the word "salines" it extended the provisions of the earlier acts so as to conform the statutes to meet the condition of the country, in respect to salt, in the light of the discoveries of salty formations in Nebraska, Kansas and elsewhere.

In Morton *v.* Nebraska (21 Wall., 660–667), Justice Davis, speaking for the supreme court, states without qualification, that "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." Again, page 669, "there was certainly no reason why a long established policy, which had permeated the land system of the country, should be abandoned . . . . . 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." Again, page 671: "It can not be supposed, without an express declaration to that effect, that Congress intended to permit the sale of salines in territories soon to be

organized into states, and thus subvert a long established policy by which it had been governed in similar cases."

If the language used by the court in the opinion in that case, is fairly construed, it can only be understood as holding that from the date of the acquisition of the Northwest Territory, up to October, 1874, the time said decision was rendered, the policy of the government was to reserve salt springs, and in fact salines, from disposition except such disposal as Congress might make of them.

In support of the claim that it has been the settled policy of Congress to reserve to itself the right to make a disposition of salt springs and lands adjacent thereto, it may be stated that by the act of March 6, 1820 (3 Stat., 545), authorizing the people of Missouri to form a State government, and for the admission of the State, it was provided: That no salt spring, the right whereof now is or hereafter shall be confirmed or adjudged to any individual or individuals, shall, by this section, be granted to said States." Similar provisions were made in the States of Arkansas (5 Stat., 58); Michigan (5 Stat., 59); Florida (5 Stat., 789); Iowa, (id., 789); Wisconsin (9 Stat., 56); Minnesota (11 Stat., 166); Oregon (id., 383); Kansas (11 Stat., 269); Nebraska (13 Stat., 47); Colorado (18 Stat., 474).

In the case of Hall *v.* Litchfield *et al.* (Copp's Mineral Lands, 321–323), Acting Commissioner Lippincott, after citing the case of Morton *v.* Nebraska, *supra*, said: "After a careful consideration of all the facts and the law in the case, I am clearly of the opinion, that this office has no authority to dispose of said tracts either as agricultural or mineral lands." Secretary Chandler, in affirming the decision of the Commissioner in that case, uses the following language: (id., 324) "This policy of reservation has uniformly and consistently been applied by the government to said Territory, as well as the other territory of the United States."

In the case of the Salt Bluff Placer (7 L. D., 549) Secretary Vilas held that no authority exists for the disposal of saline lands, or salt springs belonging to the United States except under the provisions of the act of January 12, 1877, and that said act is not applicable to the Territory of Utah. He said: "I am satisfied . . . . . that the policy of the government is, and has been from the earliest date, to reserve all salines, and to dispose of them only by specific acts of Congress."

The Litchfield case was decided by the Secretary, February 13, 1877, about five years after the passage of the mineral act; the Salt Bluff Placer, by the Secretary, December 19, 1888, which was about sixteen years after the passage of the mineral act. From the fact that all of these decisions of the Land Department were made a long time after the passage of the mineral act, and also the decision of the supreme court in the Morton case, it is fair to presume that in making said decisions the provisions of the mineral act and all laws having any bearing on the subject, were fully considered.

The act of March 3, 1853 (10 Stat., 244), was only intended to provide for the survey of the public lands in California, and to grant preemption rights therein. The surveyor-general was required to perform the same duties as were required of the surveyor-general of Louisiana, under the act organizing that Territory. Hence the reasoning of the court in the Morton case, *supra*, applies with the same force to land acquired from Mexico, as that acquired from France.

The seventh section of the act of 1853, provides among other things, that "No person shall make settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on *any other land reserved by competent authority;* nor shall any person obtain the benefits of this act by a settlement or location on mineral lands." Assuming that salt lands, or all salines, were reserved by Congress, by its settled policy respecting the same, it is clear that they were "reserved by competent authority" and they would come under the express provisions of said section, and thus the act itself negatives the idea that Congress intended to change the settled policy as to the disposition of salines.

An examination of the debates as reported in the Congressional Globe, relating to the mineral act of 1872, satisfies me that said act was intended to apply to the precious metals and not to such minerals as salt. The bill was originally introduced in the house by Mr. Sargent of California, a substitute for which passed the Senate, and afterwards became the law of 1872, (see Congressional Globe, B 172, page 395; id., 174, page 2456, 2457) and was reported to the House January 23, 1872, (id., page 632, 733). During the debate which followed (id., 533, 534), Mr. Maynard said: "I desire to make an inquiry of the gentleman from California (Mr. Sargent). This bill, so far as I am able to judge from the reading of it, seems to introduce a change in the policy of the government with regard to mineral lands." Mr. Sargent said in reply, among other things, "The bill does not make any important changes in the mining laws as they have heretofore existed. It does not change in the slightest degree the policy of the government in the disposition of the mining lands."

In the Senate the substitute was debated at considerable length, in the course of which (book 174, page 2460), Mr. Ramsey inquired of Mr. Stewart of Nevada: "Whether the terms of this bill apply to iron or coal, or to any other mines than those of the precious metals," and Mr. Stewart replied: "I think not," but added that if it did it would be no objection to it.

As to salines or salt springs, their consideration has been before the United States Senate. On June 29, 1866, there was a bill pending there to authorize the Secretary of the Interior to lease such of the public lands of the United States as are known as saline lands, containing mineral springs (see Cong. Globe, book 144, page 3475, 3804, 3805, and 3806). Mr. Conness (page 3805), inquired "how and why saline lands

or salt land and mineral springs are reserved," to which Mr. Harris replied: "It has been the policy of the government never to sell them. They never have been sold." Mr. Pomeroy said: "We can not buy a salt spring in any State. Senator Grimes said (page 3806): "All salt springs are reserved." Senator Howard said: "I know they are." Senator Stewart said:

> Whenever it can be understood and investigated so that a bill can be prepared whereby parties desiring to mine in these salt springs can obtain title . . . . . I shall favor such a bill . . . . . There is a salt bed (referring to Nevada) there, which is said by those who have examined it, to be the most remarkable that has ever been found in the world. It has never been surveyed, but it contains probably several thousand acres of rock salt in a pure state. . . . . When a system shall be devised to operate all over the United States, allowing these lands to fall into the hands of private proprietors, so that there shall be no monopoly, no harm to anybody, it is desirable it should be done. The Senate has passed a bill to allow the mineral lands to fall into the hands of private proprietors . . . . I say let the circumstances in regard to these salt springs be understood; let a bill be introduced; let it be presented at the next session.

In these remarks it seems altogether probable that Senator Stewart referred to these mines involved in this case, in part, at least. From these expressions, and others made in debate, it sufficiently appears that so far as the opinions of Senators go, that body has treated saline lands (1) as not embraced in the mineral laws, and (2) as being reserved, and not subject to disposition under any law of Congress.

The error of counsel's argument in this case is two-fold: (1) It assumes that Congress, by the acts providing for the admission of the two Dakotas, Montana, Washington, Idaho and Wyoming, expressly abandoned the former policy of reserving salines for future disposition. It is true the Idaho and Wyoming act provides that, "in lieu of any grant for saline lands to said State, the following grants of land are hereby made," but this language does not import any change respecting the reservation of salines for future disposition, but does seem to change the disposition to be made of salines. (2) In assuming that Congress would attempt to change the settled policy as to so important a matter as salines, after such policy had been recognized by all three of the branches of the government, by an indirect and obscure reference to salines. It seems to me that if Congress contemplated any such change, it would have made known its intention by a plain and unequivocal enactment, evincing such intention.

I am constrained to believe, that in the light of the authorities, salt mines of rock salt are salines within the meaning of said authorities, and that all mineral springs, salt springs, salt beds and salt rock, are covered by the general term "salines."

In addition to the laws above mentioned, I find that the instructions issued to surveyors-general, and their deputies, from the earliest period to the present time, have required them to note, among other things, "salt springs and licks" (Manual of Surveying and Instructions, etc.,

1855, 19; edition of 1890–44). In the field notes on file in your office of the survey of the township in which this claim is located, there is noted: "Great salt mine, 3 chns, S., of line —" the line referred to being that between Secs. 27 and 34. And on the plat in your office at this point is noted: "Salt mine." So that it would seem that in pursuance of the instructions this mine was noted and, if the views I have herein expressed are correct, became segregated.

In view of the legislation referred to upon this matter and in the light of what I find to be the uniform judicial and departmental rulings, I am unwilling to change the well settled rulings of the Department, which in my judgment, are in accordance with law. The Secretary of the Interior is but an agent selected by the executive to carry out the legislative will in the disposal of the public lands and he has no power to sell or dispose of the same without a positive direction from Congress. Believing as I do, that it has been and is now the intention of Congress to reserve all salines and salt lands, and finding no error in your judgment, it is affirmed.

SECOND HOMESTEAD ENTRY—RESIDENCE—MILITARY SERVICE.

WILLIAM E. ERWIN.

A pre-emptor who transmutes his claim to a homestead entry under the proviso to section 2, act of March 2, 1889, is entitled to credit for military service, in making proof of residence, although credit therefor was allowed under a former homestead entry.

Secretary Noble to the Commissioner of the General Land Office, June 6, 1892.

I have considered the appeal by William E. Erwin from your decision of May 14, 1891, rejecting his homestead proof, covering the NE. ¼ of the SW. ¼, the E. ½ of the NW. ¼, and lots 1 and 2, Sec. 18, T. 12 N., R. 33 W., North Platte land district, Nebraska, because prematurely made, and requiring him to show five years actual residence upon said tract.

On December 15 1888, Erwin filed pre-emption declaratory statement No. 10,578, for the tract here in question, and on September 29, 1890, he transmuted the same to homestead entry No. 15,919, under the provisions of section 2 of the act of Congress approved March 2, 1889 (25 Stat., 854).

He offered proof January 17, 1891, claiming credit for his military service, and the local officers were divided upon the question as to the allowance of the same, for the reason that Erwin had prior to making this entry completed a homestead and received credit for such service in the proof of residence offered thereon.

Your decision holds "that a soldier having exhausted his rights in

regard to military service, can not again be permitted to receive the benefit of said service in making final proof."

The proviso to section 2 of the act of March 2, 1889 (*supra*), as follows:

> 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.

It is clear to my mind that under this provision allowing the transmutation, the party seeking the benefit of the same is placed in the same position, with respect to the homestead law, after making the transmutation, as though he had never exercised the homestead right, and this being so, I can not see how this Department can impose a condition not contained in the statute.

The privilege granted the soldier or sailor by section 2305 of the Revised Statutes is a personal one, and is a part of the homestead law, and as the authority of Congress to extend the same to a second homestead can not be questioned, in the absence of any restriction upon the second homestead right, I am of the opinion that said privilege extends to the second entry, and that the claimed credit for service should be allowed.

Your decision is therefore reversed, and the record herewith returned that the case may be re-adjudicated in accordance herewith.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT RIGHT.

MISSOURI, KANSAS AND TEXAS RY. CO. *v.* TRAMMEL.

Land covered by an expired pre-emption filing, but on which the pre-emptor is yet residing, is not subject to indemnity selection.

Secretary Noble to the Commissioner of the General Land Office, March 25, 1892.

I have examined the record in the appeal of the Missouri, Kansas and Texas Railway Company from your decision of June 6, 1890, holding for cancellation the indemnity selection of said company of the N. ½ of the SW. ¼, Sec. 2, T. 26 S., R. 20 E., Independence, Kansas, and sustaining the application of William B. Trammel to make homestead entry for the same.

The facts are correctly stated in your decision and show, in brief, that at the date of the indemnity withdrawal of the land, to wit, April 3, 1867, James Ard had a valid, subsisting pre-emption filing on the

land, it having been made July 14, 1866, alleging settlement the same day. This filing served to except the land from the withdrawal. Malone *v.* Union Pacific R'y Co., 7 L. D., 13.

James Ard, after his settlement, continued to live on the land until his death in 1883, but he never made final proof under his pre-emption filing.

The railroad company selected this tract as indemnity, September 25, 1882, a year before the death of Ard and while he was still living on it.

It is claimed that Ard not having made proof prior to the date of the company's selection, his pre-emption filing had expired, it having been made fifteen years prior thereto, and in consequence of such failure to make proof his claim was no bar to the selection by the company.

The rulings of this Department—too numerous to need citation—are to the effect that while a failure to make pre-emption proof within the statutory limit (thirty-three months from settlement) opens the land to settlement, yet such failure can not be asserted by a railroad company claiming under a grant of lands "free from pre-emption or other claims or rights," etc.

That such failure to make proof is only presumptive evidence of abandonment, which may be overcome by showing that at the date of definite location (in this case indemnity selection) the pre-emption claimant was in actual possession of the land under his claim. Northern Pacific Railroad Company *v.* Stovenour, 10 L. D., 645.

The evidence taken at the hearing abundantly shows that James Ard was in such possession at the date of the company's selection.

Your judgment, therefore, allowing the homestead entry of Trammel, was right and is affirmed.

PRIVATE CLAIM—RESERVATION—LOCATION.

SCOLLY GRANT.

The Department is without authority to make an agreement by which the grant claimants can secure, through desert entry, lands that have been improved by them but that will fall outside of the grant if it is located in a square form as required by the statute of confirmation.

The confirmees under this grant have the right to select the point of location when the government is ready to survey the tract confirmed, but a failure on the part of the confirmees to avail themselves of this privilege, after due notice, will be treated as a waiver of said privilege.

Secretary Noble to the Commissioner of the General Land Office, June 4, 1892.

In 1843 the Mexican authorities made a grant of lands to John Scolly and his associates. This grant was submitted to the surveyor general of New Mexico for action, under the provisions of section 8 of the act of July 22, 1854, 10 Stat., 308–; was recommended for confirmation by

that officer to the extent of "five leagues square," (Vol. 2 Private Land Claims pp. 409, 427) and was confirmed, as claim No. 9 by the first section of the act of June 21, 1860, 12 Stat., 71; with the proviso however, that it "shall not be confirmed for more than five square leagues." Section 2 of said act further provides—

> That in surveying the claim of said John Scolly it shall be lawful for him to locate the five square leagues confirmed to him in a square body in any part of the tract of twenty-five leagues claimed by him.

In 1876 the surveyor general of New Mexico was instructed to cause a survey to be made of the outboundaries of the twenty-five square leagues, and to notify the owners of the grant that they would be allowed to select the five leagues in accordance with the provisions of the act of Congress.

In response to this notice the grant owners filed a protest, containing a long argument against the proposed survey and the action of Congress upon which it was based, denying the right or authority of that body to restrict the grant to less than twenty-five square leagues and insisting upon their right to ask for "a reconsideration of the decision of Congress." Notwithstanding this protest the survey of the outboundaries was made as directed and approved by the surveyor general, December 30, 1876.

On January 24, 1878, Secretary Schurz wrote to the grant owners urging the propriety of making selection of the tract confirmed to them without further delay, inasmuch as the Department had no power or discretion otherwise than to issue patent for the confirmed land only and, as it was to be presumed that "Congress restricted the claim to five square leagues after thorough investigation and in accordance with what it deemed to be just and right," it would be inconsistent with his views as a public officer to urge upon that body legislation to confirm the grant for twenty-five square leagues.

To this letter of the Secretary a reply was made attempting to refute the presumption that the action of Congress was taken after a thorough investigation; a repetition was given in substance, of the former arguments in the protest, and the statement made that—

> We view the decision of Congress as unjust in an eminent degree, and utterly at variance with the facts of the case, and consequently, feel fully justified in declining to comply with its requirements and in demanding a re-examination of the facts in the case as our right before any further steps are taken to dispossess us of lands which are justly ours, &c.

Under date of March 4, 1878, the Secretary wrote to the Chairman of the House Committee on Private Land Claims, recommending that Congress take some action to compel the claimants to select the five square league confirmed to them within a limited time, and suggesting that section 8 of the act of July 23, 1866, 14 Stat., 218 be extended so as to cover the case. No action was taken by Congress in relation to the matter. At different times efforts have been made to obtain action

from the land officers to open up to settlement the lands within said grant and to protect settlers thereon. But nothing has been done in the premises, because the authority to act seems to have been doubted.

Under date of April 7, 1892, a communication was received here from Mr. Frank Springer in relation to said grant, which was sent to you for report and was returned with your report of May 16, 1892.

Referring to the history of the grant, the early settlement thereon of American citizens, after the acquisition of the Territory, the unwillingness of the owners heretofore, to acquiesce in the reduction of the area thereof by the act of confirmation, which they have continued to hope might be reconsidered, Mr. Springer states that all parties in interest submitted the matter to him for advice, expressing a desire to end the uncertainty as to their titles and get what belongs to them. After consideration, he has advised that they had better select the five leagues confirmed to them and abandon all claim to the rest. This advice they have expressed a disposition to follow, if it can be done without great injury to them.

It is further stated by Mr. Springer that the original grant was divided among seven parties, who established themselves in different locations and have highly improved ranchos, well known in that section; that although said ranchos may not embrace a superficial area of more than five square leagues, nevertheless, if that quantity must be taken in a square form, it is impossible to locate it without excluding, upon one side or the other, some of these long settled and valuable ranchos; that whilst by a slight departure from the square form a location might be made, which would not work a serious hardship to anyone, it is believed that the executive authority is so limited by the act of Congress that a patent issued in other than a square form would be void on its face.

It is suggested however, that with the aid of the Department perhaps the difficulty may be obviated. One of the owners who occupies the most westerly of the locations has constructed it is said, an extensive system of irrigating ditches and reservoirs for the purpose of reclaiming his lands, which before that were desert in character. The ditches and reservoirs which were constructed in 1864 and 1865, it is asserted, can be held under the provisions of the act of March 3, 1891, granting a right of way for such purposes, and as the occupant has several sons, it is proposed that the Department allow them to make desert land entries of those lands which would not be included in the square location of the five leagues confirmed; and thus enough land would be covered to give the benefit of the improvements and expenditures thereon to those who made them. In conclusion Mr. Springer says if this course can be adopted the owners will agree to select their five square leagues and relinquish the surplus to the United States, whereby there would be restored to the public domain twenty square leagues or about eighty-seven thousand acres of land.

The Department is not clothed with authority to make the proposed agreement by which said lands may be secured to the grant claimant, or his sons under the desert land law. If said lands are now, or hereafter become subject to disposal under that law, applications to purchase the same only can be considered and disposed of in the regular way, under the law, the decisions and rules of the Land Department. Therefore the proposition made through Mr. Springer, in this behalf is denied.

If now the owners are not willing to locate the five square leagues confirmed to them they cannot retain possession of twenty-five square leagues of land; as it has been declared by the legislative branch of the government, which alone has authority to act in such matter, that they are entitled to but five square leagues.

It is not necessary to discuss the authority of Congress to restrict the grant to five square leagues, or the justice of its action in the present case. These are no longer open questions. They have been determined by the law making authority of the government and its action will not be questioned by this Department. The statute must prevail and be executed.

It is well settled that a grant of a certain quantity of land to be located within a larger tract, described by out-boundaries, "is really a float to be located by the consent of the government before it can attach to any specific land." United States *v.* McLaughlin 127 U. S. 428, 448. This is directly applicable here.

The government, not the grantee, has the option to locate the quantity granted. It has the right to say where the grant shall, and where it shall not, be located and if a sufficient quantity be left within the out-boundaries to satisfy the specific grant, the other lands can be disposed of by the government without doing any wrong to the confirmees. This was the law of Mexico and is the law of the United States. Ib., p. 450, and cases there cited.

In the administration of such grants the owners have usually been permitted to select the point where they wish to have the quantity located, provided it be located in one tract, and if there be no sufficient reason to the contrary. But this is a mere privilege, not a right, which has been accorded by the land officers, and which they might give or withhold as seems proper. (Ib.) The privilege not having been exercised in the long time that it might have been, the government will proceed on its own powers and reasonable notice. When the claim is surveyed it shall be lawful for Scolly to locate the grant within the out-boundaries, and the surveyor shall adopt his selection. Without the enactment the officers might or might not adopt his location; with it they are bound to do so if the selection be as authorized and otherwise proper. But it was not intended by Congress, that the supreme right of the government itself to make the location should be abrogated, and that exclusive right be conferred upon the grant owners. The govern-

ment has not so unnecessarily abandoned a public right nor can the grantees be allowed to practically secure the sole and indefinite possession and enjoyment of the whole twenty-five leagues, by omitting to exercise a privilege.

It is my opinion, the proper construction of said act of Congress is that, when the United States is ready to survey said confirmed grant the confirmees have a right to select the point of location. If they are afforded an opportunity to do this and fail to avail themselves of it within a reasonable time, it is adjudged they will have waived the privilege and the land officers will proceed to discharge their duty by locating the confirmed lands and extending the public surveys over the surplus.

You are therefore directed to cause a survey of the grant to be made in accordance with the act of confirmation, first notifying the owners of your purpose and the time when; that they will be allowed a reasonable time, say ninety days from notice, within which to exercise the right of location conferred by the act of Congress, if they choose to do so; and that the survey will be made in accordance with their location, if practicable and legal; and if the owners fail or decline to make the location within the appointed time, then the surveyor shall proceed to locate said grant in a square form, having due regard to the character of land and the improvements of the owners thereon.

You will notify Mr. Springer hereof, whose letter is sent you to file with your papers in the case.

RAILROAD GRANT—WITHDRAWAL—INDEMNITY SELECTION.

SOUTHERN PACIFIC R. R. CO. *v.* MCWHARTER.

The fact that a deficit exists in the granted limits does not relieve the company from the necessity of selection to acquire title to indemnity lands.

The withdrawal contemplated by section 6, act of July 27, 1866, relates only to the primary or granted lands, and the validity of any further withdrawal, upon the filing of the requisite map, depends entirely upon executive action.

Secretary Noble to the Commissioner of the General Land Office, June 8, 1892.

I have considered the appeal by the Southern Pacific Railroad Company from your decision of May 1, 1891, reversing the action of the local officers in rejecting the final proof tendered by Milton McWharter upon his pre-emption filing covering the NE. ¼ of Sec. 17, T. 17 S., R. 16 E., Visalia land district, California, for conflict with the grant for the Southern Pacific Railroad Company.

On January 3, 1867, said company filed in your office a map showing the line of its proposed road, under the act of July 27, 1866 (14 Stat., 292), upon which a withdrawal was ordered March 22, 1867, of all the

odd sections falling within both the primary and indemnity limits of the grant.

The 3d or granting section of the act of 1866 is as follows:

That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, 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 designated by a plat thereof, filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers.

The 6th section provides:

That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company.

The location of 1867 was designed as a map of general route.

Some question having risen as to whether this location satisfied the requirements of the act of July 27, 1866 (*supra*), the joint resolution of June 28, 1870 (16 Stat., 382), authorized said company to construct its road and receive patents along the designated route indicated by the map filed in the General Land Office, January 3, 1867.

Without discussing the effect of said joint resolution of 1870 upon the location of 1867—i. e., in the matter of making definite that which before was but a general route—no further action appears to have been taken by the company towards locating its road opposite this land, prior to August 15, 1887.

By departmental order of that date, the order of withdrawal on account of this grant, so far as it related to indemnity lands, was revoked and the lands not embraced in pending or approved selections were restored to entry, after due notice by publication.

No selection of this tract having been made, on January 16, 1888, one John H. Maxwell made homestead entry of the same, which entry he relinquished May 22, 1890, and same day McWharter filed pre-emption declaratory statement for the land upon which he offered final proof, and upon the rejection of the same the present case arose.

On November 12, 1889, while this tract was covered by the entry of Maxwell, the company filed a map, showing the constructed line of its road opposite this tract.

This map was by you treated as the map of definite location, and the limits of the grant were readjusted thereto, the tract in question falling within the primary limits of the grant upon that adjustment.

The company in its appeal urges, under the authority of the decision in the case of the St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (139 U. S., 1), that the act making the grant withdrew the lands "in the forty mile limits," and that no selection was required to save the company's right of selection, it being shown that there was a deficiency in the grant.

If this be so, then there was no authority to revoke the indemnity withdrawal. The question as to the authority to revoke the withdrawal of indemnity lands on account of this grant and others of a like nature was thoroughly considered by this Department prior to the revocation of such withdrawals, and rights of others attaching under such revocation have been repeatedly recognized by this Department as against the claim of the company. Southern Pacific R. R. Co. *v.* Meyer, 9 L. D., 250; Southern Pacific R. R. Co. *v.* Cline, 10 L. D., 31; Lane *v.* Southern Pacific R. R. Co., 10 L. D., 454; Southern Pacific R. R. Co. *v.* Meyer, 10 L. D., 444.

The matter would therefore seem to be *stare decisis*.

I deem it unnecessary to refer to the decision in the case of the St. Paul and Pacific Railroad *v.* Northern Pacific Railroad Company (*supra*), to which counsel refer, further than to say that it has no application to the facts in this case.

I might remark in passing that if the construction insisted upon by counsel be correct, then a reservation exists ten miles beyond the indemnity limits of this grant, in this State as it is limited to thirty miles on each side of the road in the selection of its indemnity.

The withdrawal contemplated by the 6th section of this act has been uniformly construed to relate only to the primary or granted lands, and the validity of any further withdrawal upon the filing of said map rests entirely upon executive action.

In the case of the Northern Pacific Railroad Company *v.* Miller (7 L. D., 100), it was held that the 6th section of the act of July 2, 1864 (13 Stat., 365), similar to section 6 in the act under consideration, was a mandate effectually prohibiting the exercise of the executive authority to withdraw indemnity lands.

It is unnecessary at this time to pass upon the correctness of that proposition, but, after the revocation of the indemnity withdrawal, the lands were surely subject to appropriation as other public lands, and the entry by Maxwell was properly allowed.

This being so, the land was excepted from the operation of the grant, as said entry was a valid, subsisting claim at the date of the definite location, November 12, 1889, and upon the cancellation of Maxwell's entry the land embraced therein was restored to the public domain, free from any claim under the railroad grant. Kansas Pacific Railway Company *v.* Dunmeyer, 113 U. S., 629.

Your decision is therefore affirmed.

RAILROAD GRANT—WITHDRAWAL—APPLICATION TO ENTER.

SHADBOLT *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

No rights are acquired by the presentation of an application to enter lands that are withdrawn for railroad purposes. On the subsequent restoration of the land, a new application will be necessary to protect the interest of such an applicant.

Secretary Noble to the Commissioner of the General Land Office, June 8, 1892.

I have considered the appeals of George B. Shadbolt and thirty-seven others from your judgment of May 18, 1889, rejecting their respective applications to enter tracts of land within the indemnity limits of the grant to the St. Paul, Minneapolis and Manitoba Railway Company of March 3, 1857 (11 Stat., 195).

The tracts are situated in the St. Cloud land district, Minnesota, and were withdrawn by order of the Secretary of the Interior of June 3, 1869, under authority of the act of March 3, 1865 (13 Stat., 526).

This withdrawal was in force when these applications to enter were made and rendered said tracts not subject to entry. The withdrawal was not revoked until after the passage of the act of September 29, 1890 (26 Stat., 496). (See the order of May 22, 1890, directing the revocation of said withdrawal, 12 L. D., 541).

The rejection of said applications was therefore proper, and no rights were acquired by the presentation of the same. Shire *et al. v.* Chicago, St. Paul, Minnesota and Omaha R'y Company, 10 L. D., 85.

The lands involved will be disposed of under the terms of the order of restoration. In giving notice of this decision, due notice should be given these parties that they may file new applications so as to protect their interests in these lands, if they so desire, but this shall in no wise be construed as affecting the rights of others claiming an interest therein.

TIMBER CULTURE ENTRY—REPEALING ACT.

ALVIN A. WILTSE.

A timber culture entry made on the date of the repealing act, March 3, 1891, by a successful contestant may be allowed to stand.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 9, 1892.

On the 3d day of March, 1891, Alvin A. Wiltse made timber-culture entry for the NW. ¼ of Sec. 9, T. 34 N., R. 26 W., Valentine land district, Nebraska, and upon the payment of fourteen dollars received from the local officers certificate No. 8525.

On the 10th of June, 1891, you advised the local officers that said entry

is hereby held for cancellation for illegality, the timber-culture law having been repealed March 3, 1891, and the party had at that time no right accruing under said law.

An appeal from such action on your part brings the case to the Department.

In his paper constituting his appeal, it is stated that Wiltse made his entry about one o'clock P. M., that prior to that time he had been to a great deal of trouble and expense in contesting said tract, and that after his entry and prior to receiving notice of your decision he had acted in good faith, and had broken about twenty acres of said tract. He asks that his entry be reinstated and be allowed to remain intact.

Of the entire good faith of the entryman in making his application and his entry there is no question. He had contested a prior entry and secured its cancellation, for the purpose of securing the land for himself, under the law there in force, and up to the time of receiving notice of your decision of June 10, 1891, he had fully complied with the provisions of that law.

On the day the entry was made, "an act to repeal timber-culture laws, and for other purposes" (26 Stat., 1095), was approved. In that act it was expressly provided

that this repeal shall not affect any valid rights heretofore accrued or accruing under said laws, but all bona fide claims lawfully initiated before the passage of this act may be perfected upon due compliance with law, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests, as if this act had not been passed.

