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DECISIONS

OF

THE DEPARTMENT OF THE INTERIOR

AND

GENERAL LAND OFFICE

IN

CASES RELATING TO THE PUBLIC LANDS

FROM JULY, 1881, TO JUNE, 1883.

VOLUME I.

REVISED EDITION.

EDITED BY S. V. PROUDFIT.

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EDITOR'S PREFACE.

The first edition of this volume having been exhausted and a second required, it was deemed advisable by the Department to revise the work and make it uniform with the later volumes. In accordance with such design, the form of the book has been substantially modified in several respects; a new index, with full notes of reference, has been prepared, together with tables of cases reported and cited, acts of Congress, and Revised Statutes, cited and construed, etc. Reversed or modified decisions have been noted, with proper reference to the later authority. Several important decisions are also included in the present edition that did not appear in the former, while none of importance have been omitted.

S. V. PROUDFIT.

DEPARTMENT OF THE INTERIOR,

Secretary's Office, Washington, D. C., June 30, 1887.

P R E F A C E .

It is desirable and important that the decisions of the Land Department illustrating the administration of the land laws of the United States should be published in an authentic manner, and in permanent form convenient for reference. This will enable the several divisions of the office to refer readily, not only to the decisions originating in the appropriate business of each, but with equal readiness to consult the decisions of all the other divisions, and of the Department; and, it is believed, will greatly systematize and facilitate the operations of the office.

For the purpose indicated, the present publication, commencing with the beginning of the present administration of this office and extending to this date, is directed.

It is intended to continue the publication hereafter at stated periods.

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GENERAL LAND OFFICE,
June, 1883.

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

MILITARY BOUNTY LAND WARRANTS.

ANDREW ANDERSON ET AL.

- Overruled
34 I. D. 606
36 * 14*
- The Commissioner of Pensions has no authority to cancel a military bounty land warrant in the hands of an innocent assignee.
 - The Commissioner of the General Land Office has jurisdiction as to the *bona fides* of holders of warrants by purchase.
 - One purchasing a warrant issued in the name of a person deceased without heirs, or of a fictitious person, is not an innocent purchaser.
 - Patents issued on warrant locations but withheld, should be disposed of as to their delivery, under the directions of the Department, of February 23, 1881, made in view of the decision of the supreme court in the McBride case.

Secretary Kirkwood to Commissioner McFarland, July 23, 1881.

I have examined the following reports from your office, viz:

First. Report of August 9, 1869, in the matter of the application of Andrew Anderson to have the patent which was fully executed September 23, 1853, for the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ Sec. 19, T. 98, R. 7, Iowa, located with military bounty land warrant No. 48,552, 80 acres, delivered to him as the owner of said lands.

From your report it appears that the Commissioner of Pensions on the 6th of August, 1862, indorsed upon the face of said warrant that the same had that day been canceled by him, and declared void as against the United States, for the reason that satisfactory evidence had been furnished that the papers upon which warrant was issued, and the assignment of the warrant, were false and fraudulent.

Second. Report of December 8, 1880, in the matter of a tract of land located at Elba, Ala., March 19, 1856, by William H. Barton, assignee, with military bounty land warrant No. 31,511, 160 acres, act of 1847, for which patent was duly executed November 10, 1857, which patent is now in the files of your office.

In this case it appears that a caveat was filed in your office by the Commissioner of Pensions against said warrant.

The report shows that the Commissioner of Pensions, by letter of November 4, 1880, declined to withdraw the caveat for the reason that the person locating the warrant had failed to show to the satisfaction of his office that he was an innocent purchaser of the same for value.

Third. Report of January 29, 1881, which has relation to cases generally in which patents for land located with military land warrants are withheld in your office, and to suspended bounty land warrant locations.

These reports present for my consideration the following questions:

First. As to the authority of the Commissioner of Pensions to cancel a land warrant in the hands of an innocent assignee.

Second. Whether the jurisdiction to determine the question whether an assignee is an innocent purchaser of a military land warrant for value may be exercised by the Commissioner of Pensions, or by the Commissioner of the General Land Office.

Third. As to the delivery of patents for lands covered by warrant locations which patents are withheld for the reason that the warrants were falsely or fraudulently procured.

As to the first question it is not necessary for me to make any decision whatever. It was decided by Secretary Stuart, November 10, 1851, that the Commissioner of Pensions has no such authority. He re-affirmed his decision March 20, 1852, stating his reasons therefor at some length (Lester's Land Laws, vol. 1, Nos. 621 and 622).

The same doctrine was sustained by Attorney-General Cushing in an able and exhaustive opinion rendered to Secretary McClelland March 15, 1856 (7 Opinions, 657). The doctrine announced by Attorney-General Cushing was adopted by Secretary Thompson, by decisions of January 19 and 21, 1860 (Lester's Land Laws, vol. 1, Nos. 636 and 637). And lastly the same doctrine was re-affirmed by Secretary Schurz in the cases of Samuel Love and Lyman Worden, July 23, 1878, in a decision addressed to the Commissioner of Pensions. The question seems to be firmly settled; the doctrine announced by Secretary Stuart in 1851 and 1852 ought not only to be treated as having all the force of *stare decisis*, but of law.

Congress has on several occasions legislated regarding the issuance, assignment, and location of bounty land warrants since the decisions of 1851, 1852, and 1860, above referred to, were rendered, without in any manner attempting to change the law as therein construed. A notable instance is the revision of the laws in relation to bounty lands. (See chapter 10 of the Revised Statutes.)

Congress therefore has impliedly and in legal contemplation sanctioned the rule established by this Department as to this question, and all officers of this Department are bound to observe it.

The definition of "innocent purchaser" given in the opinion of Mr. Cushing and in the decision of Secretary Thompson of January 21, 1860, should be kept in view. A party purchasing a warrant issued in

the name of a person deceased without heirs, or of a fictitious person, cannot be deemed an innocent purchaser; for in such case the assignment would be forgery, against which it is the business of the purchaser or assignee to guard.

As to the second question, it is clear that the Commissioner of Pensions has no jurisdiction to determine the question of innocent purchaser or *bona fide* assignee of military land warrants. Section 2414 of the Revised Statutes, and other sections relative to the location of such warrants, undoubtedly confide that question to the jurisdiction of the Commissioner of the General Land Office. It follows, therefore, that caveats filed against, and cancellations of warrants by the Commissioner of Pensions in cases in which your office determines that the warrants are in the hands of innocent purchasers, are of no force or effect.

Concerning the third question, I deem it unnecessary to give instructions.

The rules laid down by the Department in the decisions aforesaid are sufficient to guide your office both in the matter of suspended locations and the delivery of patents. Moreover, the specific rules laid down by my predecessor February 28, 1881 (Copp for April, 1881, p. 10), in view of the decisions of the supreme court of the United States in the case of the United States *Ex rel.* Thomas McBride *v.* The Secretary, October term, 1880, are deemed sufficient to cover all cases of duly executed patents now withheld in your office for any cause.

I may add that the delay in replying to the reports of December 8, 1880, and January 29, 1881, is due to the fact that time was allowed the Commissioner of Pensions in which to reply to the argument therein.

I have this day forwarded a copy of this letter to the Commissioner of Pensions and instructed him to return to the files of your office as early a day as practicable all military land warrants heretofore withdrawn therefrom by his office; that if hereafter it becomes necessary in the ordinary transaction of the business of his office to examine military land warrants that are in the files of your office, he will require the examination to be made by his subordinates in your office.

VIRGINIA MILITARY DISTRICT, OHIO.

JEREMIAH HALL.

The act of May 27, 1880, has no relation to the act of March 3, 1855, and does not cure any error or defect committed under the same. It provides for issuing patents *only* where entries have been duly made *but not surveyed*, and carried into survey within three years after the date of its passage.

Commissioner McFarland to Jeremiah Hall, Circleville, Ohio, October 17, 1881.

I am in receipt of your letter of the 27th ultimo, and have to inform you in reply that the act of Congress, approved May 27, 1880, entitled "An act to construe and define 'An act to cede to the State of Ohio the

unsold lands in the Virginia military district in said State,' approved February 18, 1871, and for other purposes," has no relation whatever to the act of Congress of March 3, 1855, to which you refer.

The said law of 1880 declares that the act of 1871, ceding to the State of Ohio the lands remaining "unsurveyed and unsold" in the said military district, had no reference whatever to such lands as had been entered and surveyed therein founded on continental line warrants, but the true intent and meaning of said cession was to grant to said State only such lands as had not been appropriated and were not included in any entry or survey within said district and founded on said warrants. It declares valid all legal surveys returned to the "land office" on or before March 3, 1857, on entries made on or before January 1, 1852, and founded on the above class of warrants, but gives no authority to carry the same into patent.

By the words "land office" it is understood that the local office at Chillicothe, Ohio, otherwise designated as the "office of the principal surveyor of said district," is intended in contradistinction to the term "General Land Office."

The said act also provides in the third section thereof—and therein is contained all that relates to the issue of patents—"That the officers and soldiers of the Virginia line on continental establishment, their heirs or assigns, entitled to bounty lands which have on or before January 1, 1852, been entered within the tract reserved by Virginia, between the Little Miami and Scioto Rivers, for satisfying the legal bounties to her officers and soldiers upon continental establishment, shall be allowed three years from and after the passage of this act to make and return their surveys for record to the office of the principal surveyor of said district, and may file the plats and certificates, warrants, or certified copies of warrants at the General Land Office, and receive patents for the same." In other words, that patents shall only be issued in those cases where entries have been duly made, but the same not surveyed, and where such entries have been carried into survey within three years from and after May 27, 1880, and the said survey warrant, or certified copy of warrant, filed in this office.

The said act of 1880 is not to affect or interfere with the title to any lands sold for a valuable consideration by the Ohio Agricultural and Mechanical College under the said act of February 18, 1871.

From the above you will perceive that the law of May 27, 1880, does not cure, amend, or render valid any error or defect committed under the act of March 3, 1855.

ON REVIEW—ISSUE OF PATENT REFUSED.

Commissioner McFarland to Jeremiah Hall, April 4, 1882.

Referring to your several letters of November 1 and December 21, 1881, and March 9, and two of March 20, 1882, and all in relation to the proper legal construction of the act of Congress of May 27, 1880, as

affecting the issue of patents for lands in the Virginia military district, Ohio, I have to advise you that, after full and careful examination of the various arguments, suggestions, and statements made in said communications, I am still of the opinion as set forth in full in my letter to you of the 17th October last, viz, that said law only authorizes the issue of patents for lands in said district in cases where the entries were made prior to January 1, 1852, and the same had not been surveyed before the passage of the said act, for which purpose of survey three years from and after such period were allowed therefor, and for the return of the survey to the surveyor's office, and therefrom, and when the plats and certificates, warrants, or certified copies of warrants are filed in this office, the parties entitled might receive the patents for the same.

The third section of the said act, the substance of which is above set forth, contains all that is stated in or can fairly and justly be implied from any part of the said law, as authorizing the issue of patents.

I must, therefore, decline to comply with your request in the case of survey No. 3,487, for 400 acres, founded on Virginia military land warrant No. 3615, issued to William Dangerfield, as desired by your letters of December 21, 1881, and 20th ultimo, and also in the case of certified copy of survey No. 12,017, for 200 acres, founded on warrant No. 6508, and made in the name of Archibald Gordon, as set forth in your communications of the 9th and 20th ultimo.

MILITARY BOUNTY LAND WARRANTS.

JEREMIAH HALL.

History of the legislation relating to the Virginia military land district in Ohio, and proceedings under the same. Construction of the several acts, etc. There is no authority of law under which a patent can issue in the case presented.

Commissioner McFarland to Jeremiah Hall, May 9, 1882.

On May 12, 1880, you filed in this office an application for the issue of a patent on survey No. 12096, for 150 acres of land in the Virginia military district in Ohio; you also transmitted a certified copy of Virginia military warrant No. 584, for 200 acres, issued in the name of Aquilla Norval, a sergeant in the continental line, and also an uncertified paper purporting to be a duplicate of survey No. 12096, made in part satisfaction of said warrant.

On October 1, 1880, you filed proof of publication of notice of the loss of the original warrant and of the original survey. The copy of survey is defective and is not conclusive evidence that any survey was made as alleged. But the defect is one that may be cured by the production of the proper evidence of the existence of the survey. As it is desirable

to reach the ultimate merits of the application made, it is deemed unnecessary to decide what is such proper evidence.

From the papers before me, it would appear that the survey was made of the tract described therein of December 28, 1822, and recorded in the surveyor's office January 27, 1823. I assume for the purposes of this decision that the survey was made and recorded as alleged. Attached to the copy of survey is a certificate from E. P. Kendrick, surveyor of the military district, dated December 27, 1875, stating that warrant No. 584, on which survey No. 12096, for 150 acres, was made, had not been satisfied at that date.

The act of Congress of May 23, 1804 (2 Stat., 274), provided that parties entitled to bounty lands in the reserved territory should complete their locations within three years from the date of the act, and return their surveys and file the original warrants or certified copies thereof in the Department of War within five years from the date of the act.

The parties should then be entitled to receive patents for the lands so located. If the surveys were not returned to the Secretary of War within the time and times prescribed by the act, the land should be released from any claims for bounty lands and should thereafter be disposed of as public lands of the United States. The effect of this act was to require a completed location to be made within three years and a survey and return thereof, together with the original or certified copy of the warrant on which they were founded, to the Department of War within five years from the passage of the act. These acts were conditions precedent to the requirement of the right to receive patents.

It is unnecessary to cite authorities to show that conditions precedent must be strictly performed. By a positive provision of this act all lands not thus effectually appropriated within the prescribed times were thereafter to become released from all claims for bounty lands by virtue of any location and survey not thus completed and returned, and were to become the property of the United States to be disposed of as other public lands free from any trust in favor of the soldiers of Virginia on continental establishment (*Fussel v. Hughes*, U. S. circuit court, northern district of Ohio, September, 1881). The survey required was not the mere circumstance that a chain had followed a compass around a particular piece of land. (*Jackson v. Clark*, 1 Pet., 789.) It must have been returned, together with the warrant, in the manner, within the time, and to the officer designated. At the date of this act, the Secretary of War was charged with executive duties appertaining to grants of land for military services. These duties were subsequently transferred to and devolved upon the Commissioner of the General Land Office. The returns that, by the act of 1804, were to be made to the Secretary of War then became returnable to the Commissioner of the General Land Office. The provisions of the act of 1804 were continued by subsequent enactments until finally, by the act of March 3, 1855 (10 Stat., 701), a further time of two years was allowed to make the return of surveys and war-

rants to the General Land Office. The effect of the act was to extend to March 3, 1857, the limitation of the time in which surveys and warrants could be returned to the proper office and patents be issued thereon. All lands not then and thus effectively appropriated reverted to the public domain from and after said March 3, 1857, and no patents could issue on surveys based on military warrants and returned to the General Land Office after that date.

The provisions of the act of 1804 were therefore extended to March 3, 1857, when all rights thereunder finally ceased and terminated and the unappropriated lands became public lands of the United States.

On February 18, 1871 (16 Stat., 416), the lands remaining unsurveyed and unsold in the Virginia military district in Ohio were ceded to the State of Ohio, reserving certain pre-emption rights to actual settlers.

On May 27, 1880 (21 Stat., 105), Congress passed an act construing the act of 1871, as ceding to the State of Ohio only such lands as were unappropriated and not included in any survey or entry founded on military warrants upon continental establishment. The second section of this act declared valid all legal surveys returned to the land office on or before March 3, 1857, on entries made on or before January 1, 1852, founded on unsatisfied Virginia continental warrants. The third section provided that parties entitled to bounty lands which had been entered within the Virginia military district in Ohio, on or before January 1, 1852, for satisfying legal bounties to Virginia soldiers on continental establishment, should be allowed three years to make and return their surveys for record to the office of the principal surveyor of said district and might file their plats and certificates, warrants or certified copies of warrants, at the General Land Office and receive patent for the same. The first section of this act limited the cession, to the State of Ohio, of the reverted lands to such as had not been surveyed or entered. The effect of this section was to leave the lands that had been surveyed or entered in the same position in which they remained after March 3, 1857, and prior to February 18, 1871; in other words not to disturb titles that had grown up under surveys and entries made many years before but which had never been consummated into patent. The reason for this is obvious.

The method of acquiring the legal title to bounty lands under the act of 1804, and the several extensions thereof, was for the party in interest to make an entry, by virtue of the warrant, in the proper book of entries in the office of the principal surveyor of the military district. Then the party procured a survey to be made of the land so selected in satisfaction of the warrant, which survey was recorded in the surveyor's office. This original survey and the original or a certified copy of the warrant was to be then filed in the General Land Office, whereupon patent would issue.

As soon as the lands were entered in the surveyor's office they became taxable under State laws without regard to the issue of patent, and the

equitable titles created by entries were subject to assignment and inheritance. Many years frequently passed before the further proceedings essential to the procurement of patent were had, and in many instances such proceedings were not had within the statutory period. Meanwhile the lands had been sold for taxes or by order of probate courts and otherwise.

Where the parties to the original entry had omitted to obtain legal titles and the period in which legal titles might have been obtained had passed and nearly a generation of time had subsequently intervened and the lands had long been in peaceful possession and actual occupancy under possessory rights and titles derived through tax sales or judicial proceedings, or by purchase from the holders of the original entry, the evidence of which was often imperfect and not infrequently lost, there was manifestly good reason why legislation that would provoke litigation and throw titles into confusion or disturb long possession under claim of title should be avoided.

The second section of the act of 1880 declared valid all legal surveys that had been returned to the land office on or before March 3, 1857, on entries made on or before January 1, 1851. The effect of this section was to confirm all patents that had been issued on such surveys and to prevent the grantees of the State, under the act of 1871, from asserting claim to any such lands on account of defective proceedings or technical irregularities connected with the surveys and entries on which the patents were issued.

A mistake of the land office in issuing patents where the basis of the patent was legal but the proceedings in some manner irregular could not thereafter be inquired into by the courts.

Surveys had been made, but not returned within the time prescribed in the act under which they were made, but were returned before March 3, 1857.

The surveys so validated were such as had been returned to the General Land Office at the seat of government on or before March 3, 1857. It has been argued before me that the office of the principal surveyor of the Virginia military district at Chillicothe was meant as the office to which the surveys should be returned, or that, if returned to that office, they were validated by the act of 1880. The proposition is untenable. The office to which the returns were to be made under former laws, to which the provision of this act conformed, was the General Land Office, at Washington, as successor to the Department of War for this purpose.

There was otherwise no evidence of the survey, and no basis on which a patent could be issued.

The return to the General Land Office was a positive requirement of law and a precedent condition to the acquirement of any rights under the entry, failure in compliance with which was fatal to the legality of the survey. Legal surveys only were affected by the provisions of the second section.

A survey not returned to the General Land Office on or before March 3, 1857, was not a legal survey. Notice to the world of the appropriation of the land must have been given in the manner prescribed by the statute, and a survey filed elsewhere than in the office designated by law was not notice to anybody, and no rights could be established, maintained, or concluded in the absence of such notice filed in the General Land Office within the prescribed time.

As a minor but no less effective, consideration it may be observed that the office of the principal surveyor of the Virginia military district is never termed a "land office." The descriptive words "land office" and "general land office" are sometimes used convertibly; the words "land office" and "office of the principal surveyor," etc., are never so used.

The Land Office is an office of the government universally recognized by this descriptive designation. The office of the principal surveyor of the Virginia military district is not. This latter office is specifically mentioned in the third section of the act, in relation to the record required by previous laws to be made in that office. The "General Land Office" is also mentioned in said section, in the same relation as "land office" is mentioned in the second section.

Obviously, there was no intention of confounding the General Land Office with the office of the principal surveyor of the Virginia military district, or of confusing the functions, duties, or obligations respectively connected with those district offices.

An essential modification of a system that had been maintained from the period of establishment of the boundary line of the Virginia military district cannot be assumed by implication. The proposition to which I have adverted appears to have been raised upon the point that the initial letters of the words "land office" in the second section of the statute are not printed in capitals. This is a mere clerical or typographical incident, and does not control the law. If it were of sufficient importance to be mentioned, it might be stated that in the Report of the Senate proceedings (Cong. Record, vol. 10, 2d sess. 46th Cong., p. 3572) it is seen that this section as inserted in the bill by the Senate used the words "Land Office," spelling the same with capital letters. The substitution of small letters was apparent fancy or accident of the copying clerk.

The third section of the act of May 27, 1880, is not a revival of the act of 1804. It is a new act and it is in effect and in fact a new grant.

The parties entitled to bounty lands under former laws, but whose rights had lapsed by the efflux of time and the limitations of the statutes, were allowed three years in which to make surveys in cases in which by virtue of a proper warrant, entries had been made and duly recorded on or before January 1, 1852, and where the surveys had not been made previous to the passage of this act. The language of the act is "shall be allowed three years from and after the passage of this

act to make and return their surveys," etc. Such surveys were to be recorded in the office of the principal surveyor, and the original plat of survey and the warrants or certified copies of warrants were to be filed in the General Land Office in the same manner as formerly provided by the act of 1804. This was the application of the old and familiar method of the new grant.