The precise question presented by the case before me has never been passed upon by the Department, but I am of the opinion that Wiltse had valid rights accrued or accruing under the timber-culture laws, before the passage of the act of March 3, 1891.

The Department has repeatedly held that where an entry or filing was made the same day that the map of a general railroad route was

filed and an order of withdrawal made thereon, that the entry or preemption filing would except the land included therein from the operation of such withdrawal.

In the case of the Northern Pacific Railroad Company *v.* Parker and Hopkins (2 L. D., 569), the withdrawal took effect August 13, 1870. Parker made homestead entry the same day. It was held that as Parker entered the same day the withdrawal took effect, his entry must be regarded as the superior right, and that the land was thereby excluded from the withdrawal, and upon the subsequent cancellation of his entry, that the land covered thereby passed to the United States. In support of this position, the case of Saint Paul, Minneapolis and Manitoba R. R. Co. *v.* Gjuve (9 C. L. O., 119), and the case of Talbert *v.* Northern Pacific R. R. Co. (2 Brainerd's Legal Precedents, 321, are cited. The same doctrine was repeated in the case of the Northern Pacific R. R. Co. *v.* Flaherty (8 L. D., 542).

Those were cases between individuals and corporations, while the case at bar is between an individual and the government. Applying to this case the doctrine adopted and adhered to in those cited, and the entry of Wiltse must be allowed to stand. His application and his entry were acts performed by him in good faith, under the timber-culture law, prior to or simultaneously with the passage of the repealing act, and I think conferred upon him certain rights. These were "accrued or accruing" rights, lawfully initiated under laws in force prior to the passage of the act of March 3, 1891, and it was therein provided that such rights "may be perfected upon due compliance with law, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests, as if this act had not passed."

In the case of August W. Hendrickson (13 L. D., 169), where a prior entry had been successfully contested, but where the successful contestant did not apply to enter the land until the 10th of March, 1891, it was held that his application came too late, and your decision rejecting it was affirmed by the Department.

The facts in that case, however, differed from those herein presented in a very essential particular. There the application to enter was not made until several days after the passage of the repealing act of March 3, 1891, while in this case, the entry and the repeal both occurred on the same day.

In view of the decisions cited in the cases between individuals and corporations, and of the provisions in the repealing act for the completion of accrued or accruing rights lawfully initiated under the timber-culture law, and of the facts and circumstances of this case, my conclusion is that the entry of Wiltse was valid, that it should be allowed to remain intact, and that upon the compliance with the law under which it was made, he should be permitted to perfect the same. The decision appealed from is therefore set aside.

SECOND HOMESTEAD ENTRY—ACT OF MARCH 2, 1889.

JOHN LINDELL.

Section 2, act of March 2, 1889, does not authorize a second entry, where the entryman, prior to the passage of said act, has purchased the land covered by his first entry under the act of June 15, 1880.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 9, 1892.

On the 30th of September, 1889, John Lindell made homestead entry for lots 3 and 4, and the S.½ of the NW.¼ of Sec. 5, T. 19 N., R. 5 W., Kingfisher land district, Oklahoma Territory, which entry was held for cancellation by you on the 15th of January, 1891. The case is before me upon an appeal from such decision by you.

Your action in the case was based upon the fact that the record in your office showed that on the 7th of December, 1878, Lindell had made homestead entry for one hundred and sixty acres of land at Hays City (now Wa Keeney), Kansas, which land was purchased on the 28th of July, 1885, under the act of June 15, 1880 (21 Stat., 237), and patent issued June 6, 1888.

In explanation of this transaction, Lindell states in an affidavit which accompanies and forms part of his appeal, that he made entry for that land in good faith for the purpose of a home, and built thereon a good sod house, a stone stable fourteen feet square, with a shed of stone on one side ten feet in width; that he dug two wells, one sixty-eight and the other seventy-five feet in depth, but obtained no water, striking a shale rock which in that country indicates no water; that some of his neighbors bored to the depth of four hundred feet and found no water; that he was compelled to abandon his wells and haul all his water two and a quarter miles; that he continued his residence upon the land two years and two months, but was unable to secure any water, or raise any crop, or even a garden, although he attempted to cultivate twenty-eight acres of the land; that finding it impossible to live on the land and support his family, he abandoned it on the 3d of February, 1881, and gave it up as lost; that he never returned to said land again to live on it, or to attempt its cultivation, or even to see it; that about four years and five months after he had moved from the land and abandoned it forever, for the reasons stated, one E. H. Barton offered him fifty dollars for his improvements thereon, which offer he accepted; that he never made any attempt at any time to obtain title to the land, but he understands that a few days after purchasing such improvements Barton made cash entry for the same.

He further makes oath that when he sold his improvements to Barton, he signed a paper which he supposed simply authorized Barton to take possession of said improvements; that he did not intend to convey or attempt to convey any interest in the land itself, as he claimed none, having abandoned the land and all claim thereto, several years before.

His affidavit is corroborated by two witnesses who declare it to be true, of their own knowledge, and that they have no interest in the case. Lindell's statements in this affidavit, that he only sold and transferred his improvements to Barton, and that he never had the title to the land for a moment, are not borne out by the records of your office.

It appears from said records that Lindell made the regular proof required under the act of June 15, 1880. In his proof he swore, among other things, "that he has 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, or commissions and excess of payments made thereon." Said proof was sworn to before E. H. Barton, notary public, and corroborated by William W. McKeever and F. M. Lauck; upon which a patent was issued to Lindell June 6, 1888. Under these circumstances, his affidavit filed in this matter can not be accepted as true in so far as it attempts to contradict your records respecting his cash entry under the act of June 15, 1880. That he made such cash entry under the act of June, 1880, is unquestionably true, and the only question remaining is whether said cash entry bars his right to make an entry under the act of 1889.

The right to make a second entry is accorded by section 2, act of March 2, 1889, to "any person who has not heretore perfected title to a tract of land of which he has made entry under the homestead law." Now on the record, as stated, Lindell has perfected title to a tract of land which he entered under the homestead law and that too, by virtue of a special privilege conferred by the act of 1880, upon persons who did not comply with the terms of the general homestead act. This special act must be certainly considered a part of the homestead system Martha A. Carter, 9 L. D., 604), and it can not, in reason, be argued that under the act of 1889, the right to make a second entry extends to one who has been permitted to perfect title in spite of previous noncompliance with law while denying the same privilege to one who secures title, after having complied with the law in all respects.

The Department, in the case of Joseph A. Nixon (13 L. D., 257), held that section 2, act of March 2, 1889, does not authorize a second homestead entry when the entryman, prior to the passage of said act, has purchased the land covered by his first entry under the act of June 15, 1880. No sufficient reason for any change in the holding in that case is made to appear. The decision appealed from, is therefore affirmed.

TIMBER AND STONE ACT—LAND DEPARTMENT—ALIENATION.

UNITED STATES *v.* MILLER.

The Commissioner of the General Land Office, acting under the direction of the Secretary of the Interior, is vested with general authority to determine whether entries allowed by the local officers are in fact made in due accordance with

law; and this authority is in no wise abridged in the provisions made by the act of June 3, 1878, for the sale of timber and stone lands.

The phrase "bona fide purchaser" as used in said act is not applicable to a purchaser before patent.

Secretary Noble to the Commissioner of the General Land Office, June 10, 1892.

By letter of February 7, 1890, you transmitted a petition of Charles Lewis, transferee and present claimant of the land involved in the case of United States *v.* Charles C. Miller viz: lots 1, 2, 3, and 4, Sec. 22, T. 21 N., R. 2 E., Seattle land district, Washington.

On March 16, 1883, Miller made entry for said land under the timber and stone land law act of June 3, 1878 (20 Stat., 89). On November 3, 1885, said entry was held for cancellation on the report of a special agent to the effect that "the land embraced therein was and is agricultural land" and that "said entry was made in the interest of George H. Ryan of Tacoma, Washington Territory." Afterwards upon the filing of affidavits by Miller and Ryan a hearing was ordered which resulted in a decision by the local officers in favor of the claimant. That decision was reversed by your office and the entry held for cancellation. Upon appeal to this Department your office decision was affirmed upon the ground that the evidence showed "that the entry was not made by Miller in good faith to appropriate the land to his own exclusive use and benefit, but in the interest of Ryan." A motion for review based upon the theory that said decision was contrary to the weight of evidence was denied.

The petition now under consideration sets forth that the petitioner, a resident of the State of Iowa, while on a visit to Washington Territory in July 1883, had his attention directed to the land in question and was advised by one B. McCrady to invest money in the purchase thereof from one George H. Ryan, who as he was informed, was its owner. That intending to make investments of that sort he examined said land and finally purchased it for the sum of $9000, which amount he has since that time paid in full. He further sets forth that

at the time of his paying the $5,000 (1st payment) aforesaid, and up to that at which the Land Department began its action which ended in a forfeiture of the interest acquired by Miller in his application, as well as for some time thereafter, the undersigned was not informed and did not believe, and he had no reason to believe, that the said Charles C. Miller had not in all respects conformed his action in making application for the land in question, to the statute and other regulations governing such cases; particularly, he had no information or notice that Miller had complicated himself in that respect with G. H. Ryan, as subsequently decided in the land office.

The prayer of this petition is couched in the following language:—

Your petitioner shows that his connection with the land and payment of the $9,000 and interest aforesaid, originated, and was conducted, *with good faith* towards the United States and all other persons; and therefore he prays that as a *bona fide* purchaser he may obtain the relief to which, as he submits he is entitled by the provisions of the T. and S. Statute, section 2, last clause.

This petition although it sets up facts, the existence of which and makes statements and allegations the truth of which could in the very nature of things be known to Lewis alone, is verified by one of his attorneys. This practice is not to be commended and although I have concluded to consider this petition upon its merits, it will hereafter be insisted upon that petitions requiring verification shall be verified by some one in position to have and having a personal knowledge of the facts alleged.

Section 2 of the act of June 3, 1878, prescribes the oath that is to be made by applicants for land under this law, provides that any person who shall in making such oath swear falsely, shall be subject to the pains and penalties of perjury, and shall forfeit the money he may have paid for such lands and all right and title to the same, and by the last clause provides, "and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void."

It is strongly urged that the rule as to forfeitures under this act is not the same as that which obtains under the pre-emption law. The position taken upon this point is fairly presented in the following quotation from the argument filed:—

> It seems to be certain, however, that in applications under the timber and stone statute, something more than swearing to a matter merely not true is required to warrant a forfeiture of the money and land. This is made plain by the provision that the false swearing which authorizes the forfeiture is the very same which renders the party subject to the pains of perjury; for if it be necessary for such subjection that the swearing be corruptly false, so also is it for the forfeiture; * * *. It follows also that inasmuch as for liability to the pains of perjury it is necessary that there should be a previous conviction by a jury, so also for the forfeiture of money and land imposed as another consequence of such fact.

This rule if it is to be adopted would apply as well to those cases where the original entryman still claims the land as to those where it is held by a transferee of such entryman; that is to say, the question of the rights of a bona fide purchaser does not enter into the discussion and determination upon this point in the case as a controling factor. It may be noted further that neither the question of the degree of criminality required to subject the entryman to punishment nor the question of the forfeiture of the money paid for said land is now under consideration; the only question now here being as to the authority of the proper officers of this Department, prior to the issue of patent, to examine into all the facts and circumstances surrounding and connected with an entry allowed by the local officers under this law for the purpose of determining whether the entryman has shown such good faith and compliance with the requirements of the law as to entitle him to a patent and if it be determined that he has not complied with the law or has not acted in good faith to refuse to pass the entry to patent. Upon the Commissioner of the General Land Office, acting under the direction of the Secretary of the Interior, the law has confered super-

visory power over the action of the local officers in such matters and has imposed "all executive duties pertaining to the surveying and sale of the public lands of the United States or in anywise respecting such public lands." Revised Statutes Sec. 453.

The duty thus imposed necessarily carries with it the power and authority to take such steps as may be necessary to determine whether there has been a compliance in good faith with the provisions of the law under which title is sought and in case it be determined that there has not been such compliance or that there has been an attempt, through fraud and false swearing to wrongfully procure title to the public land, or to avoid the provision of the law, to refuse to approve such claim for patent. The truth of this proposition as applied to the system of public land laws as a whole is well settled by a long line of decisions and in support thereof reference need be made only to the cases of Smith *v.* Custer *et al.*, (8 L. D., 269) and Travelers Insurance Company (9 L. D., 316), and the authorities referred to in those decisions.

That this is the general rule is not, indeed, specifically denied by this petitioner, but it is, in effect, claimed that the law under which the land here involved was purchased forms an exception to such general rule. To allow this claim would be to say that an entry under this law when allowed by the local officers must be passed to patent although it may be apparent to the officers charged with the supervision of the actions of those officers and the proper execution of this law, that such entry was made in direct violation of the provisions of the law, for the benefit of another and was procured through fraud and false swearing. The issue of patent vesting as it would legal title in the grantee would necessitate, on the part of the government, recourse to the courts for redress against such wrong-doing. To work such an exception to the general rule as would bring about this condition of affairs in the administration of the land laws or would abridge the authority of those officers of the government charged with the due administration of the land laws in a matter so necessary and essential to the proper execution of the duties imposed upon them, and the trusts confided to their care, would require the use of clear and explicit language such as would leave no doubt as to the intention of Congress. No intention to make this act such an exception to the general rule is indicated by the language used, nor can I think it was intended there should be one rule for entries of this character and another for entries under the other laws providing for the disposal of the public lands. The provision of this law, that any person who shall swear falsely in the premises shall be subject to all the pains and penalties of perjury, does not add to, nor does it detract from the authority of the officers of the government charged with the execution of such law. It is clearly the duty of those officers to examine all applications for land under this law, and in those where it is found that the law has

not been complied with, or that an attempt to fraudulently acquire title in defiance of the provision of said law has been made to refuse to approve such claims for patent. This is what was done in the matter of Miller's application, and the correctness of the findings of your office and this Department is not now being questioned. The position taken by the petitioner upon this point in the case is not tenable and can not be sustained.

It is further contended that the phrase *bona fide purchaser* as used in this statute should be construed to include all "such as have dealt with the applicant about the land honestly." It is at the same time, however, admitted that ordinarily that phrase does not include one who has bought a mere equitable title. One of the well established rules to be followed in the construction of statutes is that words or phrases which have come to have a known legal import are to be considered as having been used in their technical sense, unless it is apparent that it was intended they should have some other meaning. The term "bona fide purchaser" had, long before the passage of this law, come to have a well-defined meaning as a legal term, and it did not in this meaning include one who had bought merely an equitable title. Not only is this true, but it may properly be said to have attained a technical meaning as used in the laws relating to the disposal of the public lands of the United States. As far back as 1841, Attorney-General Legare (3 Op., 664), in considering the use of this term in the pre-emption law, said:—

> The assignee took only an equity, and he took it of course subject to all prior equities. The patent, it is needless to say, is the only complete legal title under our land laws. But to protect a purchaser under the plea of a purchase for a valuable consideration, without notice, he must have a complete legal title. There must have been, not a contract, but a conveyance—not a *jus ad rem*, but a *jus in re*.

The same position was taken by Justice Miller in the decision in the case of Root *v.* Shields, rendered in November, 1868 (1 Woolworth's Circuit Court Reports, 340).

In that case the vendees of Shields, a pre-emption entryman, claimed protection as *bona fide* purchasers, and the court said:—

> Until the issue of the patent, the title remained in the United States. Had this entry been valid, Shields would have taken only an equity. His grantees took only an equity. They did not acquire the legal title. And in order to establish in himself the character of a *bona fide* purchaser, so as to be entitled to the protection of chancery, a party must show that in his purchase, and by the conveyance to him, he acquired the legal title.

This phrase, as used in the pre-emption law, had then, at the date of the enactment of the timber and stone law, received construction and had been by the proper authorities invested with a well-defined meaning and import. Congress must therefore in making use of this phrase in the later law relating to the same subject-matter, i. e., the disposal of the public lands, be held to have used it in the light of such construction and to have intended the same meaning as had attached to the phrase by such construction.

As to the rulings of this Department and of the courts upon the rights of a purchaser from a pre-emptor, before issue of patent, it is only necessary to refer to the cases, hereinbefore cited, of Smith *v.* Custer *et al* (8 L. D., 269), and Travelers Insurance Company (9 L. D., 316), where this question was carefully considered, the authorities upon the point referred to and the conclusion arrived at clearly and definitely stated.

The arguments advanced in support of the position taken by this Department in those cases are equally applicable to cases involving the same question under the statute now being considered. That the same rule obtains here as under the pre-emption law, is, in effect, held in the case of Richardson *v.* Moore (10 L. D., 415). This same question was also presented in the case of United States *v.* Allard *et al.*, (14 L. D., 392), and was very carefully considered. The whole matter was quite fully discussed in the decision rendered in that case, the conclusion then reached being that a purchaser before patent, of one claiming lands under the statute now under consideration is not to be considered a "*bona fide* purchaser" within the meaning of the term as used in said statute. This position is, in my opinion, in perfect accord with both the letter and the spirit of the law, is in entire consonance with the general policy of our system of land laws, and will therefore be adhered to.

The prayer of the petitioner, Lewis, must be and is hereby denied.

ABANDONED MILITARY RESERVATION.

FORT SANDERS.

The act of July 10, 1890, providing for the disposal of certain abandoned military reservations in Wyoming repeals the provision in the act of July 5, 1884, which confers a preferred right to purchase the land on which improvements are situated upon the owners of such improvements.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 10, 1892.

I am in receipt of your letter of the 3d instant in relation to the appraisement of certain lands in Fort Sanders military reservation (abandoned).

On March 26, 1891 you held that one Vine could not purchase the NW¼ of the SW¼ of section sixteen within said abandoned reservation under the act of July 5, 1884 because it was school land. On May 17, 1892 this Department held that the land must be disposed of under the act providing for its sale, and that the fact that it proved to be in section sixteen when the survey was completed, did not affect it, and that Vine having purchased the buildings on the tract which he sought to purchase, he would be allowed, upon appraisement being made, to complete his purchase under the said act of 1884.

My attention, however, has been called to the act of Congress of May 28, 1888 (25 Stat., 158) which granted to Wyoming six hundred and forty acres of land in Fort Sanders (abandoned) military reservation, as nearly as practicable in square form, for the purpose of enabling the Territory (now State) to maintain a fish hatchery. This act contains a proviso:

> That nothing in this act contained shall be construed to have the effect to impair the rights of any person in or to any portion of said land acquired under any law of the United States.

Taking these two acts alone, Vine would have the right to purchase the subdivision upon which his buildings stood, and the State could select the land adjoining. But on July 10, 1890 (26 Stat., 227) Congress passed an act entitled "An act to provide for the disposal of certain abandoned military reservations in Wyoming Territory," and which provided:

> That all public lands now remaining undisposed of within the abandoned military reservations in the Territory of Wyoming, known as . . . . Fort Sanders and . . . and which are not otherwise occupied by or used for military purposes, are hereby made subject to disposal under the homestead law only.

This act contains four provisos: First, actual qualified settlers are given a preference right of entry, not exceeding one hundred and sixty acres which shall include their respective improvements.

Second, lands occupied for townsite purposes, and coal and mineral lands are excepted, and these are to be disposed of under the laws relating thereto respectively.

Third, "This act shall not apply to any subdivision of land which subdivision may include adjoining lands to the amount of one hundred and sixty acres, on which any buildings or improvements of the United States are situated until the Secretary of the Interior shall so direct."

Fourth, this act shall not be construed to amend or repeal the act of May 28, 1888.

In this case of James Vine (14 L. D., 527) referred to in your letter, it appeared that he had purchased the buildings on a part of the Fort Sanders reservation prior to the passage of the act of 1884, and his case was covered by the clause of the act relating to buildings or improvements which had theretofore been sold by the United States authorities, and the preference right of purchase at the appraised value, when appraisement should be made, was given such owner of the buildings. Congress, however, in the act of July 10, 1890, did not make this class of cases an exception to the operation of the act, and I am of opinion that his right of purchase was taken away by this act. He will have, however, the right to make homestead entry for the land as any other person, and if an actual qualified settler, will have the preference right of entry for one hundred and sixty acres, including the tract upon which his buildings are situated, subject to the rights of the State to select six hundred and forty acres, as that right was expressly reserved in the act last passed.

So much of the decision of May 17, 1892, as held that Vine could purchase the land is recalled, but so much as held that the land was not school land will remain in force.

RAILROAD GRANT—PRE-EMPTION FILING—CONFLICTING GRANTS.

MEISTER *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. ET AL.

An expired pre-emption filing of record at the date when the grant becomes effective does not except the land covered thereby from the operation of the grant.

The priority of right accorded the Northern Pacific Company, under its grant, as against the St. Paul, and Minneapolis company, in the decision of the Supreme Court of the United States, 139 U. S., 1, involved lands either within the place limits of said grant or within the withdrawal on general route, and the disposition of indemnity lands, not withdrawn under said grant until after the rights of the other company attached, is not governed by said decision.

Secretary Noble to the Commissioner of the General Land Office, June 10, 1892.

I have considered the appeal by Conrad Meister from your decision of April 28, 1890, affirming the decision of the local officers at St. Cloud Minnesota, rejecting his application to make homestead entry of the S. ½ of the NW. ¼ of Section 1, T. 129 N. R. 37 W., tendered November 17, 1885. Said rejection by the local officers was based on the ground that said tract is within the ten miles (primary) limits of the St. Paul, Minneapolis and Manitoba, St. Vincent Extension Railway grant, the line of which road was definitely located December 19, 1871, and because said tract was selected on account of said grant, October 28, 1879.

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

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

On appeal to this Department, Meister alleges error in rejecting his application on such ground. Under the pre-emption law (Sec. 2264 of the Revised Statutes) it was necessary for Cronk, within twelve months after the date of his settlement to "make the proof, affidavit, and payment" required, and upon failure thereof said land became "subject to the entry of any other purchaser." Cronk never complied with this provision of the law. The twelve months from his settlement expired July 5, 1870, and said tract then became prima facie vacant public land, and subject to the grant of the company at the date of the definite location of its road on December 19, 1871, and must be held to have passed

under its grant in the absence of any showing to the contrary. Northern Pacific R. R. Co., *v.* Stovenour (10 L. D. 645) Same *v.* Moling (11 L. D. 138). Such showing is attempted to be made by the Northern Pacific R. R. Co. Said tract is within the thirty miles (indemnity) limits of the grant to the Northern Pacific Railroad Company, as fixed by the definite location of its line, but was not in said grant as indicated by the maps of general route filed in 1870. The indemnity lands of this grant were ordered withdrawn December 26, 1871. This withdrawal was revoked August 15, 1887. This tract has never been selected or applied for on account of said grant. In your decision you held that "the Northern Pacific Railroad Company cannot be regarded as a claimant for the land." No appeal from your decision was taken by said company, which was then party defendant in this case, and said decision became final as to said company. Since said decision was made the case of the St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (139 U. S. 1) has been decided by the supreme court of the United States, Under these circumstances the attorney for the Northern Pacific Railroad Company, has filed a brief in your office which has been transmitted to this Department contending that under and by virtue of said supreme court decision the Northern Pacific Railroad Company is entitled to said tract by the priority of its grant.

The fifth specification of error filed by Meister alleges error in your decision in not holding that "the grant to the said Northern Pacific Railroad Company, excepted said land from the operation of the grant to the St. Paul, Minneapolis and Manitoba Railway Company."

This question will therefore be considered. The grant of lands to the Northern Pacific Railroad Company is *in presenti* (13 Stat. 365) and provides (Sec. 3) that the title to certain specific sections, constituting the primary limits of said grant, shall attach "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.

In construing this grant the supreme court, in the above cited case, says (page 5)—

> The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in presenti;* that is to say, it is of that character as to lands within the terms of the grant, and not reserved from it at the time of the definite location of the route.

And the court says (p. 8) that said company "on the 21st of November, 1871, filed in the office of the Commissioner of the General Land Office, a map or plat of the line thus definitely fixed, approved by the Secretary of the Interior."

The court in that case awarded the lands involved to the Northern Pacific Railroad Company, which were either within the place limits of

its grant or within the limits of the withdrawal on general route of October 12, 1870.

But the lands involved in the present case do not belong to either of said classes, but are within the indemnity belt of said grant which were not ordered withdrawn till December 26, 1871, which was subsequent to the date (December 19, 1871) when the grant to the St. Paul, Minneapolis and Manitoba Railway Company attached to said land as already shown. The decision therefore in the case of the St. Paul and Pacific Railway Company *v.* Northern Pacific Railway Company, *supra*, does not govern the present case. Northern Pacific Railway Company *v.* Walters (13 L. D. 230, 235) Northern Pacific Railway Company *v.* Pettit (14 L. D. 591).

The Northern Pacific Railroad Company has never selected these lands and it is well settled that no title vests in indemnity lands under grants of this character until selection is made. In Wisconsin Railway Company *v.* Price County 133 U. S. 496, it is said "The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected." The same doctrine is re-affirmed in United States *v.* Missouri Railway (141 U. S. 358, 376).

Your judgment is affirmed.

PRIVATE CLAIM—PRE-EMPTION SETTLEMENT.

HUNGERFORD *v.* BARNARD.

One holding title, under a private land claimant, to a larger amount of land than he would be allowed to take under the pre-emption law, is not thereby deprived of the right to enter as a pre-emptor one hundred and sixty acres of such land when it is restored to settlement, if he is then an actual settler thereon.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 10, 1892.

This appeal is filed by Thomas J. Barnard from your decision of March 18, 1891, rejecting his final proof, and holding for cancellation his declaratory statement for lots 1, 2, and 3 (south of Arkansas River), Sec. 10, and the W. ½ of the NE. ¼, Sec. 15, T. 22 S., R. 59 W., Pueblo, Colorado, so far as it relates to lots 1 and 2, in said section 10.

The tracts in controversy, to wit: lots 1 and 2, in said section 10, were formerly embraced within the limits of the land reserved to satisfy the derivative claim of William Craig, under the Vigil St. Vrain grant, and were released from suspension, and restored to entry May 19,1887, in pursuance of the letter of your office of March 29, 1887, which restored to settlement and entry all the lands within said limits, except the land awarded to Craig by the register and receiver, under the act of February 25, 1869, 15 Stat., 275.

Charles H. Hungerford, who is a derivative claimant under the Vigil St. Vrain grant through William Craig, filed pre-emption declaratory statement for said lots 1 and 2, of Sec. 10 (south of Arkansas river), and lot 1 of the NE. ¼ and the N. ½ of the SE. ¼, Sec. 15, T. 22 S., R. 59 W., Pueblo, Colorado, alleging settlement December 1, 1865.

Thomas J. Barnard filed declaratory statement August 30, 1887, for said lots 1 and 2 in said section, with other land, as heretofore stated, not involved in this controversy, alleging settlement December 13, 1886, and offered final proof June 8, 1888, when Hungerford appeared and protested against the acceptance of said proof, so far as it affected the tracts in controversy. The local officers sustained said protest, which was affirmed by your decision of March 18, 1889, rejecting Barnard's proof, and holding for cancellation his declaratory statement, so far as it relates to said lots 1 and 2. From your decision Barnard appealed.

Hungerford went into possession of this tract as a derivative claimant under the Vigil St. Vrain grant, by deed from William Craig, made in 1866, of a tract of land embracing about four hundred and four acres, which included the land embraced in his declaratory statement, which was within the exterior limits of said claims, until May 19, 1887, when it was restored to settlement and entry after the adjustment of the claim of William Craig.

The proof shows clearly that Hungerford went into possession of said tracts in 1865, and has resided thereon continuously ever since, and, although his house was upon the NW. ¼ of the SE. ¼ of Sec. 15, yet it is shown by the testimony that he cultivated and improved to some extent every part of the tract embraced in his filing.

It is urged by defendant that Hungerford's occupation and improvement of his derivative claim, embracing over four hundred acres, did not "constitute a pre-emption segregation of said lots 1 and 2," and that his residence on the SE. ¼ of Sec. 15, in the absence of pre-emption notice, would only entitle him to the technical quarter section.

Barnard also insists that he was the first settler, and that Hungerford has not improved the tracts in controversy in such manner as to distinguish them as a pre-emption claim, but has improved land adjoining the SE. ¼ of Sec. 15—not embraced in his pre-emption claim—to a greater extent than he has improved lots 1 and 2. He further contends that Hungerford is not entitled to carve a pre-emption from his derivative claim, while claiming under private title the ownership of from four hundred to five hundred acres, it being inhibited by section 2260 of the Revised Statutes.

The foregoing are substantially the errors complained of.

The mere fact that Hungerford's claim under his derivative title from Craig embraced a greater quantity of land than he would be allowed to take under the pre-emption law would not deprive him of the right to take one hundred and sixty acres of said land as a pre-

emption claim, if he was an actual settler upon said tract when it was restored to settlement and entry. Although his residence was on a different quarter section from the tract in controversy, yet his actual improvement of the different tracts embraced in his filing is sufficient to cause his claim to attach to each of them. It is only where there is no actual improvement on the legal subdivision claimed that the rule applies, restricting him to the technical quarter on which the improvements are placed.

Hungerford's settlement commenced in 1865, and his filing was made June 20, 1887, within three months after the land was restored to the public domain. There is nothing in the record showing that he is disqualified from entering the tract as a pre-emption claim, and it being clearly shown that he was the prior settler, your decision rejecting the proof of Barnard, as to lots 1 and 2 in said Sec. 10, and canceling his declaratory statement therefor, is affirmed.

TOWNSITE APPLICATION—SECTION 22, ACT OF MARCH 3, 1891.

FORT PIERRE AND SOUTH PIERRE TOWNSITES.

The party filing a townsite plat and application under section 2382 R. S., is the proper party to receive notice of action thereon.

The right accorded by section 22, act of March 3, 1891, to enter under the townsite law, the tract of land specified therein is limited to a single entry of said tract.

Secretary Noble to the Commissioner of the General Land Office, June 11, 1892.

I have considered the case of the townsites of Fort Pierre and South Pierre, in the State of South Dakota.

Under the provisions of section 16 of the act of March 2, 1889 (25 Stat., 893), a section of land located on the west bank of the Missouri River, at the mouth of Bad River, was reserved for the benefit of the Dakota Central Railroad company. By section 22 of the act of March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," (26 Stat., 1095), it was provided that said land should "be subject to entry, under the townsite law only." The tract in question is designated as the mile square and is located on both sides of the Bad River; both tracts have been surveyed by the United States, that on the north side of the river contains 384.50 acres, and the tract on the south side contains 164.20 acres.

Although situated within the limits of the Sioux Indian reservation, it is asserted that the tract in question, especially north of the river, was occupied for townsite purposes as early as 1876, and that it was surveyed and platted in 1883.

On November 29, 1890, Wm. R. Ervin, mayor of the city of Fort Pierre, made townsite entry of the tract north of the river "in trust for the use

and benefit of the occupants of said city of Fort Pierre" under the provisions of sections 2387, 2388 and 2389, Revised Statutes.

This entry was irregularly made. It embraced land outside of the "mile square" and excluded a small portion of said tract north of the river. By your letter of July 13, 1891, the entry was rejected. In said letter you state:

> In view of the foregoing and the fact that said "mile square" has been specially surveyed into two tracts and that patents for the same, when issued, must describe the whole of said tracts according to the field notes of the special surveys thereof, I therefore suspend the Fort Pierre townsite entry and hereby direct that you require the mayor of said town to make new and correct publication of notice, townsite proof, and entry of the 384.50 acres of land north of Bad River and within the "mile square."

On the 10th day of March, 1891, there was filed in the office of the register of Stanley county, a plat of the townsite of South Pierre, which embraces that portion of the mile square south of Bad River, together with the application of H. P. Robie, who asserts that he acts for himself and others to enter said tract as a townsite under the provisions of sections 2382, 2383, 2384, 2385 and 2386, Revised Statutes.

On March 23, 1891, a copy of this plat and application was transmitted to you by F. C. Flickinger with the following letter:

> I send you by this mail a plat of the townsite of South Pierre to be filed in your office in compliance with section 2383, Revised Statutes, United States. I understand there are no filing fees, but if there are, draw on me through the First National Bank of Pierre for the amount.

Section 2382, Revised Statutes, provides as follows:

> In any case in which parties have already founded, or may hereafter desire to found, a city or town on the public lands, it may be lawful for them to cause to be filed with the recorder for the county in which the same is situated, a plat thereof, for not exceeding six hundred and forty acres, describing its exterior boundaries according to the lines of the public surveys, where such surveys have been executed; also giving the name of such city or town, and exhibiting the streets, squares, blocks, lots, and alleys, the size of the same, with measurements and area of each municipal subdivision, the lots in which shall each not exceed four thousand two hundred square feet, with a statement of the extent and general character of the improvements; such map and statement to be verified under oath by the party acting for and in behalf of the persons proposing to establish such city or town; and within one month after such filing there shall be transmitted to the General Land Office a verified transcript of such map and statement, accompanied by the testimony of two witnesses that such city or town has been established in good faith, and when the premises are within the limits of an organized land-district, a similar map and statement shall be filed with the register and receiver, and at any time after the filing of such map, statement, and testimony in the General Land Office, it may be lawful for the President to cause the lots embraced within the limits of such city or town to be offered at public sale to the highest bidder, subject to a minimum of ten dollars for each lot; and such lots as may not be disposed of at public sale shall thereafter be liable to private entry at such minimum, or at such reasonable increase or diminution thereafter as the Secretary of the Interior may order from time to time, after at least three months' notice, in view of the increase or decrease in the value of the municipal property. But any actual settler upon any one lot, as above provided, and upon any additional

lot in which he may have substantial improvements, shall be entitled to prove up and purchase the same as a pre-emptor, at such minimum, at any time before the day fixed for the public sale.

The plat filed failed to comply with the requirements of the law. It did not exhibit lots or alleys and did not give the size of the same, neither was there a statement of the extent and general character of the improvements.

By your letter of July 13, 1891, you rejected the application and the plat and held that the entire tract was subject "to entry as a whole at such time as it can be shown that the population, business and municipal improvements thereon are in number and character sufficient to warrant the allowance of an entry thereof."

In his application, H. P. Robie swears that he and the persons for whom he acted were the first settlers on said tract for townsite purposes.

The records show that on July 20, 1891, the register at Pierre, gave F. C. Flickinger personal notice of your decision of July 13, 1891, and on July 18, 1891, mailed a notice of said decision in a registered letter addressed to H. P. Robie, Fort Pierre, So. Dakota, the post-office nearest to the land in dispute. This letter was returned uncalled for.

On August 1, 1891, Wm. R. Ervin, mayor of Fort Pierre, published notice of his intention to make proof and entry of the entire tract embraced in the "mile square" for the use and benefit of the occupants of the land, under the provisions of section 2387, 2388 and 2389, Revised Statutes, said proof to be offered on September 19, 1891. On said day, before any evidence was taken, a protest was filed by J. B. Wolgemuth. In this protest Wolgemuth swore that he and some forty others made the first townsite settlement on the land south of Bad River, and had the better right to the same, and protested against the contemplated entry of said tract by Ervin. The register of the land office at Pierre reports as follows:

At the time that this protest was filed in this office, the parties offering the same were advised that they would be allowed during the hearing of the final proof of said city of Fort Pierre, to offer such testimony as they might have to support their alleged rights and would be allowed to cross-examine witnesses of said townsite as provided by the rules and decisions of the General Land Office.

The record shows that counsel for the protestants was present at the hearing, that he took part in the examination of witnesses, filed objections, etc., but he did not introduce any witnesses to sustain the claim asserted by the protestants.

In the matter of the application of H. P. Robie to make the townsite entry of South Pierre, it is clear that F. C. Flickinger, who filed the plat and application in your office, was the proper party to receive notice of your decision. This notice was given him personally, but no appeal was taken by him.

H. P. Robie swore that he and his associates, were the first settlers on the land in dispute for townsite purposes, hence the notice of your

decision sent to him at the post-office nearest to the land, viz., Fort Pierre, was properly sent, in the absence of a statement by him giving his correct post-office address. No appeal was taken by him within the time allowed by the rules of practice.

It appears from an affidavit filed by Robie, October 5, 1891, that at the time he filed the townsite application, March 23, 1891, he was an actual resident of the city of Pierre, and resided there with his family, until August 3, 1891, when he moved away. He states that he and his co-settlers still claim said land and desire the said townsite of South Pierre established as prayed for under section 2382, Revised Statutes. His affidavit was made at Yankton, where it is alleged he is now residing.

On September 28, 1891, J. B. Wolgemuth filed an appeal from your decision of July 13, 1891, rejecting the application of H. P. Robie *et al.* He alleges that he was a party in interest, but his name does not appear in the original application filed by Robie.

The evidence shows that a portion at least, of the people who are actually residing on the tract south of Bad River, desire that the land should be entered as a townsite by W. R. Ervin, mayor, under the provisions of section 2387, Revised Statutes. Under such an entry the rights of all parties could be maintained and protected.

So far as those who claim under section 2382, are concerned, they were allowed full opportunity to submit evidence in support of any and all rights and claims asserted by them, but they declined to submit any evidence, and there is no reason why a further hearing should be ordered. No appeal was properly filed from your decision of July 13, 1891, and there is no reason why the supervisory authority of the Department should be exercised to consider the irregular appeal filed by Wolgemuth. Your decision rejecting the plat and application as presented was correct.

In my opinion the spirit of the 22d section of the act of March 3, 1891, before cited, contemplates but one entry of the tract in question "under the townsite law," and I think the evidence clearly shows that a single entry is the desire of the majority of the people, and that their rights will be best subserved by such an entry. The area of the tract reserved is less than the number of acres which could be entered by the number of inhabitants occupying the same, under the townsite law.

You have not passed upon the application of the mayor of Fort Pierre to enter the entire tract under section 2387, Revised Statutes.

The appeals from your decision rejecting the application of Robie *et al.* are dismissed, and the application to enter under section 2387, Revised Statutes, is returned for such action as may be proper in the premises.

TIMBER CULTURE ENTRY—AMENDMENT—SECOND ENTRY.

CHARLES A. VINCENT.

A timber culture application for land not intended to be entered originally can not be allowed as an amendment, and the repeal of the timber culture act precludes the allowance of a second entry embracing said land.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 11, 1892.

Charles A. Vincent appeals from your decision of June 4, 1891, denying his application to amend his timber-culture entry for N. ½ of NE. ¼ and N. ½ of NW. ¼, Sec. 5, T. 21 N., R. 41 W., Alliance land district, Nebraska, to embrace the S. ½ of NE. ¼ and W. ½ of SE. ¼, Sec. 4, of said town and range.

The record shows that on July 14, 1890, he made application for a timber-culture entry for the first above described tract, which was accepted by the local officers and the proper papers issued; that on May 18, 1891, he was advised by the local officers that his entry was in conflict with a prior entry for the same tracts in the name of Sarah L. Lotspeich; that he filed petition in your office asking to be allowed to amend his entry to embrace the last above described tract, which you denied and Vincent appeals.

The local officers state that the entry of Lotspeich was received in the local office by Mr. Windsor, a clerk, who on that day was taken sick and failed to record the entry and therefore, when the Vincent application was presented, there being no adverse claim of record, the entry was allowed. Both local officers recommended the amendment asked for.

It does not appear in this case that at the date of making his timber-culture application, Vincent intended to enter the tracts he now seeks to have his entry amended to, but that this was an afterthought when he learned that the land he applied for was covered by a prior entry. An application for land not intended to have been embraced within the original application can not be properly allowed as an amendment. Goist *v.* Bottum (5 L. D., 643); Christoph Nitschka (7 L. D., 155). Furthermore as the timber-culture law was repealed by the act of March 3, 1891 (26 Stat., 1095), the appellant can not now be allowed to make another timber-culture entry.

Your decision is affirmed.

COAL LAND—DISCOVERY—DECLARATORY STATEMENT—TRANSFERREE.

MCGILLICUDDY ET AL. *v.* TOMPKINS ET AL.

A coal declaratory statement under section 2349 R. S., is void, if, prior thereto, no discovery of coal has been made on the land covered thereby.

An application to purchase coal land cannot be allowed, where it appears to be made in the interest of another who has already exhausted his rights under the law authorizing the sale of such land.

Secretary Noble to the Commissioner of the General Land Office, June 14, 1892.

This record involves the validity of the application by William H. Tompkins and Lyman Lamb to purchase, as coal land, under the act of March 3, 1873 (17 Stat., 607), certain described tracts aggregating 306.68 acres, located within the municipal limits of Rapid City, South Dakota.

The township plat was filed February 18, 1880, and as stated by your office, the land in question was returned as agricultural.

On February 23, 1888, said applicants filed in the land office at Rapid City a coal declaratory statement for the N. ½ of NW. ¼, the N. ½ of NE. ¼; the SE. ¼ of NE. ¼ and lots 1, 2, and 3, Sec. 36, T. 2 N., R. 7 E., excepting "that portion of the NW. ¼ of said Sec. 36, ... lying within the exterior north boundary line of the original townsite of Rapid City."

The applicants alleged that they had been in joint possession of said tracts since February 20, 1888; that they had "located and opened a valuable mine of coal thereon;" that they were developing said coal land, and mines; that they had expended fifty dollars in labor and improvements, and that said improvements consisted of a shaft house, and shaft four feet square and twelve feet deep, "sunk in the ground above the body or vein of coal."

On February 28, 1888, the local office rejected said filing "for the reason that by section 1946 Revised Statutes, U. S., sections sixteen and thirty-six are reserved for school purposes in Dakota." The applicants appealed, whereupon your office by letter dated August 21, 1888, reversed said action, returned said filing and accompanying papers, directed the same to be filed, and remitted any objections to entry by applicants to such time as they may undertake to "prove up and enter." Thereupon, August 28, 1889, the applicants filed the pending application ("affidavit at purchase") wherein they claimed the right under the act of 1873, *supra*, to purchase the N. ½ of NW. ¼ the N. ½ of NE. ¼ and lots 1, 2, and 3, of said section 36, and alleged that they had expended in developing coal mines on said tract, in labor and improvements the sum of $8650; that such improvements comprised "machinery, drills, steam engines, etc., $6650; expense of operating said machinery, fuel, water supply, laborers' wages in sinking a hole to the depth of

758½ feet, $2000;" that they were in actual possession of said mines and that they "make the entry for our (their) joint use and benefit and not directly or indirectly for the use or benefit of any other party."

On the same day, August 28, 1889, protests against said application were filed by the judiciary committee of the Board of Education of Rapid City, and V. P. McGillycuddy and others.

These protests set out in effect that the land was not shown to be of the character contemplated by the act of 1873, *supra*, and that it was much more valuable for municipal purposes than for coal.

Thereupon a hearing, at which the parties appeared with counsel, was commenced before the local officers, October 3, and proceeded with upon different days until November 14, 1889, when it was concluded.

By their joint decision the register and receiver rejected said application for the reason that the land was not sufficiently developed nor satisfactorily shown to be valuable for coal, and for the further reason that by a written contract the applicants, for specified considerations, had agreed to transfer after entry or patent, a certain interest in the land to one M. H. Day, who had exhausted his right of coal entry.

The applicants appealed, whereupon your office by decision of May 26, 1890, affirming the action below, found the land "more valuable for agricultural and municipal purposes than for mining purposes of any kind," and also that the pending application should by reason of said agreement be dismissed as defective "irrespective of the question of the character of the land."

The applicants have taken an appeal from this decision and in support thereof counsel have been heard orally and upon brief. Counsel for protestants have in like manner been heard in opposition to said appeal.

By the act of February 22, 1889, (25 Stat., 676), sections sixteen and thirty-six were, upon her admission into the Union, granted to the State of South Dakota, and by its terms mineral land was excepted from said grant. The said State was so admitted by the President's proclamation of November 2, 1889.

The applicants' case, therefore, proceeds upon the theory that the land was prior to the State's admission, shown to be valuable for coal, and that being thus reserved from the grant it was subject to coal entry.

The land contained no outcropping or other surface indications of coal and none was discovered in the shaft described in the applicants' filing. Said filing was therefore properly found void by the local and your office, Section 2349 R. S.

The applicants' contention that the land was proved to be valuable for coal is based upon testimony showing the results of two borings made thereon with a diamond drill.

The first of said borings was begun in May, 1889, at about the center of the NW. ¼ of said section 36, and continued until July following,

when at a depth of about 750 feet the "drill core" disclosed a vein of bituminous coal some thirty-four inches in width. The second boring was then made at the center of the NE. ¼ of said section 36, where at a depth of 780 feet, a like "core" showing a vein of about thirty-six inches, was obtained in September, 1889. Cores of coal said to have come from said borings, cores showing other strata therein and different samples of coal and lignite are filed as exhibits in the case. Expert and other testimony tending to show that the coal cores filed as stated did not in fact come from said land, was introduced by the protestants.

The finding by the local and your office, touching the character of the land, and the sufficiency of the improvement thereof, was to the effect that the said borings, which constituted the sole development claimed by the applicants, were insufficient to prove the land valuable for coal or to warrant the entry applied for. Act of March 3, 1873, 17 Stat., 607, Sections 2347–8 Revised Statutes.

The specific allegations contained in the pending appeal set out in substance that your office erred in the finding thus outlined.

It will be unnecessary, however, for me to determine whether or not the land is "coal land" and liable as such to purchase under section 2347, *supra*, or whether or not the applicants by said boring have "opened and improved" thereon such "coal mine or mines" as would entitle them to entry under the act of 1873, *supra*, Secs. 2348 and 2349 R. S.

In the appeal here it is further alleged, that "the evidence given" did not warrant your office in rejecting the pending applications, and also that your said decision was "against" both the evidence and the law. But aside from these general statements, your finding, that the applicants had in fact made the said agreement with Day, is not assailed.

The said agreement is not in the record as the applicants at the trial, refused to produce it in evidence.

The testimony, however, shows that such agreement was made in the winter of 1888 and 1889; that it was in force up to and at the time of trial; that it was in writing and that by its terms the applicants agreed to transfer, after entry or patent, a certain interest in the land to Day, in consideration of his exploration thereof.

The improvements (drill, engine, boring etc), described and claimed by the applicants were in pursuance of said agreement, placed on the land by Day. Day, in like manner, supplied the labor and paid the expenses attending said borings, which were done under the personal supervision of a foreman employed by him. And the drill, engine, etc., used in said boring thereafter continued to be his property.

The applicants urge, however, that as said agreement was not made until long after and without Day's knowledge of their filing, it was simply an assignment of their right to purchase under Sec. 37 of the cir-

cular regulating the sale of coal land, approved July 31, 1882 (1 L. D., 687). Sec. 37, *supra*, provides that

> Assignments of the right to purchase will be recognized when properly executed. Proof and payment must be made, however, within the prescribed period, which dates from the first day of the possession of the assignor who initiated the claim.

But said section does not authorize such assignment to be made to one who has exhausted the right of purchase under the act of 1873, *supra*, and to thus defeat the manifest purpose of that act by giving such person the benefit of more than one coal entry. Such assignment could not, therefore be recognized as "properly executed" within the meaning of section 37, supra.

When the applicants filed the pending application they were, to the extent of said agreement acting as agents for Day. Consequently, the entry now sought could not be, as alleged, for their sole use and benefit.

Day testifies that in 1881, he made a coal entry for land in Charles Mix county, Dakota. If, therefore, the entry now asked for be allowed, Day for all practical purposes will have exercised a second time the right to purchase government coal land. This would be clearly at variance with the act of 1873, *supra*, which authorizes "only one entry by the same person or association of persons." Sec. 2350 Revised Statutes; Northern Pacific Coal Company. (7 L. D., 422).

To allow the pending application would, therefore, be in substance to authorize an entry in contravention of said statutory provision. It follows, I think, that for this reason the said application should be rejected as invalid.

The judgment appealed from is accordingly hereby affirmed.

DESERT LAND APPLICATION—ACT OF AUGUST 30, 1890.

LARRY LARSSON.

An application to enter desert land that is included within the existing desert entry of another is not a claim protected by the statute of August 30, 1890, and on the subsequent cancellation of said entry the limitation in acreage, imposed by said act, will restrict the applicant to three hundred and twenty acres.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 14, 1892.

On March 24, 1890, Larry Larsson made application to enter the S. ½ and lots 1 and 2, and the unsurveyed part of section 23, T. 5 N. R. 36 E., at Blackfoot, Idaho, which was rejected because in conflict with prior desert land entry No. 660 for the same tract made by William B. Norway January 18, 1887, which was canceled March 3, 1891. On March 20, 1891, Larsson was permitted to file his application No. 1478,

for said tract, containing six hundred and forty acres, and certificate issued. By your letter of September 7, 1891, you held *inter alia* that:

> The application of Larsson, being for land not subject to entry at the time it was made, was without force, and as the act of August 30, 1890, restricts the amount of land to which any person can acquire title to three hundred and twenty acres, you will advise claimant that he is allowed to elect that portion of his land he desires to retain.

From this decision an appeal has been taken to this Department. It is contended that said application, when received March 20, 1891, related back to March 3, 1890, when it was originally tendered, and therefore was not affected by the act of August 30, 1890 (26 Stat., 371, 391).

This contention cannot be sustained. The said act only protects "all entries made or claims initiated in good faith," and the original application, when offered, was rejected, and the mere offering of said application was neither an "entry" or "a claim initiated" within the meaning of those terms as used in said act. Said application must date from March 20, 1891, and cannot relate back as claimed. Selway *v.* Flynn (6 L. D., 541).

When the original application was made the land was segregated by the desert land entry of Norway. Jefferson *v.* Winter (5 L. D., 694).

When Norway's entry was canceled on March 3, 1891, the land then became open to entry as vacant public land, but the act of August 30, 1890, had then gone into operation and restricted the quantity of land that could be embraced in one entry to three hundred and twenty acres, hence when Larsson renewed his application on March 20, 1891, he could not lawfully enter a greater quantity than that named in the act.

Your judgment is affirmed.

APPLICATION FOR SURVEY—SHALLOW MEANDERED LAKE.

PRUSZYNSKI *v.* WINONA AND ST. PETER R. R. CO.

The government having disposed of the lands bordering on a shallow meandered lake has no jurisdiction to entertain an application for the survey of tracts lying between the meander and water lines, as such lands now belong to the owners of the adjacent lands.

Secretary Noble to the Commissioner of the General Land Office, June 14, 1892.

I have considered the case of Martin Pruszynski *v.* The Winona and St. Peter Railroad Company, as presented by the appeal of the former from your decision of August 21, 1890. In your letter of that date to the local officers of the land office at Marshall, Minnesota, the facts of the case and the grounds of your judgment, are detailed as follows, to wit:

> The official plat of survey relating to township 112 N., range 45 W., 5th principal meridian, was approved in February, 1872. Upon it appears a meandered lake, covering 129.75 acres in the S ½ section 15, and 67.87 acres in the SE ¼ section 16.

There is nothing upon the official records to indicate that a settlement claim of any kind, for any part of either of the sections mentioned, was ever made or asserted prior to that hereinafter considered.

The odd-numbered section came within the 10-mile (granted) limits of the Winona and St. Peter Railroad under act of March 3, 1865 (13 U. S., Stat., 526). A map showing the proposed line of said road opposite this land was received in this office February 23, 1867, and by letter of August 15, 1867, the register and receiver were directed to withdraw the odd sections falling within the limits of said grant, along the part of said line shown by said map, upon the receipt at their office of the plats of survey. The precise date when the plat of the township described was filed in the local land office is unknown, but the report of the surveyor general of Minnesota, for the year 1872, shows that it was transmitted to the register and receiver (at Redwood Falls) with his letter of May 4, 1872, and it was, no doubt, received a few days later.

August 26, 1872, the Winona and St. Peter Railroad Company listed or selected "all" of section 15, 112 N., 45 W. A map showing the definite location of the line of road opposite said land was filed, and accepted by the Secretary of the Interior, June 9, 1873, and on June 24, 1873, "all" of said section (510.25 acres) was certified on account of said railroad grant. The area of said section given in the list of certification corresponds precisely with the area of that portion of the section lying outside of the lake as shown by the plat of survey.

With a letter from your office dated September 13, 1889, was received a petition, by Martin Pruszynski, alleging that the waters of the lake above referred to had receded from, if in fact they ever covered, the portion of section 15 within the meander lines; that he erected a house upon the tract included in said lines in 1886, the same being located at or near the center of the SW ¼ of said section; that he had resided in said house with his family continuously ever since, had cultivated and otherwise improved a considerable portion of said land, and asking that the tract within the lines of meander might be surveyed or platted, so that he might make entry for the same. The prayer of the petitioner was denied by decision of September 20, 1889, and said decision was adhered to upon motion for review. An appeal from this action was filed, and subsequently withdrawn to enable this office to further consider the case, certain allegations of facts, not before considered, having been made in connection with the appeal. It was deemed advisable, upon reconsideration, to authorize a hearing in the matter, and such action was taken by letter of January 18, 1890. The record of the hearing, received with your letter of May 16, 1890, is before me.

There is nothing in the record, nor in the letter of transmittal, to show who or what parties were cited to appear at the hearing. It is shown, however, that Samuel McPhaill, an attorney, residing at Taunton, Lincoln county, Minnesota (in which county the land in controversy lies), informed you, by letter of February 6, 1890, that John Swenson, John Krouk, and Walen Semmon were claimants to said "meandered land", and requested information relative to the character of claim asserted by Pruszynski; that on the day of hearing (March 3, 1890) Pruszynski, with counsel and witnesses, appeared, and the Winona and St. Peter Railroad Company was represented by attorney.

The evidence submitted in behalf of Pruszynski consists of his own testimony and that of Ole Siverson, William G. Meenie and Martin Frieske, and a diagram showing, approximately, the location of the "meandered land," and the position of Pruszynski's house and improvements.

* * * * * * *

It is contended by Pruszynski that the railway company, "having selected the section by the original survey of the government, acquiesced in and accepted the same," is not a party in interest, and not entitled to recognition in this proceeding. It being admitted, and, in fact, proved by the petitioner's own witnesses, that the

land was never covered by a permanent natural lake, and that, even if it was so covered at date of survey, said lake had disappeared prior to the definite location of the line of road, the contention referred to must be based upon the theory that the subsistence of the meander line upon the plat of survey at the date of the definite location excepted the land within the meander from the operation of the railroad grant; or the petitioner must be under the impression that the grantee acquires right to such lands only as are described specifically by subdivisions or parts of sections in its lists of designation or selection.

The act of March 3, 1857 (11 U. S. Stat., 195), to which the act of March 3, 1865, is supplementary or amendatory, describes the lands granted in aid of the construction of the railroad mentioned as "every alternate section designated by odd numbers," within a distance or width specified on each side of the line of road; and the section of which this land forms a part is an odd-numbered one within the limits prescribed by the acts. The lands excepted from the grant, by the language of the statute, are those found to have been sold, or to which the right of pre-emption had attached, at the date of the definite location of the line of the road, and such as might at that time be reserved by competent authority for any purpose. Assuming that it was the intention of Congress to save the rights of all settlers upon lands coming within the limits of the grant, the department and the courts have held homestead (as well as pre-emption) claims to have been excepted.

The right of the grantee attached to all lands within the granted limits, subject to the operation of the grant, upon the definite location of its line opposite the same. No right can be acquired by listing or selecting lands not legally subject to the grant, and a failure to list or select lands to which the right has legally attached does not affect the grantee's right to the same. Van Wyck *v.* Knevals, 106 U. S., 360; St. Paul and Sioux City Railway *v.* Winona and St. Peter Railway, 112 U. S., 720; Kansas Pacific Ry. Co. *v.* Dunmeyer, 113 U. S., 629.

All of the corner and quarter-section posts, pertaining to said section, were set at the time the survey was made, and no further surveying or platting are necessary for the identification of the smallest sub-division of said section. I am, therefore, of the opinion that, whatever may have been the actual area of the land embraced within the boundary lines of section 15, at the date of survey or definite location of the railway line, the rights of the grantee attached to all of it.

The prayer of the petitioner, Pruszynski, is therefore denied.

An appeal now brings the case before me.

Section 7 of the act of March 3, 1865, provides,—

That as soon as the governor of the said State of Minnesota shall file or cause to be filed with the Secretary of the Interior, maps designating the routes of said road and branches, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act.

These lands included "every alternate section of land designated by odd numbers," for ten sections in width on each side of said road. It appears that the map of definite location of said road was filed with the Secretary of the Interior June 9, 1873, and that on June 24, 1873, "all" of said section 15 (510.25 acres) was certified on account of said grant.

It is contended bx the applicant that as this area (510.25 acres) does not embrace the land within the meander line of the lake, that such land did not pass by the grant to the railroad company, but is public land, and that it was error to reject his application to have said land surveyed and platted, so that it might be subject to his application to enter the same.

The plat of the survey of this township shows a meandered lake covering portions of sections 15 and 16, and the contiguous land, forming the rim of the lake, has been disposed of by the United States under the survey as made.

I deem it unnecessary therefore to consider the question raised as to the correctness of the survey in the matter of the representation of the lake.

All of section 15, without the meandered lines, has been certified on account of the railroad grant. That within section 16, and without the meandered lines, passed to the State as school lands upon its identification by the survey. It is now shown that the lake, as to lands in section 15, has disappeared, or dried up, if it ever existed, and towards said lands the petition is directed, seeking to have them surveyed and disposed of by the government as other public lands.

As thus presented, this case is similar to that arising upon the application by John P. Hoel, 13 L. D., 588, for the survey and entry of certain tracts lying within the meandered lines of a lake in the Rapids City land district, South Dakota.

There it was held, under the authority of Hardin *v.* Jordan (140 U. S., 371), —

> that non-navigable inland lakes and ponds, where the public survey shows the same meandered, and the fact appears that the contiguous lands or lots have been disposed of by the government, that the land covered by such lakes and within the meandered lines does not belong to the government, but to the adjoining proprietors, under the common law right of riparian ownership. The government has no jurisdiction over such lands, and, therefore, no power to dispose of them.