An important limitation of the act is the restriction of its application to cases where there had never been a survey and it is in such cases only that a survey was authorized to be made in the manner and within the time prescribed and patent authorized to be issued. Patents could therefore be issued only on surveys made after the passage of the act, and not on surveys made before the passage of the act.

Congress is presumed to be familiar with the subject-matter of its legislation and the reasons which under the existing situation of titles to lands in the Virginia military district would have sanctioned and in justice and equity required; this limitation must be presumed to have been the reasons which operated on the legislative mind in affixing such limitation and restriction. After making an entry by virtue of their warrants and obtaining surveys many parties neglected to return the surveys and warrants to the General Land Office as required, and therefore never obtained legal title to the land. Whether this was mere negligence or a design to escape taxation, is not material. The fact is known to be that such title as the holders of entries or their assigns originally had, passed by tax sales and otherwise to third parties and their transferees and that the lands at the date of the passage of the act of 1880, were as now the cultivated farms and homes of numerous citizens.

To have authorized the issue of patents to the original holders of entries or their immediate assigns who had slept on their rights for a period of from twenty-five to seventy-five years would have been to prefer stale equities to living rights and to provide a means of wholesale ejection and dispossession of actual occupants and the speculative acquirement after a life-long evasion of a participation in the public burthens and, without compensation to the injured parties, of property increased in value by the growth of population and the labor and means of those who had lawfully nurtured and improved it under the protection of the laws of the State. Congress did not intend to perpetrate an injustice of this magnitude and I find in this necessary inference a reason which satisfies me that the proper construction of the third section of the act of May 27, 1880, is that which follows the strict literal and natural import of the words employed in the statute. If there were any doubt upon this point it would be removed by a consideration of the nature of the act, which I do not regard as of the essence of a remedial statute but as a grant *de novo*, operating upon lands that had been released from all prior reservation for the satisfaction of military claims. I do not, however, esteem the law doubtful. I do not think it

the law or the intention of the law that ancient surveys not lawfully returned prior to March 3, 1857, or surveys made without lawful authority between March 3, 1857, and May 27, 1880, should be habilitated and patents issue thereon under this act.

The third section comprises the sole existing authority for the issue of patents on surveys founded on Virginia military warrants. It authorizes patents to be issued in certain clearly defined cases; namely, where the warrant was entered on or before January 1, 1852, and the survey had not been made and returned to the General Land Office at the date of the passage of the act, but should after that date be made and recorded in the office of the principal surveyor of the Virginia military district and returned to the office of the Commissioner of the General Land Office together with the original or certified copies of the warrants.

Patents can only be issued when specifically authorized by law. Specific authority is found in this section for the issue of patents in the cases thus described in the statute. No authority exists under this act for the issue of patents in any other case or class of cases, and if there were any doubt upon this point it would still be my duty to decline to issue patents in doubtful cases by the very reason of such doubt.

Applying the principles and views above set forth to the case presented by you, I find as follows:

1st. An entry appears to have been made by virtue of the warrant prior to January 1, 1852, to wit: in or prior to 1822, and if so the case is to that extent within the statute.

2d. The survey was made in 1822, as would appear from the purported copy now filed, but was not returned to the office of the Commissioner of the General Land Office on or before March 3, 1857, and so far the case is not within the statute.

3d. There is no authority of law under which a patent can issue in this case.

—

JEREMIAH HALL.*

Review of the case and statute, applicable thereto, and affirmance of Commissioner's decision of May 9, 1882, *ante*.

Secretary Teller to Commissioner McFarland, January 31, 1883.

I have considered the appeal of Jeremiah Hall, esq., of Circleville, Ohio, from your decision of May 9, 1882, refusing to issue a patent, upon his application therefor as attorney of Samuel Ruggles *et al.*, for 150 acres of land in the Virginia military district in the State of Ohio.

The application was filed in your office on the 12th of May, 1880, and is founded on survey No. 12096, made by virtue of Virginia military land warrant, No. 584, for 200 acres, which warrant was granted for the

* See 4 L. D., 373.

services of Aquilla Norvall, a sergeant of the Virginia Continental Line, in the war of the Revolution.

The survey was made in the name of said Aquilla Norvall, and the application for patent contains request that the patent be issued in his name.

The main question to be decided is does the law authorize the issue of a patent on said survey No. 12096? A decision of this question involves the consideration, in the light of existing law, of certain facts relative to the warrant and survey by virtue of which patent is claimed. In other words it becomes necessary to inquire whether said warrant and survey have now any such vitality and force as would constitute them a legal basis for the issue of patent as desired. It appears that the survey was made on the 28th of December, 1822, and was recorded in the office of the principal surveyor at Chillicothe, Ohio, on the 27th of January, 1823. It is stated that both the warrant and the original certificate of survey have been lost, and in lieu thereof an alleged duplicate of copy of each was filed in your office with the application for patent.

The paper filed as duplicate of survey is not certified, and does not carry with it conclusive evidence that survey was made, or that it is what it purports to be; but, as suggested by you, this technical defect is one which might be cured, and therefore for the purpose of this decision, which is to reach a conclusion on the main question, the case will be treated as if the record were complete as to the fact of survey.

It is shown that the warrant, upon which the survey in question was made, had not, at least as lately as December 1875, been satisfied. Assuming that it has not yet been satisfied, the main question naturally recurs—is there authority of law for its satisfaction at this late day by the issue of patent on survey No. 12096? As long ago as August 10, 1790, Congress passed an act entitled “An act to enable the officers and soldiers of the Virginia line on continental establishment to obtain titles to certain lands lying northwest of the river Ohio, between the Little Miami and Sciota.” (1 Stat., 182.) This was followed by the act of June 9, 1794 (1 Stat., 394), prescribing more particularly the method of obtaining patents for such lands.

By the act of March 23, 1804 (2 Stat., 274), Congress placed certain limitations upon the preceding acts. The second section of the act of 1804 required of those entitled to bounty land, or their legal representatives, that to obtain patents they should “complete their locations within three years,” and “make return of his or their surveys to the Secretary of the Department of War within five years after the passing of this act, and every person entitled to said lands, and thus applying, shall thereupon be entitled to receive a patent in the manner prescribed by law.”

These requirements were conditions precedent, and as such it was necessary that they be strictly complied with before the benefits of the

act could be enjoyed. This proposition rests upon a principle of law too well recognized to need argument or citation in its support. The implication of the law quoted from section 2 is that such of these reserved lands as were not effectually appropriated within the time of limitation were released from all claims for bounty lands, and became subject to disposal by the United States the same as other public lands. This, however, was not left to implication. Section 3 of the act specifically provided for the release from reservation and the disposal by the United States of such of the reserved territory as had not been located and the surveys whereof had not been returned within the time prescribed by the act. As long ago as 1828, the supreme court, in the case of *Jackson v. Clark* (1 Peters, 628), decided this to be the purpose and effect of the law. In that case Chief Justice Marshall said:

Although then the military rights constituted the primary claim on the trust, that claim was, according to the intention of the parties, so to be satisfied as still to keep in view that other object, which was also a vital interest.

That other object was the disposal by the United States, for the purposes of another and a different trust, of the lands not appropriated under the military trust, and on this point the Chief Justice remarked that "unless some time might be prescribed, the other purposes of the trust would be totally defeated, and the surplus land remain a wilderness."

The fact (1) that Congress by the act of 1804 provided for the disposal by the United States of all the lands in the Virginia military reservation in Ohio not completely segregated and appropriated as bounty lands by the location of warrants and the proper return of surveys thereunder within a prescribed time, and (2) that it had a right to make such disposal, being settled by so high an authority, the next inquiry is, how was the act affected by subsequent legislation?

Subsequent to 1804 successive acts, a dozen or more in number, were from time to time passed, the principal features of which were provisions extending the time for making locations, and for making and returning surveys. Their general effect was to revive and continue in force, for a limited time, the beneficial provisions of section 2 of the act of 1804. Section 3 of said act was not incorporated into any subsequent act, but it was not repealed, and may properly be construed as a general provision of law applicable to any subsequent act extending the time of limitation, as well as to the act of which it forms a part, and for the same reason. It could not become operative, even under the act of which it was a part, until the expiration of limitation named in the act, and when said limitation was by subsequent acts extended, such extensions of time were in the nature of amendments to section 2 of the act of 1804; and the effect was to further hold in abeyance section 3 of the act until the expiration of limitation prescribed by said act and the numerous acts amendatory thereto, after which it should, and did, be-

come fully operative, according to its terms, in the same manner as if there had been no legislation subsequent to the act of 1804 extending the time for returning surveys. Following this view, the next question suggested is, when did said section 3 take effect and become fully operative? It is unnecessary to review, or even to cite, all the intermediate acts between 1804 and May 27, 1880, the date of latest legislative expression relative to locations and surveys under continental warrant. It is sufficient to say that they did not all connect as to time of limitation—that is, in some instances the limitation prescribed has expired and some time elapsed before the passage of a subsequent act reviving and continuing the same. These omissions were remedied, however, by the first section of the act of July 7, 1833 (5 Stat., 262), which, after further extending the time for completion of locations and return of surveys, also provided that—

All entries and surveys which may have heretofore been made within the said reservation, in satisfaction of any such warrants, on lands not previously entered or surveyed, or on lands not prohibited from entry and survey, shall be held to be good and valid, any omission heretofore to extend the time for the making of such entries and surveys to the contrary notwithstanding.

This provision of law was in terms revived and continued in force in the several subsequent acts of extension down to and including the act of February 20, 1850 (9 Stat., 421), which act named the 1st day of January, 1852, as the final limitation of time for the return of surveys and for the operation of the proviso above quoted. After the last-mentioned date, no entries could be made and no surveys could be returned. What, then, became of the lands within the reservation which had not, at that date, been effectually appropriated by the issue of patents or by location and proper return of survey? Being no longer subject to entry as bounty lands, were they to remain a barren wilderness—wild lands, subject to no control—or were they released from reservation and subject to disposal by the United States? Manifestly the latter, and by authority of section 3 of the act of 1804, which has never been repealed, but which, being no longer held in abeyance by the numerous acts extending the time for locating Virginia military land warrants and returning surveys thereon, now becomes fully operative, and under its operations located lands the surveys whereof had not been returned to the General Land Office were as much at the disposal of the United States as were those upon which no location had been made. The lands thus subject to disposal must so remain until disposed of or until later legislation changing the conditions. The next legislation in the nature of extension of time to those entitled to Virginia military bounty lands was the act of December 9, 1854 (10 Stat., 598). This act allowed those who had made entries prior to January 1, 1852, two years from the date of its passage in which to make and return their surveys of lands covered by such entries. The provisions of the first section of the act of 1838, relative to former entries and surveys, which had in all subse-

quent acts down to that of 1850 been re-enacted and continued in force are not found in the act of 1854. This act omitted to mention surveys made prior to its passage. It did not, as did the preceding acts, provide for the return of "surveys which may have heretofore been made," but did provide for the making and returning of surveys on entries made prior to January 1, 1852. In other words, it had sole reference to such surveys as might be made subsequent to the date of its passage and within two years therefrom.

Now, it cannot be presumed that Congress inadvertently, or without purpose, made the omission. Its purpose must have been to exclude surveys made prior to the passage of the act. Such is the plain import of the language of the act. On the 3d of March, 1855, Congress passed another act (10 Stat., 701), the first section of which is a repetition in identical words of the act of 1854, except that it further extends the time for making and returning surveys by allowing two years from and after its passage for such purpose. The second section repeals the act of 1854, evidently for the reason that, this act having taken its place, there was no longer any occasion for its existence. So we still find no provision since the act of 1850 for returning old surveys.

The next act relative to these lands was that of February 18, 1871 (16 Stat., 416), providing for the cession to the State of Ohio, upon certain conditions, of such of them as remained "unsurveyed and unsold." This act in effect recognized the force of section 3 of the act of 1804 and the authority of the United States to dispose of the unappropriated lands in the Virginia military district in Ohio, and simply prescribes the manner and direction of the disposal of certain of those lands.

This brings me to a consideration, in its chronological order, of the act of May 27, 1880 (21 Stat., 142), and its effect upon the survey in question. The purpose of this act was, among other things, "to construe and define" the act of 1871. In so doing it limited the cession to the State to lands—

Unappropriated, and not included in any survey or entry within said district, which survey or entry was founded upon military warrant or warrants upon continental establishment.

This excepted (1) all lands which had been appropriated by patent or by location and legal return of survey, and (2) all lands covered by entry or survey which had not been legally returned. This second exception did not rest on any want of legal title in the United States to the lands described, but was evidently made on the ground of policy and in recognition of certain equitable rights which during a long series of years had grown up in the occupants of said lands. The act, as a whole, like that of 1871, recognized the vitality and operation of the third section of the act of 1804, by authorizing the disposal to the State. If the title were not in the government, how could it, by cession

or otherwise, confer title; and if it did not have the right of disposal, how could it make disposal as the act provided it should?

Section 2 of the act of 1880 declared valid "all legal surveys returned to the Land Office on or before March 3, 1857, on entries made on or before January 1, 1852." This section, like the preceding one, was intended to protect certain equitable rights which by purchase and occupation has attached to the lands covered by such surveys. If patent had issued, the title of occupants holding thereunder should not be attacked because of some technical defect in the preliminary proceedings leading to that patent. If no patent had issued, the occupant, holding under an equitable title coming to him by purchase, and having possibly for its original foundation a tax title from the State, or perchance a contract of purchase from the person in whose name the survey was made, shall be protected and remain in undisturbed possession, even though the actual amount of land in any case be in excess of that authorized by the warrant on which the survey was made.

Section 2 finds a basis in the maxim that "the law favors quiet and repose." Under it the applicant for patent in this case can have no claim, for it contains no provision authorizing the issue of patents; and if it contained such provision, the applicant would not be benefited thereby, because the survey under which he claims was not returned to your office prior to March 3, 1857. It is contended, for the applicant, that the words "land office," as found in the section, mean the office of the principal surveyor of the Virginia military district at Chillicothe, and that as the survey No. 12096 had been filed in that office prior to 1857, it is valid within the meaning of the law. The fallacy of this proposition has been so clearly set forth in your decision that I deem its further discussion unnecessary. It is sufficient to say that, in the light of all previous legislation relative to the return of these surveys, as well as in view of the manifest propriety and necessity of such papers lodging in the General Land Office (in order that they may become complete public notice of the fact of survey), there can, I think, be no doubt that by the term "land office," as used in section 2, is meant the General Land Office.

Does the application come within the provisions of the third section of the act of 1880? That section allows three years from and after the passage of the act in which "to make and return" surveys on entries made "on or before January 1, 1852." It will be observed that it contains two restrictions as to time: First, the entries must have been prior to January 1, 1852; and second, the survey must be made and returns within three years from and after the passage of the act. The latter restriction clearly excludes the application under consideration, for the reason that the survey upon which it is based was made long anterior to the passage of the act of 1880, to wit, in December, 1822.

The remarks made on foregoing pages hereof as to the effect of the acts of 1854 and 1855, are applicable in this connection, and need not be

enlarged upon. In this act, as in those, the language "from and after the passage of this act to make and return their surveys" occurs, and for reasons already given relates exclusively to surveys made after the passage of the act. On such surveys only can patents properly issue.

The tenor of the act as a whole clearly indicates that Congress had in view the protection and preservation of certain equitable titles to lands within the Virginia military district in Ohio, which were held by persons who had come into possession in the belief that they had acquired full legal title. It is not to be supposed that any part of the act having this object in view is by a strained construction to be given such effect as would defeat and destroy the very equities it was designed to protect. In other words, Congress did not intend to place in the law a section which, as between stale equities based upon old surveys made twenty-five or fifty, or, as in this case, sixty years ago, and allowed to slumber ever since, and living rights based upon purchase and occupancy, would favor the former to the destruction of the latter.

In these considerations is found the reason of the law for the exclusion of surveys made prior to the passage of the act, they being surveys from thirty to seventy-five years old. I find no authority of law for the granting of patent as asked on survey 12096, in the Virginia military district in Ohio, and your decision is, for the reasons herein stated, affirmed.

MILITARY BOUNTY LAND WARRANTS.

JOHN F. TIPTON.

The only act of Congress which confers authority to issue patents for such lands is that of May 27, 1880, which is restricted to cases of entries made prior to January 1, 1852, and not surveyed.

Commissioner McFarland to John F. Tipton, Bloomington, Ill., April 3, 1882.

You are informed in answer to your letter of the 10th February last, that an examination of the records of this office shows that entry No. 386 for 1,000 acres of land in the Virginia military district, Ohio, founded on Virginia military land warrant No. 738, for 7,000 acres, issued to Mace Clements, a surgeon in the continental line in the war of the Revolution, was made by him August 1, 1787, and same carried into survey in his name November 13, 1787, which was "examined and recorded" in the surveyor's office of said district, March 23, 1788, but never returned to this office for patents.

You are further advised that there is now no authority of law for the issue of a patent in the case, should the said survey, etc., be now returned for such purpose.

The only existing act of Congress which confers authority to issue patents for lands in the said Virginia military district, Ohio, is that

approved May 27, 1880, and this by express terms is restricted to cases of entries made prior to January 1, 1852, and not surveyed. It authorizes the survey of such entries at any time within three years from and after the passage of the act, and the return thereof to the surveyor's office for record; and upon the filing of the plats and certificates, warrants, or certified copies of warrants, at this office, the persons entitled may receive patents for the same.

The entry of Mace Clements having been carried into survey long anterior to the said act of May 27, 1880, is not embraced in the provisions thereof authorizing the issue of patents.

DELIVERY OF PATENT—INCOMPLETE RECORD.

ANTONIO D. MARTINEZ ET AL.

When patents have been prepared, signed by the President's secretary, countersigned by the recorder, except that the day and month of signing and sealing the President's name and the signatures of his secretary and of the recorder have not been inserted, the record is incomplete, the title has not passed, and delivery of patent cannot be legally demanded.

*Commissioner McFarland to Messrs. Wilshire & Sibbald, Washington,
D. C., May 24, 1882.*

I have duly considered your application and demand of 27th ultimo, in which as attorneys for claimants you seek the delivery to you of certain patents which you allege to have been heretofore executed by the proper officers of the United States upon entries made in the Pueblo land district, Colorado, to wit:

Final certificate No. 789, dated April 2, 1881 (homestead application No. 1786), by Antonio D. Martinez, for south west $\frac{1}{4}$ sec. 32, T. 33 S., R. 63 W., 6th P. M., containing 160 acres.

* * * * *

You represent that said respective entrymen have in all respects complied with the law, and that said patents were on the 15th day of March, 1882, transmitted by my letter of that date to the President of the United States, to be executed by him, and were executed on that day in the manner prescribed by law, and on the same day were countersigned by the proper recording officer of this office and duly recorded, and have not been transmitted to said patentees.

An examination of said patents shows that they are signed for the President by his secretary, and countersigned by the recorder of this office; have the seal of this office attached, and are noted as having been recorded in vol. 8 on certain pages thereof. The day and month of the signing and sealing is still in blank, such dates not having been inserted in the patents.

The patent record is incomplete in that the day and month of the signing and sealing of the patents, the President's name, and the sig-

natures of his secretary and of the recorder of the General Land Office have not been filled in.

It appears that on the 21st of March last John Mullan, of counsel for coal land contestants, addressed a letter to me, stating in substance that the lands described in said entries would be contested as being of coal lands, and that affidavits in support thereof would be forwarded by mail, and asked that patents should not issue for the next few days in order to enable said affidavits to reach this office.

The completion of patents and the record thereof was at once suspended, and on March 27th affidavits were filed here alleging that the lands covered by said entries were valuable coal lands; valueless for agricultural purposes, and that no person resided thereon July 10, 1875, nor since that date, nor had the land ever been improved by plowing, breaking or otherwise, and that the proceedings for patents were fraudulent.

The district land officers at Pueblo, Colo., were, on the 8th ultimo, directed to order a hearing, under usual course of procedure, to determine the character of the land and the good faith of the homestead claimants; and completion of the patents (in the condition aforesaid) was suspended.

The character of the affidavits submitted (and which were mailed to the district land office for use at the trial) is such as to make it my clear duty to suspend issue of patents and order such hearing unless the patents have passed beyond Executive control, and thereby are subject to delivery to the parties named therein as patentees, and the title to the land has consequently passed from the jurisdiction of the Executive Department of the government.

You insist that the patents have been duly executed; that they bear on their face by indorsement that they have been signed, sealed, and recorded, giving page of record, and that these are attested by the signature of the recorder; and that these things having been done, there is nothing left to the discretion of this office; but the duty mandatory under the statutes, as construed by the supreme court, of completing the record and delivering the patents, remains.

In support of this construction of the law you refer to the cases of *McGarrahan v. New Idria Mining Company*, p. 590, *Lewis's Leading Cases*, *Leroy v. Clayton*, pp. 599 to 601 and 602, *Lewis's Leading Cases* and to *McBride v. Schurz*, decided by the supreme court of the United States and found in *Copp's Land Owner*, vol. 7, page 152; also to certain other authorities.

You rely upon the case of *McGarrahan v. New Idria Mining Company*, as establishing that when the patent has been signed by the President, countersigned by the recording officer, and sealed with the seal of the General Land Office, the patent is complete, and that the last act required to complete the patent is the countersigning by the recorder.