The present tract lies within the State of Minnesota, and there can be no doubt but that the common law doctrine as to to the rights of owners of land on non-navigable lakes and ponds prevail in said State. The proprietors of the land on the rim of this lake own that within the meandered line of the lake according to their several interests.

I deem it unnecessary, therefore, to determine to whom any particular portion of the lake bed belongs, but deny the application for the survey of the lake bed, for the reason that the lands involved are not public lands, and that the United States has no jurisdiction over the same.

Your decision is affirmed.

MINING CLAIM—ADVERSE PROCEEDINGS—JUDICIAL ORDER.

APPLE BLOSSOM PLACER *v.* CORA LEE LODE.

A decree of the court in adverse proceedings determines the right of possession as between the parties but does not deprive the Land Department of the requisite authority to ascertain whether there has been due compliance with law, and the land is of the character claimed by the mineral applicant.

A judgment of a court that placer ground may be entered as a lode, or that known lodes may be entered as placer ground, subject only to the right of the lode claimants to the possession of veins beneath the surface, is in conflict with the mineral laws and will not be held as conclusive upon the Department.

Secretary Noble to the Commissioner of the General Land Office, June 14, 1892.

The Apple Blossom placer entry No. 211 was located September 29, 1887, and patent applied for March 26, 1888, by Charles W. Miller and Albert Smith, Glenwood Springs, Col.

The Cora Lee and Ellen Sherwood lodes were located March 12, and the B. and M. and Little Maud lodes were located April 5, 1884, upon all of which patent was applied for September 18, and entry made December 21, 1888, by H. W. Pierson, R. G. Carlisle, W. C. English, Alice Anderson, Edward W. Burkhardt and Julius Berg.

On May 28, 1888, the above lode claimants filed adverse claims against the placer claim, alleging a conflict to the extent of 17,404 acres. Suit was thereupon instituted in the district court of Pitkin county, June 26, 1888.

The placer applicants also filed an adverse claim and protest against issuing patent for said lode claims.

On December 21, 1888, a copy of the judgment roll in the adverse proceedings against the placer claim was filed in the case of the lode claims, and on December 27, 1888, a like copy of said judgment roll was filed in the adverse proceedings against the lode claims.

As shown by these judgment rolls it is declared by the court that the lode claimants

> are the owners of and entitled to the possession of that portion of the premises in controversy described as follows: The Cora Lee, Little Maud, Ella Sherwood and B. and M. lodes or veins throughout their entire length across the Apple Blossom Placer, described in the adverse claim and claimant together with surface area described as follows, but excluding the grounds hereinafter described as belonging to the defendants. (Placer claimants).

The judgment then describes by metes and bounds the land found to belong to the lode claimants.

Said judgment further declares that the defendants (placer claimants) "are the owners and entitled to the possession of that portion of the premises in controversy described by metes and bounds as follows: but excluding therefrom the lodes or veins above named but not excluding surface ground except as described."

Then follows a description of the land awarded to the placer claimants which is part of the land awarded to the lode claimants.

The judgment then concludes as follows:

> It is therefore considered, ordered and adjudged by the court, that the plaintiffs do have and recover from the defendants the Cora Lee, Ella Sherwood, Little Maud and B. and M. lodes or veins above described together with the surface area belonging to the plaintiff (lode claimants), as above found and described and that the defendants (placer claimants) do have and recover from the plaintiffs, that portion of the premises belonging to them as above found and above described.

Following this judgment the lode claimants were allowed to make entry for the lands found by the court to belong to them and the placer claimants were allowed to make entry for the lands found by the court to belong to them.

On May 13, 1891, you considered the case and held for cancellation so much of the placer entry as conflicted with the location of the lodes following the judgment of the court awarding a part of said territory in conflict to the placer claimants.

You state that "Notwithstanding the award of the court in the adverse proceedings and the assent of the parties litigant thereto, in view of the fact, as virtually shown by the judgment record, that the veins or lodes do exist "throughout their entire length across the Apple Blossom Placer." This office cannot under all the facts in the case allow a patent to be issued for the placer, including as it does, "known veins or lodes."

The claimants of the Apple Blossom Placer have appealed from your judgment to this Department.

It is a well settled doctrine that until the issue of patent title to the public lands is in the United States, and that while so the Land Department must under the law be the judge as to when, under what circumstances, and how the government shall part with title. (Moore *v.* Robbins, 96 U. S. 530).

Section 2326 of the Revised Statutes of the United States, after providing for the adjudication of disputes arising between different mineral applicants in the courts for the same land as to who is entitled to the possession thereof etc, provides that

> After such judgment shall have been rendered the party entitled to the possession of the claim or any portion thereof, may, without giving further notice file a certified copy of the judgment roll with the register of the Land Office . . . . . whereupon the whole proceeding 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.

While a judgment in mineral cases is conclusive upon the parties thereto by the section above cited, it is only conclusive as showing the right of possession and a party in whose interest such judgment is made is not entitled to a patent on demand; he is only entitled to such patent when he has furnished evidence that the requisite amount of

work has been done on the claim and it was held in the case of Alice Placer Mine, decided January 9, 1886 (4 L. D., 314) that (syllabus)

It is within the discretion of the Commissioner to order a hearing to ascertain the character of the land and whether the conditions of the law have been complied with, though the applicant for patent may have obtained a favorable judgment in the courts as against an adverse claimant.

It was also held in that case that the judgment roll proves the right of possession only.

The law vests in you the authority and makes it your duty to see that the requirements of law relative to entries and granting of patents thereunder shall have been complied with before the issue of patent. The usual result following a favorable judgment in a court under section 2326 of the Revised Statutes is the issue of patent in due time but in such a case the patent is issued by you, not on the judgment of the court alone but is upon your judgment pursuant to that of the court and on certain evidence supplemental to that furnished by the judgment roll. The judgment determines the question as to the right of possession and when it has determined which of the parties litigant is entitled to possession its office is ended, but the right to a patent is not yet established. The successful litigant must prove by report of the surveyor general that sufficient improvements have been made on the claim and as we have seen you may further investigate the character of the land. In the case at bar, the court found that the lodes exist in the placer claim and that they extend clear through that part of the placer claim in conflict and yet the court rendered a judgment to the effect that notwithstanding the fact that the tract is included in the lode locations and contains valuable lodes the placer claimants are entitled to a patent for all of the surface ground thereof and that the lode claimants are entitled to the "lodes or veins throughout their entire length across the Apple Blossom Placer." Thus making it necessary if the judgment is to be followed, that you issue two patents for the same ground, one to the placer claimants to all the surface of the ground by the court found to belong to them and one to the lode claimants for the lodes declared to exist in said ground and to extend clear through it. This the Department has often decided it has no jurisdiction to do, Pacific Slope Lode, 12 L. D. 686, and cases therein cited.

The mineral laws must be construed together and a judgment under section 2326 that placer ground may be entered as a lode or that known lodes may be entered as placer mining ground subject only to the right of lode claimants to the possession of certain veins under the surface is directly in conflict with the mineral laws and must be held as not binding on the Department.

You will order a hearing to determine whether known lodes existed on that part of the placer ground in conflict with the lodes above referred to, at the time the patent for placer ground was applied for. The entries will be suspended pending said hearing. This hearing is neces-

sary because no proof is in the record from which the character of the land can be determined and since the judgment of the court was rendered upon a stipulation of counsel and no direct finding that the lodes were known to exist was made.

Your judgment is accordingly modified.

RELINQUISHMENT—TRANSFEREE.

RICHARD F. HAFEMAN.

An entryman who has mortgaged the land, after final certificate has issued, will not be permitted to relinquish his claim and thus defeat the rights of the mortgagee.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 14, 1892.

On September 3, 1884, August Hafeman made homestead entry No. 8683 embracing lots 2 and 3, in Sec. 4, T. 26, S., R. 11 W., at Larned, Kansas, alleging settlement March 2, 1878.

On December 13, 1884, he filed notice of his intention to make final proof in support of his claim to said land on February 14, 1885, before the clerk of the district court in and for Platt county, Kansas, which notice was duly advertised.

Said final proof was taken before said clerk as advertised who inadvertently described the land, in writing said proof, as lots 3 and 4 instead of lots 2 and 3. This mistake was also carried into his final certificate No. 4137, issued February 18, 1885.

The said lot 4 was not subject to entry by Hafeman, having been previously segregated from the public domain by the timber culture entry of Joseph A. McOsher. This mistake in the final certificate was corrected under instructions contained in your letter of June 27, 1890.

On December 1, 1887, said Hafeman mortgaged said lots 3 and 4 to the Kansas Mortgage and Investment Company to secure his promissory note for $300. Upon discovering the said error said mortgage was released and a new mortgage made correctly describing said lots 2 and 3.

On March 12, 1889, said company filed in the local office notice of their interest in said entry by virtue of said mortgage. On February 17, 1891, Richard F. Hafeman filed the relinquishment of August Hafeman to said lot 2, dated October 13, 1890, and also an application to enter the same under the homestead laws, which was rejected by the local officers. The applicant appealed and by your letter of June 26, 1891, you affirmed their decision, holding that

> the seller under a final certificate will not be allowed to take advantage of any irregularity in his proof to ignore rights which he, himself, has conferred, and dispose again of property already once assigned or mortgaged.

An appeal now brings the case before me.

It is well settled that where an entryman has mortgaged the land after receiving his final certificate he will not be permitted to relinquish the same and thereby defeat the rights of the mortgagee. Addison W. Hastie (8 L. D., 618). Patrick H. McDonald (13 L. D., 37).

The Sioux Investment Company has filed a petition asking that the rejection of said relinquishment may be made final, alleging that it is the present holder of said mortgage as the successor to said Kansas Mortgage and Investment Company, praying that its rights under said mortgage may be protected, and said appeal be dismissed, and alleging that there was a conspiracy between said August Hafeman and Richard F. Hafeman to defraud said petitioner.

It is contended by the appellant that there was error in your decision in refusing to cancel so much of said entry as embraced lot 2, for the reason that said lot was relinquished because it was not embraced in said final proof or entry.

The answer to this contention is that said lot 2 should not be relinquished, for the reason that it was embraced in the entry of August Hafeman, and he had created a lien thereon, which he should not be permitted to defeat, and the fact that said lot 2 was not embraced in said final proof and certificate was due to a clerical error which has been corrected.

The appellant relies upon technicalities which are destitute of merit. The course of the local officers was the correct one.

Your judgment is affirmed.

REPAYMENT—FEES FOR REDUCING TESTIMONY TO WRITING.

SOPHIA EDER.

Fees received by the local office since August 4, 1886, for reducing to writing the testimony in support of an entry may be properly included in allowing repayment where said fees are collected according to law.

Secretary Noble to the First Comptroller, June 15, 1892.

I am in receipt of your letter of April 19, 1892, transmitting for my consideration General Land Office report No. 55,409 and the papers constituting the claim of Sophia Eder for repayment of purchase money paid by her on pre-emption cash entry No. 3909 at Helena, Montana, on January 10, 1890, for eighty acres at $1.25 per acre, allowed and stated by the Commissioner and approved by this Department for $106.33. This amount is made up as follows: $100 purchase money; $3 fee for filing declaratory statement, and $3.33 fees collected for reducing to writing by the register and receiver, the testimony in support of the entry. You express some doubt as to the propriety of repaying this last item.

By subdivision ten of section 2238 Revised Statutes, the register and receiver are allowed a fee of fifteen cents a hundred words for reducing

to writing the testimony in support of an entry of public land under the homestead or pre-emption law; by subdivision twelve of the same section, in Montana and certain other States and Territories, an additional fifty per cent. is allowed.

This is no more a fee for personal services by the local officers than is the fee for filing a declaratory statement, or the fee received for the location of lands by States and corporations under grants from Congress for railroad and other purposes.

In each and every case the fee collected is turned into the treasury of the United States, and the salaries of the registers and receivers are regulated by the receipts of the office, up to the maximum of $3000.

It is true that from March 3, 1883 (22 Stat., 484), to August 4, 1886 (24 Stat., 239), by act of Congress, the fees received by the local officers for reducing testimony to writing, formed no part of their salary, but was retained by them. It follows, that no repayment should be made of fees of this kind received during that period.

But as before stated, fees received since August 4, 1886, have been turned into the treasury, and in my opinion, repayment should be made in such cases, the same as of any other fees and commissions paid in connection with an entry of public land. I herewith transmit the report of the Commissioner of the General Land Office, on your letter, from which it appears that it has been the practice to make repayment of fees paid to the register and receiver for reducing testimony to writing, when said fees were collected according to law, that is, when the work was actually done by said officers, as was the case in the present instance.

PREFERENCE RIGHT OF ENTRY—COSTS.

JACKSON *v.* HOLLAND.

A contestant is not entitled to a preference right of entry unless he pays the costs of the contest, including the testimony of the defendant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 15, 1892.

On October 4, 1888, Frank B. Jackson, the plaintiff, filed a contest against the homestead entry of Arthur Warren, for the E. ½ of the SE. ¼ and the E. ½ of the NE. ¼, Sec. 30, T. 6 S., R. 2 W., Los Angeles, California, upon which a hearing was had.

Jackson paid the cost of taking the testimony in said contest, except for the testimony of Warren, the defendant, which he refused to pay and which Warren was compelled to pay, in order to get the benefit of said testimony.

Upon the proof submitted, the local officers recommended the cancellation of the entry of Warren, from which decision he appealed.

Pending said appeal—to wit: April 8, 1889—Warren relinquished

his entry, having sold his improvements to John H. Holland for $500, and on the same day Holland made homestead entry of the tract.

On April 23, 1889, Jackson filed declaratory statement for the land.

On receipt of Warren's relinquishment by your office, you, by letter of May 24, 1890, ordered that the case be closed, and Jackson notified of his preference right of entry for thirty days.

Upon Holland's application to make commutation proof, and upon the protest of Jackson, a hearing was ordered to determine the question of the preference right of entry.

The local officers decided in favor of Jackson, and Holland appealed. You reversed said decision and awarded the right of entry to Holland, and from your decision Jackson appealed.

The question involved in this case is, whether Jackson is entitled to the preference right of entry, either by virtue of his contest, or by virtue of your letter of May 24, 1890, closing the case upon the receipt of Warren's relinquishment and notifying Jackson of his preference right of entry.

The grounds relied on by Jackson in his appeal are (1) that the question of Jackson's preference right as between these parties was adjudicated before Holland offered proof; and (2) that there is nothing in the record to show that Jackson did not pay the contest fees.

As to the first proposition, the letter of May 24, 1890, did not pretend to pass upon the question of the preference right of Jackson, or to question the validity of Holland's entry, which had then been made. The entry of Holland and the filing of Jackson's declaratory statement had both been made before the expiration of thirty days from the relinquishment of Warren's entry. The letter of May 24, 1889, appears to have been written without a knowledge of these facts, and as stated in your letter all that was intended by the statement was that, *prima facie*, Jackson was entitled to said right, of which he should have been notified, and which could only have been properly determined when he appeared to make entry. To entitle him to the preference right, he must have successfully contested the entry and paid the cost, and must be qualified to make entry. If he did not pay the cost of the contest, he was not entitled to the preference right, and the land was subject to entry by the first legal applicant.

In support of the second ground urged in the appeal, it is insisted that "in the absence of anything of record to show the contrary, the presumption is that the rules of practice and law were complied with in the matter of cost." It is further insisted that the only evidence which could be properly received of the charge made by Holland is the record in the Warren contest, and, as that record is silent on this point, Holland must fail.

This was the direct question involved on the hearing ordered to determine whether Jackson was entitled to the preference right of entry, and the evidence upon that point is, I think, conclusive, as shown by

the extracts from the testimony of witnesses, set out in the argument of counsel for Jackson.

Your decision holding for cancellation Jackson's filing, and holding intact Holland's entry, with leave to proceed *de novo* to make final proof, is affirmed.

SOLDIERS' ADDITIONAL HOMESTEAD—SECTION 7, ACT OF MARCH 3 1891.

FRED. W. KELLY.

A bona fide purchaser, after final entry and prior to March 1, 1888, is entitled to the confirmation of a soldiers' additional homestead entry under section 7, act of March 3, 1891, though the original entry, on which the additional is based, may have been canceled.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 15, 1892.

I have considered the appeal of Fred W. Kelly from your decision of October 9, 1890 rejecting his application to make homestead entry for the NE¼ of Sec. 25, T. 47 N., R. 41 W., Marquette, Michigan, land district.

It is useless to give the entire detail of this case. It will suffice to say that on February 25, 1871, one Nathaniel Combs made a homestead entry for forty acres of land at the Ironton, Missouri, land office, upon his death, his widow, Lucy Combs, completed the entry, made final proof and received final certificate on March 1, 1878 therefor. On same day she made application for a certificate for soldiers' additional entry and filed the necessary affidavits and evidence showing her late husband's military service, and obtained a certificate dated September 13, 1878, entitling her to an additional homestead entry not exceeding one hundred and twenty acres.

The record further shows that on February 14, 1879, she made application No. 1741 to enter the N½, NE¼, and SE¼, NE¼, Sec. 25, T. 47 N., R. 41 W., Marquette, Michigan, land office, the entry was allowed, and final certificate No. 216 was issued thereon on said day.

On March 31, 1890, Fred W. Kelly applied to enter the NE¼ of said Sec. 25, but his application was rejected by the local officers because of the homestead entry of Lucy Combs for the tracts mentioned, and the entry of George Roller for the remaining forty acres.

From this action Kelly appealed, and you affirmed their ruling, and he again appealed.

Your decision is based upon the fact that the said entries of Combs and Roller being intact upon the records, that the entry of Kelly could not be allowed by the local officers. Counsel claim, however, that inasmuch as the record shows that the original entry of Combs for the forty acres was canceled by your office, that the additional entry of

Lucy Combs (widow) based thereon became a void entry, and that on the entry of cancellation being made on the original, there was nothing to support the additional entry and that it should have been canceled when the original was.

Your decision sustaining the local officers was correct as rendered. The land being segregated by the additional homestead entry could not be entered by Kelly until the record was cleared by proper proceedings regardless of the question of the legality of the entry. But since your decision was rendered, the statute of March 3, 1891 (26 Stat., 1095) has been passed. This may control the entry in view of the fact that after final certificate was issued to Lucy Combs for the one hundred and twenty acres additional, one John M. Longyear, according to his sworn statement filed herein, became the purchaser thereof in good faith.

Longyear's affidavit is dated August 20, 1890. He says "shortly after the entry," exact date not given, he purchased the land, relying upon the certificate which showed her entitled to one hundred and twenty acres additional homestead and the final certificate of entry therefor, and that he is an innocent purchaser and should be so treated, but he does not produce his deed or other evidence of title. Under the act cited, if there was no adverse claim originating prior to final entry, and the land was sold to a bona fide purchaser prior to March 1, 1888 but after final entry for a valuable consideration, and no fraud on the part of the purchaser has been found the entry may be confirmed.

Your decision rejecting Kelly's application, for the reason given, is affirmed, but as the case is before the Department, and in view of the claim of Longyear, I return it to your office that he may be allowed to show, if he can do so, that his title is such as brings him within the purview of said act. Upon proof, as required by circular of May 8, 1891 (12 L. D., 450) being furnished within reasonable time after notice hereof to the parties in interest, the entry will be approved and patent will issue for the land. If he shall fail to produce such evidence, your office will take such action upon the additional homestead entry as may be proper under the law and regulations.

SOLDIERS ADDITIONAL HOMESTEAD—SECTION 7, ACT OF MARCH 3, 1891.

ALEXANDER H. PLEMMONS ET AL.

A soldier's additional homestead entry, based on service in the Missouri Home Guard, may be confirmed in the interest of a transferee.

The decision in the case of the United States *v.* Coonsy cited and followed.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 15, 1892.

This appeal is brought by Thomas Price, transferee, from your decision of May 11, 1891, holding for cancellation the soldier's additional

homestead entry of Alexander H. Plemmons, for the SW. ¼ of SE. ¼, Sec. 29, and the NE. ¼ of NE. ¼, Sec. 32, T. 10 N., R. 17 E., Sacramento, California, and denying his right to purchase under the act of June 15, 1880.

The facts in this case are, briefly, as follows:

On July 2, 1878, the Commissioner of the General Land Office certified that Alexander H. Plemmons was entitled to an additional homestead, not exceeding eighty acres, based on service in the Missouri Home Guards.

The original homestead was made at Booneville, Missouri, November 27, 1865.

Under this certificate soldier's additional homestead entry was made of the tract in controversy, May 2, 1879, by G. W. Farr, as attorney in fact for said Plemmons, and on May 7, thereafter, the land was sold to Thomas Price, the appellant.

By letter of April 21, 1885, the local officers were directed to notify the parties in interest that they would be allowed sixty days in which to show cause why said entry should not be canceled, because based on service in the Missouri Home Guards, or to file an application to purchase under the act of June 15, 1880.

It appearing that no notice had been given to the parties in interest of said letter of April 21, 1885, the local officers at San Francisco, California, by letter of May 11, 1891, were instructed to ascertain in whose name the alleged title stands, and to notify him that the entry is held for cancellation for illegality, as stated in said letter of April 21, 1885. You revoked the direction contained in said letter, authorizing a purchase under the act of June 15, 1880, upon the ground that, since the date of said letter, the Department, in the case of J. S. Cone, 7 L. D., 94, has held that entries invalid and illegal in the inception are not subject to purchase under said act. You also held that the 7th section of the act of March 3, 1891 (26 Stat., 1095), has no reference to entries void *ab initio*.

From your decision Thomas Price, the transferee, appeals.

This case is similar in all important respects to the case of Samuel C. Coonsy (14 L. D., 457), in which it was held that such an entry, in the hands of a *bona fide* purchaser against whom no fraud has been found, is confirmed by the 7th section of the act of March 3, 1891. Such entries when made were held to be legal by the Commissioner of the General Land Office, and rights which attached thereunder in favor of innocent parties are protected by the act of March 3, 1891, but the Coonsy case and this case should be limited to the point therein decided.

You are therefore directed to notify the transferee to furnish proof as required by the letter of instructions of May 3, 1891 (12 L. D., 450), and after receiving the same, you will adjudicate the case in accordance with said instructions.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

UNITED STATES *v.* GILBERT ET AL.

In determining the rights of a transferee under section 7, act of March 3, 1891, the transfer is protected by the presumption that it was made in good faith up to the point where sufficient evidence is furnished to overcome it.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 16, 1892.

On April 1, 1884, David O. Gilbert made pre-emption cash entry for the E ½ NE ¼, SW ¼ NE ¼, and NW ¼ SE ¼, Sec. 9, T. 1 S., R. 38 W., Oberlin, Kansas. On April 17, 1884, he sold and conveyed the tract to H. B. Ketcham for a consideration of $450.

On May 1, 1885, special agent Samuel Lee, of your office, investigated the entry, and, examining the tract, reported that "Messrs. Bird and Ketcham use land as a cow range and to control the water; bought the land from the entryman, who entered it for their use and benefit," and that neither Gilbert nor any member of his family has ever resided upon the land; further, that Gilbert will testify that "Messrs. Bird and Ketcham furnished him with the money to pay for the land, and that he afterwards sold them the tract." The special agent recommended the "cancellation of the entry for failure of entryman to reside upon and improve the land and because the entry was made in the interest of and use and benefit of Messrs. Bird and Ketcham."

On May 23, 1885, the entry was held for cancellation by your office, and on May 7, 1886, said entry was canceled.

On December 2, 1887, Robert I. Swinehart filed a pre-emption declaratory statement for said tract, and made cash entry therefor July 9, 1888. Ketcham appealed to this Department from the ruling of your office of May 7, 1886, canceling the entry of Gilbert, and May 8, 1888, the Department, considering said appeal, ordered a hearing, at which the transferee might be permitted to show that Gilbert had complied with the law.

A trial was finally had before the local officers on June 8, 1889, when special agent J. G. Allard appeared on the part of the government, and H. B. Ketcham, transferee, in person and by his attorneys. Three witnesses were offered on the part of the government, but no testimony was offered for the defense. On August 8, 1889, after considering the evidence submitted, the register and receiver found that "Gilbert never established his residence upon the tract, or in any manner complied with the requirements of the pre-emption law." Ketcham appealed from said ruling to your office, where, on June 5, 1890, the ruling of the local

land officers was affirmed. An appeal has now been taken to this Department. His appeal is as follows:

Before the Hon. Secretary of the Interior, Washington, D. C.

United States v. David O. Gilbert et al. } Involving cash entry No. 245, E½ NE¼ of SW¼, NE¼ NW¼ SE¼ 9–1–38 W.

Appeal from decision of Hon. Commissioner of Gen. Land Office to Hon. Secretary of Interior.

The Hon. Commissioner erred in his conclusions of fact. Erred in his conclusions of law.

MAY & MCELROY,
Atty. for Deft.
H. B. KETCHAM.

This appeal is not accompanied by a specification of the errors complained of. Rule 90 of the Rules of Practice provides that—

A failure to file a specification of errors within the time required will be treated as a waiver of the right of appeal, and the case will be considered closed.

The appeal in the case at bar fails to designate the errors complained of, but leaves your office and this Department in the dark as to the particular respect in which Ketcham deems your office decision to be wrong. In the case of McLaughlin *v.* Richards (12 L. D., 98) it was said:

The party complaining ought to be able, and by these rules is required, to point out the particular errors complained of, and not leave this Department to fish out of a voluminous record supposed errors.

For the informality and inadequacy of this appeal it might be dismissed, and would be, were it not that on March 3, 1891 (26 Stat., 1095), Congress passed an act which confirms entries like this, on certain conditions. Let us see what these conditions are.

The seventh section of said act provides, substantially, that in any case where a pre-emption entry has been made and the receiver's receipt issued, and the tract has been sold to a bona fide purchaser after such final entry and before March 1, 1888, a patent shall issue for said tract, provided no adverse claim exists which originated prior to final entry, and that such purchase shall have been for a valuable consideration, and "unless upon an investigation by a government agent, fraud on the part of the purchaser has been found."

The entry in question was made and the final receipt issued in 1883; the tract was sold for a valuable consideration after final entry and before March 1, 1888; no adverse claim which originated prior to final entry exists. We come now to the question as to whether or not fraud on the part of the purchaser has been found.

The special agent of your office reported that the entry was made in the interest of the transferee, and that it could be shown by the testimony of Gilbert and J. A. Hoffman. This report was answered by the transferee, who furnished the affidavits of Gilbert and one Bird, tending to show that the entry was made for the sole benefit of the entryman

and not in the interest of Bird and Ketcham. At the trial, the testimony of Gilbert, Swinehart, and George C. Evans was submitted by the government, but Hoffman was not sworn. The application for a hearing was made by Ketcham; still, when the trial was had, he offered no testimony, but relied upon the failure of the government's evidence to establish the fact that the entry was illegal. His demurrer, filed after the government was through introducing testimony, is as follows:

> Defendant demurs for the reason that all the testimony introduced, wholly fails to show by any competent proof that D. C. Gilbert did not in fact comply with the requirements of the pre-emption law with reference to the land in controversy, and moves that the action on the part of the government be dismissed and the pre-emption cash proof of D. C. Gilbert be passed to patent.

The burden of proof was on the government to show the truthfulness of its allegations; still Ketcham's remaining silent, if he had any knowledge as to whether or not the entryman had complied with the law, would tend to create a presumption that the law had not been complied with. However, since it is not known that the transferee had any such knowledge, and he claims that his purchase of the tract was made by reason of his reliance on the receiver's receipt, no such presumption arises.

At the trial of this case held on the application of the transferee, the special agent attempted to show by the entryman that the entry was made in the interest of another; that part of his examination is as follows:

> Q. Did you make this entry for the benefit or in the interest of any one else?
> A. I could not say that I did.
> Q. Who furnished you the money to make the proof on this land?
> A. Mr. Bird.
> Q. Did you sell or contract to sell this land before you made proof?
> A. No sir.
> Q. What did you do with the land after you made your proof?
> A. I sold it.
> Q. Who did you sell it to?
> A. To Mr. H. B. Ketcham.

This was all the testimony introduced for the purpose of showing that the entry was made in the interest of another rather than in the interest of the entryman, and clearly fails to establish the charge that the entry was made for the benefit of another. The affidavit of Bird, Gilbert, and the administrator of the estate of Ketcham all tend to show that the entry was made for the sole benefit of the entryman.

The letter of instructions to chiefs of divisions, of May 8, 1891 (12 L. D., 450) after defining who a bona fide purchaser or incumbrancer is within the meaning of section seven of the act in question states that

> where it is satisfactorily shown that a sale . . . . was made prior to March 1, 1888, such sale . . . . will be presumed to have been made in good faith, and unless such presumption be overcome by facts presented by the record or in connection with the sale, such entry shall pass to patent.

In the case at bar the sale is shown to have been made before March 1, 1888, and all the other conditions requisite to confirmation under said section are found to exist. The sale is protected by the presumption that it was made in good faith up to the point when sufficient evidence is furnished to overcome it. In this case, that point has not been reached, the testimony utterly fails to show any bad faith on the part of the transferee.