It must be borne in mind while seeking direction from this decision, that the point before the court and under discussion was whether the record kept in this office for the recording of patents and relied upon by McGarrahan, proved a conveyance by the United States of the land in controversy; that McGarrahan contended that the record was of itself a grant; or, if not, that it proved the issue of a patent which did grant the legal title to the property involved.

In discussing the case the court said:

The record of this patent is evidence of the grant, but not the grant itself. It is evidence of equal dignity with the patent, because, like the patent, it shows that a patent containing the grant had been issued.

The record called for by the act of Congress is made by copying the patent to be issued into a book kept for that purpose. The effect of the record, therefore, is to show that an instrument such as is there copied has actually been prepared for issue from the General Land Office. If the instrument as recorded is sufficient on its face to pass the title, it is presumed that the grant has actually been made; but if it is not sufficient no such presumption arises.

The public records of the Executive Departments of the government are not like those kept pursuant to ordinary registration laws intended for notice, but for the preservation of the evidence of the transactions of the Department.

The court found that the record did not show a patent countersigned by the recorder, and that it (the record) was not sufficient to prove title in the party under whom McGarrahan claimed.

So far as said reasoning of the court can find any application in this case, it shows that when a patent has been issued, a correct record thereof is presumed to have been made in this office, and that a copy of an incomplete record cannot prove the issue of a patent. To illustrate: a copy of the record of the patents now in question would not prove their issue.

In the case of *Le Roy v. Charles Clayton et al.*, 2 Sawyer, 493 (Lewis's Leading Cases, 598), the leading points passed upon by the court relate, first, to the power of the Commissioner to cancel a patent after the party entitled had refused to accept it and with his consent; and, second, his power to cancel without the consent of the patentee. It was decided affirmatively as to the first and negatively as to the second proposition; but in both the patents were fully recorded and the patents completed in all respects. That case is not identical with the one under consideration, and the points decided are not those now presented. It is true the court said:

The patent of March 1, 1870, took effect from the moment it was signed by the President and passed the great seal, certainly from the time it was recorded in the proper record and dispatched to the surveyor-general of California to be delivered to the claimants. But this is manifestly no guide in the present case.

This language was directed to a state of facts entirely different from that under discussion, and even were it otherwise, it would be necessarily regarded as of dubious import.

In fact no case cited by you as authority for your present demand constitutes a clear precedent for my action in this case.

The most recent decision relied upon is that of *McBride v. Schurz*. But this case only involved the duty of the delivery of a patent, about the perfection of which as well as the record thereof there was no question.

The court, however, decided that title passed by matter of record. Referring to the officers of the Land Department the court said :

From the very nature of the functions performed by these officers, and from the fact that a transfer of title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases. It is equally clear that this period is at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place the land has ceased to be the land of the government, or, to speak in technical language, the legal title has passed from the government and the power of these officers to deal with it has also passed away.

In the case of *Marbury v. Madison*, this court was of opinion that when the commission of an officer was signed by the President and the seal of the United States affixed to it, the commission was complete, and the officer appointed entitled to its possession, so that he could enforce its delivery by the writ of mandamus. In regard to patents for land it may be somewhat different, and it is not necessary in this case to go quite so far. But we may well consider that in all nations, as far as we know, where grants of the property of the government or of the Crown are made by written instruments provision is made for a record of these instruments in some public government office.

Our experience in regard to Mexican, Spanish, and French grants of parts of the public domain purchased by us from those governments teaches us that such is the uniform law of those countries.

We have already shown that under the English laws all letters patent are enrolled, and that this is the last act in the process of issuing a patent which is essential to its validity.

The acts of Congress provide for the record of all patents for land in an office and in books kept for that purpose. An officer, called the recorder, is appointed by law to make and to keep these records. This officer is required to record every patent before it is issued and to countersign the instruments to be delivered to the grantee.

This, then, is the final record of the transaction, the legally appointed act which completes what Sir William Blackstone calls title by record ; and when this is done the grantee is invested with that title.

While this case is not identical with that under consideration, yet it was necessary for its adjudication to determine at what stage of proceedings in the preparation of a patent the authority of the Executive officer ceased.

The court undertook to decide, and in my judgment did decide, just when that authority ceased, and the party claimant became entitled to his patent. Its decision was that "title did not pass by delivery of the patent, but that the title was 'title by record,' and that the grantee was invested with that title when the record and patent were complete."

The court said, referring to the recorder :

This officer is required to record every patent before it is issued and to countersign the instrument to be delivered to the grantee. This, then, is final record of the transaction, etc.

From this language you insist it follows that the patent having been countersigned by the recorder, such last act has been performed; that your clients are invested with title and delivery of patents is due.

The court, however, cannot be interpreted as intending by said language to specify the exact order of proceedings necessary in the issue of a patent. It referred to said acts of recording and countersigning as being the last acts essential to the record; and the gist of the opinion, as I understand it, is that when these last acts have all been performed, and nothing further is left to be done by this office in preparing, signing, sealing, and recording the patent, the "title of record" passes and the delivery of a patent becomes a duty concerning which no discretion can be exercised by the Executive officers, and no further jurisdiction over the land remains in them.

The several acts of recording and countersigning and sealing the patent are substantially contemporaneous, and altogether constitute the title of record. The fact that any one of those acts in the order of the proceedings is prior or subsequent to some other of said acts, all of which are essential, and together constitute one complete proceeding, is, in my opinion, immaterial; and until all of said acts, including the perfection of the record, have been completed, the title remains in the United States and in the jurisdiction of this Department.

In fact, in this case, the completion of said record was designedly postponed in order to retain the jurisdiction essential to a determination of the questions raised by the affidavits alleging fraud.

I therefore decline to deliver said patents, and would add that after your demand for their delivery, to wit, on the 2d instant, my previous order for a hearing was suspended to await the disposition of the questions raised by you.

Your appeal from this ruling will be entertained, under the rules of practice.

DELIVERY OF PATENT—INCOMPLETE RECORD.

ANTONIO D. MARTINEZ.

Until the record of the completed patent has been made, the Executive has retained something of jurisdictional authority. The Department has not power to direct the Commissioner to deliver the unrecorded patent. Commissioner's decision of May 24, 1882, affirmed.

Secretary Teller to Commissioner McFarland, March 26, 1883.

I have considered the appeal of Messrs. Wilshire and Sibbald, attorneys for homestead claimants, from your decision of May 24 last, declining to deliver certain undated patents, the records thereof not

having been perfected, issued in the name of Antonio D. Martinez and others. The appeal is in the nature of a motion for a mandamus to the Secretary to compel the Commissioner to "deliver certain undated patents, of which there is no record—because an incomplete record is not a record—in your office. The facts, which are undisputed, are set forth in your opinion, and need not be repeated; and upon these facts a question of law arises, whether the unrecorded patent is, under the circumstances, such a one as a court would compel the Commissioner or the Secretary to deliver. I am of the opinion that no court would direct either yourself or myself to give up possession of the paper which these homestead claimants now seek. Whatever bearing the cases cited by the attorneys for the claimants in their brief or oral argument may have upon the question involved in this case I deem it unimportant to discuss, as I am convinced that the case of the *United States v. Schurz* (12 Otto, 378), from which you largely quote to sustain your conclusion, completely disposes of the present application, because it shows the latest views of the supreme court of the United States on the power of the Land Department over patents and records by which title to public lands from the United States is acquired, and sets forth the extent of the jurisdiction of the supreme court of the District over the acts of Executive officers of the government in general, and in what cases it is the duty of the Secretary of the Interior to deliver patents when demanded. From this decision it must be ascertained what would be the result of an application for a mandamus by the claimants to the supreme court of the District on a refusal by the Commissioner to deliver an unrecorded patent. That court, following the language of the *United States v. Schurz*, would doubtless hold that the Commissioner has not exercised finally his discretion in the case at bar; his last official act necessary to transfer title to the claimants has not been performed; one of the conditions precedent to the issuing of patents from the General Land Office has not been observed, namely, the record of the completed patent has not been made in the book kept for that purpose (R. S., 458), and until that is done the Executive has still retained something in the nature of judicial authority. The value of a delivered and presumably recorded patent is really the question discussed by the appellant's attorneys; but that is a different question from that presented by the record, which is, whether I have power to direct you to deliver the unrecorded patent to the claimants, which in my opinion would be a violation of the law.

It will be noticed that I have not discussed the question whether the undated paper is technically a patent or not; that seems to me to be unnecessary, inasmuch, as accepting the views of the appellants on that subject, I still believe that I would have no right to direct you to deliver the patent before the record of the same is made in your office.

The appeal is dismissed.

HOMESTEAD—ABSENCE ON ACCOUNT OF DROUGHT.

MARTIN A. ADAMS.

A homestead party absent on account of severe drought, under act of June 4, 1880, was constructively residing upon his land, and in case the statutory period of five years' settlement and cultivation expired during such absence final proof may be made as though he were actually residing upon the land claimed.

Commissioner McFarland to register and receiver, Larned, Kansas, November 3, 1881.

I am in receipt of your letter of June 28, 1881, transmitting, on appeal from the decision of your office, the final proof papers of Martin A. Adams for the NW. $\frac{1}{4}$, 28, 21, 21 W., rejected by you for the reason that the claimant absented himself from the tract in question in July, 1880, under the act of June 4, 1880, and has not since that time returned thereto to resume and perfect his settlement, as required by the first section of said act.

It appears that Martin A. Adams made homestead entry 507 on above described land March 14, 1876, and has resided upon and cultivated the same since December 12, 1875; that he lost his crops in the year of 1879 and also in the year 1880, on account of the severe and unusual drought in those years, and that he was therefore compelled to go away to work in order to support his family. I am of the opinion that the act of June 4, 1880, does not contemplate that in cases where homestead claimants have left their claims under the said act by reason of extreme drought, and where the five years from date of entry would have expired during said absence, the parties should be required to return to their land and live thereon before being allowed to make final proof, but rather that they are to be considered as constructively residing upon the land embraced in their entries.

Your decision is therefore reversed, and you will, upon payment of the commissions due, issue final papers in the case.

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HOMESTEAD—ADDITIONAL ENTRY.

ANNIE ANDERSON.

The act of March 3, 1879, comprehends and includes all persons who in any manner by original entry or by operation of law have succeeded to the right to make final proof.

Secretary Kirkwood to Commissioner McFarland, December 19, 1881.

I have considered the appeal of Annie Anderson (formerly Annie Middleton) from your predecessor's decision of February 8, 1881, rejecting her application, as widow of Joshua Middleton, deceased, to make additional homestead entry of the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 14, T. 18, R.

14 W., Grand Island district, Nebraska, under act of March 3, 1879. (20 Stat., 472.)

Joshua Middleton made homestead entry No. 7338, February 20, 1878, of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section, and appears to have complied with the requirements of the law to the date of his death, October 15, 1878.

The reason given by your office for rejecting the claim was that the right conferred by this act is a personal one, limited to the individual who made the original homestead entry.

The act provides for additional entry upon prescribed conditions by "any person who has, under existing laws, taken a homestead on any even section within the limits of any railroad or military road land grant," etc. Its provisions are remedial, and while the beneficiaries take by descriptive words, thus confining the grant to a personal right, the spirit of the act must be observed in recognizing whomsoever may have been proper objects of relief, if pointed out with reasonable clearness by the descriptive language employed.

I am of the opinion that the words "who has under existing laws taken a homestead" comprehend and include all persons who in any manner, by original entry or by operation of law, have succeeded to the right to make final proof and payment of fees and take the patent for the land. As this right is cast upon the widow by operation of law, she must be held to have taken the homestead under existing laws, and should not by narrow and inequitable construction be deprived of the benefit of the amendatory statute.

Your decision is accordingly reversed.

Overruled, HOMESTEAD—ACT OF JUNE 15, 1880.

J. D. D.

GEORGE W. MLUGHAN.*

Purchase may be made under the second section of the act of June 15, 1880, though the entry was void at inception.

Commissioner McFarland to register and receiver, Benson, Minnesota, August 25, 1881.

It appears from our records that George W. Maughan made homestead entry No. 10236, December 10, 1879, N. $\frac{1}{2}$, SW. $\frac{1}{4}$, Sec. 22, T. 124, R. 43. The homestead affidavit was made before the clerk of the court, the party alleging that he was a single man and was residing on the land which he desired to enter.

In the case of Peter G. Gorden *v.* Maughan, involving the above-described entry, and now pending before this office on appeal, you decided that the party had failed to meet the requirements of the statute in regard to residence and cultivation, and that the entry was void from its inception, for the reason that the testimony showed that the claimant was not residing upon the land at the date of his entry.

* This decision was affirmed by the Secretary, April 28, 1882.

I am in receipt of your letter of the 16th ultimo, transmitting the application of Maughan to make cash entry of the land in question under the second section of the act of June 15, 1880, on appeal from your decision rejecting the same on the ground that you held the entry to be invalid in its inception.

It is now held by this office that a party having made entry of land, properly subject to such entry, prior to the passage of the act of June 15, 1880, is entitled to make cash entry of the land, under the second section of said act, although the homestead entry may have been invalid in its inception. You are therefore directed to allow Maughan to make cash entry of said land, and when the purchase money is paid and the entry made of record promptly report the fact to this office.

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DESERT LAND—FINAL PROOF.

WALLACE *v.* BOYCE.

In the desert land act the intendment of the statute is to provide for the reclamation of such lands from their desert condition to an agricultural state. Congress specified water as the means to that end, but the mere conveying of water upon the land is not a fulfillment of the law unless in sufficient quantity to prepare such land for cultivation. The final proof must show that it has been so reclaimed.

Secretary Teller to Commissioner McFarland, August 2, 1882.

Pursuant to departmental order of August 12, 1881, in the case of William Wallace *v.* James R. Boyce, involving desert land entry No. 62 of the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of Sec. 28, T. 10 N., R. 3 W., Helena district, Montana Territory, a hearing was had at the local office November 10, 1881, to the end that Wallace might have an opportunity to verify his allegations touching Boyce's failure to comply in good faith with legal requirements.

It appears that Boyce made final proof, F. C., No. 42, September 1, 1880, whereupon Wallace filed affidavit of contest alleging (1) that the defendant had not reclaimed and cultivated said land as required by the desert land act; (2) that he was not the owner of enough water to irrigate his land; (3) that he was not the owner of a ditch or ditches from the source of supply to the land; (4) that the ditches through which the water was conveyed were not of sufficient capacity to properly irrigate the entire tract.

The act in question, commonly called the desert land act (19 Stat., 377), prescribes "that it shall be lawful for any citizen of the United States, . . . upon payment of twenty-five cents per acre, to file a declaration under oath" with the proper register and receiver—

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: *Provided, however*, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres, shall depend upon *bona fide prior* appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation, etc.

A careful examination of the testimony adduced at the hearing discloses substantially the same state of facts that existed at the date of the initiation of contest, excepting perhaps that the capacity of Boyce's main ditch had been materially diminished meantime by reason of obstructions of tailings and *débris* from the mines along the upper part of Dry Gulch, from which source Boyce indirectly derived his water, not by virtue of a "*bona fide prior* appropriation," but by mere sufferance. It thus appears that the only improvements upon the tract evidencing any intention on his part to reclaim the same from its desert state consist of a main ditch and two lateral furrows (from which the loose earth had never been removed), and that only about fifty of the two hundred and forty acres could be properly irrigated thereby.

You state that—

Though this office deemed it proper, in preparing the final proof blank forms under said act, to insert questions as to the cultivation and growing of agricultural crops upon the lands entered . . . there is nothing in the language of the statute requiring proof of cultivation or of the growing of agricultural crops upon the land entered as a prerequisite to the issuance of patent therefor.

It would appear from this finding that you regard the instructions as in contravention of law. I do not so construe the act. The law allows entry for the purpose of reclaiming by irrigation lands that without such reclamation will not produce any agricultural crop. The final proof must show that it has been so reclaimed "by conducting water upon the same" as required. The forms of proof are drawn with direct reference to the proof of such facts as will show compliance by showing results. They are clearly in furtherance of the law, and authorized by the power to make all proper regulations to enforce in the land administration whatever is not specifically prescribed by statute. Besides, these regulations were promulgated by your office with express approval of the head of the department, and you are not authorized to declare them void or violative of the law.

✕ The primal question to be determined is the signification of the word "reclaim," as the same is used in the statute. It is presumable that Congress used this word in its ordinary acceptation, which, according to Webster, is:

To reduce by discipline, labor, *cultivation*, or the like, to a desired state; to rescue from being wild, desert, waste, submerged, or the like; as to *reclaim* wild land, overflowed land, etc.

Hence, I am of the opinion that the intendment of the statute is to provide for the reclamation of such lands from their desert condition to

an *agricultural* state. Congress specified water as the means to that end, but the mere conveying of water upon the land is not a fulfillment of the law, unless in sufficient quantity to prepare such land for cultivation. It would be imputing a vain intent to the statute to interpret the same as requiring a mere occasional seepage of water upon such land, which in itself would not materially change the original *status* of the same so far as agricultural purposes are concerned.

Inasmuch as it has been proved to my satisfaction that Boyce has failed to comply in good faith with what I conceive to be the requirements of the statute his entry should be canceled. ✕

Your decision is accordingly reversed.

DESERT LAND ENTRY—NON-ASSIGNABLE.

CHARLES BOWLING.

The desert land act restricts entries to six hundred and forty acres each, and prohibits one person from making more than one entry.

To recognize the assignability of desert land claims would be to acquiesce in an evasion of the law and to enable one person to acquire the title to an amount of land in excess of the legal limitation.

Commissioner McFarland to the register and receiver, Lake View, Oregon, March 2, 1883.

I am in receipt of the register's letter of November 29, 1882, in which he states that Mr. Charles Bowling, Fort McDermitt, Nev., claims to be the assignee of three desert land entries made at your office, to wit: No. 3 made by Moses Seigle, September 3, 1877; No. 7 made by Arthur W. Fisk, October 8, 1877, and No. 11 made by Cornelius Ryan, May 7, 1878, all upon unsurveyed land in T. 41 S., R. 42 E., in the State of Oregon near the line of the Fort McDermitt hay reserve.

The register states that Mr. Bowling desires to submit final proof for the land, and asks instructions from this office in regard to the matter.

The desert land act restricts entries to six hundred and forty acres each, and prohibits one person from making more than one entry.

To recognize the assignability of desert land claims would be to acquiesce in an evasion of the law and to enable one person to acquire title to an amount of land in excess of the legal limitation.

It has been held by the honorable Secretary of the Interior that desert land claims are not assignable, and that no rights pass to the purchaser when such assignments are made, S. W. Downey (2 C. L. L. 1381).

The application of Mr. Bowling is accordingly rejected.

HOMESTEAD—ADDITIONAL ENTRY.

EDWIN D. SEWALL.

A homestead claimant, otherwise qualified, may make an additional homestead entry under the act of March 3, 1879, notwithstanding his original homestead entry was changed to a cash entry under the act of June 15, 1880.

Acting Commissioner Holcomb to register and receiver, Fergus Falls, Minnesota, July 1, 1881.

With your letter of April 16, 1881, you transmitted proof made by Edwin D. Sewall, under circular of this office, dated September 20, 1879, for the purpose of securing his right to an additional homestead entry under act of March 3, 1879, his original entry No. 3862, N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ sec. 20, T. 128, R. 45, having been made March 19, 1878, at which time he was restricted by law to 80 acres, the land being of the double minimum or \$2.50 class.

By my letter "C," of the 29th of April, you were instructed to allow the additional entry, although the party had not fully complied with legal requirements respecting residence upon his original homestead.

Under date of May 14, 1881, you inform this office that Mr. Sewall immediately after making the proof referred to above and filing his application for an additional entry, made cash entry No. 2266, under act of June 15, 1880, for the land embraced in his original entry, and you ask whether under existing circumstances "he is entitled to an additional entry under act of March 3, 1879; and, if so, what conditions are necessary for him to obtain patent for the tract."

I am of opinion that the party's right to make an additional entry under the act of March 3, 1879, remains, though he may have changed his original homestead to a cash entry under the act of June 15, 1880.

Upon making such additional entry the party will be required to establish an actual residence upon the land embraced therein and continue the same with cultivation for such time as may be necessary with the residence upon and cultivation of his original homestead, prior to date of cash entry, to aggregate the full legal period of five years.

The act of March 3, 1879, provides that "any person who has, under existing laws, taken a homestead on any even section within the limits of any railroad or military road land grant, and who by existing laws shall have been restricted to eighty acres, may enter, under the homestead laws, an additional eighty acres adjoining the land embraced in his original entry, if such additional land be subject to entry."

You will observe that the only conditions precedent are that the original entry shall have been made prior to the approval of the act; that the land entered shall have been of the class described; that the party shall, at date of original entry, have been restricted by existing laws to eighty acres, and that the land applied for must be contiguous to the original homestead and subject to entry.

In the case under consideration the conditions necessary to entitle the party to additional privileges are shown to exist, and the party is undoubtedly entitled to avail himself of those privileges, although his original homestead has been changed to a cash entry.