You will therefore call upon the transferee in this case, or those representing him, to furnish testimony as required by the letter of instructions of May 8, 1891 *supra*.

After receiving this testimony, you will adjudicate the case in the light of the act and instructions cited.

EDWARD BROTHERTON ET AL.

Motion for the review of departmental decision of March 27, 1891, 12 L. D., 305, denied by Secretary Noble, June 17, 1892.

MINING CLAIM—PLACER PATENT—KNOWN LODE.

MAGGIE LODE.

A patent for a placer claim passes title to all lodes or veins contained therein, if they are not known to exist at the date of the placer application.

Secretary Noble to the Commissioner of the General Land Office, June 17, 1892.

On September 30, 1889, George C. Fitschen and others made mineral entry No. 1993, at Helena, Montana, of the mining claim known as the "Maggie Lode" situated in Sec. 24, T. 3 N. R. 8 W., and designated as Lot No. 334, and embracing 15.08 acres, in the Summit Valley mining district in Silver Bow county, Montana.

Said claim was located February 20, 1880, and the notice of location was recorded on February 23, 1880, in book "L" p. 40, of the records of Deer Lodge county, Montana.

The papers were transmitted to your office and by your letter of July 18, 1891, you held said entry for cancellation, on the ground that said land was embraced within the limits of two other placer claims, which had been patented April 15, 1881, and that "there is nothing with the papers in the case to indicate that the lode claim embraced in this entry was known to exist before the dates when the applications for patent for the placer claims were filed." An appeal now brings the case to this Department.

The specifications of error are four in number, but are all substantially embraced in the third, as follows:

In holding that the veins and lodes described and claimed by appellants under their said mineral entry, passed to and became the property of said placer claimants under patents above mentioned, dated April 15, 1881.

Section 2333 of the Revised Statutes provides 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."

In the case of the Iron Silver Company *v.* Mike and Starr Co., (143 U. S., 394–402) the supreme court uses the following language: "The time at which the vein or lode within the placer must be known in order to be excepted from the grant of the patent is, by section 2333, the time at which the application is made."

In your decision you state that—

The records of this office show that mineral application, 714, for patent for one of the placer claims was made July 14, 1879, by John Noyes *et al;* and that mineral application 717, for the other placer claim was made July 18, 1879, by David N. Upton et al; that entries were made for both June 22, 1880, and that patents were issued for them April 15, 1881.

The Maggie Lode was not located till February 20, 1880, and there is nothing to show that its existence was known on July 14 or 18, 1879, when the applications for said placer patents were made as above stated. If the existence of the Maggie Lode was not known on either of those dates, it was not excepted from the grants of said patents. If its existence was then known it was a very material and important fact which it was necessary for the appellant's to show. As they have not shown it, the fair presumption is that they could not do so, and that the Maggie Lode was not then known to exist, and consequently the mineral thereof was conveyed by said placer patents as provided by the statute above cited.

Your judgment is affirmed.

ARTHUR GENTZLER ET AL.

Motion for the review of departmental decision of March 27, 1891, 13 L. D., 429, denied by Secretary Noble, June 17, 1892.

RAILROAD GRANT—PRE-EMPTION FILING—VACATION OF PATENT.

HOLM *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

An unexpired pre-emption filing of record when the grant herein becomes effective excepts the land covered thereby from the operation of said grant.

Proceedings for the vacation of a patent are warranted where it appears that lands, excepted from a railroad grant have been erroneously patented thereunder.

Secretary Noble to the Commissioner of the General Land Office, June 17, 1892.

By the grant of March 3, 1857 (11 Stat., 195) Congress granted to the Territory of Minnesota to aid in the construction of what is now the St. Paul, Minneapolis and Manitoba Railway Company and its branch lines, "every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads and branches."

By the act of March 3, 1865, (13 Stat., 526) the grant was increased to ten miles on each side of said roads.

By the act of March 3, 1871, (16 Stat., 588) a new grant was made for the St. Vincent branch thereof and the line of said branch so fixed "as to form a more direct route to St. Vincent with the same proportional grant of lands to be taken in the same manner along said altered lines as is provided for the present lines by existing laws."

Lot 5 Sec. 9, T. 127 N., R. 39 W., Fergus Falls, Minnesota, is within the ten miles granted limits of the grant of 1871, supra. The rights of the company attached to lands within its granted limits on December 19, 1871. St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (139 U. S., 1–16).

On February 27, 1886, Peter J. Holm, filed a pre-emption declaratory statement for the tract alleging settlement the same day. The application was rejected by the register and receiver for the reason that the tract was railroad land; he appealed from said rejection to you and on May 24, 1889, you affirmed the finding of the local land officers and rejected his application. He has appealed from your judgment to this Department.

He claims settlement on the land February 27, 1886, but since the rights of the company attached to lands within the primary limits of its grant before that time and since this tract is within said limits it passed to the company and Holm could acquire no rights by his settlement or application unless, at the date the company's rights would have attached the tract was excepted from the grant. The records of your office, show that it is unoffered land and that one Per O. Krom, on July 29, 1867 filed a pre-emption declaratory statement No. 3035 for the land.

The pre-emption law then in force did not designate a time within which proof was required to be made, except that it was required to be made "at any time before the commencement of the public sale, which

shall embrace the land claimed (1 Lester 374) (2 Lester 241) Malone *v.* Union Pacific Railway Company (7 L. D. 13).

On July 14, 1870, Congress passed an act (16 Stat., 279) requiring pre-emption claimants of the class of Krom to make proof in one year from the date of the passage of the act or before July 14, 1871. Afterwards by joint resolution, dated March 3, 1871, (16 Stat., 601) the time within which proof was required to be made was extended for one year or until July 14, 1872 and May 9, 1872, Congress passed an act for the protection of pre-emption claimants in the State of Minnesota and other states (17 Stat., 88), extending the time within which proof was required to be made for another year or until July 14, 1873.

It is thus seen that the filing of Krom had not expired in 1871 when the rights of the railroad company under its grant attached hence the tract in question was excepted from the operation of said grant. And as to whether Krom complied with the law or not is a question between him and the government and one which can be of no interest to the company. Kansas Pacific Railway Co., *v.* Dunmeyer (113 U. S. 629) (12 L. D. 232).

Upon investigation it is found that this tract was patented to the railroad company in February 1889. In your decision of May 24, 1889, you did not mention this fact; of course the issuance of a patent during the pendency of the appeal of Holm was irregular, this inadvertent issuance of the patent might yet be ratified were it not for the fact that said patent was issued without the sanction of law.

The tract covered by it was excepted from all claims of the company by the unexpired filing of Krom, hence it has remained public land.

The issuance of the patent terminated the jurisdiction of the Department over the land but since said patent was wrongfully and erroneously issued, you will serve notice upon the St. Paul, Minneapolis and Manitoba Railway Company to show cause within thirty days from notice why proceedings should not be instituted under the provisions of the act of March 3, 1887 (24 Stat., 556) to vacate the outstanding patent. If any showing is made by the company as contemplated by the above notice you will transmit it together with the record to this Department for further action, should no showing be made, you will demand of the company the reconveyance of said tract as provided by the above cited act. Union Pacific Railway Company (12 L. D. 210). And if at the end of ninety days from the date of service of said demand the company shall refuse or neglect to make said reconveyance as demanded you will transmit to this Department all the papers in the case in proper order, for forwarding to the Attorney General for the institution of suit.

Your judgment rejecting the application of Holm to enter the land is suspended, and you will take no further action on said application until the tract shall have by reconveyance or by decree of the court been restored to the public domain.

SWAMP LAND CONTEST—APPLICATION TO ENTER.

MALLET *v.* JOHNSTON ET AL.

A preference right of entry may be properly accorded the successful contestant of a swamp land selection.

A pending application to make homestead entry protects the rights of the applicant as against the subsequent claims of others.

Secretary Noble to the Commissioner of the General Land Office, June 18, 1892.

By letter of June 21, 1889, you transmitted the papers in the matter of the application of Richmond D. Mallet to make homestead entry for the E. ½ of the SW. ¼ and the N. ½ of the SE. ¼ of Sec. 14, T. 63 N., R. 11 W., 4th P. M., Duluth, Minnesota, land district.

On July 18, 1865, the State of Minnesota selected said tracts as swamp land.

On August 23, 1886, Richard H. Fagan applied to make homestead entry for said land. This application was refused by the local officers because of the State's selection, and he appealed to your office, accompanying his appeal by an affidavit alleging that said land was not of the character contemplated by the "swamp land" grant.

On August 30, 1886, one James S. Johnston applied to make homestead entry for said land, tendering the fees and commissions at the same time, it seems, asserting the non-swampy character of said land. This application was refused by the local officers because of the selection by the State and of Fagan's prior application. Upon appeal to your office, it was, it seems, held that two contests against the State's selection could not be entertained at the same time, and Johnston's application was, by letter of October 19, 1886, returned to the local office with directions that it be received and placed on file but that no action be taken thereon until after the final disposition of Fagan's case then pending. Johnston filed with his appeal a motion to dismiss Fagan's application to enter on the ground that there had been no tender of fees and commissions, but that motion was, by your office, denied. In your letter of October 25, 1886, it was said

> Said lands are designated by the marking on the plat of U. S. survey as swamp lands, but from a careful examination of the field notes of U. S. survey, on file in this office, I am of the opinion, that such designation is not warranted by the facts as set forth in said notes of survey,

the claim of the State was held for rejection, and Fagan's application was returned to the local office with instructions that he be allowed to complete his entry if the final decision in the case should result in clearing the record of the State's claim. The State appealed from the decision holding its selection for cancellation.

While this appeal was pending, the State, on February 1, 1888, filed

a relinquishment of all claim to said land, which having been forwarded to this Department, it was held that no action here was necessary and the papers in the case were returned to your office where the selection was formally cancelled March 31, 1888. On April 2, 1888, the local officers notified Fagan of the cancellation of the State's selection, and allowed him thirty days within which to complete his entry for said land.

On April 3, one N. B. Thayer appeared at the local office and presented an application to make homestead entry for said land, which was marked filed, no further action being then taken in relation thereto.

On May 1, 1888, Richmond D. Mallet presented his application to make homestead entry for said land, which was rejected by the local officers for the reason that the time allowed Fagan within which to perfect his entry had not yet expired. On May 2, N. B. Thayer presented an application dated that day, to make homestead entry for said land, and filed therewith Fagan's relinquishment of his preference right of entry. Thereupon, the register made the usual certificate as to said application and also made a certificate as to Thayer's application filed April 3, and said Thayer was allowed to make entry for the land. On May 3, Mallet presented another application to make homestead entry for said land, which was rejected because of Thayer's entry.

On May 4, James S. Johnston appeared by his attorney and asked to be allowed to make entry under his application filed August 30, 1886, which request was denied because of Thayer's entry. On May 25, 1888, Mallet filed appeals from the two decisions of the local officers rejecting his respective applications. After considering said appeals, you, on October 13, 1888, decided that Thayer's application filed April 3, had precedence over any other application except that of Fagan, who was, under your office letter of October 13, 1886, entitled to notice of the cancellation of the State's claim and a reasonable time within which to perfect his entry and the decision of the local officers rejecting Mallet's application was affirmed. On November 2, 1888, Thayer filed in the local office a relinquishment of his entry, and the same was that day canceled on the records of the local office. On November 5, 1888, N. B. Thayer as attorney in fact for one Elizabeth Yates appeared at the local office and made soldiers' additional homestead entry for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section. On the same day, said Thayer as attorney in fact for Rhoda A. Taylor made soldiers' additional homestead entry for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section.

On November 8, the attorneys for Johnston filed in your office a motion for review of the decision of October 13, 1888, upon the grounds that the facts in the case were not all before you at the date of that decision. It was alleged that the attorney for Johnston, on May 13, 1888, filed in the local office an appeal from the decision of May 4, rejecting his application, and was advised that such appeal would be forwarded to your office with the other papers in the case, and supposed this had been done until the rendition of the decision of October 13,

led to the discovery that said appeal could not be found either in your office or the local office, and that thereupon they filed a duly verified copy of such appeal, and it was asked that you reconsider the case in the light of the facts presented by said appeal. The attorney for Thayer moved to dismiss said motion for reconsideration. The verified copy of Johnston's appeal was subsequently forwarded by the local officers.

Mallet also filed a motion for review of your decision and afterwards filed what is termed a "supplemental motion for review," setting up the fact of Thayer's relinquishment and the cancellation of his entry thereon. Mallet filed also a motion to dismiss Johnston's appeal from the decision of the local officers because not filed in time and because there was no sufficient proof that any appeal had been filed such as would justify the filing of a certified copy.

On March 11, 1889, with all these facts presented, you decided that while the reasons given in the decision of October 13, 1888, were not all tenable there appears to be no good cause for revoking that decision; that the facts presented did not sustain the allegation that an appeal in behalf of Johnston had been filed in the local office on May 18, 1888, stating, however, that if such an appeal had been filed, the judgment of the local officers would have to be affirmed, and declared the land involved vacant public land subject to entry by the first legal applicant.

From that decision, Johnston and Mallet each took an appeal, to each of which the attorneys for Taylor and Yates filed a reply.

From this statement it is clear that Thayer is no longer in the case, and that his claims need not be considered. When he filed a relinquishment of his entry, he abandoned all claim to this land and withdrew from the case. The entries of Yates and Taylor were made while a case involving the land was pending in your office on appeal, and were therefore improperly allowed. Whatever claims these parties may have are subject to those of Mallet and Johnston, and these latter will be first disposed of.

Mallet has filed a motion to dismiss Johnston's appeal because it was taken from a decision rendered on motion for review and was not taken within sixty days from the original decision excluding the time the motion for review was pending. The rules require appeals from the Commissioner's decision to be filed within sixty days "from the date of the service of notice of such decision." There is nothing to show that Johnston was ever served with notice of the original decision of October 13, 1888, and since his claims were not then considered, it is the presumption that no notice was given him. The appeal was filed within the time allowed after the decision of March 11, 1889, wherein Johnston's claims were for the first time considered and passed upon in your office. The motion to dismiss this appeal is overruled.

Mallet filed in your office a motion to dismiss Johnston's appeal from

the decision of the local officers rejecting his application to enter, for the reason that it was not filed in time, and no notice thereof was served on Mallet. If an appeal was filed as claimed by Johnston's attorney, it was within time, but it is insisted that the records of the local office must be taken as showing the facts, and must control. In your office, the appeal was dismissed upon the ground that the statement of Johnston's attorney was not sufficient to overcome the statement of the local officers and the record of their office. The statement of Mr. Boggs, Johnston's attorney, is direct and positive, being as follows:

> On the 18th of May, 1888, this deponent, as the attorney for James S. Johnston, filed in the U. S. Land Office at Duluth, Minn., a notice of appeal from said rejection, accompanied by specifications of error, statement of case and argument; that said notice of appeal and other papers attached this deponent, on said 18th day of May, 1888, filed with the register of the U. S. Land Office at Duluth, Minn. for transmission to the Commissioner of the General Land Office.

The register in his letter of January 10,1889, transmitting the substituted papers says: "We have no knowledge nor do our records disclose the filing of any appeal from the rejection prior to the one now transmitted."

In his letter of January 14, 1889, the register says that Mr. Boggs requested them to forward the copy of said appeal with a statement confirming his affidavit, and continues:

> This did not accord with our recollection of the case or the actual facts as shown by the retention in our files of the original application of Johnston with our order of rejection thereon—nor have we been able since to recall the fact as claimed by Mr. B. of the filing of the original appeal.

This is all I find in the record touching upon the filing of said appeal. Johnston is not attempting to refute or contradict any express statement made by the record, or to deny any fact affirmatively appearing therein, but is attempting to have the record completed by supplying a paper once, as he claims, a part of the record. The showing made by him certainly makes out a *prima facie* case in his behalf, but before final action shall be taken thereon, the other parties interested will be afforded an opportunity to refute his claim.

There is nothing in the record showing that notice of Johnston's appeal was served upon any one. Rules 43 to 48 inclusive, relate to appeals from final decisions of the local officers to the Commissioner, and rule 93 requires a copy of notice of appeal, arguments, etc., to be served upon the opposite party. Rules 66 to 69 inclusive, relate to "appeals from decisions rejecting applications to enter public lands," and make no requirement as to service of notice. Rule 70 as amended October 26, 1885 reads as follows:

> Rule 70, Rules 43 and 48 inclusive, and Rule 93 are not applicable to appeals from decisions rejecting applications to enter public lands.

As late as March 2, 1889, this Department held in the case of Mullen

v. Heirs of Aylesworth (not reported—95 L. & R. 222) that it was not necessary under rule 70 to serve a notice of an appeal from the rejection of an application to enter upon one who had then an entry of record for the same land.

In the case of Horace H. Barnes (11 L. D., 621) a different rule was announced, it being held without reference to said rule 70 that in such cases notice of the appeal must be given claimants of record. In the case now under consideration, neither Johnston nor Mallet served notice of his appeal from the local officers upon any one, and if one should be dismissed, the other ought to be treated in the same way. Thayer, the only person except these two, who are equally delinquent, who might have been heard to complain of any failure to serve notice, has voluntarily withdrawn from the controversy. In view of this fact and the further fact that it was apparently not the practice to require that notice should be served in such cases, a practice sanctioned by this Department as late as a year after the transaction in question, and of the ruling in the case of Hiram Brown *et al.* (13 L. D., 392) I am not inclined to consider this point as well taken, but will consider the claims of these parties on the merits.

In your decision of March 11, 1889, it is held that there was at the time of Fagan's and Johnston's respective applications no authority for contesting swamp land selections, and that so far as your office, "in its decisions of October 19, and 25, 1886, attempted to award a preference right to Fagan or to recognize the right to receive applications to enter pending the State selection its decisions were clearly unsustained either by the law of or regulations in force at that time," and that at the date of the cancellation of the State selection, March 31, 1888, "this land was vacant public land subject to entry by the first legal applicant." I can not concur in this holding.

In the case of Ringsdorf *v.* State of Iowa, decided April 22, 1886 (4 L. D., 497) it was said it was not necessary to decide "whether or not it was competent for Ringsdorf to institute a contest," but in view of the fact that he had called the attention of the government to the character of the land, had paid the expenses of the contest, and had an application on file, such application was considered. Ringsdorf's position in that case was very similar to Fagan's in this.

On August 7, 1886, before the applications of Fagan and of Johnson were filed, the right of settlers to contest a State's claim to a tract of land as swamp land was, in the case of State of Oregon (5 L. D., 31), distinctly recognized. In the decision in that case, after directing that the investigation as to the character of lands claimed under the swamp land grant be proceeded with as rapidly as possible with a view to approval and certification, it was said:

> But if before such approval and certification any person files a contest under existing regulations of the Department, you will order a hearing to determine the character of any legal subdivision upon which such contest is filed.

Your action awarding Fagan a preference right of entry was, under the circumstances, authorized.

An application to enter, made during the period accorded Fagan for the exercise of his preference right of entry, might have been allowed subject to his right if such action would have prejudiced no other rights. Henry Gauger (10 L. D., 221).

Johnston had on file an application to make homestead entry which had, by the express directions of your office, been held to await the final disposition of Fagan's case, and he had a right to rely upon that action. Under these circumstances, his application ought to have been acted upon before any other disposition was made of the land embraced therein. Subsequent applications, if received at all, ought to have been held subject to Johnston's application as well as to the preference right of Fagan. Fagan's case was disposed of and a subsequent application to enter was allowed, and Johnston was not given any notice of the action taken, but his attorney, on the same day he learned incidentally of the action had therein, called up Johnston's application to enter, and caused it to be considered. This application of Johnston being on file and protected by the instructions of your office at the time Mallet presented his application, it must be held subject to such prior application, provided the prior applicant promptly prosecuted his claim. As hereinbefore stated, Johnston has made out a prima facie case.

A hearing seems necessary in this case to the end that the officers of the government may be put in possession of such fact as will make it possible to properly adjudicate the several claims of these various parties, and you will therefore cause such a hearing to be had, after due notice to all interested parties. At this hearing the question as to whether Johnston presented an appeal, as claimed, will be investigated, and testimony may be submitted for and against each of the claims made to said land or touching upon the good or bad faith of the respective claimants. This investigation will be made as broad and searching as possible, and to the end that the interests of the government may be properly protected, it may be well to direct one of the special agents of your office to be present and take part therein. Upon receipt of such evidence as may be presented under this order, with the report of the local officers thereon, you will re-adjudicate the case. The entries of Yates and Taylor are hereby suspended awaiting a final judgment in the case.

The decisions of your office are modified to accord with the views herein expressed.

RAILROAD GRANT—ALIEN—SETTLEMENT CLAIM.

HERRON *v.* NORTHERN PACIFIC R. R. CO.

An alien can not acquire any right by his settlement upon public lands prior to the filing of his declaration of intention to become a citizen, and his subsequent qualification will not relate back so as to defeat an intervening right.

Secretary Noble to the Commissioner of the General Land Office, June 21, 1892.

I have considered the case of Wm. Herron *v.* Northern Pacific Railroad Company, involving the NW. ¼, Sec. 17, T. 3 S., R. 5 E., Bozeman land district, Montana, on appeal by Herron from your decision of April 28, 1891, sustaining the action of the local officers in rejecting his homestead application for said tract.

The land involved is within the primary limits of the grant for said company as shown by the map of definite location filed July 6, 1882, and is also within the limits of the withdrawal upon the map of general route filed February 21, 1872.

At the last mentioned date this tract was embraced in an unexpired pre-emption filing by one George H. Town, which served to except the land from the withdrawal on general route. Northern Pacific R. R. Co. *v.* Stovenour (10 L. D., 645).

At the date of the definite location of the road, July 6, 1882, this land was in the possession of Herron, the present claimant, who although not then residing upon the land, had valuable improvements thereon.

It appears, however, that at that date Herron was not qualified to make entry of lands under the homestead law, for the reason that he had not declared his intention to become a citizen of the United States.

He alleges that he was always under the impression that, by the naturalization of his father he became a citizen of the United States, but at that date he was over the age of twenty-one, and learning that he was not benefited by his father's naturalization he, himself, took out naturalization papers January 8, 1891.

It is a well settled principle that an alien can not acquire any right by his settlement upon public lands prior to the filing of his declaration of intention to become a citizen, and his subsequent qualification will not relate back so as to defeat an intervening right. Titamore *v.* Southern Pacific R. R. Co. (10 L. D., 463), and cases therein cited.

I can therefore see no error in your decision, holding that the settlement by Herron was no bar to the attachment of rights under the grant, and the same is accordingly affirmed.

PRIVATE CLAIM—SECTION 7, ACT OF JULY 23, 1866.

CARPENTIER *v.* MAHEW ET AL.

The purchaser of a private claim of quantity within larger outboundaries who controls the subsequent location of the grant as confirmed is not entitled under section 7, act of July 23, 1866, to purchase lands excluded from said grant on final survey.

Secretary Noble to the Commissioner of the General Land Office, June 22, 1892.

I have examined the record in the case of H. W. Carpentier *v.* Christopher Mahew and nineteen others, which is here on appeal of several defendants from your decision of December 26, 1890, holding that the said Carpentier has the right to purchase lots 8, 10, and 11, and parts of lots 6, 7, and 9, and part of the E. ½ SE. ¼ Sec. 4, and lots 1, 2, 3, 4, and 5, and part of the NE. ¼ of the NE. ¼ Sec. 9, and part of the NW. ¼ and part of lots 1 and 2 Sec. 10, and part of the NW. ¼ Sec. 15, and part of lot 1, and parts of the E. ½ and the SW. ¼ NE. ¼ Sec. 16—all in T. 1 S., R. 2 W., M. D. M., San Francisco, California, under the act of July 23, 1866 (14 Stat., 218), the 7th section of which provides:

That where persons in good faith, and for a valuable consideration, have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continued in the actual possession of the same as according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may 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.

Carpentier's claim is based upon his purchase from the heirs of Joaquin Moraga and Juan Bernal, original grantees under the Mexican grant in which the land is described as follows:

The place known by the name of the Laguna de los Palos Colorados, bounded at the north by the arroyo de San Pablo, which lies contiguous to the Corral Antigno; at the south by the establishment of San Jose; at the west by the Sierra (mountain range) up to the top, and at the east by the Cuchilla de las Trampas,

with the condition that—

the tract of land of which mention is made is of three sitios de granada mayor (three leagues), a little more or less, as explained by the sketch, which runs with the expediente. The judge giving the possession shall cause it to be measured according to ordinance, the surplus thereof to be left to the proper use of the nation.

This grant was confirmed by the board of land commissioners for settling private land claims in California, to Joaquin Moraga and the widow and heirs of Juan Bernal, by decree of January 23, 1855, which was affirmed on appeal by the United States district court for the northern district of California, March 24, 1856.

The heirs and representatives of Moraga and Bernal, deceased, were substituted by decree of October 20, 1862.

It appears that juridical possession was not given to the grantees, but, in the confirmation by the board of land commissioners and the several decrees of the United States courts, the exterior boundaries of the grant were in all cases described, substantially, as above set forth.

The grant was one of quantity—to wit: three square leagues (Mexican) within the above described exterior boundaries. These boundaries were surveyed by U. S. Deputy Surveyor H. A. Higley, in 1855, and embraced more than 20,000 acres, or about four and a half Mexican leagues. This survey has been accepted by the United States, as "correctly representing the exterior boundaries of the rancho Laguna de los Palos Colorados," or Moraga grant. (See Perkins *v.* Central Pacific R. R. Co., 5 L. D., 155, and cases there cited.)

A plat of this survey is filed with the record, and shows the eastern, exterior boundary along the disputed territory to be at the top of the "Cuchilla de las Trampas," the name given to a ridge of mountains or hills.

By the Boardman survey, which was for the segregation of the three leagues, and which was made in 1875 under a decree of the United States district court for the northern district of California, the eastern boundary of the said three leagues was established at or near the foot of the "Cuchilla de Las Trampas," about a half mile west from the exterior boundary line as surveyed by Higley.

The tract in dispute lies between these two lines, and contains about four hundred and fifty-seven acres.

The Boardman survey was approved by Commissioner Williamson, April 17, 1878, and on appeal his judgment was affirmed by Secretary Schurz, August 9, 1878 (see Land Office Report for 1879, pages 189 and 197).

This is the only approved official survey of the grant in quantity shown by the records of this Department, although, on the 18th day of May, 1858, the surveyor-general of California, issued instructions to John La Croze for a survey of the claim. It appears that if this survey was made, it was never approved by the surveyor-general, but, in September 1860 La Croze made a survey, which was approved by the surveyor general, November 19, of the same year.

The survey having been excepted to by some of the claimants for an undivided interest in the grant, the plat of the survey was, on December 3, 1860, on petition of said claimants, ordered into the district court for the northern district of California, for investigation and adjudication.

The objections made to the La Croze survey were:

1st. That it does not embrace all the land within the exterior boundaries of the grant, and

2d. That if this be disallowed, the three leagues granted should be located within the exterior limits at the election of the grantees, or those entitled to represent them.

(See Land Office Report for 1879, near bottom of page 190.)

In this court proceeding the owners of the Sobrante lands and the Moraga claimants were represented by H. W. Carpentier, applicant herein.

By decree of said court, of date July 29, 1874, this survey was disapproved and rejected, and a new survey ordered. This decree, which was affirmed by the United States circuit court, December 4, 1874, directed the new survey to be made "in a compact form and in an entire tract, so as to contain three square leagues of land and no more, the *location thereof to be selected by the claimants* within the following exterior boundaries of the grant heretofore confirmed to the claimants herein. Then follows a description of the exterior boundaries within which the three leagues were to be selected, which are substantially the same as those established by the Higley survey, the eastern limit being identical—viz: the "Cuchilla de las Trampas."

It was in pursuance of this decree that the Boardman survey was made, which, after several hearings on objections filed by the United States, the Central Pacific Railroad Company, and several settlers, was finally approved by this Department, August 9, 1878, as before mentioned.

Patent was issued August 10, 1878, and transmitted to E. R. Carpentier, attorney for claimants, October 5, 1878, and recorded at the request of H. W. Carpentier, in Contra Costa county, California, December 18, 1885.

On the 22d day of February, 1884, Horace W. Carpentier subscribed to an affidavit, stating:

> That William Cary Jones, E. A. Lawrence, and Charles B. Strode, in good faith and for a valuable consideration, on the 7th day of March, 1855, purchased from the Mexican grantees and confirmees of the Rancho Laguna de los Palos Colorados, as a part of said rancho, the tract of land above described (it being the land in dispute), which parcel was within the exterior limits of the tract or rancho as granted. He further avers that himself and grantors, from a date long anterior to the act of July 23, 1866 (U. S. Stat., Vol. 14, page 218), have continuously used and improved and been in the actual possession of the aforesaid tract of land, according to the lines of his and their original purchase, and is now in actual use and possession, having the same enclosed with a substantial fence and valuable and permanent improvements thereon, and the land under cultivation, and that there was a right to purchase existing in the assignees of the Mexican grantors at the date of and pursuant to the provisions of said act of Congress, and that no valid adverse right or title (except in the United States) existed to any part thereof, and that said lands do not contain mines of gold, silver, cinnabar, or copper, which right has by diverse means conveyances vested in applicant; and applicant further avers that the portion of said lands so purchased . . . . . has been excluded from the final survey of said rancho and from the patent thereof.