A party who had thus changed his homestead entry could not make a new entry under the act of March 3, 1879, for the reason that there is no provision of law under which a valid cash entry may be surrendered, and the act referred to requires that a party seeking to make a new entry under its provisions must surrender his original entry to the United States for cancellation before the right to make a new entry can be extended to him. You will inform Mr. Sewall respecting his rights as set forth herein, and in letter "C," of April 29, 1881, referred to above.

In future, when submitting cases of any kind to this office, you are requested to state fully all facts respecting the same, that instructions necessary may be based upon a thorough knowledge of the case in point. Your failure to embody, in your letter transmitting Mr. Sewall's proof, a statement of the fact that he had availed himself of the privilege granted by act of June 15, 1880 (your returns for the month in which his cash entry was made not having reached this office at date of my letter of April 29, 1881), was, to say the least, a careless act, and might have caused this office to commit a serious error. District officers are expected to exercise great care in the submission of special cases, and make in their letters of transmittal full and impartial statements of all facts respecting the same with special reference to the questions of points upon which they desire information or instruction.

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MILITARY RESERVATION—ENTRY—POWER OF PRESIDENT.

Where a homestead entry of public lands has been made by a settler the land so entered cannot, whilst such entry stands, be set apart by the President for a military reservation, even prior to the completion of full title in the settler. But lands covered by a pre-emption filing may be so set apart any time prior to proof and payment.

DEPARTMENT OF JUSTICE,
Washington, D. C., July 15, 1881.

SIR: By a letter received from the chief clerk of your Department, dated the 27th of May last, inclosing papers relative to the proposed withdrawal of lands for a military reservation on the Rio de la Plata, in Colorado; I am informed that you desire my opinion upon this question:

Where public lands have been surveyed, and pre-emption filings or homestead entries have been made in accordance with law, may the Executive, prior to the completion of full title in the settler, set apart and declare a military reservation embracing the lands of said settler?

I have now the honor to state to you my views thereon:

That the President has power to reserve from sale and to set apart, for public uses, such portions of the public domain as are required by

the exigencies of the public service to be appropriated to those uses is too well established to admit of doubt. In the case of *Grisar v. McDowell* (6 Wall., 381), the supreme court remark:

From an early period in the history of the government it has been the practice of the President to order, from time to time, as the 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 authority of the President in this respect is recognized in numerous acts of Congress.

The question submitted, indeed, assumes the existence of the power, and suggests that there is doubt only as to whether it can be exercised with respect to lands which, at the time, are included in a pre-emption filing or homestead entry, and to which steps have thus already been taken by an individual to acquire title under the general land laws.

The power of the President, above adverted to, extends to lands which belong to the public domain of the United States and are subject to sale or other disposal under the general land laws. It is capable of being exercised with respect to such lands so long as they remain unappropriated and unreserved from the public domain, but no longer. When an entry thereof is made under those laws (whether pre-emption, homestead, or other) the particular land entered thus becomes segregated from the mass of public lands and takes the character of private property. "In no sense," observe the supreme court, in *Witherspoon v. Duncan* (4 Wall., 218), "can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property."

In regard to the case of a homestead settlement, the claim of the settler is initiated by an *entry of the land*. This is effected by making an application at the proper land office, filing the affidavit and paying the amount required by section 2290, Revised Statutes, and also paying the commissions as required by section 2238, Revised Statutes. It is true, a certificate of entry is not then given, the certificate being, under section 2291, Revised Statutes, withheld until the expiration of five years from the date of such entry, at the end of which period, upon proof of settlement and cultivation during that period, and payment of the commissions remaining to be paid, it is issued. But upon the entry a right in favor of the settler would seem to attach to the land, which is liable to be defeated only by failure on his part to comply with the requirements of the homestead law in regard to settlement and cultivation. This right amounts to an equitable interest in the land, subject to the future performance by the settler of certain conditions (in the event of which he becomes invested with full and complete ownership), and until forfeited by failure to perform the conditions it must, I think, prevail not only against individuals but against the government. That, in contemplation of the homestead law, the settler acquires, by his entry, an immediate interest in the land, which (for the time being, at least)

thereby becomes severed from the public domain, appears from the language of section 2297, Revised Statutes, wherein it is provided that, in certain contingencies, "the land so entered shall revert to the government."

The result to which this leads is, that where public land subject to homestead settlement has been duly entered under the homestead law it thenceforth ceases to be at the disposal of the government so long as the claim or entry of the settler subsists.

The case of a settlement on public land, with a view to acquire a right of pre-emption, where a declaratory statement has been filed and other preliminary steps taken by the settler, but by whom payment for and entry of the land have not yet been made, which remains to be considered, is relieved of much of its difficulty by the doctrine laid down by the supreme court in *Frisbie v. Whitney* (19 Wall., 187), and in the Yosemite Valley case (15 Wall., 77), respecting the right of the settler in such case as against the government. It was there held that under the pre-emption laws mere occupation and improvement of any portion of the public lands of the United States, with a view to pre-emption, do not confer upon the settler any right in the land occupied, *as against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper; that the power of regulation and disposition conferred upon Congress by the Constitution only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler; that until such payment and entry the acts of Congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner, that is, the privilege to purchase them in that event in preference to others—and that the legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use. "It seems to us little less than absurd," remark the court in the case last cited, "to say that a settler or any other person by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires a right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition."

Thus it is no longer an open question that public land covered by a pre-emption filing, but as to which there has been no payment and entry by the settler, may be appropriated by Congress to public purposes, or otherwise disposed of, without thereby involving a collision with or invasion of any right or interest of the settler in and to the lands.

The inquiry now is, can the President, in such case, under his power to reserve and set apart lands of the United States for public uses, make a similar disposition of the land for such uses?

It should be borne in mind that the power of the President here referred to is recognized by act of Congress (*Grisar v. McDowell, supra*). Such recognition is equivalent to a grant. Hence, in reserving and setting apart a particular piece of land for a special public use, the President must be regarded as acting by authority of Congress; and unless this authority is so restricted as not to extend to land covered by a pre-emption filing (and I am not aware of any restriction of that sort), I do not see why such land may not be as effectually reserved and set apart by the President thereunder as by the direct action of Congress. Land so covered, where payment and entry have not been made, is subject to appropriation or disposal by Congress simply because, although occupied with a view to pre-emption, the settler has not, by virtue of his occupancy, acquired any interest whatever therein as against the government, and it still remains a part of the public domain, over the disposition of which Congress has full control. Upon the same ground (namely, the absence of any right in the settler to the land as against the government, and the fact that it continues in the absolute ownership of the latter), such land would seem to be subject to reservation for public uses by the President when acting by authority of Congress.

I am therefore of opinion that where a homestead entry of public lands has been made by a settler, the land so entered cannot, whilst such entry stands, be set apart by the President for a military reservation even "prior to the completion of full title in the settler"; but that where a pre-emption filing has been made of public land, the land covered thereby may be set apart by the President for such reservation at any time previous to payment and entry by the settler under the pre-emption law.

I am, sir, very respectfully,

WAYNE MACVEAGH,
Attorney-General.

Hon. ROBERT T. LINCOLN,
Secretary of War.

Acting Secretary Bell to Commissioner McFarland, August 5, 1881.

I have received from the honorable Secretary of War, under date of 22d ultimo, and herewith transmit for your information a copy of the opinion of the honorable Attorney-General, rendered July 15, 1881, touching the power of the President to establish military reservations upon the public lands where claims thereto have been initiated by settlers under the homestead and pre-emption laws respectively.

With regard to homesteads, he holds that after original entry made the land is segregated from the public domain, so as to forbid such occupation for military purposes by Executive order; but that in pre-emption cases there is no legal investiture of right as against the

government until the making of final proof and payment of the purchase money.

These are also the views of this Department upon the questions presented; and, having been adopted by the War Department, which has, under the law, jurisdiction of the subject-matter of declaring military reservations, will be treated as authoritative in the adjustment of settlers' claims by your office.

HOMESTEAD—SOLDIERS ADDITIONAL—AGENT.

BARNES AND ALLISON.

Where a soldier's additional homestead claim was filed, with all the papers then required by an agent, who also filed a power from the homesteader authorizing the agent to prosecute the claim and receive the certified papers, they should be delivered to the agent if he has done all within his power to discharge his duties although later papers were filed by another agent with a power of attorney revoking the elder power.

Secretary Kirkwood to Commissioner McFarland, July 22, 1881.

I have considered the appeal of S. F. Barnes from your decision of March 12, 1881, refusing to deliver to him or to his attorneys (Messrs. Curtis, Earle, and Burdett) the official certification of the additional homestead papers in the case of Calvin A. Allison.

It appears that on February 12, 1879, Mr. Barnes filed powers in your office in behalf of said Allison for an additional homestead entry, together with a power of attorney from Allison authorizing him (Barnes) to act for him in said matter and to obtain a certificate. These papers appear to have been in accordance with the requirements of your office then in force.

Subsequently, on September 1, 1879, your office issued instructions requiring from such claimants a further special affidavit as to their military or naval services, identity, etc., in addition to the usual homestead affidavit of the party, to be corroborated by the affidavits of two persons. A copy of these instructions was sent to Barnes, who failed to file such affidavit, after having made reasonable effort to procure the same from Allison as alleged.

On April 28, 1880, your office advised Barnes that new papers had been filed by Allison's attorneys, Messrs. Heylman and Kane, on behalf of said claim, with a power of attorney to them revoking all former powers. You also allowed him thirty days from that date within which to file such special affidavit, and to show cause why such certificate, if allowed, should not be delivered to Messrs. Heylman and Kane. Messrs. Curtis, Earle, and Burdett subsequently appeared in behalf of Barnes, and were allowed twenty additional days within which to file said special affidavit. They allege their inability so to do by reason of Allison's employment of Messrs. Heylman and Kane, as his attorneys, who had filed such affidavit and his refusal to make another.

Your decision that said certificate should be delivered to Messrs. Heylman and Kane, I think was erroneous. So far as appears Barnes properly discharged his duties as attorney for Allison; and the only question submitted is to which of these attorneys shall said certificate be delivered—and this has been settled by the rulings of this Department in like cases.

In the case of Patterson (2 C. L. L., 206), Secretary Schurz held that for the safety of claimants and the Department, as a matter of regulation in practice, the only proper course with respect to attorneys is to continue to deal with the agent presenting the claim for your certification, and to refuse, except for good cause shown, to recognize a subsequent power of attorney for the purpose of delivery of the certificate. He also said in his decision of September 28, 1880, on application for reconsideration of his decision of December 10, 1879, upon the rights of certain parties to additional homestead, that—

The only question involved is, whether the original attorney or attorneys who filed the claim shall, by reason of such action, be recognized as entitled to receive from the Commissioner of the General Land Office the usual certificate as to the soldier's right, or whether the same shall be delivered to the holder of a subsequent power of attorney, revoking the former power under which the certification has been requested. . . . Will the Department permit an attorney in fact, who has done all that is required to be done, so far as any present action of the General Land Office is concerned, to be dismissed from a case upon the mere whim or motion of his principal, without showing any cause whatever for such removal?

And while admitting the general authority of a principal to revoke a naked power, reiterated and affirmed his ruling in the case of Patterson. The same ruling was also held November 24, 1880, in his decision of the case of Roemer.

Concurring in these decisions, yours of March 12, 1881, is reversed, and said certificate will be delivered to Mr. Barnes.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

ALEXANDER LOW.

An administrator cannot purchase under the act of June 15, 1880, the homestead right of a deceased entryman; but such right descends to his widow, minor orphan children, or heirs. Where a transfer of his right, or an attempt at transfer, was made prior to the claimant's death, the right to purchase is in the party concerned, to the exclusion of the widow, children, and heirs.

Commissioner McFarland to register and receiver, East Saginaw, Michigan, July 23, 1881.

Referring to my letter "C" of September 29, 1880, relative to homestead entry No. 3159, in the name of Alexander Low, covering the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ sec. 28, T. 22 N., R. 6 E., Michigan, I am in receipt of your letter of May 27, 1881, stating that Thomas W. Low, administrator of the estate of Alexander Low, deceased, has made application to purchase

the above-described tract, under the act of June 15, 1880, and asking to be instructed how to proceed in the matter.

In reply I have to inform you, that Mr. Low, as administrator, cannot purchase the tract in question, under the provisions of the act of June 15, 1880.

On the death of the original homestead party—if there has been no attempt by him to transfer—the right to purchase under the act of June 15, 1880, descends, according to the rule which governs the descent of the homestead rights under the entry, first, to the widow, if any, and if there be no widow or minor children, then to the heirs of the original homestead party, if any.

If there has been an attempt to transfer, the right to purchase under said act rests with the party in whose favor the transfer was attempted, or his heirs, to the exclusion of the widow, minor children, or heirs of the original homestead party. For instructions under said act, see pages 17 and 18, circular of October 1, 1880. In case of entry thereunder being allowed in favor of the heirs of the homestead party, the certificate will issue in favor of "the heirs" of said party, and the patent also, under which the title will inure to the heirs as if individually named.

PRACTICE—SECOND CONTEST.

VAN OSTRAND *v.* LANGE.

Where one contest against a homestead entry is pending a second application to contest will be rejected.

Secretary Kirkwood to Commissioner McFarland, November 16, 1881.

I have considered the appeal of G. E. Van Ostrand from your decision of June 2, 1881, rejecting his application to contest the homestead entry of Frank Lange, No. 7271, made February 16, 1880, upon certain lands in Sec. 2, T. 24, R. 8 W., Norfolk, Nebr., because, prior to the filing of said application, a contest had been initiated by one Woodworth against said entry and was then pending.

Your decision is affirmed.

HOMESTEAD ENTRY—CREDIT FOR SETTLEMENT.

MARGARET WALKER.

In case of settlement upon land by a married woman, who after the lapse of time became a widow, and made a homestead entry of said land, credit for settlement back of the date of her husband's decease—the time that she became a qualified homesteader—will not be allowed.

*Commissioner McFarland to register and receiver, Stockton, California,
December 9, 1881.*

Homestead entry No. 3394, final certificate No. 1112, in the name of Margaret Walker, covering the NE. $\frac{1}{4}$, Sec. 24, T. 8 S., R. 7 E., is suspended. The entry was made April 11, 1881, under the provisions of

the act of May 14, 1880, and settlement was alleged in 1872. Final proof was made October 3, 1881.

From the proof submitted it appears that Mrs. Walker went upon the land with her husband in July, 1873, and resided there with him until he died, June 17, 1879, and continued such residence till date of proof. The plat of survey was filed in your office March 14, 1881.

Had Mrs. Walker's husband made entry of the land she would have been entitled to credit for residence in making final proof back to date of settlement; but as party to the original entry she cannot receive any benefit of settlement prior to the date she was qualified, under the law, to make a homestead entry, which was at the date of her husband's death.

The entry will therefore remain suspended, and after the expiration of five years from June 17, 1879, the date of her husband's death, she will be required to submit supplemental proof showing continued residence from October 3, 1881, the date of former proof, and you will so advise her.

HOMESTEAD ENTRY—RESIDENCE BEFORE ENTRY.

MICHAEL MCVVEY.

Where the land was settled and resided upon by claimant before making his entry, credit could be given for such residence if the land had been vacant, but not so when occupied by another party, under entry subsequently canceled. In that case credit can only be given from date of such cancellation.

Commissioner McFarland to Michael McVey, Sutton, Nebraska, August 10, 1881.

In reply to your letter of the 24th ultimo, I have to state that the records of this office show that you made homestead entry No. 16401 for the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 32, T. 7, R. 5 W., under date of November 26, 1878, and you state that you have resided thereon since the year 1873, and ask if you cannot receive credit for such part of said residence as will be required to make up the five years required under the homestead law, and thus make proof without further delay.

With reference thereto I will state that I find from an examination of the records of this office that one P. M. Cillin made homestead entry for this same tract, under date of April 17, 1872, and said entry remained intact until October 10, 1878, when it was canceled for relinquishment.

Had the tract been vacant and unappropriated when you settled upon it, and remained so up to the date of your entry, then you could have been allowed credit thereon from date of settlement, without regard to the date of your actual entry, as provided by the third section of the act of May 14, 1880, but in view of the existing entry you can only obtain credit in computing the five years required under the law from date of cancellation of said entry—October 10, 1878.

HOMESTEAD—ADJOINING FARM ENTRY.

THOMAS S. WETHERBEE.

The owner of an *undivided portion* (less than 160 acres) of a tract of land upon which he resides, if qualified, may make an adjoining farm homestead entry under section 2289 of the Revised Statutes.

Commissioner McFarland to Thomas S. Wetherbee, Waldo, Oregon, September 27, 1881.

I am in receipt of your letter of the 8th ultimo, in which you state that you are the owner of the undivided one half of "an eighty-acre tract," and you ask if you will be allowed to make an adjoining farm entry, embracing an area of 120 acres.

In reply you are advised that if you are legally qualified, the fact that your interest in the tract named is undivided would be no bar to your making an adjoining farm entry for 120 acres.

For particulars relative to the requirements of the statute governing this class of entries, you are referred to the district officers for the district in which the land described is situated.

HOMESTEAD ENTRY—MARRIED WOMAN.

EDA M. CARNOCHAN.

A married woman who, prior to marriage, made a homestead entry within railroad limits of land enhanced to the double minimum price of \$2.50 per acre, and was restricted by then existing laws to entry of eighty acres, is entitled to make an additional entry under the act of March 3, 1879.

Commissioner McFarland to register and receiver, Visalia, California, September 29, 1881.

I am in receipt of your letter of the 25th ultimo, transmitting the application of Eda M. Carnochan to enter the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 30, T. 20 S., R. 25 E., under the provisions of the act of March 3, 1879, as additional to homestead entry No. 2390, for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of said Sec. 30. You refused to allow the entry for the reason that she is now a married woman, and therefore is disqualified from making a homestead entry, and submit the case to this office for instructions.

The records of this office show that on May 24, 1877, Eda M. Cady made homestead entry No. 2390 for N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 30, T. 20 S., R. 25 E., and on September 13, 1879, commuted the same to cash entry No. 3230, in the name of Eda M. Carnochan, her present legal name. The land thus entered was rated at \$2.50 per acre, and she was restricted by existing laws to an entry of eighty acres.

The act of March 3, 1879, provides that "any person who has, under existing laws, taken a homestead on any even section within the limits

of any railroad or military road land-grant, and who, by existing laws shall have been restricted to eighty acres, may enter under the homestead laws an additional eighty acres of land adjoining the land embraced in his original entry, if such land be subject to entry."

Mrs. Carnochan, *nee* Cady, was qualified to make the original homestead entry, and was restricted to eighty acres. The act of March 3, 1879, is remedial in its provisions, and in order to place those who had already made entries upon an equal footing with those who might thereafter enter double minimum land granted them the privilege of making additional entries. The fact of Miss Cady having married does not, in my opinion, disqualify her from availing herself of the provisions of said act.

The additional homestead papers are herewith returned, and you will allow Mrs. Carnochan to perfect her entry, after which you will give the papers the current number and transmit them to this office with your regular returns.

HOMESTEAD—COMMUTATION—FINAL AFFIDAVIT.

JOHN J. MCKAY.

Where a homestead claimant failed to make settlement within six months after entry on the tract entered he will not on account of such failure be prevented from making commutation entry upon proof of settlement and cultivation such as would entitle him to make entry upon the pre-emption law.

*Commissioner McFarland to register and receiver, Benson, Minnesota,
December 31, 1881.*

July 2, 1880, John J. McKay, of Appleton, Swift County, Minnesota, made homestead entry No. 10577, for the NW. $\frac{1}{4}$ Sec. 26, T. 121, R. 42. October 6, 1881, he offered to commute the entry to cash under section 2301, Revised Statutes. His proof showed that he did not establish a residence upon the land within six months from date of entry, the date of performing that act being April 7, 1881. Because of this failure to establish residence on the land within the period prescribed by homestead law you declined to accept the purchase money and issue the usual receipt and certificate, and transmitted the proof to this office for consideration with your letter of November 7, 1881.

Upon examination of the papers it was determined by this office to submit the case to the board of equitable adjudication, and by letters C of November 28 and December 13, 1881, W. N. Severance, of this city, and the Hon. H. B. Strait were informed that such action had been taken.

I have reconsidered the matter, however, and am now of opinion that such submission is not necessary, inasmuch as section 2301 Revised Statutes provides that—

Nothing in this chapter shall be so construed as to prevent any person who has availed himself of the benefits of section 2289, from paying

the minimum price for the quantity of land so entered at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases directed by law, on making proof of settlement and cultivation as provided by law, granting pre-emption rights.

The failure to establish residence upon the land within six months from date of homestead entry does not, therefore, in my opinion, create a defect in this entry. It is only required in commutation cases that the party shall make proof of settlement and cultivation as required by pre-emption law, and if upon examination of his proof it be found that such settlement and cultivation have been made as would entitle him to make payment for the land under pre-emption law and receive patent, it is immaterial whether he shall have complied with the homestead law in respect to time of making settlement upon the land, provided no adverse claim for the tract appears of record, as it is expressly provided that "nothing in this chapter shall be so construed as to prevent" him from making the payment and receiving patent.

Upon a re-examination of the case I find that the final affidavit is not executed in proper form, the ordinary form (No. 4070) for homestead proof having been used instead of that prescribed for commutation proof (No. 4069).