This application was filed in the local office, San Francisco, California, March 5, 1884. Notice was issued October 14, 1885, and served upon all the parties interested, summoning them to appear on December 7, 1885, to defend against said application. Numerous continuances,

motions, and stipulations were filed, and the hearing was finally closed March 16, 1888, and on November 22, 1888, the local officers denied the application of Carpentier, on the ground that he "fails to show that he used, improved, and cultivated (and was) in the actual possession of the land here claimed according to the lines of his purchase on the 23d day of July, 1866, the date of the act quoted."

Upon appeal you reversed the action of the local officers, and allowed the application to purchase.

Although in his application Carpentier bases his claim on his purchase from Strode, Lawrence, and Jones, yet, at the hearing, he introduced a voluminous mass of documentary evidence, principally certified copies of deeds conveying to him the interests of different heirs and assigns of the original Mexican grantees. Among these are a deed from Juan Bernal, of date May 14, 1859, conveying "all his right, title, and interest" in said grant (said to be one-sixteenth); deed from Cipriano Thurn, grantee of Nicholas Bernal, of date July 8, 1861, conveying to Carpentier a sixteenth interest in the same; also a sheriff's sale, under a judgment of foreclosure, in the case of John B. Watson against Gaudalupe Bernal *et al.* This deed was executed April 16, 1860.

As it was on this proceeding that Carpentier claims to have succeeded to the rights of Lawrence, Strode, and Jones, the proceedings will be briefly noted herein.

The suit is based upon a promissory note, executed by Gaudalupe Bernal to one John Curry for $600, bearing date May 7, 1855, due sixty days after date, with three per cent per month interest after maturity. This note not having been paid on May 13, 1856, Gaudalupe and Nicholas Bernal executed their joint and several notes to Curry for $780. Both these notes were secured by mortgage—the first conveying "all and singular the right, title, interest, and estate" of Gaudalupe Bernal in said grant, and the second (which was stipulated to be an additional security for the payment of both notes) conveying "all and singular whatsoever right, title, interest, or estate said Gaudalupe and the said Nicholas (Bernal) had or held in the said grant."

These notes remaining unpaid were on the 9th day of September, 1858, endorsed and delivered to Horace W. Carpentier, applicant herein, and were afterwards by said Carpentier endorsed and delivered to the plaintiff, John B. Watson.

All parties claiming or supposed to claim an interest through said Bernals were impleaded in the case, and certain of them, including Lawrence, filed a joint answer therein, alleging conveyances to them from Gaudalupe Bernal prior to the execution of the said mortgages to Curry, upon which the suit was based. Horace W. Carpentier appears of record as attorney for Watson in said suit.

In the answer of Lawrence *et al.*, it is alleged, *inter alia*—

> that there has not as yet been any official survey of the rancho made or approved by the United States surveyor-general . . . . . and that the east and west lines of said

rancho have therefore not been located or defined, and can not be so defined with certainty, and until such official survey the rights of said plaintiff and these defendants can not be adjudicated or determined.

The court found that the deeds set forth in the answer of Lawrence and others, and under which they claimed, were subsequent to the Curry mortgages, and that none of the defendants impleaded with the said Gaudalupe Bernal and Nicholas Bernal had any right or encumbrance upon the said premises, except such as was acquired subsequent to the lien of the said mortgages, and decreed a sale of the interest of said Gaudalupe Bernal to satisfy the debt, and, if that was insufficient, that the interest of said Nicholas Bernal be also sold. Under this decree all the right, title, and interest of said Gaudalupe Bernal in the said grant were sold to one Herman Wohler, the highest and best bidder, on the 3d of September, 1859, and a certificate of sale was issued to him by James C. Hunsaker, sheriff. The sheriff's deed was made to Horace W. Carpentier, April 16, 1860, and recited that Wohler, the purchaser at the sale, had "sold and conveyed all his interest in said certificate of sale" to the said Carpentier. A copy of the deed or bill of sale of said certificate also accompanies the record.

All the foregoing evidences of title were vested in Carpentier prior to the act of July 23, 1866. Subsequent to that date, through numerous conveyances and sales in courts, he procured the interests of other heirs, and in 1878, date of approval of the Boarman survey, he had procured the interests of all, or nearly all, the heirs, devisees, and assigns of the original Mexican grantees and the United States confirmees. Through the title so acquired, and his alleged possession and occupancy thereunder, he claims the right to purchase under the 7th section of the act heretofore cited.

The plat of the township embracing the land in controversy was first filed in the district land office, July 30, 1878. It was withdrawn the following October, and restored February 24, 1882; again withdrawn March 9, 1882, and finally restored April 16, 1883.

Those claiming adversely to Carpentier are as follows:

July 30, 1878, Christopher Mahew made soldier's additional homestead entry for the SW. $\frac{1}{4}$ and a portion of lot 6, Sec. 4.

March 8, 1886, John Glasson made homestead entry for S. $\frac{1}{2}$ S$\frac{1}{2}$ lot 7, and all of lot 8, Sec. 4.

February 8, 1886, James Tippett made homestead entry for lots 10 and 11, and the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 4.

April 17, 1882, John Tippett offered his declaratory statement for lots 6 and 7, Sec. 4, which was referred to your office April 30, 1882.

March 20, 1889, John Brady applied to make homestead entry for lots 1, 2, and 3, and the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 9, which was forwarded to your office on the same day.

Lieu State selection offered for all of Sec. 9, August 10, 1878. Central Pacific Railroad also claims said Sec. 9.

Martin M. Kelly made homestead entry June 2, 1883, for lots 4 and 5, Sec. 9.

Phillip Falk offered to make homestead entry for the NW. ¼ of Sec. 10, April 26, 1883, and his application was referred to your office July 20, of the same year.

R. G. Falk applied to make timber-culture entry for the same tract April 16, 1883, and his application was referred to your office July 20, 1883.

W. H. George offered his declaratory statement for same tract, which was forwarded to your office February 12, 1886.

H. C. Oden offered to make pre-emption filing for the same tract April 27, 1883, which was referred to your office April 30, 1883.

C. L. Perkins offered to make pre-emption filing for lots 1 and 2, and the E. ½ of SW. ¼, Sec. 10, which was referred to your office May 5, 1883.

Carsten Abrott filed his pre-emption declaratory statement for the NW. ¼ of Sec. 15, March 7, 1882.

Joseph Napthally and the Central Pacific Railroad Company each severally claim all of Sec. 15, the nature and date of their claims not appearing in the record before me.

Edward S. Colburn's application to make homestead entry for fractional NE. ¼ and the NE. ¼ of SE. ¼, Sec. 16, was referred to your office January 1, 1888.

Joseph Johnson made homestead entry for the E. ½ of NE. ¼, Sec. 16, July 3, 1878, for which patent issued April 10, 1889.

John F. Riley filed his declaratory statement for the NW. ¼ of Sec. 15 April 7, 1883, all in T. 1 S., R. 2 W.

The evidence of Carpentier's use, improvement, and actual possession of the tract in dispute consists of the testimony of two witnesses, S. S. Kendall and Walter Renwick, by which, I think, it is fairly shown that Carpentier occupied the tract for grazing purposes prior to the act of 1866; that as early as 1861 or '62, there was an old fence on the eastern side of it, corresponding nearly with the line of the Higley survey, which was repaired by Carpentier about 1870. He never lived on the land, and this fence was the only improvement.

From this record it is apparent that the grant was one of quantity (namely, three leagues), within defined exterior limits; that by the terms of the grant this quantity was to be measured by the "judge giving the possession," the "surplus thereof to be left to the proper use of the nation."

A Mexican league is equivalent to 4,438.68 acres, making the number of acres granted 13,316.014, "a little more or less."

A certified copy of the plat of the Higley survey is before me, filed as an exhibit by the applicant, in which the number of acres embraced therein is shown to be 20,464.91, or more than one and a half times the amount conveyed by the grant. This survey was made in April, 1855, long prior to the purchase of any interests by Carpentier.

Whether the Higley survey was designed to segregate the three leagues granted, or to establish the exterior boundaries within which they were to be located, is in my judgment immaterial to the issue in this case. The plat showed upon its face that the survey so made embraced more than seven thousand acres in excess of the quantity granted, and so must be considered as imparting notice to all purchasers, either of the entire grant, or undivided interests therein, that the limits so established did not correctly describe the quantity granted (three leagues). Nor can I find from the record that this survey was ever so considered. On the contrary, I find from the report of your office for the year 1879 page 194, that:

> said map, under stipulations entered into by the United States attorney and the respective intervenors before the court, was admitted and considered in evidence in the case and as correctly representing the *exterior boundaries* of the Rancho Laguna de los Palos Colorados. Said stipulation was filed in court October 23, 1862, and is among the papers constituting the record in the case before this office.

The "case before this office" was the case involving the approval of the Boardman survey, and the case in which this stipulation was originally filed was the investigation of the La Croze survey in the U. S. district court for the northern district of California, in which H. W. Carpentier, the applicant herein, represented his own interest and those of other claimants, and was necessarily a party to the stipulation. The La Croze survey is not before me, nor was it ever approved by this Department. The court, after an investigation lasting many years, rejected it, and decreed, in pursuance of the petition of the claimants under the original grant, that a new survey be made of three leagues of land, within the exterior boundaries as defined by the Higley survey, anywhere the claimants might select.

There is no complaint here that the land in controversy was ever included in the La Croze survey, but it is insisted that, because it was included within the Higley survey, and excluded by the Boardman survey, a right to purchase accrued to Carpentier by reason of his occupancy and improvement of the land.

The Boardman survey embraces 13,316.25 acres, a fraction of an acre more than three leagues the amount called for by the grant. By this survey he has received the full quantity granted by the Mexican government and confirmed by the United States. It is located within the exterior boundaries of said grant, the lines being run according to his selection and direction.

By this selection and location many settlers and claimants under the United States have been compelled to yield to his superior right. These settlers appealed from the judgment of your office approving the Boardman survey, but Secretary Schurz affirmed the decision of your office. See Report, *supra*, last part of page 199.

After a selection so made of the quantity named in the grant, he now asks that he be allowed to purchase four hundred and fifty-seven acres, which he had fenced and used for grazing, thus enlarging the grant to

that amount. When the survey was made he could have included this, if he had so desired, and such choice on his part would have left settlers to that extent undisturbed in their possession.

To allow this application would be to say to a purchaser of a Mexican grant of quantity within larger exterior limits:

> You may take posession of the quantity granted anywhere within the boundaries named, by fencing it in and turning your stock upon it, and when the survey is made you may locate the boundaries of the quantity outside of your enclosure, and then purchase at the minimum price all you have enclosed.

In this way the purchaser would be enabled to appropriate double the quantity granted, if so much was included within the exterior boundaries, the only condition being tha the should pay one dollar and twenty-five cents for the excess.

But, aside from these considerations, it appears from the record that prior to the date of the purchase of any interest in this grant, Carpentier had actual notice that the boundaries of this grant (the three leagues) were unsettled. His first purchase, as shown by the record, was the interest of Nicholas Bernal, which he received from Bernal's grantee, Cipriano Thurn, February 22, 1860. Prior to that time, to wit, November 1, 1858, he, as attorney for John B. Watson, had brought suit against Gaudalupe Bernal and others on a promissory note, secured by mortgage on the interest in said grant, of said Gaudalupe and Nicholas Bernal.

Certain of the defendants filed an answer therein, in which they distinctly and specifically allege "that there has not as yet been any official survey of the said rancho made or approved by the United States surveyor-general . . . . . and that the east and west lines of said rancho have not been located or defined."

It is true the Higley survey had been made prior thereto, but, as before shown, it purported on its face to, and did actually, embrace more than seven thousand acres in excess of the grant, and was well understood and afterwards stipulated by parties to proceedings in the United States district court, relating to the survey of this land, of whom Carpentier was one, that this survey correctly described, not the grant, but the exterior boundaries within which it was to be located, according to the selection of Carpentier himself, in conjunction with others claiming the grant.

Further than this, it is shown by the evidence of Walter Renwick (one of the two witnesses introduced by Carpentier to show his occupancy of the land) that as early as 1861 or '62 Carpentier had actual knowledge of the unsettled condition of the boundaries proper of this grant. He says, on page 32 of the oral testimony, that he bought an interest equivalent to a one-fortieth interest of what he (Carpentier) claimed at that time (1861 or '62). On page 34, on cross-examination, the following occurs:

> Q. When you bought from Mr. Carpentier at that time, did you buy an undivided interest, or did you offer to buy any particular tract?

A. Well, no, I didn't offer to buy any particular tract. I knew that he wouldn't sell any particular piece of land.

Q. That is exactly what I want to get at.

A. Not by metes and bounds.

Q. Why did he not wish to sell any particular piece of land by metes and bounds?

A. I don't know, I am sure.

Q. What did he say to you?

A. He said the grant was not finally located, and he did not want to get into any trouble about the matter.

Question by counsel for Carpentier:

Did he give you possession of any portion of the land in question?

A. No, sir, none at all; I didn't claim any of it, and didn't have any of it in possession.

Thus, it is shown that prior to the acquirement of any interest in this land, Carpentier had both constructive and actual notice that the grant proper had not been segregated—constructive notice, as shown by the Higley map of record, showing upon its face that the survey embraced one and a half times the amount conveyed by the grant, and actual notice by the answer filed in the case in which he was attorney of record.

It also clearly appears that he has been connected with all the litigation and proceedings in court in regard to the survey of the land, and that the final survey was made upon the petition of the claimants under the grantees and in accordance with their said petition; that in such survey the land was segregated in conformity with the selection of the claimants, and that at the time of such selection Carpentier was the principal owner of the grant, and represented his own interests and those of other claimants in all or nearly all the proceedings in court. To allow his application to purchase under the statute invoked would be, in my judgment, a violation of the spirit, if not the letter, of the law, and make this act of Congress, designed to protect innocent purchasers, subservient to speculation, by making it possible for unscrupulous land speculators to appropriate large bodies of the public domain to the exclusion of honest settlers.

The record in this case shows that many settlers since the Boardman survey have claimed this land, some of whom, notably Tippett and Brady, had expended a good deal of money and made many improvements thereon prior to Carpentier's application, and are still living on the land.

Counsel for applicant cite the case of Taylor *v.* Yates 10 L. D., 242, as authority for this purchase.

The cases are by no means parallel. That case merely holds that the purchaser of an undivided interest in a grant, who by tacit consent of his co-tenants "enters into possession of a tract marked by specific boundaries," may upon a proper showing avail himself of the benefits of this statute. Taylor was claiming under the Sobrante grant, which was not a grant of quantity within larger boundaries, but, as its name

implies, was a grant of the *surplus* "lands lying between the tracts known as ranchos San Antonio, San Pablo, Pinole, Moraga, and Valencia," which, subsequent to the purchase of Taylor, was determined by a survey defining the proper limits of the grants aforesaid. The applicant had no power or authority to direct the location of the grant under which she claimed.

When a grant is for quantity within larger boundaries, with no decree or provision to the contrary, the government has the right to survey and fix the limits of the quantity granted. Van Reynegan *v.* Bolton, 95 U. S., 33; Frasher *v.* O'Connor, 115 U. S., bottom of page 107; United States *v.* McLaughlin, 127 U. S., 428; Childs *v.* Southern Pacific R. R. Co., 9 L. D., 471; Rancho El Sobrante, 1 L. D., top of page 201.

I can see no reason why a purchaser of an undivided interest in a grant of this nature, who had in good faith taken possession of a part of the grant by consent of his co-owners, might not avail himself of this statute, when the government had by its final survey excluded a part of his possessions from the grant.

This is all that is decided in the Taylor-Yates case that is so largely quoted in the argument of counsel for Carpentier. In that case, Taylor was not allowed to locate the grant "anywhere within the exterior boundaries," etc. Had she been so authorized by the decree of the court ordering the survey, and chose to leave out her improvements and take in those of settlers, she would then have stood in the attitude of the applicant herein, and I have no hesitancy in saying her application would have been denied.

The decision of your office is reversed, and the application of Carpentier is denied.

SWAMP GRANT--PRIVATE CLAIM.

STATE OF FLORIDA.

The location of a private claim does not effect a disposition of the land, and so defeat the operation of the swamp grant, if such location is not fixed and definite in character.

Secretary Noble to the Commissioner of the General Land Office, June 22, 1892.

I have considered the question raised in your letter of November 13, 1891, as to whether a certain list No. 15 of selections within the State of Florida, made under the swamp land grant and certified by the surveyor-general, January 22, 1855, and subsequently included in list No. 2 (Newnanville series), which list was approved by the then Secretary of the Interior, July 16, 1855, should be patented, or submitted to this Department for the revocation of the approval previously made, as before stated.

The objection raised to the list is, that the greater portion of the lands covered thereby are within the reservation made on account of what is known as the 20,000 acre Arredondo grant, "the supposed *locus* of which is in T. 3 and 4 S. of R. 16 and 17 E."

The following history of this grant is taken from a report made by your office upon Senate Bill No. 1914, under date of April 9, 1884:

Prior to the cession of Florida to the United States the Spanish governor of that province on the 20th day of March, 1817, granted to Don Jose de la Maza Arredondo, with promise of a title in absolute property, twenty thousand acres of land at a place known as "Big Hammock about twenty miles from the river Suwanee, about eighty miles westward from St. Johns."

It also appears that the land granted was duly surveyed by Andres Burgevin, a Spanish surveyor, and that his plat and certificate of survey were signed by Burgevin, September 14, 1819.

Under the provisions of the 6th section of the act of May 23, 1828, the superior court for the eastern district of Florida on the 24th day of November, 1834, rendered a decree recognizing the validity of the claim according to said survey, and confirmed the same to Benjamin Chaires, Peter Miranda, and Gad Humphreys, and on appeal the supreme court of the United States at its January term, 1836, affirmed the decree of the court below, 10 Peters, 308.

Repeated efforts were made by the government to effect a proper survey of said grant, but a survey was not executed, owing to forcible resistance offered by parties who were occupying lands within the alleged limits of the claim under some supposed color of title derived from the United States.

A diagram, however, showing the approximate location of the claim in townships 3 and 4 south of ranges 16 and 17 east, was compiled in the office of the surveyor-general of Florida and approved by him February 10, 1848, since which time said tract was held to satisfy the grant.

Proceeding by petition in the U. S. district court, northern district of Florida, the claimants obtained a supplemental decree on the 10th day of April, 1882, awarding scrip, amounting to 20,000 acres, in lieu of the land in place, and this judgment was made final by said court, September 11, 1883. The scrip was issued November 20, 1883, at which time reservation was released.

Your report states that the land "was held to satisfy the grant."

As to whether any formal reservation was ever made does not appear, but, as I learn that for years the lands were disposed of without regard to the grant, I am led to believe that the lands were never formally withdrawn.

The claimants under the grant objected to the location as made by the surveyor-general, and, after an unsuccessful effort to have the decree of the court reformed, they petitioned Congress for a change of location without avail.

The question arises as to the effect of the approximate location made by the surveyor-general upon the claim of the State, under the swamp land grant, to any lands included therein—i. e., did it amount to a disposition of the lands embraced in such location, for, if it did, the lands were not subject to the swamp land grant; otherwise, they passed to the State upon the determination of their character.

The act of September 28, 1850 (9 Stat., 519), granted to the State of Arkansas and other States within their respective boundaries "the

whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of the act."

In the case of the swamp grant in the State of Michigan for land under reservation as a part of old Fort Mackinaw wood reservation in Bois Blanc Island (8 L. D., 310), it was held:

Congress may grant any and all lands the fee to which is in the United States, unless such lands have been sold or in such manner disposed of, that another disposition of those lands would be incompatible with the obligation of the government to others. The grant in this case was "a present grant vesting in the State *proprio vigore* from the day of its date, title to all the land of the particular description therein designated, wanting nothing but the definition of the boundaries to make it perfect," Wright *v.* Roseberry (121 U. S., 488), and authorities therein cited.

Although the lands may at the date of the grant be temporarily reserved, or set apart for the use of the government, or for other temporary purposes, not amounting to a disposal of the land, it will not prevent such lands from being subject to the operation of the grant, and when disencumbered the right attaches as of the date of the grant. Therefore the sole question to be determined is, was the reservation of such a character as to amount to a disposal of the land.

With reference to swamp lands temporarily reserved for the use of the government, or other purposes at the date of the grant not amounting to a disposal of the land, this grant should receive the same construction given to the grant for school purposes.

. . . . . .

The question as to the right of a State to the specific school section embraced within a reservation at the date of the grant, came before the supreme court in the case of Ham *v.* the State of Missouri (18 How., 126). In this case the land was reserved under the act of Congress of March 3, 1811, reserving from sale all lands embraced within the limits of a private land claim, filed in time and in accordance with law until the decision of Congress upon such claim.

An application was presented to the Land Commissioners for confirmation of this claim in due time and in accordance with law, and was rejected by the Commissioners in their report to Congress.

The act of March, 1820, passed while this claim was pending before Congress—and therefore in reservation—granted to the State of Missouri, the sixteenth section of every township, and equivalent land where such section had been sold or otherwise disposed of.

Subsequently Congress by act of May 24, 1828, confirmed to Valle and his associates, the tract for which confirmation was prayed—according to a survey made in 1806—providing that said confirmation thus granted, shall only extend to a relinquishment of title on the part of the United States, and shall not prejudice the rights of third parties, nor any title heretofore derived from the United States.

. . . . . .

It was insisted upon by the defendant, that the land in question being within the limits of the survey of 1806, and the confirmation by Congress, was never public land subject to donation for the use of schools; that the reservation of section sixteen for the use of schools, could only refer to public lands proper, and could not attach to lands embraced in private claims, which had previous to, and at the time of such donation been claimed by individuals, and reserved by Congress to satisfy those claims. But the court construed the proviso reserving such lands from sale as neither declaring or importing a final and permanent divestiture or any divestiture whatever of the title of the United States, but merely a temporary arrangement for the purpose of investigation, leaving the title in the government.

Then speaking of the grant to the State of equivalent lands, where section sixteen had been sold or otherwise disposed of, the court say:

"Sale, necessarily signying a legal sale by competent authority, is a disposition

final and irrevocable of the land. The phrase 'or otherwise disposed of' must signify some disposition of the property *equally efficient*, and equally incompatible with any right in the State present or potential, as deducible from the act of 1820, and the ordinance of the same year."

The court therefore held that the reservation from sale of the lands within the limits of the private land claim, did not prevent the title of the State from attaching to the sixteenth section specifically.

To the same effect is the ruling in the cases of Cooper *v.* Roberts (18 How., 173); Beecher *v.* Wetherby (95 U. S., 517); Buttz *v.* Northern Pacific R. R. (119 U. S., 55).

. . . . . .

The principle announced in the cases cited as controlling the grant for school purposes, is alike applicable to the grant of September 28, 1850, granting to the State all of the swamp and overflowed land which shall remain unsold at the date of the grant, which included all land of the character specified, owned by the United States at the date of the act, although they may at that time be reserved from sale, or set apart for some temporary use of the government.

From your report it is clear that, if any reservation was ever made on account of the Arredondo grant, it did not amount to a disposition of the lands. It was at best an approximate location of the claim, and never acquired that fixity of character or definiteness of location as would amount to a disposition of the land included thereby.

Its effect upon the swamp grant must have been considered at the time of the approval of the list under consideration, and, after the lapse of so many years, I should hesitate to disturb the adjudication then made, unless it was clearly shown that the action then taken was without authority of law.

I have therefore to direct that patent issue upon the approval heretofore given.

DESERT LAND ACT—RESIDENT CITIZEN.

INSTRUCTIONS.

The phrase, "resident citizen of the State or Territory in which the land sought to be entered is located," as used in the desert land act, amended March 3, 1891, should be construed to embrace all persons living in such State or Territory and entitled to protection in the exercise of civil rights, without regard to their political rights, and must be read in connection with the provisions of sections one and seven of said act.

Secretary Noble to the Commissioner of the General Land Office, June 22, 1892.

By letter of February 27, 1892, you ask to be advised of the views of the Department upon the provision of section eight of the act of March 3, 1877 (19 Stat., 377) as amended by section two of the act of March 3, 1891 (26 Stat., 1095) that "no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located."

The amendment made by the act of March 3, 1891, consisted of the

addition of five sections numbered four to eight inclusive, and in order to arrive at a satisfactory conclusion as to the point referred to by you, it will be necessary to consider the whole act as it now stands.

Section one provides "that it shall be lawful for 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,'" to file a declaration that he intends to reclaim a tract of desert land, etc. This is the only provision or requirement as to citizenship found in the original act.

Section seven of the act as it now stands provides that at any time after filing the declaration, and within the period of four years thereafter, upon the applicant making satisfactory proof of reclamation and cultivation "and that he or she is a citizen of the United States," and upon payment, as required, a patent shall issue.

In section eight is found the provision quoted in your letter as follows:

and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located.

These quotations contain all that is said in this law, as it now stands, upon the subject of citizenship. There is at least one proposition as to which there can be no dispute, that is, that the applicant must, in his final proof, show himself to be a citizen of the United States. I can not, however, entirely agree with you that it is now required

that a party, at the time of making application to enter desert land, must be a citizen of the United States, and have his permanent residence in the State or Territory where the land sought to be entered is located, without regard to the length of time he may have been residing in the State.

This construction would, in effect, nullify that part of section one which declares that one who may be entitled to become a citizen of the United States and who has filed his declaration to become such may file an application to make an entry under said act, and such a result should be avoided if possible. Effect should be given to every part of this law unless there be provisions so contradictory as to render this impossible. I do not find in these two provisions that degree of repugnance that would require a construction disregarding either of these provisions. The proper construction seems to be that the eighth section specifies another qualification or attribute that must belong to one to entitle him to file his application under this act. If the provision found in section eight had been inserted in section one, where it might very properly have been placed, it would have had the same effect on the provisions of said section as it now properly has. That section would then have read as follows:

That it shall be lawful for 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," and who shall be a resident citizen of the State or Territory in which the land sought to be entered is located, etc.

So far as said provision in section eight affects the question as to the qualifications of those who may file a declaration of intention to reclaim a tract of desert land, it should be given the same effect as if it had been found in section one of said act.

Said provision being placed where it is in this act must be read also in connection with that part of section seven reciting the facts required to be shown in final proof. The requirements as to personal qualification would then be as follows:

> That he or she is a citizen of the United States and a resident citizen of the State or Territory in which the land sought to be entered is located.

It remains then to be determined what is meant by the added requirement that one seeking to acquire title to a tract of land under the provisions of this act must show both at the date he files his declaration of intention to reclaim and at the date he offers final proof that he is "a resident citizen of the State or Territory in which the land sought to be entered is located." In determining this point we may properly take into consideration not only all parts of the act in question and its scope and purpose, but also all other acts relating to the same subject. In this connection it may be said that statutes forming the general system of laws regulating the disposal of the public domain are to be considered in *pari materia* and are to be construed accordingly. Daniel G. Tilton (8 L. D., 368).

Under those laws which require a settlement on the land the title to which is sought to be acquired, the claimant must of necessity be a resident of the State or Territory in which the land is located. But a claimant under one of those laws is not required to show that he is a citizen of such State or Territory in the sense that he has a right to exercise political functions. No more should be required in this particular of claimants under this law now under consideration than of one under those laws requiring settlement, unless the language used is clearly and absolutely indicative of an intention on the part of Congress to require something more. I do not find in this act language indicating such an intention, but it is, in my opinion, clear that Congress intended to place claimants under this law in exactly the same position in this particular as claimants under those laws requiring settlement. You say "it has been suggested that a party qualified to exercise the elective franchise in any State or Territory might be considered a 'resident citizen' of that State or Territory." I agree with you that such a construction should not be adopted. It would shut out from the benefits of this act women in those States where the right of suffrage has not been conferred upon them, and it would also debar those who may be citizens of the State in the sense of being inhabitants thereof and entitled to participation in civil rights, but who are not electors or entitled to exercise political functions.

The fact that the word citizen does not always have the same signifi-

cance has been frequently adverted to by the courts. Thus in The Dred Scott case (19 How., 393–422) we find the following language:

> Undoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification can not vote or hold the office, yet they are citizens.

In the case of United States *v.* Cruikshank (92 U. S., 542–549) the court defined citizens as follows:

> Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights.

After quoting this definition, in the case of Boyd *v.* Thayer (143 U. S., 135–158) the court said:

> There is no attempt in this definition, which was entirely sufficient for the argument, to exclude those members of the State who are citizens in the sense of participation in civil rights, though not in the exercise of political functions.

In Baldwin *v.* Franks (120 U. S., 678–690) it was said:

> In the Constitution and laws of the United States, the word 'citizen' is generally, if not always, used in a political sense to designate one who has the rights of privileges of a citizen of a State or of the United States. . . . But it is also sometimes used in popular language to indicate the same thing as resident, inhabitant, or person.