The party is therefore required to execute a new affidavit upon the proper blank, and upon receipt of the same by you with the amount of purchase money you will issue the usual receipt and certificate in the case and transmit the same to this office with your regular returns for the month in which issued.

Inform the party as to the contents and requirements of this letter.

ACT OF JUNE 15, 1880—REPAYMENT.

W. W. DEWHURST.

A party having purchased the land embraced in his homestead entry under the act of June 15, 1880, is not entitled to relinquish the same, or any portion thereof, for the sole purpose of obtaining repayment of the purchase money, nor is he entitled to such repayment for the reason that the character of the land does not suit him.

*Commissioner McFarland to register and receiver, Gainesville, Florida,
January 9, 1882.*

Referring to your letter of the 22d of November last, inclosing petition of W. W. Dewhurst to amend his homestead entry, No. 4057, for lot 1, and E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 32, T. 20 S., R. 36 E., Florida, purchased by him under the act of June 15, 1880, I have to state that it appears by the records in this office that said entry was made by Dewhurst September 22, 1876, containing 162.84 acres; that

on the 5th of April last he made application and purchased the land embraced by said homestead entry for cash, No. 1480, Gainesville series.

It now appears by the petition presented by Dewhurst that he desires to relinquish the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, or S. $\frac{1}{2}$ of lot 1, embraced in his homestead entry, and have refunded to him the amount of purchase-money paid thereon. Furthermore he desires to have the area of the tracts retained by him computed according to the actual topography of the land as shown by the recent coast survey, which represents that quite a portion of the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ or N. $\frac{1}{2}$ of lot 2, and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ is covered by navigable water, and that the purchase money for that portion actually covered by water not shown by the official plat of survey also be refunded.

On examination of the official plat of survey in this office I find that there is quite a difference between said plat and the map of coast survey filed by Mr. Dewhurst; but in view of the fact that no evidence of fraud in the original survey has been presented, nor any evidence that said survey did not correctly represent the character of the lands at the date thereof, to wit, March 1, 1848, and the lands having been disposed of regularly under such survey this office has no authority of law to enter upon the resurvey or direct a resurvey of the lands in question.

In relation to the request of Mr. Dewhurst to be allowed to relinquish a portion of his entry as above indicated, and have the purchase money refunded thereon, I have to state that he having decided to take the benefit of said act of June 15, 1880, and having paid the government price, as stipulated by the provisions of said act, there is no authority in law whereby this office can refund the purchase money paid on any portion of the land.

Approved, HOMESTEAD ENTRY—DEVISEE.
16 I D 4 6 4

SARAH LEONARD.

A homesteader cannot by will defeat the law, which provides that in case of the death of both father and mother, leaving minor children, the homestead right shall inure to their benefit. In this case a *feme sole* devised her homestead to her son and died. Held that in such cases, in order that the devisee may obtain title it must appear satisfactorily that no infant children survived.

Commissioner McFarland to Hon. W. D. Washburn, House of Representatives, January 13, 1882.

I am in receipt of your letter of the 9th instant, inclosing one from John Carmody, esq., dated Princeton, Minn., January 4, 1882, respecting the delay in issuance of patent in Taylor's Falls, Minn., homestead entry No. 1831, final certificate No. 1369, for N. $\frac{1}{2}$ of SE. $\frac{1}{2}$ and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, 14, 35 N., 27 W., 4th P. M.

This entry was made July 19, 1871, by Sarah Leonard, who, on the 25th day of May, 1874, executed a will devising all her right, title, and interest in the land described to her son, John Carmody. The will was probated and declared valid by the probate court of Sherburne County, Minnesota, October 5, 1878, and on the 7th of that month the said John Carmody was duly appointed administrator of the estate of Sarah Leonard, deceased.

November 26, 1878, John Carmody, as devisee, made final proof as prescribed by section 2291 of the Revised Statutes, and final certificate and receipt were issued by the register and receiver on that day in his name.

Section 2292, Revised Statutes provides that "in the case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children," and it is held by this office that a homestead party cannot will away the right of infant children thus guaranteed by express statutory provision.

The final proof in this case does not show whether or not infant children survived the homestead party, and in the adjudication of such cases it is an official requirement that the proof shall be explicit upon this point, that the object of the law may be fully secured and that the orphans may be protected in their legal rights.

The issuance of patent in the entry described has therefore been deferred until the question pertaining to the survival of infant children shall be satisfactorily determined. Upon the receipt of testimony upon this point, properly transmitted through the district land office, the case will receive due consideration and such action will be taken in the matter as may be warranted by the facts.

PRACTICE—SECOND CONTEST—PREFERENCE RIGHT OF ENTRY.

BENNETT *v.* COLLINS.

Where a second contest against a homestead entry was initiated before the determination of a prior contest, and the entry in question was canceled as a result of the first contest, the second contestant has no preference right of entry should the first contestant fail to make entry. The preference right cannot be transferred or assigned.

*Commissioner McFarland to register and receiver, Grand Forks, Dakota,
January 13, 1882.*

I am in receipt of your letter of the 22d November last, transmitting testimony and proceedings in the case of Richard Bennett *v.* Lizzie Collins and Edmund Demers *v.* Lizzie Collins, both cases involving homestead entry No. 1337 SE. $\frac{1}{4}$ 4, 150, 51. Bennett filed his affidavit of contest on the 26th of May, and Demers on the same day, but at a later hour. The case of Bennett is therefore entitled to be first considered.

The proceedings appear to be regular, and upon the testimony presented you decided that the entry should be canceled.

The cancellation of the entry resulting from the first contest, the subsequent one by Demers necessarily falls and the testimony therein is not considered.

You ask, in connection with these cases, should Bennett fail to make entry of the land within the period allowed him for that purpose by the act of May 14, 1880, or should he waive his right as contestant, would the tract be subject to entry by the first legal applicant, or should Demers have the preference.

The right allowed a contestant by the act of May 14, 1880, is a personal one and cannot be transferred or assigned. Neither is it a bar to an entry of the land by another party, at any time subsequent to the cancellation of the contested entry.

An entry allowed within the period during which the contestant's right attaches would, however, be forfeited should he present his application within the time allowed him for that purpose.

In the case in question the first legal application for the land should be received and made of record, and should Bennett fail to exercise his right of entry under the law it would be allowed to stand.

Demers could claim nothing by virtue of the contest instituted by him.

HOMESTEAD—RESIDENCE—SECOND CONTEST.

NICKALS *v.* BIRD ET AL.

In the cases of two homesteaders who entered land within the inclosure of an occupant, and were prevented from establishing permanent residence on the same within six months from date of entry because of threats of the occupant, and a decision of the local land officers, in a contest brought by the occupant, in favor of the latter, rendered within the six months and thereafter set aside: *Held*, on second contest brought by the occupant on the ground of abandonment, that time should not run against the homesteaders during the period from date of said decision of the local officers and the date that the same was set aside, and that therefore inasmuch as abandonment for a period of over six months from date of entry could not be shown, the entries were not subject to attack under section 2297 of the Revised Statutes.

Commissioner McFarland to register and receiver, Eureka, Nevada, January 13, 1882.

I am in receipt of your letter of October 24, 1881, transmitting the testimony taken at hearings held at your office July 11 and 12, 1881, with a record of the proceedings in the contested cases of William W. Nickals *v.* the parties to the following homestead entries involving the entries, to wit: No. 159, March 23, 1880, Thompson J. Bird SW. $\frac{1}{4}$ Sec. 17, 20 N., 52 E.; No. 161, March 23, 1880, Peter Winn, SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 17, N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ Sec. 20, and NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ Sec. 21, 20 N., 52 E.

The entries were attacked by Nickals on the ground of abandonment, by affidavits filed April 21, 1881, a period of a year and nearly one month after date of the entries.

It appears that Nickals has fenced a tract containing about 1,000 acres, and that the tracts in said entries are almost entirely within the inclosure.

Nickals states that Bird appeared on the outside of the fence about the 27th or 28th of September, 1880, and commenced the construction of a small house, which was found partly finished a few days after, and situated within the inclosure, and that in May, 1881, Bird again appeared and put a canvas roof on the house. Nickals also states that a spring had been cleared out and a ditch opened, requiring about two days' work. Although the testimony of Nickals is to the effect that Bird did not make settlement until the 27th of September, 1880, his statement is not very positive as to the date, and is unsupported by his witnesses. On the other hand Bird testifies positively that he commenced building the house on September 20, 1880, and that he was on the land in March and May, 1881, and, in June, 1881, went thereon and remained there. Bird is positive from dates and circumstances that he commenced improving the tract on the 20th of September, 1880. At the latter date, six months from date of entry had not expired. Bird states that the land having been in litigation and the decision of your office against him he felt unable to risk expenditure thereon sufficient to establish a permanent residence upon the tract until informed of the decision of this office in his favor in April, 1881. Bird referred to the previous contest of Nickals against Burbank, Bird, Winn, *et al.*, which will be referred to further on.

The testimony in the case of Winn shows that he conveyed lumber to the land embraced in his entry May 24, 1881, and that he was then threatened with violence by Nickals, in consequence of which he, Winn, left the lumber and returned to Eureka. On June 5, 1881, Winn commenced the erection of his house on the land, but it appears that he was unable to finish it previous to the hearing, because of sickness and poverty, and sought shelter with Bird, who lived in the vicinity. Winn was sick nearly all the time from August, 1880, until May, 1881, part of the time being in the county hospital. These facts were not disputed on trial, cross-examination being waived and no evidence adduced in rebuttal. It would appear, therefore, that it was impossible for Winn to have made settlement for a period commencing about five months after entry and ending subsequently to the initiation of the contest in April, 1881.

Bird and Winn claim under the homestead statutes for the benefit of soldiers and sailors.

You decided that the defendants had failed to comply with the requirements of the homestead law in respect to residence, citing in your opinion as to Bird's case the decision of the honorable Secretary of the Interior in the case of *Byrne v. Catlin* (2 C. L. L. 406), in which it was

held that going upon the land by the homestead claimant and remaining over night once or twice in six months fails to establish the residence contemplated by the homestead law. Defendants took an appeal from your decision.

The prior contest of Nickals against the parties above mentioned was made on the ground that the lands, being inclosed and in the possession of Nickals, were not subject to homestead entry. This contest was commenced April 5, 1880, less than one month after the entries were made, and on August 31, 1880, before the expiration of six months from date of entry, you rendered a decision adverse to the homestead parties. The decision of this office dismissing the contest, dated March 31, 1881 (Copp's L. O. for July, 1881, p. 57), which became final, reached your office on or about April 15, 1881, in which month the present contest was commenced. It therefore appears that the homestead claimants were embarrassed by the possession of Nickals and the adverse decision of your office, rendered within six months from date of entry and not set aside until a few weeks prior to the initiation of the present contest. When the first contest commenced, in April, 1880, there was ground for apprehension as to the result upon the part of defendants, in view of the decisions then followed; besides, upon the decision of your office in August, 1880, there was danger of ejection by due process of law in case of inhabitation of the tracts by them. I do not think that it has been shown, as you conclude, that the "element of good faith" has been lacking on the part of defendants. The case of *Byrne v. Catlin*, cited by you, is not analogous to the ones under consideration. On account of the circumstances mentioned I think that time should not run against the defendants.

I have mentioned testimony relating to a period of time subsequent to the initiation of this contest, not as relevant to the issue, but in order that my ruling may be the better understood. It being held that time should not run against the defendants up to April, 1881, it follows that the entries at the time of the contest in said month were not subject to attack on the ground of abandonment under section 2297 of the Revised Statutes. Your decision is reversed for the reason given.

HOMESTEAD ENTRY—RELINQUISHMENT.

EDWARD EZERNACK.

Relinquishment of homestead entry because of conflict and to avoid contest, does not prevent party from making another entry.

Commissioner McFarland to register and receiver, Natchitoches, La., February 2, 1882.

Referring to your letters of June 23, September 3, and December 3, 1884, in the matter of homestead entry No. 2010, of Edward Ezernack, made March 1, 1881, for the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ Sec. 20, T.

8 N., R. 8 W., La. M., and subsequently found to be in conflict as to the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, with Rio Hondo claim No. 102, in the name of James McKim, jr., and for this reason relinquished and canceled under the act of May 14, 1880, I have to state that inasmuch as the said entry was illegal in its inception, because of the conflict here stated, and was for this reason, and to avoid contest, relinquished and canceled, the act of the party thereto cannot be considered such a voluntary relinquishment as will deprive him of the right to make another homestead entry.

The party is, therefore, hereby allowed to make another entry, with credit for existing payments, and you will so inform him.

HOMESTEAD ENTRY—RESIDENCE ON SEGREGATED LAND.

ELI EWELL.

Credit cannot be given for residence on a homestead, under act of May 14, 1880, during the existence of a prior entry on the land.

Commissioner McFarland to Eli Ewell, Spring Grove, Nebraska, February 2, 1882.

In reply to your letter of the 20th ultimo, inquiring as to making proof upon your homestead entry, No. 6661, made April 21, 1879, for the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Sec. 15, T. 4, R. 20 W., alleging that you have resided thereon for the past six years, I have to state that the records of this office show that homestead entry No. 2544 was made upon the tracts named in 1874 and remained of record until January 7, 1879, when it was canceled for relinquishment. Had it not been for this entry, and had there been no adverse claim to the tracts for the last six years, or during your residence thereon, you could have received credit for such time, as provided by the act of May 14, 1880, in computing the term of residence required to acquire title; but in view of said existing entry you can only receive credit from the date of cancellation of said entry.

HOMESTEAD—PRELIMINARY AFFIDAVIT.

GIESEKE v. KIWILIAN.

Where an imperfect knowledge of the English language is shown, parties can cure a defective entry by filing a new affidavit.

Commissioner McFarland to register and receiver, Benson, Minnesota, February 6, 1882.

The case of Fred. Gieseke v. Martin Kiwilian, involving homestead entry No. 9977 on the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ Sec. 20, T. 120 N., R. 43 W., was closed by this office June 18, 1881, Kiwilian having purchased the land under the second section of the act of June 15, 1880,

per cash entry No. 4860. I am now in receipt of your letter of December 12, 1881, transmitting the application of Gieseke to have the cash entry above mentioned canceled for the reason that the homestead entry upon which it is based is wholly illegal. Gieseke alleges, and the testimony shows, that Kiwilian made the original affidavit before the clerk of the court for the county in which the land is situated, per section 2294, Revised Statutes; that neither he nor any member of his family was at that time residing on the tract.

Kiwilian testifies, however, that his knowledge of the English language is very imperfect; that he was not aware that he made affidavit to the statement above mentioned. It has been the practice of the office to permit parties whose entries are found to be defective in this respect to complete the same by filing a new affidavit, provided the first appeared to have been made in ignorance of its contents. I see no reason to doubt that such was the case with Kiwilian. The entry is not, therefore, wholly void, and the purchase of the tract by Kiwilian is, I think, within the scope of the act of June 15, 1880.

His entry will not, therefore, be disturbed, and you will so advise the parties.

HOMESTEAD—DEVISEE—RELINQUISHMENT.

43-245

H. C. DODGE.

The devisee of a homestead claimant is entitled to all the privileges that would descend to the heirs.

Commissioner McFarland to register and receiver, San Francisco, California, February 10, 1882.

Referring to my letter of November 11th last, relative to homestead entry No. 2762, covering the NW. $\frac{1}{4}$ Sec. 6, T. 23 S., R. 8 E., requiring H. C. Dodge (devisee of N. E. Adams, the homestead claimant) to furnish an affidavit explaining his connection with the case and also evidence establishing the date of Adams's death, I am in receipt of your letter of the 26th ultimo, transmitting certain papers bearing on the case.

From all the papers in the case it would appear that on May 7, 1877, Mr. Adams made the entry in question, the affidavit in which was made before the clerk of the court for the county in which the land is situated, May 3, 1877. Adams died May 24, 1877, devising his homestead entry to Dodge; the will was filed for probate April 23, 1879, and letters testamentary were issued May 17, 1879, instead of 1877, as stated in my former letter. Mr. Dodge fully explains his connection with the case.

May 24, 1881, Escolastica Freeman initiated a contest for abandonment against said entry, notice of which was served on the devisee, who appeared before you at the time fixed for the hearing.

From the testimony submitted at the hearing it appears that Mrs. Freeman has resided upon and cultivated the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of said Sec. 6 since 1873, and desires to enter the same under the provisions of the act of March 3, 1879, and May 14, 1880. It also appears that Mr. Dodge entered into possession of the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of same section, and cultivated and improved the same by tenants for over two years next preceding Adams's death; that Adams was entitled to a credit of three years for service in the army during the war of the rebellion. The devisee relinquishes all claim to the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of said Sec. 6, and desires to perfect title to the residue of Adams's entry.

I am of the opinion that the devisee of a homestead claimant is entitled to all the privileges that would descend to the heirs, and in view of the decisions of the honorable Secretary of the Interior in the cases of *Dorame v. Towers* (2 C. L. L. 438) and *Stewart v. The Heirs of Jacobs* (id. 459) the character of the proof submitted, and of your recommendation, you will, after Mr. Dodge shall have given due notice that on a certain day, to be fixed by you, he will apply for final papers covering the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of said Sec. 6, upon the proof already submitted, if no objection is made, issue final papers in the case.

Homestead entry No. 2762 is this day canceled on the records of this office, so far as it relates to the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ Sec. 6, T. 23 S., R. 8 E., and you will so note on your records. The application, affidavit, etc., of Mrs. Freeman are herewith returned for completion, and to be regularly numbered and transmitted to this office with your regular returns.

SOLDIERS' ADDITIONAL HOMESTEAD—DATE OF FILING.

HENRY BOOTH.

The rights of a soldier making homestead entry go back to the date of his filing, providing the entry is in other respects regular, and carries with it the right to an additional entry.

*Commissioner McFarland to Hon. Thomas Ryan, House of Representatives,
February 16, 1882.*

Referring to my letter of the 10th ultimo, addressed to you, rejecting the application of Henry Booth to make a soldier's additional homestead entry on the S. $\frac{1}{2}$ of NW. $\frac{1}{2}$, Sec. 34, T. 21 S., R. 16 W., embracing 80 acres, I have to advise you that my attention having been called to said decision by a letter filed in this office from Mr. Booth, I find the same to have been based upon a decision by the Secretary of the Interior in the case of J. N. Miller, dated March 18, 1880, in which it was held that a party who had filed a pre-emption declaratory statement prior to June 22, 1874, and afterwards changed the same to a homestead entry, could not avail himself of the provisions of the act of May 27, 1878, in respect to the computation of time for perfecting title from date of original set-

tlement, because prior to the enactment of the statute of 1878 "persons who had transmuted a pre-emption filing to a homestead entry were not entitled to an allowance for time under their pre-emption settlement, but the computation of time required to perfect title under their homestead entry dated from the day of such entry only."

The case presented by the claim of Mr. Booth differs from the case decided by the Secretary in this particular. Soldiers' homestead rights date back to the period of filing the declaratory statement, if the entries are in other respects regular. The limitation of time in respect to entries commuted from pre-emption filings does not exist when the homestead entry is founded on a homestead declaratory statement instead of on a pre-emption filing. It therefore appears to me upon review that the decision of the Secretary in the Miller case is not applicable to this case.

The facts in this case appear to be that Mr. Booth filed a soldier's homestead declaratory statement for the NW. $\frac{1}{4}$ of Sec. 34, T. 21 S., R. 16 W., Larned district, Kansas, on June 6, 1874. Prior to that date he had contested the homestead entry of one Oliver Boyd on this tract. Before the cancellation of Boyd's entry, and while the contest was pending, Mr. Booth made settlement on the land. One Webb also made a pre-emption settlement on the same land during the pendency of the contest and before the cancellation of Boyd's entry.

Upon the cancellation of Boyd's entry Mr. Booth filed his soldier's declaratory statement, and on the same day and at about the same time Mr. Webb filed his pre-emption declaratory statement. Booth made his homestead entry, under his filing, on October 29, 1874. Webb contested Booth's entry. A hearing was had, the local offices and this office deciding in favor of Booth. Mr. Webb appealed to the Secretary, who decided that the filings should be considered as having been made at the same time; that both parties had made valuable improvements on the land, and that their rights were equal. He therefore instructed that a division of the land should be made in equal parts, so as to include the respective improvements of the parties, and that each should be allowed to enter other contiguous public land, if such there should be, so as to include one hundred and sixty acres in all.

Mr. Booth filed for one hundred and sixty acres. He actually settled previous to filing, and his settlement became legal the day the former entry was canceled, which was the date of his filing. His right, under the soldiers' homestead law, related back, therefore, to the date of his filing, which was prior to the passage of the Revised Statutes. He made entry of one hundred and sixty acres under this right. The subsequent adjudication reduced this entry to eighty acres. The right to have amended his entry so as to embrace eighty acres more of contiguous land, in accordance with the instructions of the Secretary, should have inured to him under the general homestead laws if his entry had been made under those laws. But his entry was made under the soldiers'

homestead laws, which do not restrict additional entries to contiguous land. He was unable to avail himself of the privilege of amending his entry so as to include one hundred and sixty acres contiguous, and he now applies to make an additional entry under the soldiers' homestead laws in lieu of the privilege of amending his former entry.