It was held that the word was not used in the law then under consideration in this latter sense, because all the surroundings indicated that it was intended in its political sense. None of the surroundings of the law now under consideration indicates that the word was used here in its political sense, but all support the theory that it was used in its wider and broader sense. To restrict it to the narrower meaning would be to render the law unequal in its application in the different States, and inharmonious with the whole system of land laws.

It may be said that if the construction indicated herein be given the word "citizen," the word "resident" is superfluous and adds nothing. That objection would, however, be equally forcible if the word "citizen" be given the other definition.

After a full and careful consideration of this matter, I have concluded that the phrase "resident citizen of the State or Territory in which the land sought to be entered is located" should be construed to embrace all persons living in said State and entitled to protection in the exercise of civil rights without regard to their political rights, and must be read in connection with the provisions of sections one and seven of said act, as hereinbefore indicated.

SCHOOL LAND—MINERAL LAND.

WARREN ET AL. *v.* STATE OF COLORADO.

The title to school land passes to the State without patent or certificate, at the date when the grant takes effect, and to except lands therefrom, on account of coal alleged to be found therein, it is necessary to show the existence of such mineral in sufficient quantity to add to the value of said lands and justify expenditure for its extraction, and that such fact was known when the grant took effect.

Secretary Noble to the Commissioner of the General Land Office June 22, 1892.

I have considered the cases of M. V. Warren and J. M. Burkhart *v.* The State of Colorado and the Trinidad Coal and Coking Company, intervenor, on appeal by the former from your office decision of October 30, 1889, rejecting their applications to purchase the E. ½ of Sec. 36, T. 33 S., R. 64 W., Pueblo, Colorado, land district.

The record shows that on June 8, 1887, Burkhart applied to the local officers to purchase the NE. ¼ of said section, under section 2347, of the Revised Statutes, and on July 7, 1887, Warren likewise applied to purchase the SE. ¼ of said section.

The local officers rejected both applications on the ground that the land described in said applications was not subject to sale by the United States, because it had passed to the State of Colorado under the grant for school purposes, made in the act of Congress providing for its admission into the Union as a State. Burkhart and Warren appealed, and thereupon your office on the 2d day of November, 1887, modified the decision of the local officers by ordering hearings to be had to determine whether said land, "was known to be mineral prior to the admission of Colorado into the Union, to wit: August 1, 1876, and chiefly valuable for coal."

A hearing was accordingly had at which the parties appeared; the applicants in person and by counsel, the State of Colorado by its attorney-general, and the Trinidad Coal and Coking Company as an intervenor, claiming title to the land in question under a purchase from the State of Colorado.

It was agreed by all of the parties in interest, that the testimony taken should apply to both cases, and that the cases for the purposes of the trial, should be consolidated, and tried as one case.

The State claimed,

That said land was donated, granted and confirmed to the State of Colorado in aid of the support of common schools of said State, and for the creating of a fund for that purpose by act of Congress, approved March 3, 1875. That Colorado became a State August 1, 1876, and accepted said grant and donation of said land for such purpose, and made due selection thereof, at or about said time, as agricultural land, and had ever since by her or her grantees, held control and possession of the same. That said land at the time of said grant as well as at the time of the admission of Colorado into the Union, was not known to be coal land nor chiefly valuable as such, but on

the contrary, said land was at said time, and as this protestant is informed and believes is now agricultural land known as and chiefly valuable as such, and that the same could not have been then, and cannot be now profitably worked for coal or any other mineral whatever.

The State further protested,

Against the right or power of any department of the Government, save the judicial and the courts thereof of this State and the United States, to take jurisdiction over said matter and to determine the right, title and interest of the State of Colorado or her grantees in and to said land.

From the evidence introduced before them the local officers found that:

Nothing in our opinion should disturb this peace and security of the grant, but the most indubitable proof that the land at date thereof was valuable coal land and generally known as such. We find that the evidence fails to establish that fact and therefore recommend that the applications of the contestants to purchase said tracts be not allowed.

Burkhart and Warren appealed.

On the 30th day of October, 1889, your office affirmed the judgment of the local officers. Burkhart and Warren again appeal. They specify errors as follows:

First. In not finding and holding that the land involved is in an economic, as well as in a geological sense, coal land.

Second. In not finding that the land in question contains valuable, working deposits of coal.

Third. In not finding, from the evidence, that the land in question was known to contain valuable, working deposits of coal at and prior to the admission of Colorado as a State on August 1, 1876.

Fourth. In finding that the State, and intervener, have satisfactorily established the fact that there was not on the land, on the 1st of August, 1876, a known coal mine capable of being profitably worked for its product, so as to make the land valuable for coal mining.

Fifth. In not finding that the plaintiffs have satisfactorily established the fact that there was on the land in question, on the first of August, (sic) 1886, a known coal deposit capable of being profitably worked for its product, so as to make the said land valuable for coal mining.

The fourteenth section of the act of February 28, 1861 (12 Stat., 172), providing a temporary government for the Territory of Colorado provides:

That when the land in said Territory shall be surveyed, under the direction of (the) government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be and the same are hereby reserved for the purpose of being applied to schools in the States hereafter to be erected out of the same.

This is clearly a reservation of the specified sections taking effect upon surveyed land upon the day of its passage. The township in which the lands in question are situated was surveyed on the 1st of October, 1869, and a plat thereof was approved by the Surveyor-General of Colorado December 1, 1869, and received at your office on the 16th of that month.

On the 3rd day of March, 1875, Congress passed the act enabling the people of Colorado to form a constitution and State government and for her admission into the Union, (18 Stats., 474). The seventh section of said act provides:

> That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not more than one quarter section, and as contiguous as may be, are hereby granted to said State for the support of common schools.

The fifteenth section provides: "That all mineral lands shall be excepted from the operation and grants of this act."

Colorado was admitted as a State on the first day of August, 1876, by proclamation of the President (19 Stats., 665), and subject to the exceptions contained in the seventh and fifteenth sections *supra*, the grant became effective on that date as to all surveyed lands.

The case has been elaborately argued here, both orally and in print. Many questions not properly embraced in the record have been discussed by counsel, among them it is urged that the discovery of valuable minerals at any time subsequent to the State's admission will defeat her right to the land under said grant. If this question ever was in the controversy, it was when the case was appealed by Burkhart and Warren to your office, from the decision of the local officers rejecting their applications; and your office at that time—November 2, 1887—passed directly upon the point as follows:

> The grant to the State of Colorado took effect as regards surveyed lands August 1, 1876, by virtue of the President's proclamation and was decided by this office in the case of the townsite of Silver Cliff *v.* The State of Colorado; see Copp's U. S. Mineral Lands, 2d Ed., page 261. Therefore the section in question having been ascertained by survey long prior to the admission of the State into the Union, the question in this case is whether the land applied for by Warren was known to be mineral in character prior to the latter date.

There was no appeal from this decision and it became final and binding on all the parties. Rule of Practice 112.

While it is true that the Department might by virtue of its supervisory authority correct any error apparent in the record, yet there is no such error in your decision of November 2, 1887; see Davis *v.* Weibold, 139 U. S., 507; Colorado Coal Co. *v.* United States, 123 U. S., 307; Abraham L. Miner (9 L. D., 408).

I content myself by merely referring to this question because it has been critically argued on both sides just as if it was actually involved in the case. I conceive it to be the duty of the Department to decide this case, as all others appealed here, upon the record as presented by the parties. It will be perceived that the errors assigned really relate to questions of fact and not of law. The evidence is voluminous and very conflicting as to whether the lands in question were valuable coal lands, and known to be such prior to the first day of August, 1876; the local officers found from the evidence introduced before them that

they were not such in character, and dismissed Burkhart's and Warren's applications to purchase under the coal law. Your office concurred with the local officers; in such cases, as to questions of fact, the general rule is to accept the decisions of your office and the local officers as conclusive; Finan *v.* Palmer *et al.* (11 L. D., 321); Cleveland *v.* North (11 L. D., 344); Conly *v.* Price (9 L. D., 490).

I discover no reason for any departure from this rule in the case at bar. In view of the importance of the case, I have carefully examined the evidence and I find the facts to be substantially as set out in your office decision.

The fact that this land lies in what is known as the Colorado coal fields, which includes about two thousand five hundred square miles, in which there is probably not more than one hundred square miles of land valuable for coal, and the further fact that there are valuable coal deposits in the vicinity of these lands, do not prove these lands to be coal lands within the meaning of the law. In Commissioners of King's County *v.* Alexander *et al.* (5 L. D., 126), the rule was correctly stated by Secretary Lamar:

> That the proof of the mineral character of the land must be specific and based upon the actual production of mineral; that it is not enough to show that neighboring or adjoining lands are mineral in character, and that the lands in controversy may hereafter develop minerals to such an extent as to show its mineral character, but it must be shown as a present fact that the lands are mineral, and this must appear from actual production of mineral and not from a theory that the lands may hereafter produce it.

Citing Dughi *v.* Harkins (2 L. D., 721) and other authorities. This has been followed since by the Department. John Downs (7 L. D., 71).

In Deffeback *v.* Hawke (115 U. S., 404), it is said:

> We say "land known at the time to be valuable for minerals," as 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 statutes is applicable.

In Colorado Coal and Iron Co. *v.* United States (123 U. S., 307), it is said (page 328),

> It is not sufficient, in our opinion to constitute "known mines" of coal, within the meaning of the statute, that there should merely be indications of coal beds or coal fields of greater or less extent and of greater or less value, as shown by outcroppings. . . . The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time, there were not actual "known mines" capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them, acquired under the pre-emption act can not be successfully assailed. See also Sullivan *v.* Iron Silver Mining Co. 143 U. S., 431, and Iron Silver Mining Co. *v.* Mike and Starr Gold and Silver Mining Co. 143 U. S., 394.

The grant to Colorado of the sixteenth and thirty-sixth sections includes all kinds of lands except mineral lands so that upon principle all lands embraced in said sections except mineral lands would pass to the State by the grant, the same as agricultural lands pass by sale under

the pre-emption law. No patent or certificate was necessary to pass them to the State, if they were not mineral in character.

In Davis *v.* Weibold (139 U. S., 507), it is said: (page 519)

> The exceptions of mineral lands from pre-emption and settlement and from grants to States for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant.

Applying these principles to the case at bar, it is clear that the evidence fails to prove the mineral character of the land in question at or before the first day of August, 1876. It is urged that to affirm your office decision will be tantamount to overruling the case of Central Pacific Railroad Co. *et al. v.* Valentine (11 L. D., 238). This contention is not sound. The Valentine case, in so far as it has any application, tends to support the conclusion reached in this case. The judgment appealed from is affirmed.

PLACER MINING CLAIM—KNOWN LODE.

GROSFIELD *v.* NIGGER HILL CONSOLIDATED MINING CO.

A placer entry made for the purpose of securing title to lodes and veins known to exist in the land so entered is in violation of law and must be canceled.

Secretary Noble to the Commissioner of the General Land Office, June 22, 1892.

On May 8, 1884, the Nigger Hill Consolidated Hydraulic Mining Company, by John Herrman, its president, filed application for patent for its placer mining claim designated as lot No. 391, and situated in Rawling Mining district, Lawrence County, South Dakota, containing seventy-two acres.

In the application no exclusion was made of any conflict with any lode claim, and during the period of publication no adverse claims nor protests were filed; consequently, on July 22, 1884, said company made mineral entry No. 174 of said lot 391.

On July 16, 1888, Edmund Grosfield filed a protest against said entry and the issuance of a patent thereon, alleging in substance that he is part owner in the Gray Eagle, Uncle Sam, Baltimore, Yankee, Brooklyn, Bangor and Portland lode claims bearing tin, and that some portion of each lies within the boundaries of said placer claim. Also, that there are a number of other lode claims conflicting with said placer, referring to the Washington, Steptoe, Rattler, Chester, Foxtail, Cleaveland and others; that many of said lode claims were located in 1877 for gold, and after tin was discovered in 1883 were re-located and new discoveries made.

Protestant assigned as a reason why no adverse claims had been made

during the period of publication; that various officers of said company promised protestant and other lode owners that if no adverse claims were filed, the company would take patent with full reservations of all lode claims.

A trial was had on these charges, and after considering the evidence submitted the register and receiver held that the Steptoe, Uncle Sam, Chester, Baltimore, Rattler, Giant Cleaveland and Portland lode claims, were in conflict with the placer claim, and that they were known lode claims prior to the placer application. They therefore recommended the cancellation of the placer entry to the extent of the conflicts with said lode claims. The mining company appealed from the finding of the local land officers to your office.

On April 26, 1890, you considered the case and held the placer entry for cancellation only to the extent of the conflict with the Yankee and Steptoe lode claims.

An appeal has been taken from your decision to this Department.

The maps on file in this case show that the following named lode claims are in conflict, in whole or in part, with the placer claim of the Nigger Hill Consolidated Hydraulic Mining Company; the Centennial or Bertha, Uncle Sam, Yankee, Boston or Baltimore, Portland, Washington, Bangor, Brooklyn, Fox Tail, Modoc Chief, Crow Dog, Lula, O'Brien Fraction, Bear Fraction, Grey Eagle, Dexter, Rosa, Steptoe, Rattler, Chester, Peck Fraction, Mace, Eureka, Mary Ann and Del Norte.

The great volume of evidence makes it inconvenient to apply the particular parts thereof applicable to particular lodes named.

The Steptoe was located December 6, 1883; Baltimore (Boston) located July 26, 1883; Chester located June 24, 1882; Rattler located July 26, 1883; Portland located July 3, 1877; Morning Star located August 17, 1883, relocated as Cleveland on February 2, 1885; Uncle Sam located August 1, 1883; Yankee located August 12, 1883. The Modoc Chief, Crow Dog, and Lulu located prior to May 8, 1884, but as they are now patented there is no conflict of ownership in reference to them. It may be asserted here that the placer claimant in its application did not mention their existence, nor that any of the locations existed. Said claimant is therefore estopped from asserting any ownership thereover by means of its entry and application. Its title to the last named three lodes rests on the purchase thereof from the rightful owners.

The evidence in this case, taken as an entirety, shows that the land covered by the placer entry is of but little value for placer mining, and that while many lode locations have been made on this ground in the past, it was not until 1883 that the lodes had any great value. Many of these old locations made between 1860 and 1880 had been practically abandoned, not because gold was not found in the form of quartz veins and lodes, but because with the facilities at hand they could not be made to produce profitably. The same may be said of placer mining.

Many of the owners of placer claims in these gulches could not make fair wages by placer mining. The mining properties situated along these gulches and included in this placer application, were not of much value, but in 1883 tin was discovered. This gave to the properties a prospective value. Specimens have been taken to Cornwall, England, by the present owner of the placer entry and others, and being assayed there have been shown to produce tin in quantity and quality to compare favorably with the best tin mines in the world. It cannot be doubted, if the evidence in this case be true, that these tin mines are capable of being profitably worked for their product. Tin ore appears in croppings on the surface of the ground, and is also found in ledges and veins beneath the surface according to the testimony.

In view of all the facts in this case, it seems clear that the placer patent is sought for the purpose of securing title to this land, not for placer mining, but for the lodes contained therein. Nothing is clearer than that the proprietor of the placer claim regards the property as valuable because of the tin it contains. He knew of the existence of this tin ore before he applied for the placer patent, but whether he knew it or not, it was known in 1883, and has been known since. The tin does not appear in the form of placer but is found in veins and lodes. The placer claimant is already the owner of several of these lode claims procured through purchase and all, or nearly all, of the assessment work that has been done on the placer claim has been done in the way of quartz mining and prospecting.

The evidence shows that the following lode claims located subsequent to the placer application, include within their respective boundaries known lodes and veins of tin, and that the existence of such was known prior to and at the date of the application for placer patent, to wit: O'Brien Fraction Peck Fraction, Rosa, Bear, Fraction, Grey Eagle, Fox Tail, Brooklin, Bangor, Washington and Centennial.

Said placer entry should be canceled.

Your judgment is accordingly modified.

PRE-EMPTION FINAL PROOF—EQUITABLE ACTION.

NANCY J. CREWS.

Pre-emption final proof, made up of testimony executed before an officer not authorized to take the same and supplemental evidence taken outside of the State in which the land is situated, may be accepted with a view to equitable action where the physical condition of the claimant prevents the submission of further proof in regular form, and good faith is apparent.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 23, 1892.

The land involved in this appeal is the SW. ¼ Sec. 8, T. 5 S., R. 42 W., 6th p. m., Akron, Colorado, land district.

The record shows that Nancy J. Crews filed pre-emption declaratory statement on said tract April 1, 1887. By your letter of May 12, 1887,

the township was suspended from disposal by reason of alleged inaccuracies in the survey. The claimant, apparently, ignorant of this order, made application to the local officers then in Denver to make publication and offer final proof. The application was granted, publication ordered and July 24, 1888, set for taking said proof, before the local officers at Denver. Pursuant to published notice the claimant and her witnesses appeared at the local office on said day and offered her proof, the register and receiver declined to take the same for the reason that the township had been suspended. She then went to a notary public before whom she and her witnesses made proof on the regular blank provided for that purpose. The proof thus made was then tendered the local officers but was refused for the reason that "said tract of land having been withdrawn by the Department, this office is not allowed to accept any proof upon any lands embraced within the limits," etc.

Claimant appealed from this decision, and you by letter of October 26, 1888, affirmed said decision. She again appealed to this Department, where it was decided on February 8, 1890, that "in the present condition of this record I am unable to determine whether claimant is entitled to prove up on said land" and a report was called for from you, showing the reasons for the withdrawal, and whether it was still in force. As a result of this inquiry, it was ascertained that the land had been re-instated by letter of June 20, 1889, and by letter of June 17, 1890, you directed the local officers, as follows:

> In view of the acceptance of the new survey the case is herewith returned for proper disposition, and in this connection you are directed to proceed with all proper dispatch to adjust this claim, as the claimant is suffering from error for which she was in no way responsible. She will of course be required to make proof according to the law and regulation.

It appears that claimant, through her attorney, then requested "instructions as to whether or not entry shall be allowed upon the proof heretofore made." This resulted in a decision (12 L. D., 560) holding that "Pre-emption final proof can not be accepted where the final affidavit is made before a notary public."

The claimant then filed a petition in the local office, dated July 14, 1891, asking to be allowed to make her final proof and affidavit before the clerk of the county court of Wayne county, Illinois, and that of her witnesses before the local officers at Akron. In her petition it is said:

> And claimant would further represent that she was in no wise responsible for the withdrawal of said land from entry or the refusal of the register and receiver aforesaid, to hear the testimony she offered in said case.
>
> And that she has continued the cultivation and improvement of said land to the present time.
>
> Claimant at this time (July 24, 1888) was past sixty-two years of age, in very poor health and subject to a species of falling fit, and it was deemed extremely dangerous by her physician and relatives for her to remain alone upon said claim; and on the following August, she was removed to the residence of her son L. E. Crews where

she was stricken with paralysis on or about April 10th, 1889. Since that time she has been absolutely helpless and she is now under the care of her daughter, M. E. Sharp in Wayne county, Illinois, and is totally unable to appear before the register and receiver of the United States Land Office at Akron, Colorado.

The statements in regard to her physical condition are corroborated by the affidavits of members of her family and her physicians. The local officers referred this petition to you with the request that the prayer be granted. You by letter of July 18, 1891, refused to grant her request, whereupon she prosecutes this appeal.

In the absence of any adverse claim to this land the only question here is simply one for the action of the Department to permit the claimant to make her final proof and entry. There is no question as to her good faith or her honest endeavor to comply with the law, and her subsequent misfortunes should not, under the circumstances prevent her from perfecting her entry.

You will, therefore, instruct the local officers to accept the final proof of claimant and to permit her to make final entry and if any further affidavits of claimant are required for this purpose they may be taken before the clerk of the county court of Wayne county, Illinois, Rebecca C. Williams (6 L. D., 710); William H. Bowman (7 L. D., 18). When the final entry shall have been completed the local officers will return all the papers to you, and you will refer the same to the board of equitable adjudication for final disposition.

Your decision is thus modified.

PRACTICE—SERVICE OF NOTICE—JURISDICTION.

DAVISON *v.* BEATTIE.

A case should be dismissed where it has once been continued in order that service of notice may be perfected and the contestant refuses and neglects to secure proper service.

A defendant who enters formal objection to the jurisdiction of the local office does not waive his right to be heard thereon by subsequently taking part in the proceedings before said office.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 25, 1892.

I have considered the appeal of Thomas Davison in case of himself against George D. Beattie from your decision of March 18, 1891, dismissing his contest against the timber culture entry of Beattie for the NW¼, Sec. 17, T. 108 N., R. 61 W., Mitchell, South Dakota, land district.

This entry was made April 25, 1884, and on May 5, 1888, Davison attempted to initiate a contest against it. He filed an affidavit of contest, and notice was issued thereon fixing the hearing for July 15, 1888

On May 10, 1888, Davison filed an affidavit for service by publication in which he set out "that he has made due and diligent search and inquiry for the whereabouts and address of claimant," but does not set out anything that he did, nor any fact to show diligence, as required by rule 11.

On June 27, 1888, he appeared and filed another affidavit in which he stated that he was the contestant in the case,

> that the notice has been posted on the land and duly advertised, but he this day learns that by an oversight the register's notice has not been sent, that he has still been unable to learn the whereabouts of said Beattie and can not get personal service since, and therefore asks that the hearing be postponed to enable him to get service.

The affidavit was noted by the officers "Publication granted and case continued to August 17, 1888, 9 a. m."

On the 27th of June, a notice was published accordingly, and on August 17, the adjourned day for hearing, the attorney of Davison appeared and filed his affidavit stating that his client and his witnesses resided about forty miles from Mitchell; that they were busy harvesting and could not attend the hearing and he asked a continuance until September 12, 1888, which was granted, the claimant being in default. On September 12, the contestant and his attorney appeared and an attorney entered special appearance for Beattie for the purpose of moving to dismiss, which motion was based upon the facts appearing on the face of the affidavit for service by publication that it did not state any act that constituted diligent search and inquiry, etc., as required by rule 11, Rules of Practice; (2) that a copy of the notice was not mailed by registered letter to the last known address of the claimant, as required by rule 12 (14) Rules of Practice.

This is supported by an affidavit of one Silsby who, among other things, avers that Davison knew the address of Geo. D. Beattie, and further that he knew that Edward W. Beattie, brother of George, was the agent of George for the care and management of the land in controversy, and that Davison knew his address.

This motion was overruled by the local officers, and the case was then continued to November 7, 1888, they say "to allow the contestant an opportunity to cure the defects in his papers and perfect his service." A notice of the continuance was given by publication. Nothing appears to have been done to obtain service. No new affidavit or publication was made under this ruling and order.

The contestant, on September 14, 1888, filed what he called an "attaching" contest affidavit, and desired to try the case on his former affidavit, and if he should fail, then to try it on this new affidavit. The local officers held that this was improper; that it could not be allowed as an "attaching contest," but that it might be considered as an amended affidavit or amendment to the original, to which the contestant objected, and refused to so hear the case.

On November 7, 1888, the contestant appeared with his attorney and witnesses, but he having made no further effort to obtain service on the claimant, the attorney of claimant appeared specially and renewed his motion to dismiss, and insists that the contestant has not complied with the order or the permission to cure the defects in his papers or to obtain service of notice, and that no service has been made on the claimant, and that he is not in court. This motion was overruled, and after noting exceptions and appealing therefrom, the attorney of claimant proceeded to cross-examine the witnesses and to try the case. The local officers, on the testimony furnished, recommended the cancellation of the entry, from which, as well as from the rulings and orders of the register and receiver the claimant appealed.

You, on March 18, 1891, held that the affidavit for publication was insufficient; that the rules and regulations had not been complied with; that the local officers had no jurisdiction of the person of claimant, and that they erred in assuming jurisdiction. You reversed their decision and dismissed the contest, from which the contestant appealed.

Four assignments of error are made. The third assignment virtually admits that the local officers erred, but appellant says you erred "in holding that the contestant lost his rights by the error of the local office, even if it be conceded that the office did err." The assignments are substantially that you erred in the law of the case.

The papers are all before me, and the action of the officers on each is endorsed thereon. The error made by the local officers was not in refusing to dismiss the case and in granting the continuance "to allow the contestant an opportunity to cure the defects in his papers and perfect service," as stated by you. This could not work any injustice and was not a final order or judgment, but they allowed a publication on an insufficient affidavit, and when attention was called to it, and the continuance was granted, the contestant *refused to make service* on contestee or to do anything further toward perfecting service. Then the local officers proceeded to a hearing when they had no jurisdiction of the party defendant. They say in their decision that on August 17, 1888, they called the attention of the attorney for contestant to the irregularity in his papers, in answer to which he said "he would take his chances; that he did not believe an appearance would be made by claimant at any rate." They further state in their decision that at the continuance which was made that service might be obtained, "the attorney for contestant became very violent and abusive in his language toward the register, demanding that he be allowed to put in his testimony at any rate." They further state that at the hearing they had doubts about proceeding, and as to the correctness of their ruling, but "The contestant's attorney was so positive as to the complete and legal character of his service, and the regularity of the proceedings throughout, that we concluded to permit him to proceed to trial."

It is said in the decision of the local officers that "the case then proceeded to trial, when the claimant put in a general appearance." If a

party objecting to the jurisdiction waives that objection and enters his appearance, he cannot afterward, upon losing his case, fall back upon his prior objections, but where a party puts himself upon record as objecting to the jurisdiction, and his objection is overruled. he does not lose his right by going to trial. It was said in the case of Waterhouse (9 L. D., 131) "nor did the subsequent participation of counsel in the examination of witnesses after his motion to dismiss was overruled, in any way affect the force of his objection to the jurisdiction." citing Harkness *v.* Hyde (98 U. S., 476).

The claimant, upon the overruling of his motion to dismiss, immediately excepted and prepared his "bill of exceptions" presented his appeal from the action of the local officers. This appeal thus prepared could not oust the jurisdiction of the local officers. The refusal to dismiss was not a final order, but the appeal amounted to a "bill of exceptions," and upon final judgment he appealed and assigns as error (1) the overruling of the motion to dismiss filed September 12, 1888; (2) the overruling of the motion to dismiss filed November 7, 1888. The former ruling, as has been stated, and the continuance could not be said to work injustice, but upon the neglect and refusal of the contestant to do anything toward perfecting service, the local officers should have sustained the motion to dismiss. From the statements of the local officers they proceeded with the hearing against their better judgment simply because urged to do so by counsel for contestant, and the claimant having entered his objection of record and insisted upon it lost nothing by proceeding to contest the case on the hearing. In Harkness *v.* Hyde (*supra*), the court said: "He is not considered as abandoning his objection because he does not submit to further proceedings without contestation." "It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived." I am satisfied that the claimant did not intend to waive and did not waive his objection by his action subsequent to the overruling of his motion. In fact, it is not claimed by contestant that any appearance was entered or the objection waived.

Your judgment dismissing the contest is affirmed.

RAILROAD GRANT—INDEMNITY—PRE-EMPTION FILING.

NORTHERN PACIFIC R. R. CO. *v.* BENTSON.

No rights are secured under an indemnity selection of land embraced within an unexpired pre-emption filing of record.

Secretary Noble to the Commissioner of the General Land Office, June 27, 1892.

I have considered the case of the Northern Pacific Railroad Company *v.* Erick Bentson, involving the SW. ¼ of the SW. ¼, Sec. 17, and the

NE. ¼ of the NE. ¼, Sec. 19, T. 54 N., R. 12 W., Duluth land district, Minnesota, on appeal by the company from your decision of April 3, 1891, sustaining the local officers in rejecting the company's proffered selection of said tract.

This land is within the forty miles, second indemnity belt, of the grant for said company, on account of which a withdrawal was made by letter of October 11, 1883, received at the local office October 15, 1883, and on November 10, 1883, the company applied to select this tract, its application being rejected for conflict with the unexpired pre-emption filing, No. 2660, by John A. McKenzie, filed June 7, 1882, alleging settlement March 15, 1882, from which action the company appealed.

On July 6, 1887, Erick Bentson, the present claimant, filed declaratory statement No. 4120, covering the tracts in question, alleging settlement June 28, 1887, upon which he made proof and payment, after due notice by publication, and cash certificate No. 10,397 issued thereon, December 3, 1888.

No action appears to have been taken upon the company's appeal from the rejection of its application to select this land, until considered in your decision of April 3, 1891, in connection with the entry by Bentson, when the rejection was sustained.

In its appeal to this Department, the company urges that it had a right to select this land when its application was presented, subject to the rights of the pre-emption filing then of record, and that its appeal was a bar to the filing and entry by Bentson subsequently allowed.

The sole question for consideration is, as to the rights gained by the company, under its selection presented for this tract while embraced in the unexpired pre-emption filing by McKenzie, for, if the company gained no rights thereby, the land was subject to the filing and entry by Bentson.