The question presented is, whether an entry can be made additional to an original entry initiated prior to June 22, 1874, but not consummated until after that period. Soldiers' additional entries are allowed when a less quantity of land than one hundred and sixty acres was entered under the soldiers' homestead laws prior to June 22, 1874.

As the rights of a soldier making a homestead entry go back to the date of his filing, if the entry is in other respects regular, and if settlement was made at date of such filing, I am of the opinion that the right of additional entry should also be deemed to relate back to the date of such filing, when, as in the present case, there was actual settlement on the land at date of filing, and the restriction of the final entry to a less quantity than one hundred and sixty acres occurred from a subsequent adjudication of conflicting rights, which adjudication was, as a matter of fact, in this case determined upon the basis that the homestead right attached at the date of filing the homestead declaratory statement.

Mr. Booth will accordingly be allowed to enter the additional tract claimed. The usual certificate of the right to make such entry will be delivered to A. A. Thomas, esq., Mr. Booth's attorney.

20 ID 428

ACT OF JUNE 15, 1880—RIGHT OF PURCHASE.

WILLIAM C. PASCOE.

The right to purchase, under act of June 15, 1880, is not a personal one, and the provision that "persons who have heretofore under any of the homestead laws, entered lands properly subject to such entry," comprehends and includes all persons who, in any manner by original application or operation of law, have succeeded to the right to make final proof and payment of fees and take a patent for the land.

Secretary Teller to Commissioner McFarland, April 24, 1882.

I have considered the appeal of William C. Pascoe from your decision of June 18, 1881, allowing Eunice A. Clark, widow of Frederick A. Clark, deceased, to purchase, under the second section of the act of June 15, 1880 (21 Stats., 237), the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ Sec. 25, T. 20, R. 4 E., Olympia, Washington Territory.

The tract was embraced in the homestead entry of Frederick A. Clark, made May 29, 1877. He died in October, 1878, and on March 22, 1880, Pascoe initiated a contest against him for abandonment of the tract. In view of the facts elicited at the hearing, the local register recommended

cancellation of the entry, and the receiver recommended a dismissal of the contest. Your office held, on appeal, September 27, 1880, that the entry was valid and subsisting at the date of Clark's death, and that it was competent for his widow to perfect it. Pascoe appealed from this decision, but you have not yet transmitted the appeal to this Department; nor is this important in view of the decision of the Department (*Gohrman v. Ford*, Reporter, April, 1881; *Johnson v. Halvorson*, Reporter, July, 1881), that a homestead entryman will be allowed to purchase the land embraced in his entry, after contest, and before cancellation of the entry; and that the preferred right of a *bona fide* contestant under the second section of the act of May 14, 1880 (21 Stats., 140), and his right to continue a contest to final determination, is good as against all third parties except an entryman claiming the right of purchase under the second section of the act of June 15, 1880. This section authorizes "persons who have heretofore, under any of the homestead laws, entered lands subject to such entry" to "entitle themselves to said lands by paying the government price therefor," provided the purchase shall not interfere with the rights or claims of others who may have subsequently entered for the lands under the homestead laws.

Your decision of June 18, 1881, finds that the deceased husband of the applicant was a qualified homestead settler, and had made a valid entry of the tract, subsisting and complete in all essential particulars, and that she, as his widow, was entitled to purchase it under said act. The only material point of appeal is the allegation that the act limits the right of purchase to the entryman, and hence that, although the husband, in his life-time, had this right to purchase, his widow has not.

An analogous question was decided by this Department, December 19, 1881, in the case of Annie Anderson (formerly Annie Middleton, Reporter, December, 1881), who applied to make an additional entry under the act of March 3, 1879 (20 Stats., 472), by virtue of a homestead entry made by her deceased husband, who had complied with the requirements of the law to the date of his death. This act provided for additional homestead entries by "any person who has, under existing laws, taken a homestead on an even section within the limits of any railroad or military road land grant," etc., and my predecessor held that "the provisions of the act are remedial, and while the beneficiaries take by descriptive words, thus confining the grant to a personal right, the spirit of the act must be observed in recognizing whomsoever may have been proper objects of relief, if pointed out with reasonable clearness by the descriptive language employed," and that the words "who has under existing laws taken a homestead," comprehend and include all persons who in any manner, by original entry or by operation of law, have succeeded to the right to make final proof and payment of fees, and take patent for the land. As this right is cast upon the widow by operation of law, she must hold to have taken the homestead under existing

laws, and should not, by reason and inequitable construction, be deprived of the benefit of the amendatory statute.

The reasons apply with equal force to the second section of the act of June 15, and authorize a purchase of the tract in dispute by the widow of the deceased entryman.

SETTLEMENT ON APPROPRIATED LAND.

KATE COX.

Inasmuch as appropriation of land by actual entry on the records excepts the same from initiation of an entry by one not having a prior legal right, a party who had settled on land previous to entry by another, is not, upon cancellation of such entry, and entry by himself, entitled to credit for period of settlement either before or while the prior entry subsisted.

*Commissioner McFarland to register and receiver, Wa Keeney, Kansas,
April 26, 1882.*

Your letter of December 20, 1881, transmitting upon appeal from your refusal of the same the final proof of Kate Cox, for the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 10 in T. 13 S., R. 21 W., based on original homestead entry No. 5077, made October 7, 1880, for the same tracts of land is received.

The proof in this case was presented on the 9th day of November, 1881, and rejected by you for the reason that the records of your office show that the NW. $\frac{1}{4}$ of said Sec. 10, T. 13 S., R. 21 W. was entered by Charles C. Cox, August 29, 1877, per timber culture entry No. 321, which entry was canceled by relinquishment October 7, 1880, and the N. $\frac{1}{2}$ SW. $\frac{1}{4}$ of said Sec. 10 was entered by Columbus A. Powell, February 27, 1879, per homestead entry No. 2931, which entry was canceled by relinquishment May 31, 1880. You hold, therefore, that claimant has not resided upon said tracts of land for a sufficient length of time, since the same became subject to settlement and entry, to entitle her to make final homestead proof thereon. I concur with you in this conclusion, notwithstanding it appears from the evidence presented in this case that the claimant settled upon and has resided on the land in question continuously since June 1874, under the circumstances she can acquire no right by virtue of such settlement. Her right to this land attached at the date of the cancellation of timber culture entry No. 321, viz: October 7, 1880 (being also the date of her homestead entry) from which said date, to entitle her to a patent, it will be necessary for her to continue residence upon and cultivation of the same for the full required period, that is, five years from date of her said homestead entry.

Further, the act of May 14, 1880, cuts no figure in this case.

ACT OF JUNE 15, 1880—TRANSFEEE.

THOMAS F. WEAVER.

A party purchasing of a homesteader the improvements, right of entry, and possession of the same, and where the same is transferred by *bona fide* instrument in writing, can pay the government price for the same under the act of June 15, 1880.

Secretary Teller to Commissioner McFarland, April 27, 1882.

I have considered the appeal of Thomas F. Weaver from your decision of June 2, 1881, rejecting his application, made on the 19th of May, 1881, to purchase under section 2 of the act of June 15, 1880 (21 Stats., 237), the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, 2, 3 S., 69 W., Denver, Colorado, embraced in the homestead entry of Charles Van Alstine, No. 2696, August 20, 1873, the improvements and right of entry and possession of the same having been purchased by Weaver, and a writing purporting to convey the same having been executed in his favor by Van Alstine, June 1, 1880, prior to the passage of the act. The act is as follows:

The persons who have heretofore under any one of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing, may entitle themselves to said lands by paying the government price therefor, and in no case less than \$1.25 per acre, and the amount heretofore paid the government upon said lands shall be taken as part payment of said price; *Provided*, This shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws.

You reject the application of Weaver because: 1. "The bill of sale sent up to show his rights as a transferee to purchase the land does not purport to convey the same but only the improvements." 2. "That the said bill of sale misdescribes the tract by locating it in T. 3 north, when by the entry and true location it should be described as 3 south." 3. "That neither the duplicate receipt nor an affidavit of its loss has been furnished to accompany the entry papers if admitted."

The last two of these objections appear to be purely technical and immaterial. The land is described as being in Jefferson County. Township 3 south is in said county, while 3 north is in Boulder County, and it is clear that the former was the tract intended.

There being no doubt whatever respecting the true location, proof of actual transfer of possession and occupation of the improvements on the real tract being found, and the furnishing of the receipt or affidavit being a matter of official requirement outside the statute and capable of being complied with at any time without affecting the merits of the application, I see no reason for rejecting the application on these grounds.

Nor do I think the first objection sufficient. The writing denominated

by you as a "bill of sale" is under seal, and purports "for and in consideration of the sum of \$200 to sell, assign, grant and set over unto said Thomas F. Weaver all the buildings, betterments and improvements of every name and kind built, erected, made or done" upon the land described, and to "hereby authorize said Thomas F. Weaver to enter and take immediate possession of the same."

This writing was evidently intended by the parties as a complete transfer of all that Van Alstine possessed with respect to this homestead tract, and Weaver immediately took full possession under it.

The subsequent act recognizing a right to purchase by those "to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing," was, it seems to me, intended to protect the equities of just this class of persons, who, having paid for and entered into possession of improvements, were liable to lose the same by failure to anticipate all other claimants in reaching the district office after cancellation for the purpose of making entry in their own names. To insist upon all the technical niceties of a legal form of deed would work great injustice even if warranted by the law. But the law only refers to "attempted" transfers "by *bona fide* instrument in writing"; thereby indicating that while the writing may be only an attempt to transfer, if it be evidently made in good faith its precise form is immaterial.

I accordingly reverse your decision, and direct that Weaver be permitted to consummate his purchase.

SECOND ENTRY—CHARACTER OF LAND.

BENEDICT LEVIN.

In exceptional cases of lack of water for domestic purposes and cultivation, second homestead entry may be allowed with credit for fee and commissions already paid.

Commissioner McFarland to register and receiver, Larned, Kansas, May 4, 1882.

I am in receipt of your letter of March 16, 1882, transmitting the application of Benedict Levin to be allowed to relinquish his homestead entry No. 6220, made February 18, 1881, upon the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 8 in T. 23 S., R. 21 W., with permission to make another homestead entry upon some vacant tract with credit for fee and commissions already paid.

It appears from an affidavit, duly corroborated, submitted by Mr. Levin in support of said application, that he settled upon and has resided on the land in question continuously since May, 1879; that in the month of June, 1879, he dug a well to the depth of from fifty to sixty-five feet, a portion of which was through limestone and dark-looking

rock, like slate, and discovering no signs of water at this depth he dug in several other places, in one instance to the depth of seventy feet, but with no better success than at first. He further states that in his locality rain storms are few and far between, and that if he depended on surface water and rain he would go thirsty eleven months in the year. He further represents that for the past three years he has cultivated about ten acres of this land, but owing to the lack of rain his crops have been a total failure, and that all the water used on the premises has to be hauled from Saw Log Creek, which is about three miles distant.

I have to state that cases in which a second entry is allowed are very rare, but this seems to be a meritorious case and the application may be granted.

Notify Mr. Levin accordingly.

ACT OF JUNE 15, 1880—ALIEN—NATURALIZATION.

WILLIAM H. WHITE.

Notwithstanding the homestead entry in this case was illegal at its inception on account of alienage of claimant, his widow is allowed to purchase under the act of June 15, 1880.

*Commissioner McFarland to register and receiver, Gainesville, Florida,
May 23, 1882.*

On September 9, 1872, Wm. H. White made homestead entry No. 5699, Tallahassee series, upon which entry final certificate No. 1634 was issued. The preliminary affidavit was sworn to on August 25, 1872, before the clerk of the county court of Orange County, Florida, and recites *inter alia* that the applicant had declared his intention to become a citizen of the United States. Mr. White died (as appears by the final proof) on March 11, 1875, and final proof is submitted by Emma, his widow, since intermarried with one Spenceley, to effect the consummation of said entry, and to obtain a patent for the land embraced in said entry, to wit, the N. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Sec. 25, and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 26, T. 20 S., R. 29 E., Florida.

There is no evidence that Mr. White ever obtained a certificate of naturalization, and, as will appear hereinafter, he could not have obtained such certificate, because he died less than two years subsequent to the date when he declared his intention, etc. His widow, however, would be allowed the benefit of the homestead act, if in point of fact Mr. White had declared his intention to become a citizen at or before the time of making the entry. The applicant's affidavit, above referred to, is *prima facie* evidence of the truth of the statements it contains, and as a rule is accepted by this office as sufficient. It appears by the final proof that said White was a native of England; it also appears by a certified copy of the records of the circuit court of

Orange County, Florida, that Mr. White declared his intention to become a citizen of the United States on October 25, 1872, a month and a half subsequent to the date of the entry. The *prima facie* evidence being thus rebutted by record evidence, it is apparent that Mr. White was not legally qualified on September 9, 1872, to make a homestead entry, he not having declared his intention, etc., until a subsequent date. The entry being thus illegal, must be held for cancellation, and sixty days are allowed to Mrs. Spenceley within which to appeal from this decision to the honorable Secretary of the Interior.

The rule laid down in the case of Thomas Madigan (9 C. L. O., 7) does not now obtain, and any person who has made a homestead entry prior to June 15, 1880, and those who under the law succeed to his rights, may purchase the lands embraced in the entry under the second section of the act of June 15, 1880, provided no adverse rights exist, and the land was subject to such entry.

Notify Mrs. Spenceley of the action of this office in holding the entry for cancellation, and inform her of her rights of appeal, and that, if she desires, she may, before said entry is canceled, purchase the land under the act of June 15, 1880.

SECOND ENTRY—CHARACTER OF LAND.

38-408

LUDWIG P. SKARSTAD ET AL.

The new homestead entry will be allowed where, from the nature of the land (the character of which is not ascertained by the claimant until after entry) the important homestead condition of cultivation cannot be complied with.

Commissioner McFarland to register and receiver, Fargo, Dakota, May 26, 1882.

I am in receipt of your letters of March 14 and 15, 1882, in which you transmit the voluntary relinquishments, along with the petitions of Ludwig P. Skarstad, who made homestead entry 8102, SW. $\frac{1}{4}$ 14, 133, 58, May 2, 1881, and of Anton O. Rolstad, who made H. E. 8103, May 2, 1881, for NW. $\frac{1}{4}$ 14, 133, 58, to be allowed to make new homestead entries, with credit for fee and commissions already paid.

The bases on which the two claimants ask this relief being similar, if not identical, and the tracts described being contiguous, one answer suffices for both. From the testimony offered—which is wholly *ex parte*—it appears that the claimants, “but little learned in English language,” made homestead entries before local officers, without a previous knowledge of the land, and at a time “the prairies were covered with an unusual amount of water,” and when it was “impossible, unless he went by team and employed a surveyor, to find the section lines.”

The testimony further showeth that as soon as “the climate allowed,” and “before the expiration of six months from date of said

entry," they went upon the land and found it unfit for cultivation, "a barren deposit of gravel" "full of stones," "unfit to plow," etc. Believing it "the policy of the government to grant a fertile and productive tract to every *bona fide* settler, the deponent respectfully asks," etc.

The affidavit of Skarstad, as well as that of Rolstad, is corroborated by two witnesses; that is, each claimant swears to the truth of the other's statement, and calls in the services of another witness, Andrew J. Hoistad (who made H. E. 8101, May 2, 1881, SE. $\frac{1}{4}$ 14, 133, 58, relinquished canceled at district office January 30, 1882). The "proof" as to the "unfitness of the land for cultivation" is satisfactory.

The "homestead law" exacts cultivation as an essential part of the performance of contract on the part of the homesteader, and while it is *not* "the policy of the government to grant a fertile and productive tract to every *bona fide* settler," it is likewise *not* the policy of the government to harshly exact a condition (cultivation) where from the nature of things the condition cannot be performed.

Therefore the petition of Skarstad and Rolstad is granted, and you will so inform them. I have this day canceled homestead entries 8102 and 8103, without prejudice, and you will note the same on your records, referring thereon (in the usual manner) to this letter C by date.

HOMESTEAD—ACT OF JUNE 15, 1880.

JOHN W. MILLER.

The act of June 15, 1880, specifically grants the right of purchase in all cases where the land was properly subject to the original entry, limited only by the proviso that "this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws." A purchase can be made after cancellation, provided it does not interfere with a subsequent right.

Secretary Teller to Commissioner McFarland, June 3, 1882.

I have considered the appeal of John W. Miller from your decision of October 22, 1881, rejecting his application to purchase, under the act of June 15, 1880, (21 Stats., 237), the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ 6, 210, 27 E., Visalia, Cal., entered April 28, 1873, homestead No. 777.

It appears that your office canceled the entry June 17, 1880, on failure of Miller to make final proof within seven years from its date; that the land is still vacant, and that the fact of such cancellation is the only reason assigned for refusal to allow present application, your decision being based on that of my predecessor in the case of Maria Galliher, June 1, 1881.

The act of 1880, section 2, specifically grants the right of purchase in all cases where the land was properly subject to the original entry, limited only by the proviso that "this shall in no wise interfere with

the rights or claims of others who may have subsequently entered such lands under the homestead law.”

As no subsequent entry upon any tract taken as a homestead can be made until after cancellation of such original homestead entry, this proviso would have nothing in any case whatever to operate upon, except upon the theory that the right of purchase thus limited might be exercised as well after cancellation as before; and that the only purpose of Congress was to save any entry subsequently made in accordance with existing law from prejudice or interference under the new enactment, but to bestow upon the original claimant the otherwise unrestricted right to acquire by purchase the land which he had failed to secure by strict compliance with the law under which he had originally entered.

It can make no difference to the government whether the entry has been canceled or not. The mere act of cancellation has no force in connection with the statute. In this case less than two months had elapsed after the expiration of the seven years, and the entry was actually canceled after the passage of the remedial act; while there are on your files hundreds of entries still uncanceled, where months and years have passed since the expiration of the seven years limited by law for making final proof. Yet the rule has not been applied to these, and the parties making such entries have been allowed the benefit of the act of 1880, whenever applied for.

There can be no reason for this invidious distinction. Upon full consideration I am convinced that the decision in case of Galliher must have been inadvertent, and should not stand as a precedent—the true construction, as I apprehend, being as above stated. I accordingly reverse your decision and direct the allowance of Miller’s application.

TIMBER-CULTURE ENTRY—TRANSMUTATION.

TORJUS H. FLOM.

In view of the peculiar facts in this case, the party will be allowed to date his settlement prior to the time his timber-culture entry covered the land now covered by his homestead entry.

Commissioner McFarland to register and receiver, Redwood Falls, Minnesota, June 7, 1882.

On November 4, 1872, Torjus H. Flom filed pre-emption D. S. No. 252, for NE. $\frac{1}{4}$ 14, 112, 43, alleging settlement thereon July 1, 1872. On November 27, 1877, he made timber-culture entry No. 606, for the same land and surrendered his D. S. receipt at that time, though it does not appear that he ever executed a relinquishment of his filing. On September 14, 1879, he relinquished his timber-culture entry, and the same was canceled by this office December 5, 1879. On December 26, 1879,

he made homestead entry No. 2574, for the tract. On April 1, 1882, he made final proof claiming the benefit of residence under pre-emption law in accordance with the provisions of act of May 27, 1878. Your letter of May 17, 1882, transmitting this final proof to this office contains the following:

The proof shows continuous residence and cultivation by the claimant from September 1, 1872, to April 1, 1882, although the tract was held by claimant under timber-culture act from November 27, 1877, to December 5, 1879. We would respectfully ask what action should be taken thereon by this office.

Doubt as to the proper manner of proceeding in this case has probably arisen in your minds because, under rulings of this office, parties who have relinquished timber-culture entries upon which they had established residence, and subsequently made homestead entries for the same land, have, upon offering final proof and claiming under act of May 14, 1880, the benefit of residence prior to date of homestead entry, been restricted in such claim to actual residence subsequent to the cancellation of the timber-culture entries, it being held that a party cannot, in perfecting a homestead entry claim the benefit of residence upon the land while embraced in his timber-culture entry. In a general sense this ruling prevails, but in this case are found circumstances which operate to form an exception.

This party's pre-emption filing remained intact during the time that his timber-culture entry existed. Upon the relinquishment of his timber-culture entry he occupied the same position under his filing, and was entitled to the same rights thereunder as though the timber-culture entry had not been made. He was, therefore, legally entitled to transmute his filing to a homestead entry, and is entitled to credit for his residence on the land under pre-emption law. If no adverse claim for the land appears upon your records, you should, upon receipt of the commissions due, issue the usual final papers in the case and report the same in your regular returns for the month in which issued.

24 I D 534

HOMESTEAD ENTRY—DESERTED WIFE.

SARAH E. PIERCE.

A deserted wife depending upon her own resources for support, who made a homestead entry as the head of a family, is deemed qualified as a single person to avail herself of the homestead privilege, and, notwithstanding the return of the husband, entitled to consummate the entry.

Commissioner McFarland to register and receiver, Fargo, Dakota, June 9, 1882.

Sarah E. Pierce made homestead entry 6662, July 8, 1880, for the NE. $\frac{1}{4}$ of Sec. 12, T. 134, R. 51, as "the head of a family and a citizen of the United States."