It has been repeatedly held that the existence of a *prima facie* valid pre-emption filing at the date when the right of the road attaches excepts the land covered thereby from the operation of the grant. If such a filing will defeat the attachment of rights under the grant, it is also a bar to the selection of land for indemnity purposes, and the selection in question was properly rejected.

It is a well established principle that the right acquired by an indemnity selection is dependent upon the status of the land at the date of selection. Missouri, Kansas and Texas R'y Co. *v.* Beal, 10 L. D., 504; Hastings and Dakota R'y Co. *v.* St. Paul, Minneapolis and Manitoba R'y Co., 13 L. D., 535.

In the last mentioned case the Hastings and Dakota Railway Company sought to select a tract already embraced in a selection by the St. Paul, Minneapolis and Manitoba Railway Company, alleging invalidity in the selection then of record, and asked that in the event that the Manitoba Company is found not to be entitled to the same that the Hastings and Dakota Railroad Company be then given the preference under its selection.

It was there held that "this would be contrary to all practice, and could only be granted upon the supposition that a selection is a continuing right, and will attach at any time whenever the land may become subject thereto, without regard to its condition at the date of its presentation."

In the case of the Missouri, Kansas and Texas Railway Company *v.* Trammel (14 L. D., 605), it was held that the continued settlement by one Ard, under a filing which had expired long prior to selection, was a bar to the selection of the tract so settled upon, and that a selection made at that time did not hold the land as against Trammel, who subsequently applied to enter the same.

Under these decisions it is plain that no rights were acquired by the company under the selection made at a time when the land was claimed under the pre-emption filing of McKenzie, uncanceled upon the records and unexpired, and as no further selection was made after the expiration of the time within which proof should have been made under the filing, and before the settlement and filing by Bentson, the land in question was properly subject to his settlement and filing, and your decision is accordingly affirmed.

RAILROAD GRANT—WITHDRAWAL—AMENDED MAP—ESTOPPEL.

NORTHERN PACIFIC R. R. CO. *v.* FUNK.

The relinquishment by the company of lands not included within a withdrawal on a map of amended general route, estops it from asserting any claim thereto under the first withdrawal as against one who, relying upon such relinquishment, settles upon said land, although the action of the Department in accepting said map may be subsequently held erroneous.

Secretary Noble to the Commissioner of the General Land Office, June 27, 1892.

I have considered the appeal of the Northern Pacific Railroad Company from your decision of May 7, 1891, rejecting its claim to the S. ½ of NW. ¼ and N. ½ of SW. ¼, Sec. 27, T. 27 N., R. 6 E., Seattle, Washington, and holding that said tract was subject to the homestead entry of Virginius W. Funk, made July 1, 1884.

The tract in controversy is within the primary limits of the grant to said company upon its branch line as definitely located, September 3, 1884.

Prior thereto—to wit, on July 1, 1884,—Virginius W. Funk made homestead entry of the tract, and, on December 5, 1890, he made final proof, against which the company protested, contending that said tract was not open to settlement and entry on July 1, 1884, having been withdrawn for the benefit of said company.

You affirmed the decision of the local officers rejecting the claim of the company, from which decision it appealed, assigning several grounds

of errors, the substance of which is embodied in the third ground, as follows, to wit:

Error not to have ruled that as the Department had decided that there was no authority for acceptance of an amended general route or withdrawal thereon, that the withdrawal of 1879 was void and that the statutory withdrawal of 1873 was and always had been in full force and effect.

This tract was included in the withdrawal of lands made for the benefit of this grant upon filing of map of general route, August 15, 1873; but, subsequently, the company presented an amended map of general route, which excluded this tract, and asked that such amended map be received in lieu of the map filed August 15, 1873. The amended map was finally accepted, June 11, 1879, and the company then relinquished all claim to lands within the withdrawal of 1873, which fell outside of the withdrawal of 1879.

It is contended by the company that the Department having held that there was no authority in law for the acceptance of an amended map of general route or of the withdrawal of lands, that the withdrawal of 1879 was absolutely void and the withdrawal of 1873 has always been in full force and effect.

It is unnecessary to a decision of this case, either to admit or controvert this proposition. Whatever may have been the effect of the withdrawal of 1879, it can not affect the right of this defendant, which does not depend upon the validity or invalidity of either withdrawal, but upon the action of the company in asking for a second withdrawal on amended general route, and the relinquishment and waiver of all claim to the tracts that did not fall within the limits of said withdrawal, upon which he acted in settling upon and improving the land.

The relinquishment of all claim to lands not falling within the withdrawal of 1879 estops the company from afterwards asserting a right or claim to lands falling outside of said limits as against a settler who made settlement and improvement upon the faith of such relinquishment, although the action of the land department upon which the company acted may afterwards be declared erroneous or void.

Your decision in affirmed.

RAILROAD GRANT—SETTLEMENT CLAIMS—RELINQUISHMENT.

HUBBARD *v.* NORTHERN PACIFIC R. R. CO.

The act of June 22, 1874, and August 29, 1890, while offering inducements to railroad companies to relinquish lands on which entries or filings have been made, leave them at liberty to relinquish or not, as they may deem best.

Secretary Noble to the Commissioner of the General Land Office, June 27, 1892.

Caroline F. Hubbard has appealed from your decision of March 19, 1891, affirming the action of the local office in rejecting her application to file pre-emption declaratory statement for the N. E. ¼ of N. E. ¼ of

Sec. 25, T. 21 N., R. 4 E., the S. ½ of the S. W. ¼ and the S. W. ¼ of the S. E. ¼ of Sec., 19, T. 21 N., R. 5 E., Seattle land district, Washington.

The ground of the rejection was that the tract was within the primary limits of the grant to the Northern Pacific Railroad Company, branch line, and has been continuously withdrawn since August 13, 1870; within the limits of the withdrawal of the same date upon the general route of the main line, but lies north of the terminus as established in 1875; within the limits of the withdrawal of August 20, 1873, upon the map of general route of the branch line; within the limits of the withdrawal upon the map of amended general route of said line, filed June 11, 1879; and within the granted limits upon the definite location of the branch line, filed March 26, 1884.

The records show no entry or filing for any part of the tract, and the applicant alleges no claim, prior to her alleged settlement in 1883.

In her appeal she withdraws her application and waives all right to a portion of the tract originally claimed by her, but persists in her claim to the N. E. ¼ of the N. E. ¼ of Sec. 25, T. 21, N., R. 4 E., and contends that—

> By virtue of the act of June 22, 1874 as amended by the act of August 29, 1890, she is entitled to have the Northern Pacific Railroad Company relinquish to the government their claim to the said "forty" and she be allowed to make her filing on the same *nunc pro tunc*.

The acts of June 22, 1874, (18 Stat., 194), and August 29, 1890, (26 Stat., 369), while holding out inducements to railroad companies to relinquish lands upon which entries or filings have been made, leave them at liberty to relinquish or not, as they may see fit. (See Circular of November 1, 1890—11 L. D., 434.)

I do not see how the Department can do more than it has done in the premises, hence, your decision is affirmed.

PRACTICE—AFFIDAVIT OF CONTEST—CORROBORATION.

HILLGEN *v.* BEEZLEY.

An affidavit of contest against an entry is not required to be corroborated by more than one witness.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 28, 1892.

April 6, 1891, Joseph Beezley made cash entry, at The Dalles, Oregon, Land Office, for the NW. ¼ and the N. ½ of the NE. ¼ of Sec. 13, T. 2 S., R. 13 E., under the 3d section of the act of September 29, 1890 (26 Stat., 496), alleging that he had settled on said tract of land on or before January 15, 1886, and had been in full and peaceable possession of the same ever since; that he settled upon the same expecting to get title from the Northern Pacific Railroad Company, etc.

June 11, 1891, Henry M. Hillgen filed an affidavit in the nature of a contest in said office against so much of Beezley's said cash entry as

embraced the N. ½ of the NE. ¼ of said section, in which he stated, in substance, that Beezley had not been in possession of said N. ½ of the NE. ¼ of said section as set forth in his entry affidavit; that, on the contrary, he (Hillgen) had been in such possession and use of said N. ½, and was entitled to purchase the same under said act, and that the purchase of Beezley of said N. ½ was in fraud of the rights of the contestant, and asked a hearing to determine his rights thereto.

No action seems to have been taken by the local officers, but the papers and proceedings were forwarded to your office, and by your letter of July 21, 1891, you denied Hillgen's application to contest, for the reasons:

1st. That his affidavit was corroborated by but two witnesses, while the affidavit upon which Beezley's purchase was allowed was also corroborated by two witnesses, and 2nd, because "there is no showing by Mr. Hillgen that he made any effort or ever attempted to enter under said act of September 29, 1890, that portion of the land embraced in Mr. Beezley's entry, which he seeks to contest."

I find no authority or law for your action. Contests against entries allowed are not required to be corroborated by more than one witness. (General Circular of 1892, page 74.) This affidavit is corroborated by two witnesses.

Your second objection, that the contestant has not shown that he made any effort to enter, etc., is contradicted by the record. His application to purchase under said act is in the record before me and was made April 23, 1891. If your objection has reference to the circular of March 31, 1891, (12 L. D., 308,) requiring applicants "to come forward within sixty days and file in the local office a notice of the right of purchase, intended to be claimed within the period named," the record also shows that on said date he filed this required notice. He has therefore complied with the law and circulars in all material respects.

You will direct a hearing on the affidavit of contest.

The decision of your office is reversed.

PRACTICE—APPEAL—INTERLOCUTORY ORDER.

BRETELL *v.* SWIFT.

A decision of the General Land Office holding insufficient the publication of notice on which a mineral entry is allowed, and requiring new publication, is not an interlocutory order, but the denial of a substantial right from which an appeal will lie.

Secretary Noble to the Commissioner of the General Land Office, June 28, 1892.

I have considered the application of Joseph Swift for an order directing you to certify to this Department the proceedings in the above entitled case, and to suspend further action therein until this Department shall pass upon the same.

The record shows that the Sulphur Lode was located July 10, 1890, and application No. 581, for a patent was made March 5, 1891, at Rapid City, South Dakota. The first publication of notice of said application was made in the Deadwood Weekly Pioneer, March 12, and the last, May 14, 1892. No adverse claim was filed.

On May 16, 1891, mineral entry No. 461, of said lode was made by said Swift. On May 15, 1891, George E. Bretell filed an affidavit at the local office that he was one of the owners of the Rochester Extension lode in Lawrence county, South Dakota, a part of which is embraced in said mineral entry. That the north end of the Sulphur lode is within two thousand feet of the southeast line of the incorporated limits of Lead City, in said county, where two daily papers were published, and more than two and a half miles from Deadwood, where the Weekly Pioneer is published. That he did not know anything of the filing of said mineral application until May 13, 1891. He therefore requested the local officers to suspend all action in the matter of said application until the same had been published in one of the Lead City papers, that the owners of conflicting claims might have proper notice. This affidavit was duly corroborated by others. By your letter of January 14, 1892, you called on the local officers for a report why said notice was published in the Deadwood Weekly Pioneer.

By letter of January 18, 1892, the register reported that though in an air line Lead City might be nearer to the claim than Deadwood, a mountain intervened between the claim and Lead City, and that communication is much easier and quicker between the claim and Deadwood than between the claim and Lead City, and that greater publicity was secured by publication in the Deadwood Pioneer. By your letter of February 4, 1892, you held that the publication of said notice was not in a paper "published nearest to such claim," as required by section 2325 Rev. Stat., and Par. 34, of mining circular, and you directed a new publication in a paper published "nearest to such claim," and that a copy of such notice be posted in the local office. On February 29, 1892, said Swift filed in the local office an appeal from your decision which, by your letter of March 15, 1892, you declined to receive on the ground that this case is analogous to that of Jennie M. Tarr (7 L. D., 67) in which it was held that—

An appeal will not lie from the action of the Commissioner of the General Land Office requiring a claimant to furnish an additional affidavit in support of his entry, but only from his final action in the case upon the refusal or failure of the entryman to comply with said request.

It is contended by the applicant that your decision of February 4, 1892, was not a mere interlocutory order, and does not fall within the scope and theory of the said decision, and others of like character, cited by you. Rule 81 Rules of Practice provides that,—

An appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the dis-

posal of the public lands and to private land claims, except in case of interlocutory orders and decisions and orders for hearing or other matter resting in the discretion of the Commissioner.

If the entry was valid the applicant is the equitable owner of the mining ground, and the government holds the title in trust for him. He has perfected his entry, and therefore "is entitled to a patent" under section 2325, Rev. Stat. This is certainly a substantial right. You held in effect that the applicant's right to a patent was invalid by reason of a defective publication of said notice. This was the determination of a substantial right, and therefore not an interlocutory order. You decided that Swift was not entitled to a patent under the circumstances.

If your decision is not appealable and a new publication be made in compliance therewith, Bretell may file an adverse claim, and then if suit be brought, the question whether Swift is entitled to a patent or not would be taken from the Land Department and be relegated to a court of competent jurisdiction, in which event your decision would prove to have been a final decision so far as the land department is concerned of Swift's right to a patent. When such a consequence is liable to result from your decision, the refusal of an appeal therefrom, is the denial of a right. I am of the opinion that Swift had a right to appeal from your decision and that the appeal filed by him with the other papers in the case should be certified to this Department.

His application therefor is granted.

RAILROAD GRANT—MINERAL CHARACTER OF LAND.

NORTHERN PAC. R. R. CO. *v.* CHAMPION CONSOLIDATED MINING CO.

The discovery of the mineral character of land at any time prior to the issuance of patent therefor effectually excludes such land from the grant to the Northern Pacific Company.

Secretary Noble to the Commissioner of the General Land Office, June 28, 1892.

I have considered the case of the Northern Pacific Railroad Company *v.* Champion Consolidated Mining Company, involving lands in sections 27 and 33, T. 6 N., R. 8 W., Helena land district, Montana, embraced in mineral entries—2929, May Lode; 2040, Lillie Lode; 2041, Augusta Lode, and 2042, Champion Lode—made November 14, 1889.

Said sections are within the primary limits of the grant for the said company, as shown by the map of definite location filed July 6, 1882, and were included in list No. 13, filed November 8, 1886.

In answer to a rule to show cause why said selection should not be canceled, in so far as they conflict with the mineral entries before named, the company responded: "the plat of definite location was

filed July 6, 1882, whereas the above named lode claims were not discovered or located until in 1883, 1884, and 1885," thus claiming that in order to defeat the grant, the mineral discovery must have been made prior to the date of the definite location of the road.

Your decision held the selections for cancellation, upon the authority of the decision of this Department in the case of the Central Pacific Railroad Company *v.* Valentine, (11 L. D., 238), in which it was held that the discovery of the mineral character of the land at any time prior to the issuance of patent therefor, effectually excludes such land from a railroad grant.

The company's appeal urges:

Error not to have ruled in accordance with the decision of the U. S. circuit court, California in Francouer *v.* Newhouse, 14 Sawyer, 351; of the U. S. supreme court in Deffebach *v.* Hawke, 115 U. S., 392; Davis *v.* Wiebold, 139 U. S., 507, and U. S. circuit court, Montana, in the case of Northern Pacific Railroad Company *v.* Barden *et al.*, 46 Fed. Rep't., 592, that to exclude land from the operation of the grant as mineral land it must have been known to be such at the time of definite location and filing map of road.

In the matter of the appeal by this company, from your action declining to notify it of the approval for patent of mineral claims wherein the record discloses that the discovery of mineral was made subsequent to the filing of the map of definite location, it was held:

While it may be true, as contended by counsel, that the circuit court for the 9th judicial circuit has gone to the extent of holding that the right of the company attaches to mineral lands, unless there are known mines thereon, at the date of the definite location of the road, yet I am unwilling to accede to the contention that the supreme court of the United States has so decided. This question, and many of these decisions cited, were all fully and elaborately considered in the Valentine case, and the conclusions arrived at therein are my deliberate judgment of the rights of the company under the terms of its grant. * * * I shall hold, until satisfied by a decision of the supreme court to the contrary, that the doctrine announced in the Valentine case is *stare decisis* so far as this Department is concerned, and I have no disposition to consume the time thereof in a further consideration of that question upon a review of the authorities already digested. (13 L. D., 692–3.)

I therefore affirm your decision, holding the tracts herein involved excepted from the company's grant, and direct the cancellation of its list in so far as it includes said tracts.

PRACTICE—SPECIFICATIONS OF ERROR—NOTICE—EVIDENCE.

DORMAN *v.* MCCOMBS.

Specifications of error to receive consideration must set out the particular objections raised to the decision from which appeal is taken.

Notice of further proceedings on rehearing, given to the attorney of a party, is notice to such party.

The local office may direct the taking of testimony before a commissioner under rule 35 of Practice, but this is only done on the application of one of the parties to the contest.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 28, 1892.

I have considered the case of Charles W. Dorman *v.* William B. McCombs, involving the S. E. ¼ of Sec. 1, T. 15 S., R. 2 W., Montgomery land district, Alabama.

The tract, among others, had been withdrawn for indemnity land, for the benefit of the South and North Alabama Railroad; it was never selected, however, and was restored to the public domain, by your letter of January 17, 1888, under departmental instructions of December 15, 1887. While said lands were opened to settlement at the last named date, filings or entries therefor were not allowed until March 14, 1888.

On said date William B. McCombs made homestead entry for said land.

On the next day—March 15, 1888—Charles W. Dorman offered to file pre-emption declaratory statement for the same tract, which was refused by the local officers, on account of McCombs' homestead entry.

Thereupon Dorman instituted contest, alleging his own prior right. A hearing was ordered, and notice issued by the local officers, whereby both parties were—

> Summoned to appear before Morris Loveman, at Birmingham, Alabama, who will take testimony on December 4, 1888, and at this office on the 14th day of December 1888, at 10 o'clock, a. m., to respond and furnish testimony concerning said alleged prior right.

On December 4, 1888, both parties appeared before the commissioner named, at Birmingham, where the testimony on the part of the plaintiff, and that of three witnesses for the defendant, was submitted.

Defendant's counsel then stated that the testimony of the defendant and two other witnesses (who were present at the time) would be taken on December 14, 1888, at the local office.

Counsel for plaintiff objected, and afterward notified the defendant that he (said counsel) could not appear at the local office upon the date named. No continuance was asked or granted.

On December 14, the testimony of the defendant and two other witnesses was submitted; but the plaintiff failed to appear and cross-examine them.

The local officers rendered a decision in favor of the homestead entryman, from which appeal was taken in due time.

After the transmission of the record to your office, but before the case had been reached in its order for consideration and action, two *ex parte* affidavits, signed by one of the defendant's witnesses, F. M. Pullen, were filed with the case. The first of said affidavits alleged that he (Pullen) had testified as he did because the defendant, in whose employ he was, had threatened that unless he did he would dismiss him from his employ, and otherwise injure him; and that said testimony was false. The second of said affidavits stated that the first had been

extorted from him while he was drunk and knew not what he was doing, and was false.

In view of the irregularity of the proceedings in the taking of the testimony, a part at Birmingham on December 4, and a part at Montgomery, on December 14, and of the statements made in the contradictory affidavits of Pullen, you ordered a further hearing, at which the witnesses whose testimony had been taken on the last named date should be recalled and re-examined, and the allegations of the witness Pullen inquired into. All parties were duly notified of said hearing, which was had as ordered on March 27, 1891. The contestant failed to appear, either in person or by attorney.

But he has an affidavit on file, made March 30, 1891, in which he states that he did not know until *that day* that a partial rehearing had been ordered at Montgomery on March 27,—three days before; and that if he had known it, he had not the means to go to Montgomery and attend the hearing, or to pay an attorney to go there and represent him.

This affidavit (considered alone) would indicate that contestant had not received due notice that a partial rehearing had been ordered. But there is also on file—filed by W. E. Brown, contestant's attorney of record at the original hearing, at the trial before your office, and now representing him before the Department—a letter from the register of the land office at Montgomery, notifying him, on December 22, 1890, of the hearing to be held on March 26, 1891. Notice to contestant's attorney was notice to contestant.

The testimony taken at the several hearings was transmitted to your office, and you, on April 17, 1891, rendered decision in favor of the defendant.

The first exception taken to your decision is the following:

> Appellant assigns all and several of the exceptions taken by him to the decision of the register and receiver; and said exception or grounds of error are here insisted on and made a part of this appeal.

The appeal to the Department is from *your* decision; if the appellant does not take sufficient interest in his case to "set forth in brief and clear terms the specific points of exception to *the ruling appealed from*" (Rule 45 of Practice), he can hardly expect the Department to cull from the voluminous record objections that he may have filed in the case when it was before some other tribunal. The "ruling appealed from" is your decision; and objections raised to your decision are all that will be considered in this case. The second allegation of error is—

> Said further hearing was illegally ordered; and if ordered at all it should have been ordered to take place before a commissioner at Birmingham, Alabama, near the land, and where said Dorman could attend with his witnesses. Being ordered to take place at the Montgomery land office, it was a bar to Dorman's attendance, not having the means to attend and carry counsel to Montgomery. But defendant was not entitled to have said evidence taken at all, as he refused to give it on December 4, 1888.

This alleged error has no substantial basis. The matter of ordering hearings is largely within your discretion, and in no case will the Department interfere therewith, unless it is clearly shown that there has been an abuse thereof. See Finch *v.* Morath, 13 L, D., 706.)

While it is true that the order directing the hearing did not fix any place, yet, that was not necessary; primarily all hearings are to be had before the register and receiver. They may, in the interests of justice and to save the parties expense, under rule 35, direct that the testimony be taken near the land in controversy, but this is never done except upon the application of one of the parties to the contest, and Mr. Dorman had he desired to have the testimony taken before a commissioner at Birmingham, could readily have secured such an order upon application.

The hearing was ordered by you on December 20, 1890. The claimant was notified on the 22nd day of December, 1890, that the hearing would take place before the register and receiver, at Montgomery, Alabama, on the 27th day of March, 1891. He had all this time within which to make application to have the testimony taken before a commissioner at Birmingham, and not having availed himself of this opportunity, and the usual ordinary forms of law, it does not become him at this time to say that he could not attend the hearing at Montgomery on account of his poverty. In other words, he will not be permitted to rest quietly knowing his inability to attend, and then complain of your action in not fixing the hearing at Birmingham.

The preceding is also a sufficient answer to the sixth allegation of error, which objects to the consideration of the testimony taken at the re-hearing ordered by you.

The third allegation of error refers to Pullen and his affidavits; but as the decision will be rendered herin without regard to Pullen's testimony in the case, this allegation need not be considered.

The fourth and fifth allegations go to the merits of the case, contending that you were in error in not holding that the appellant had a prior and paramount right to the land.

I have examined the testimony—ignoring that of the witness Pullen; and I concur in the conclusion reached by the local officers, and by yourself, that the homestead entryman acquired the prior right to the tract in controversy, and that his entry should remain intact.

Your decision is therefore affirmed.

TIMBER CULTURE ENTRY—REINSTATEMENT.

VINCENS KAPLAN.

A pending application for the reinstatement of an illegal timber culture entry secures no right under the act of March 3, 1891.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 29, 1892.

On the 9th of April, 1884, Vincens Kaplan made timber culture entry for the N½ of the NW¼ and the N½ of the NE¼ of Sec. 31, T. 35 N., R. 23 W., 6th P. M., Valentine land district, Nebraska. On the same day he made homestead entry for the south half of both of said quarter sections.

Prior to that time, to wit, on the 14th of March, 1884, Henry W. Hops had made timber culture entry for one hundred and sixty acres in the same section, but not including any of the same land.

As only one timber culture entry of one hundred and sixty acres can be allowed in a section, the entry of Kaplan was improperly allowed, and when that fact was discovered, he applied to have his entry canceled, without prejudice. This request was granted by you on the 22d of May, 1885, and you directed the local officers to "so note on your records and allow him to make a new entry on payment of fee and commission."

Of this action on your part no notice was given to Kaplan until the 1st of December, 1887, and on the 9th of that month he applied to be allowed to amend his homestead entry, so as to embrace the north-west quarter of said section 31. He showed by affidavit, that the west half of both his homestead and his timber culture entries was good land, while the east half was sand hill, and useful only for pasture. He also showed that he had complied with the the timber culture law, and had ten acres cultivated to trees on the N½ of the NW¼ of said section 31, and that said trees were in a thrifty condition. The amendment which he sought would have given him the good land in both his original entries, and saved him his ten acres of trees.

On the 25th of January, 1888, after reciting the facts of the case, in a letter addressed to the local officers, you say:

> In view however of the fact that he does not allege any mistake in the description of his homestead entry, and the timber culture entry was illegal, an amendment cannot be allowed, for no other reason than to save improvements made on such illegal entry.

On the 3d of March, 1888, Kaplan applied to have his timber culture entry reinstated, and set forth the fact that Hops had asked to have his timber culture entry canceled without prejudice, on the ground that his entry did not cover the land he intended to enter. Kaplan concluded his petition for the restoration of his entry, by asking "that a hearing be ordered to determine the rights of said parties, and to afford

Henry W. Hops the opportunity to show what tract of land he intended to enter." The local officers recommended that his application be granted.

Before taking action upon this application, you called upon the local officers for further information in reference to the entry of Hops, and required him to show what land he intended to enter. No response was made by Hops to your request.

On the 24th of April, 1891, Kaplan again filed an application for a reinstatement of his timber culture entry, which was transmitted to your office on the 2d of May, of that year. In this application he states that he has over 30,000 thrifty trees growing on twelve acres of the land included in his timber culture entry, and he asks that said entry be reinstated, and that he be allowed to make final proof under the act of March 3, 1891 (26 Stat., 1095).

On the 27th of June, 1891, you rendered a decision in the case, rejecting his application for reinstatement. The case is before the Department upon an instrument which purports to be an appeal from such decision, but which in fact is no more nor less than a renewal of Kaplan's application to have his timber culture entry reinstated, and that he be allowed to make proof under the act of March 3, 1891.

As an appeal, it does not specify a single error in your decision, and as upon the facts of the case, which I have recited with considerable fullness, no different conclusion from that reached by you could consistently have been arrived at, I deem it unnecessary to consider the case at length.

The act of March 3, 1891, affords no relief to persons in the situation of Kaplan, and so long as the entry of Hops remains on record, no other timber culture entry can be allowed in section 31, nor can the entry of Kaplan be reinstated. Equity commends his application to favorable consideration, but the subject is not one where the discretion of the Department can be exercised, and under the laws relating to the public domain, his application cannot be allowed. Your disposition of the questions involved in the case, is approved and affirmed.

FINAL PROOF—TOWNSHIP PLAT.

MARIUS ATHENOUR.

Final proof submitted during the suspension of the township plat may be received and held awaiting the removal of such suspension, and on such removal, be accepted, if otherwise satifactory, on execution of new final affidavit.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 30, 1892.

On the 31st of October, 1885, Marius Athenour made homestead entry for the N ½ of the NE ¼, the SW ¼ of the NE ¼, and the NE ¼ of the

NW ¼ of Sec. 24, T. 19 S., R. 14 E., M. D. M., Visalia land district, California.

After due notice by publication, he made final proof before the local officers, on the 15th of May, 1891, upon which the local officers made and signed the following indorsement:

> This proof is satisfactory in the matter of settlement, residence and improvements, but we refuse to pass the same to entry because the township in which the land is situated was suspended from entry by Hon. Commissioner's letter of December 24, 1885, which suspension has never been removed.

From this decision by the local officers an appeal was taken to your office. On the 2d of July, 1891, you affirmed their decision, and a further appeal brings the case to the Department.

In his notice of appeal the claimant states that when his entry was made the land was subject thereto, and that he has complied with the law in every respect, and done all within his power to acquire title to the land. He claims that on the removal of the suspension he should receive final certificate for said land, without the expense and time of advertising to make said proof a second time. He concludes his appeal as follows:

> Claimant prays that his proofs already submitted be held awaiting the removal of such suspension, and that on such removal, his final certificate be issued him upon the proofs submitted.

The records in the land department show that several townships in the Visalia land district were suspended from entry by your letter of December 24, 1885. That letter was based upon a report made by George C. Wharton, dated December 1, 1885. In quite a number of instances such suspension has been removed, but such is not the case in reference to township 19, in which the lands in question are situated.

That you have authority to suspend public land from disposal, to prevent the fraudulent entry thereof, was distinctly held in Kaweah Co-operative Colony, *et al.* (12 L. D., 326). In the case at bar, however, no fraud is alleged against the claimant or his entry. His entry was made before the suspension was ordered, and his proof shows compliance with the provisions of the homestead law.

In the case of Bennett *v.* Cravens (12 L. D., 647), it was held that

> Pre-emption final proof, satisfactory in all respects, but rejected on account of the suspension of the township plat, may be accepted on the execution of new final affidavit, when such order of suspension is revoked.

I think a similar course should be pursued in the case at bar, and that the request of the appellant, with which he concludes his appeal, is not unreasonable. His final proof will therefore be received and held awaiting the removal of the suspension, and on such removal final certificate will be issued upon the proof submitted, on the execution by him of new final affidavit, if no other objection exists. Your decision is modified accordingly.

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