In your letter of January 6, 1882, "proof" was transmitted, and application to purchase the land under the requirements of Sec. 2301 R. S. was offered.

In my letter C, January 27, 1882, additional evidence was called for, alluded to as "a copy of this decree of separation, which appears from her testimony to be a decree *a mensa et thoro*."

In reply to which you transmit in your letter of May 25, 1882, a copy of judgment ordered by district court county of Olmstead, State of Minnesota, in the case of Sarah E. Pierce, plaintiff, *v.* Job P. Pierce, *alias dictus* Joseph Pierce, dated December 8, 1879, in which it is shown that defendant defaulted, and

That he willfully deserted her for more than one year next before the commencement of this action, that the plaintiff is the sole owner of the real estate mentioned and described in the complaint in this action, and that judgment be entered herein that the plaintiff is the sole owner of said premises, and barring the defendant from all interest therein, and authorizing the plaintiff to sell, convey, mortgage, and dispose of said real estate without the defendant joining in the conveyance or mortgage thereof as fully as she might or could do if she were unmarried.

It is true as you suggest, that this is not what was anticipated, showing a complete "separation from bed and board," but, although a judgment relating to the disposal of certain property in Rochester, Minn., it establishes the fact that claimant was in the position of a deserted wife, and as such the head of a family, also that at date of decree she could have made a valid homestead entry. Her position at the time she made her homestead entry was the same, as is shown by special affidavit furnished with her "proof," nor were her equities disturbed or her position materially altered by the fact

That since that time (September 9, 1879), and until after taking the homestead above mentioned, viz, until November 23, 1880, she did not live with the said Job P. Pierce, but at said date he returned to the place where affiant was then living in a destitute condition, and out of compassion since that time she has supported him, but in no way has he, the said Job P. Pierce, had any interest in and to any property owned by her, nor has he in any way helped to support her.

The evidence also shows that she had supported this husband from date of marriage (May, 1852) until the time he deserted her.

From all this and from the fact that residence and improvement of the land is shown, within the requirements of the law, I am clearly of the opinion that Sarah E. Pierce was a single person, "the head of a family and a citizen of the United States," at the time of making her homestead entry, and entitled to commute the same under Sec. 2301 R. S.

You will, upon payment of the purchase money, issue final receiver's receipt and final certificate of current series, and not fail to furnish "commuted homestead affidavit" (Form 4-069), which does not appear with proof.

NATURALIZATION—COUNTY COURTS IN COLORADO.

J. F. HECHTMAN.

Record evidence of filing of declaration to become a citizen of the United States, or of naturalization, in or by a court not having a clerk distinct and separate in person from the judge, will not be accepted from a homestead party.

Commissioner McFarland to J. F. Hechtman, judge of court for La Plata County, Colorado, June 10, 1882.

On the 7th instant I received from you a letter, not dated, requesting this office to rule that county courts in Colorado not having a clerk distinct and separate from the judge are competent to naturalize aliens, in view of the State statute authorizing the judge to act, *ex officio*, as the clerk of his court. I cannot comply with your request for the reasons hereinafter stated.

The State statutes provide that the county courts shall be courts of record, and that the judges may appoint clerks for the same or act as such clerks. This office refused to receive record evidence of naturalization by a county court not having a clerk distinct and separate from the judge, and applied the same rule in respect to the declarations of parties to become citizens of the United States. It is observed that some of the county judges have recently appointed clerks, and their courts are regarded here as competent to naturalize, and naturalization papers issued by them are respected accordingly. I inclose herewith copy of letter to the register at Wa Keeney, Kans., dated April 22, 1880, wherein the competency of State courts to naturalize aliens was dealt with at length. In enumerating the four prerequisites of the organization of State courts attempting to naturalize it is stated that said court "must have a clerk." Therein were quoted judicial decisions to show that the courts must not only have a right to have a clerk, *but that they must have one*, and that said clerk must be separate and distinct *in person* from the judge. The idea which I desire to convey is that no matter what the provisions of the State laws are as to the power of county judges to act in the double capacity of judge and clerk, the requirements of the United States Statutes, as expounded by learned jurists, cannot be disregarded by this office.

 HOMESTEAD—ADJOINING FARM ENTRY.

Where land in a homestead entry that has been consummated, but not patented, is sold, the purchaser may make "adjoining farm" homestead entry of a contiguous vacant tract (as the law allows), at his own risk as to the patenting of the land purchased.

Commissioner McFarland to register and receiver, Jackson, Miss., June 17, 1882.

am in receipt of your letter of the 5th instant, in which you ask:

Where a party making a homestead entry makes final proof on the same, and no patent has been issued therefor, if he sells the land em-

braced in his entry to a third party, will the party purchasing be allowed to make an adjoining farm entry to the land purchased.

In reply I have to state that if the homestead entry upon which final proof has been made is in every respect regular, and the issuing of a patent is a mere ministerial act, the party so purchasing could enter a contiguous tract as an adjoining farm homestead entry. He would do so, however, at his own risk, with respect to the regularity of the original entry.

ADDITIONAL ENTRY—CULTIVATION.

EBEN M. GORDON.

When an additional entry is made under the act of March 3, 1879, the law does not require that the lands embraced in the additional entry shall be actually cultivated to crop.

If the tract thus entered be used in connection with that embraced in the original entry for the purposes of a home, the intention of the act of March 3, 1879, will have been secured and its purposes attained.

Tracts embraced in an original and additional entry are considered as a compact body and cultivation of a portion of the same will be considered as a cultivation of the whole.

*Commissioner McFurland to register and receiver, Fergus Falls, Minnesota,
June 21, 1882.*

I am in receipt of the receiver's letter, dated June 12, 1882, transmitting, for the consideration of this office, final proof submitted by Eben M. Gordon in support of his claim to patent for W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SE. $\frac{1}{4}$ 22, 134, 37, by virtue of homestead entries No. 2980 and 5135.

It appears that the entry 2980 was made June 22, 1875, for W. $\frac{1}{2}$ NE. $\frac{1}{4}$ of the section described under general homestead laws; and that entry No. 5135, for N. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said section, was made May 20, 1879, as additional thereto under act of March 3, 1879.

The proof shows that the party established a residence upon the land embraced in his original entry October 30, 1875; that he has continued to reside upon, cultivate, and improve said tract from that date to date of final proof—June 6, 1882—and has 53 acres thereof cultivated to crops; that since the date of his additional entry he has cleared a portion of the land embraced therein and fenced the whole tract, but that he has not actually cultivated any part of the additional homestead.

The receiver considers this failure to cultivate the tract embraced in the additional entry as a defect or failure to fully comply with legal requirements, and for that reason submits the case for consideration.

The law does not peremptorily require that the land embraced in an additional entry of this class shall be actually cultivated to crop. If the tract thus entered be used in connection with that embraced in the original entry for the purposes of a home, the intention of the act of March 3, 1879, will have been secured and its purposes attained. It has been held heretofore that the tracts embraced in an original and additional entry will be considered as one compact body and residence

upon any portion of the same will be considered as residence upon the whole, and I am of opinion that the same rule should apply respecting cultivation; though in all cases of this kind improvement and use of the additional tract as a part of the whole homestead will be insisted upon.

In my opinion, the final proof in the case under consideration is not defective; the party has made substantial compliance with legal requirements, and the usual final papers should issue to him upon payment of the commissions due.

You are therefore instructed accordingly, and will report the final papers in your regular returns for the month in which issued.

25 ID 147

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RESIDENCE—CULTIVATION—GOOD FAITH.

EDWARDS *v.* SEXSON.

When a person, although not at all times on the land, has no other recognized home, and claims and improves the land entered, in all respects showing that his claim is made in good faith, he has fulfilled the requirements of the statute.

In every case an actual personal continuous residence is not necessary.

The homestead act of 1862 should be liberally construed.

Secretary Teller to Commissioner McFarland, June 23, 1882.

I have considered the case of Thomas J. Edwards *v.* Andrew J. Sexson, involving homestead entry No. 5621, covering the S. W. $\frac{1}{4}$ of Sec. 18, T. 3 N., R. 23 W., Nebraska, on appeal by contestant from your decision of July 13, 1881, sustaining the decision of the register and receiver and dismissing the contest.

This homestead entry was made October 14, 1878. Affidavit of contest alleging abandonment and defective cultivation was made January 12, 1880, and trial was held February 20, 1880.

A question has been raised as to the admission of the oral cross-examination of contestant's witnesses in the depositions taken before C. H. Bane, notary public, upon written interrogatories on the part of the contestant. For such irregularity the testimony should have been stricken out upon the motion made for that purpose, and in considering this case the testimony so taken will be disregarded. The testimony proves satisfactorily the following facts, viz: That the defendant, Sexson, was a single man, twenty-nine years of age; that he made settlement on the land early in April, 1879, with the intention of remaining there; that he had a team, wagon, breaking-plow, cooking utensils, and some other articles of personal property; that he employed help and built a house twelve feet square, partly a dugout and partly sod, with roof of willow and earth, and an opening for a door and window. One witness, who had been acquainted with the land six years and knew the house, testifies that it was like most of the first dwellings built in that country and was fit to live in. After building the house Sexson commenced breaking upon the lines of his land for the purpose of setting trees or hedge, and a piece for crops the ensuing year. He

occupied the house a short time, eating and sleeping there. About the 1st of June, 1879, on account of the death of a brother, he went to the eastern part of the State to attend to some of his brother's business and some of his own that was left with his brother. He remained away until September. During his absence he spent part of his time in cultivating crops left by his brother, part in attending to his own affairs, and part of the time worked out for wages.

He arrived at his homestead again September 16, 1879. He occupied the house a short time, put a door in it, and otherwise made it more comfortable for the winter. The ground was too dry for further improving it, and being out of money and having no work he again returned to the eastern part of the State. He left the house in good condition, with a bed, table, cooking utensils, crockery, clothing, and some other articles of personal property in it. It was proved that a month before the trial the house was there and the personal property in it. When Sexson returned, February 10, a short time before the trial, he found the house destroyed and all the wood-work and personal property taken away. He had no other home and returned with the intention of remaining.

The claimant, Sexson, seems to have acted in good faith and with the intention of appropriating the land to his own use and making a home of it.

The facts in the case are quite similar to those in the case of *Waldo v. Schleiss* (1 C. L. L., 234). It was held in that case that "where a person, although not all times on the land, has no other recognized home, and claims and improves the land entered, in all respects showing that his claim is made in good faith that he has fulfilled the requirements of the statute." And that in every possible case an actual personal continuous residence is not necessary. And to same effect see *Baker v. Hess* (*Ib.*, 296).

I am of opinion that neither the charge of defective settlement and cultivation nor that of abandonment has been sustained.

Your decision is therefore affirmed and the contest dismissed.

The papers submitted with your letter are herewith returned.

43-24 HOMESTEAD—DEVISEE—EXECUTOR—HEIR.

JOHN J. JONES.

A devise within the meaning of the homestead law must be of the *land*, and not of the proceeds of the sale thereof which may be contemplated by the will; therefore the executors are not entitled to a final certificate in case of their appointment in the will to make such sale, although the executors are heirs to the exclusion of other heirs.

Commissioner McFarland to register and receiver, Gainesville, Florida,
June 24, 1882.

I have examined the final proof submitted by Robert Jones and William Jones, executors of the last will, etc., of John J. Jones, deceased,

who, on January 28, 1874, made homestead entry No. 437, Gainesville series, and upon which F. C. No. 1995 has been issued to "Robert Jones and William Jones, executors of John J. Jones, deceased."

The testimony shows that John J. Jones died on June 14, 1878, leaving no widow, but six children, all of whom were adults. Mr. Jones made a will on May 31, 1878 (a copy of which is transmitted with the final proof, duly authenticated), which was admitted to probate, and letters testamentary issued thereon to claimants, who are sons of the deceased. That portion of the will which relates to the homestead entry is as follows:

2dly. I want Robert Jones and William Jones, my sons, to take charge of all my estate, and my will is that they are appointed my executors to take charge of all my property, both real and personalty, and that they manage it in the manner hereafter mentioned:

1st. That they take charge of my growing crop and finish cultivating and gather it, and that they be allowed a reasonable sum for their services in the management of said crop; *also*, I want my said executors, to wit, Robert Jones and William Jones, to take charge of my lands, to wit, that portion of the Dupont grant, together with my homestead upon which I now live, and all my hogs, cattle, notes, and accounts, and dispose of the same to the best advantage for my heirs; first pay all my just debts, then sell all the rest of my property; and for my son, Robert Jones, to have two hundred and fifty dollars; then the rest of my property to be equally divided among my heirs, to wit, William Jones, Robert Jones, Mary Ann Hires, Elizabeth Hires, Jane Dougherty, and Susan Yelvington. Also, I want my grandchildren, the heirs of J. J. Jones, junior, viz, to wit, Robert Jones and Florence Jones, to have the portion of one of my heirs, and that Robert Jones, my son, is hereby appointed to take charge of the same until they become of the age of twenty-one years, then deliver the said estate to them. * * *

Under sections 2291 and 2292 United States Revised Statutes, patent issues in the following order:

1st. To the person making such entry, or, 2d, if he be dead, to his widow; 3d. If both father and mother are dead, leaving an infant child or children, then to such minor child or children. 4th. In case of the death of the widow, and there being no minor child or children, then to his (the homestead party's) heirs or devisees.

From the foregoing statement of facts it appears that at the time of Mr. Jones's death he left no widow, minor child, or children, so that patent, when satisfactory proof is made, must issue to the heirs or devisees of John J. Jones, deceased; the law makes no provision for issuing patent to an administrator or executor, and unless the land in question has been devised, patent must (when issued) be issued to the "heirs of John J. Jones, deceased." The only question to be determined, then, is: Did John J. Jones, by the will above mentioned and the clause set out, devise the land to Robert Jones and William Jones within the meaning of Sec. 2291.

The persons named as executors (who are sons and consequently heirs) are directed to take charge of, manage, sell, and dispose of the land, and

after paying the decedent's debt to divide the net proceeds among the testator's heirs. A devise within the meaning of the statute must be of the land and not of the proceeds, and the clause referred to creates the Messrs. Jones agents for the sale of the land and not devisees.

I hold, therefore, that the certificate should issue to the heirs of John J. Jones, deceased.

The proof regarding residence and cultivation by Mr. Jones during his lifetime is sufficient, but there is no evidence tending to show that the land was cultivated from the time of his death until the expiration of five years from the date of entry.

Inform the Messrs. Jones of the contents of this letter, and require them or either of them to show, by an affidavit duly corroborated by at least two disinterested witnesses, that the heirs of the deceased kept the land in a state of cultivation from the time of the death of their ancestor until the expiration of five years from the date of entry.

I inclose the final certificate heretofore issued; if upon receipt of the corroborated affidavit called for you deem the same satisfactory, the register will issue final certificate, bearing like number with the one herewith returned, in the name of the "heirs of John J. Jones, deceased," and transmit the same, together with the affidavits, to this office.

NATURALIZATION—MINOR—PROOF.

ADOLPHUS PINDER.

In case a homestead party claims to have been naturalized by reason of the naturalization of his father during his (the son's) minority, he must show that he was dwelling within the United States at the date of the father's naturalization.

*Commissioner McFarland to register and receiver, Gainesville Florida,
June 28, 1882.*

Adolphus Pinder, who made homestead entry No. 1003, Gainesville series, and to whom F. C. 1968 was issued, states in his testimony, in answer to interrogatory No. 4, that he is not a native-born citizen; that he was a minor when his father Richard Pinder (a certificate of whose naturalization accompanies the final proof) was naturalized, he (the claimant) being about nineteen or twenty years at the time.

Section 2172 of the Revised Statutes of the United States provided as follows:

The children of persons who have been duly naturalized under any law of the United States, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof, etc.

It is not shown that the claimant was dwelling in the United States at the time his father was admitted as a citizen. You will therefore

notify Mr. Pinder that he is required to transmit, through you, an affidavit, duly corroborated by at least two witnesses, showing that at the time of the naturalization of his father, to wit, on March 20, 1867, he (claimant) was dwelling in the United States.

ACT OF JUNE 15, 1880—TRANSFEREE.

ELLA M. HOYT.

Possession of a homestead duplicate receipt by a stranger is no evidence of the transfer of the land; he is not by reason of mere possession of the paper entitled to purchase the land under act of June 15, 1880, as a transferee.

Commissioner McFarland to register and receiver, Montgomery, Alabama, July 10, 1882.

I am in receipt of yours of March 16 last, transmitting the appeal of Ella M. Hoyt, by her attorney, from your decision of February 6, 1882, rejecting her application to purchase, under the act of June 15, 1880, the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ of Sec. 28, 1 N., 7 E.

In reply I have to state that the records show said tract to have been covered by Mobile, Alabama, homestead entry No. 1272, made February 11, 1873, by Charles Butler, which was canceled January 5, 1881, for failure to make final proof within the statutory period.

Ella M. Hoyt, as widow and heir of A. G. Martin, transferee, made application, February 1 last, to purchase said tract under the act of June 15, 1880, which you rejected on the ground that "canceled homestead entries are not subject to the operation of said act, and that no transfer by *bona fide* instrument in writing on the part of the homesteader has been filed," from which decision the applicant appeals.

The ruling of the Department on which you base the first part of your decision having been modified by the honorable Secretary's decision of June 3, 1882, in the case of John W. Miller, of Visalia, Cal. (*vide* Copp's Land Owner, June, 1882, p. 57), virtually disposes of that portion of your objection; therefore the latter clause of your decision will only be considered at this time.

Appellant alleges that a few months subsequent to entry Butler conveyed his right in said land unto H. Evans and McDuffie Mann by merely surrendering to said parties his duplicate receipt; that said parties subsequently conveyed their right by deed unto one Burgess Miles, and that said Miles conveyed his right by deed unto A. G. Martin, the deceased husband of the said Ella M. Hoyt.

The affidavit of the probate judge of the county in which the land is situated is introduced as evidence, showing that it was the *custom* in that county for homestead parties to transfer their lands by mere surrender of the duplicate receipt *without any deed*. Evidence as to what is custom, and what is not, is inadmissible, it being irrelevant to the

case. There is but one way to transfer real estate that is universally recognized by the courts since the passage of the statute of frauds, and that is by an instrument *in writing*; any other mode cannot be established by custom; it can only be done by special legislation as an amendment to existing laws. The act referred to is remedial and not amendatory, as the appellant's argument would seem to imply.

Possession of the duplicate receipt by a stranger is no evidence of the transfer of the lands, nor does it carry therewith the settler's equities in the land; the act expressly states that "persons to whom the right of those having so entered for homestead may have been attempted to be transferred by *bona fide instrument in writing* may entitle themselves," etc. There is nothing in the above language that could be construed to imply that the surrender of the duplicate receipt is equivalent to a transfer by *bona fide instrument in writing* or equal to a deed of conveyance; it would be necessary to interpolate words in order to admit of such construction. The lawmakers evidently contemplated such a conveyance as would entitle the grantee to the same equities in the land as the grantor possessed; therefore, your decision that the mere surrender of the duplicate receipt is not an attempted transfer by *bona fide instrument in writing* is hereby affirmed and the appeal dismissed.

You will notify the party in interest of this decision and of her right to appeal therefrom.

ADJOINING FARM ENTRY—RESIDENCE.

WILLIAM C. FIELD.

A residence or settlement on an original farm will not be computed as residence on an adjoining tract prior to entry.

*Commissioner McFarland to register and receiver, Montgomery, Alabama,
July 15, 1882.*

I am in receipt of yours of March 7, 1882, transmitting the appeal of William C. Field from your decision of January 4, last, rejecting final proof on his adjoining farm, homestead entry No. 11707, on the ground "that adjoining farm homestead entries are not governed by the provisions of the act of May 14, 1880, and that, therefore, the entry must be of five years' standing before proof for same can be made." From which decision applicant appeals.

The records show said entry to have been made June 1, 1881, for the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 14, 16 S., 4 W., the settler claiming ownership and residence on the E. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of same section, township, and range, with settlement thereon, relating back forty-eight years.

Final proof was offered December 27, 1881, six months subsequent to entry, claiming the benefit of the act of May 14, 1880, as to residence and settlement on the original farm.

The third section of said act provides :

That any *settler* who has *settled*, or who shall hereafter *settle*, on any of the public lands of the United States with the intention of claiming the same under the homestead laws, etc.

The evidence shows that Mr. Field was born on the original farm forty-eight years ago, and has resided thereon ever since. He did not *settle* on the tract he entered as an adjoining farm, *prior* to his entry thereof, with the *intention* of claiming the same under the *homestead laws*. The rights of an adjoining farm entry attach only after entry when the land entered with his original farm are treated as an entirety.

A residence or settlement, therefore, upon an original farm constitutes no residence upon an adjoining tract prior to entry, as settlement cannot be made at the same time upon two distinct tracts of land.

All decisions and precedents forbid the proving up of an adjoining farm homestead entry prior to the expiration of five years from date of entry, except where there may be credit for military or naval service during the war of the rebellion, therefore, the decision of the register and receiver is affirmed and the appeal dismissed.

You will notify the party in interest of this ruling and of his right to a still further appeal.

HOMESTEAD—ACT OF JUNE 15, 1880.

GEORGE S. BISHOP.

Should a homestead entry be canceled and an adverse right to the land attach under a subsequent entry, the same is not subject to purchase under the act of June 15, 1880, although the subsequent claim may have been asserted under a law other than the homestead law.

Secretary Teller to Commissioner McFarland, July 18, 1882.

I have considered the matter of the appeal of George S. Bishop from your decision of November 10, 1881, rejecting his application to purchase the SE. $\frac{1}{4}$ of Sec. 13, T. 3 N., R. 23 W., North Platte district, Nebraska, under the second section of the act of June 15, 1880 (21 Stat., 237). The record shows that Bishop made homestead entry No. 302, of the tract, July 25, 1874, and that the same was canceled May 25, 1877, for voluntary relinquishment. Under date of August 17, 1878, one Andrew Goddard made timber culture entry No. 328 of the N. $\frac{1}{2}$ of the said SE. $\frac{1}{4}$, and George A. Steeter filed declaratory statement No. 905 for the S. $\frac{1}{2}$ of the same, alleging settlement May 13 preceding.

On August 2, 1881, Bishop applied to purchase as aforesaid, but the register rejected his application for the reasons (1) that the said filing and entry had been made subsequently to the cancellation of his homestead entry, and (2) that by reason of said relinquishment and cancellation he had exhausted his rights under the homestead law and his right to purchase under the section in question. You affirmed the reg-

ister's action as being in conformity with the rulings of your office, and held that under the same no application to purchase under said section can be allowed where the homestead entry of such application has been canceled. Such was the ruling of the Department in the case of Maria J. Galliher, widow of Silas Galliher (8 L. O., 137), but the same was overruled by this Department under date of the 3d ultimo in the case of John W. Miller (9 *Ibidem*, 57), wherein it was held that the section in question—

Specifically grants the right of purchase in all cases where the land was properly subject to the original entry, limited only by the proviso that this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the *homestead* laws. As no subsequent entry upon any tract taken as a homestead can be made until after cancellation of such original entry, this proviso would have nothing in any case whatever to operate upon except upon the theory that the right of purchase thus limited might be exercised as well after cancellation as before, and that the only purpose of Congress was to save any entry subsequently made in accordance with existing law from prejudice or interference under the new enactment, but to bestow upon the original claimant the otherwise unrestricted right to acquire by purchase the land which he had failed to secure by strict compliance with the law under which he had originally entered. It can make no difference to the government whether the entry has been canceled or not. The mere act of cancellation has no force in connection with the statute.

The case cited was *ex parte*, no adverse right having intervened in the interim of the cancellation of Miller's entry and of his application therein drawn in question; whereas in the case at bar the adverse claims of Streeter and Goddard have been interposed, and it is presumable that the land was subject to the same, as the contrary is not shown nor even suggested. It is urged by the appellant's attorney that "only adverse claims arising under the *homestead* law are a bar" to the operation of the provisions of said section. This position appears to be taken and could only be maintained under the doctrine of the well-known maxim "*expressio unius est exclusio alterius*," and if that maxim applies to this proviso it is conclusive of the case.

But although the rights or claims of those who have subsequently made "homestead" entries are the only rights *expressly* protected from the operation of the section cited, it cannot be presumed that Congress intended to divest any *bona fide* settler of vested rights.

A statute, it has been said, is to be so construed, if possible, as to give sense and meaning to every part; and the maxim was never more applicable than when applied to the interpretation of a statute, that *expressio unius est exclusio alterius*. The sages of the law, according to Plowden, have ever been guided in the construction of statutes by the intention of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and sound discretion.

Thus it sometimes happens that in a statute, the language of which may fairly comprehend many different cases, some only are expressly

mentioned by way of example merely, and not as excluding others of a similar nature. (Broom's Legal Maxims, 7th ed., 664.)

I am therefore of the opinion that Congress used the expression "homestead laws" in a generic sense, intending thereby to illustrate its intent to protect all vested rights that might intervene prior to the application to purchase certain lands under the provisions of the act in question. Such construction is within the reason and spirit of the statute if not within its letter, and I accordingly affirm so much of your decision as rejects Bishop's application to purchase the N. $\frac{1}{2}$ of the tract in question embraced in Goddard's timber culture entry, but his application should be allowed as to the residue, *i. e.*, the S. $\frac{1}{2}$ of the tract, embraced in Streeter's filing, to be held subject to the latter's making final proof and payment pursuant to legal requirements.

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ADJOINING FARM ENTRY—PURCHASE.

40-95

ISAAC S. RIGGS.

Under the peculiar circumstances of this case the claimant is permitted to make his entry as an adjoining farm entry, to date from original entry.

*Commissioner McFarland to register and receiver, Huntsville, Alabama,
July 19, 1882.*

I am in receipt of yours of March 15 last, transmitting for instructions the final proof on homestead entry No. 6441, made January 19, 1876, for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 20, T. 7, R. 4 W., by Isaac S. Riggs.

The records show said entry to have been made for settlement and cultivation. It seems that after making entry Mr. Riggs improved said tract and built a house thereon; subsequently he found out that owing to the back-water from Flint Creek, which flows in a serpentine form through said land, the whole of said land is covered by water a portion of each year, in consequence of which it is impossible for him to reside thereon; therefore he at once purchased six acres immediately adjoining, which was not subject to such yearly overflow, on which he erected a dwelling-house and has lived therein ever since, cultivating and improving the entire tract as an adjoining farm.

After the lapse of five years he offers final proof on his entry, showing full compliance with the homestead law except as to residence.

When claimant purchased the adjoining six acres, as a site for a residence, he should have applied at once through the local office for a change of entry, as at the date of entry he was not competent to make entry of an adjoining farm homestead, he not then being owner of adjoining land as required by law in such cases; and by reason of his failure to reside on the tract entered he cannot, under section 2291 R. S., perfect his claim thereto.

As, however, he appears to have acted in good faith, and as present owner of adjoining land would be authorized to make an entry of an adjoining farm homestead (unless his right was exhausted by his original entry), and there being no adverse claimant, I have decided to consider his final proof as equivalent to an application for change of entry; therefore his entry will be allowed to stand, and will be treated as an adjoining farm homestead until five years shall have elapsed from date of said constructive application, to wit, November 5, 1881, when he can make final proof *de novo*, or if he desires patent before that time he may avail himself of the provisions of the act of June 15, 1880, and obtain title thereto by purchase.

HOMESTEAD ENTRY—TRANSFeree.

W. M. BUMPUS.

The attempt to transfer the land in a homestead entry by the party thereto having been made prior to June 15, 1880, application to purchase the same by a final transferee under act approved on said date may be allowed, notwithstanding that the final transfer was made subsequent to date of the act.

Commissioner McFarland to register and receiver, San Francisco, California, July 22, 1882.

I am in receipt of your letter of the 16th ultimo, transmitting, for the consideration of this office, the application of J. C. Rued, assignee of Wm. M. Bumpus, to purchase, under act of June 15, 1880, the land embraced in homestead entry No. 2682.

The entry was made February 20, 1877, for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 1, and W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 12, T. 8 N., R. 12 W., M. D. M. On February 16, 1878, Bumpus conveyed the land, by quit-claim, to Daniel McLaren and Wm. McLaren, who, on May 4 last, conveyed the same to J. C. Rued, and the latter party now seeks to perfect title to the land in question under said act of June 15, 1880.

It is clearly shown that said land was subject to homestead entry and that Bumpus was qualified to make the entry in question. As the attempted transfer by Bumpus was made prior to the passage of the act, I am of the opinion that Rued is entitled to avail himself of the provisions of said act, although the deed or transfer to him was not made until after June 15, 1880.

You will therefore allow Mr. Rued to perfect title to the land under said act, and upon payment of a sufficient amount of money you will issue the usual cash papers in the case and transmit the same to this office with your regular returns. The deeds inclosed in your letter are herewith returned.

HOMESTEAD ENTRY—REGISTER OF LAND OFFICE.

THOMAS J. SCOTT.

A homestead party may, after his appointment as register of the United States Land Office, purchase under the act of June 15, 1880, the land embraced in his entry.

Commissioner McFarland to Thomas J. Scott, U. S. Land Office, Montgomery, Alabama, August 3, 1882.

I am in receipt by reference from Paul Strobach, esq., of your letter of the 10th ultimo, asking whether you as register can, under the act of June 15, 1880, purchase the land embraced in a homestead entry made by you prior to your appointment.

In reply, I have to state that section 2287 Rev. Stats. provides that

Any *bona fide* settler under the homestead or pre-emption laws of the United States who has filed the proper application to enter not to exceed one quarter section of the public lands in any district land office, and who has been subsequently appointed a register or receiver, may perfect the title to the land under the pre-emption laws by furnishing the proofs and making the payments required by law, to the satisfaction of the Commissioner of the General Land Office.

The act of June 15, 1880, is an act of relief and is broad in its terms, as it provides "that persons who have heretofore under any of the homestead laws entered lands may entitle them selves to said lands by paying the government price therefor," etc.

The act of May 20, 1862, does not in terms restrict registers and receivers from perfecting entries made by them under said law; but it was held by this office that inasmuch as proof of settlement and cultivation must be made to the satisfaction of the local officers, that therefore they were barred from its privileges. While this rule was being strictly enforced the act of April 20, 1871 (Sec. 2287 Revised Statutes), was passed as cited above, granting certain rights to settlers, who were subsequently appointed as register or receiver.

Under the general rule of law, the legislation thus had confirmed the decision of the Department.

The act of June 15, 1880, does not make any distinction as to the class of persons who may avail themselves of its benefits; and as the deprivation of its privileges is, in effect, a punishment, it seems to me that the officers named should not be debarred from any rights thereunder unless required by law, or necessary to secure a just and proper administration of the homestead laws.

The reasons assigned in the former rulings of this office for denying a register or receiver the right to perfect a homestead entry were eminently correct under the circumstances, but do not obtain under the act of June 15, 1880, because under that act no proof requiring the approval of the local officers is necessary.

Therefore, I am of the opinion that if the land was properly subject to homestead entry at date of entry, and no subsequent rights or claims interfere, the register is entitled to purchase the land under the act named,

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HOMESTEAD—ACT OF JUNE 15, 1880.

JOHN D. HAY.

Alienation of the land is no bar to the original party purchasing under said act, even though the transferee protests.

Commissioner McFarland to register and receiver, Montgomery, Alabama, September 6, 1882.

I have considered the appeal of John D. Hay from your decision of August 3, 1882, rejecting his application to purchase under the act of June 15, 1880, the land embraced in his homestead entry No. 8584, made August 8, 1879, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 3, and E. $\frac{1}{2}$ NE. $\frac{1}{4}$ of Sec. 4, 4 N. 27 E., on the ground that an affidavit of contest for abandonment and alienation had been filed against said entry by John P. D. Wilkerson, and that the contestant cannot be barred from reaping the benefits of the act of May 14, 1880, until the allegations charged are disproved, etc.

Upon examination I find that you have failed to forward part of the evidence necessary in arriving at a conclusion in such cases, to wit, the application and affidavit of the homestead claimant to purchase under the act June 15, 1880.

The contest was brought on the issue of abandonment and alienation of a portion of the land, by *bona fide* instrument in writing.

It does not appear that the lands embraced in Hay's entry were not properly subject thereto, nor that any one else had a subsisting entry covering the lands in question; therefore the right of Hay to purchase is paramount to that of a contestant prior to the consummation of the contest, as the rights of the parties are unaffected during the pendency of the proceedings, and no preference right is established under the act of May 14, 1880, prior to the cancellation of the entry involved.

If the homestead party chooses to avail himself of his right to purchase under the act of June 15, 1880, his action thereby defeats the cancellation of the entry, and virtually disposes of the contest.

The latter issue, that a portion of the land had been transferred by *bona fide* instrument in writing, is no bar to an application to purchase, under the act named, as a conveyance in such case would be good, as against the grantor, although the conveyance antedates the patent.

If the applicant's application is accompanied by his affidavit showing that he is the identical party who made the entry, and he has filed therewith the duplicate receipt, or an affidavit accounting for its loss, and if the records show that the land was properly subject to entry, you will, upon payment of the government price, issue the usual certificate and receipt.

HOMESTEAD—FINAL PROOF—ACT OF JUNE 15, 1880.

BURRILL *v.* COULTER.

Claimant having failed to make satisfactory final proof, under homestead entry, is granted sixty days to make payment for the land under above act.

Acting Secretary Joslyn to Commissioner McFarland, September 12, 1882.

In the contested case of H. P. Burrill *v.* Lavinia Coulter, on appeal from your decision of May 26, 1881, holding sufficient the final proof of the latter upon her homestead No. 1452, entered April 14, 1875, for the SE. $\frac{1}{4}$ Sec. 34, T. 17 S., R. 30 E., Gainesville district, Florida, I am unable to concur in your opinion; but in view of the effort shown by her to retain and improve the land, I direct that you invite her attention to the provisions of the act of June 15, 1880 (21 Stat., 237), and allow her sixty days from service of notice to make payment for the tract. In the mean time cancellation of the entry will be suspended.

ACT OF JUNE 15, 1880—TRANSFEREE.

CHRISTIAN G. LARSEN.*

In case of an attempt by the party to a homestead entry made prior to June 15, 1880, to transfer the land embraced therein subsequent to June 15, 1880, the transferee is not entitled to purchase the same under act approved on said date, but the homestead party may make purchase thereunder.

Commissioner McFarland to register and receiver, Salt Lake City, Utah, September 19, 1882.

Upon examination of the papers in case of homestead entry No. 4755 of Sanford Forbush, jr., dated April 23, 1880, for the SW. $\frac{1}{4}$ Sec. 34, T. 18 S., R. 8 E., it appears that said applicant deeded said tract to Christian G. Larsen, under date of December 1, 1880, and you permitted said Larsen to commute the same under the second section act June 15, 1880. Said act provides:

That persons who have heretofore under any of the homestead laws, or persons to whom the right of those having so entered for homesteads, may have been attempted to be transferred by *bona fide* instrument in writing, may entitle themselves to said lands by paying the government price therefor.

It appears that said transfer to Larsen was subsequent to the passage of said act of June 15, 1880, and that you erred in permitting said entry to be made in the name of said Larsen. Said cash entry No. 2325, being illegal, is held for cancellation.

You will notify the parties in interest of this decision, and sixty days will be allowed in which to file an appeal. At the expiration of that period you will report the action taken.

* See 3 L. D., 190.

I would further state that said applicant having made said homestead entry No. 4755 prior to the passage of said act, on the cancellation of said cash entry No. 2375, he can commute the same under the provisions of said act June 15, 1880, by full compliance with its provisions.

HOMESTEAD CONTEST—ACT OF MAY 14, 1880.

WEBER *v.* SHAPPELL.

The purchaser of a claim and interest in a contested entry acquires no right of which the contestant may have been possessed, and must be held as a stranger in the case without even the right of appeal.

Prior to act of May 14, 1880, a contestant of a homestead entry had no greater right, for his initiation of a contest, than any other person, and the land upon cancellation of the entry became subject to the first legal applicant whether such applicant was the contestant or another. Nor was under that act the preference right of entry by one who secures a cancellation of a prior entry assignable.

Sixty days allowed in which to purchase the tract under act of June 15, 1880.

Secretary Teller to Commissioner McFarland, September 20, 1882.

I have considered the case of John Weber *v.* William H. Shappell, involving the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Sec. 26, T. 5, R. 15 W., Bloomington, Nebr., on appeal of James Whitesell from your decision of August 17, 1881, dismissing the contest and reinstating the entry of Shappell.

The records show that Shappell made homestead entry of the tract October 10, 1878, and that on August 23, 1879, John Weber commenced a contest against him for abandonment thereof. Shappell was not present at the hearing, but, under the proof submitted, your office found that he had failed to comply with the requirements of the law, and held his entry for cancellation, which became final April 21, 1880.

Shappell subsequently moved for a rehearing, which you granted, for reasons stated, and a new hearing was ordered for July 13, 1880. Weber failing to appear on the day assigned, Shappell moved for that reason a dismissal of the contest, which motion was denied by the local officers; but it appearing that Weber had sold all his claim and interest in and to both the contest and the land to one Jensen, who in turn had sold the same to one James Whitesell, upon the motion of the latter he was permitted to intervene and continue the contest in the name of Weber, but in his own interest.

Weber had acquired no right which he could transfer to Jensen or to Whitesell. Prior to the act of May 14, 1880, a contestant of a homestead entry had no greater right, for his initiation of the contest, than any other person, and the land upon cancellation of the entry became subject to the first legal applicant whether such applicant was the contestant or another. Nor even under that act is the preference right of entry by one who secures a cancellation of a prior entry assignable. It is a personal right in him only who procures the cancellation. Whitesell has therefore no legal right nor interest in the contest, and must be

held a stranger to the case without even the right of appeal from your decision.

Weber in the interest of the United States made his case, proved the abandonment, and final judgment for cancellation followed. Shappell asked a new hearing to set aside the result of a former trial. This was granted. It was now his turn as plaintiff to show cause why the cancellation should not stand, and the burden of proof was on him.

After his testimony closed, the United States might rebut by any witnesses at hand whether the former prosecutor was present or not. The good faith of Shappell was in issue, and he must show good reason or his entry cannot be reinstated. It was not the right of a third party, but the right of the government which was in question. The register and receiver might admit any evidence tending to contradict Shappell's claim of compliance with law, and it was good public policy to conclude the hearing by proper evidence rather than to dismiss it on a technical motion and compel a new contest to be brought by a stranger.

In my opinion the fact of abandonment by Shappell was clearly proven, both at the original and the subsequent hearing, and his entry must accordingly be canceled. In view, however, of the provisions of the act of June 15, 1880 (21 Stat., 237), you will allow him sixty days in which to purchase the tract before making final the order of cancellation. Your decision is modified accordingly, and the papers transmitted with your letter of January 20, 1882, are herewith returned.

HOMESTEAD—RESIDENCE—GOOD FAITH.

PETER v. SPAULDING.

The facts in this case show an effort to secure land under the homestead laws without complying with the important requirement of residence. Notwithstanding only eight months from date of entry have elapsed, the entry is ordered canceled.

Secretary Teller, to Commissioner McFarland, October 2, 1882.

I have considered the case of William P. Peter v. George Spaulding, involving the latter's homestead entry made August 21, 1878, upon the NW. $\frac{1}{4}$ of section 14, T. 26 S., R. 28 W., Larned, Kans., on appeal by Peter from your decision of May 14, 1881, dismissing the contest.

This contest was initiated April 28, 1879, upon allegations of abandonment, and the hearing was in June following. The testimony shows that in January, 1879, Spaulding moved upon the land a building about 6 by 8 feet in dimensions, and caused from 3 to 5 acres thereof to be plowed, chiefly in furrows around the exterior limits. At that time he passed two days on the land, one in surveying it, and the other in superintending said work, and had not since, to the date of hearing, been upon it.

He never slept nor ate a meal on the land, except such as was carried from a neighboring hotel; nor was the building ever furnished with any housekeeping effects, except a few cooking utensils which he brought with the building, and which remained therein when he moved

it, but which he never used. He did not replot the land plowed in January, nor did he ever cultivate any portion of it. Since January, 1878, he has been the traveling agent in Kansas of a Pittsburgh (Pa.) plow company, and since that date does not appear to have had any fixed habitation in Kansas.

On these facts the local officers found that Spaulding had failed to establish a residence on the land, and recommended a cancellation of his entry. Your decision holds his entry intact, because at the date of the initiation of the contest but eight months had elapsed from the date of his entry, and as there was not evidence of bad faith, it would be contrary to the lenity the Department extends to claimants under the homestead laws to forfeit it.

The clemency of the government should be extended in cases only where the good faith of the party is manifest, where there is no adverse claim, and the question is simply between the government and the party, and where the failure to comply with the law results from causes beyond the reasonable control of the party.

The homestead law requires residence on the land to be established within six months from the date of entry. Spaulding failing to do this, Peter commenced his contest, and under the act of May 14, 1880, is entitled to enter the land if the entry is canceled. A contestant should not be deprived of the fruit of his contest unless there are controlling reasons why the entry should not be canceled. None are presented in this case. Spaulding assigns no excuse for his neglect to make the land his home. The fact that he was engaged in business elsewhere, having no relation to the land or his entry, does not justify his laches in this respect. Indeed, he does not appear to have been resident in the State of Kansas, except for a temporary business purpose; and for the *ten* months preceding the hearing he made no attempt to establish a residence on the tract, or to cultivate or improve any portion of it, with the exception named.

Regarding his acts, therefore, as an endeavor to acquire a tract of the public land without complying with the conditions which Congress has imposed upon such acquisitions, and as wanting in good faith, I modify your decision and direct cancellation of the entry.

HOMESTEAD—BOARD OF EQUITABLE ADJUDICATION.

49-562 -
MCCARTHY v. DARCEY.

Residence is a material requirement of the homestead laws.

Where rights of other parties are affected or an adverse claim exists, an entry should not be submitted to the board of equitable adjudication—a contestant's preferred right under the act of May 14, 1880, is in the nature of an adverse claim.

Secretary Teller to Commissioner McFarland, October 20, 1882.

I have considered the case of William F. McCarthy v. Michael Darcey, involving the latter's homestead entry made January 30, 1880, upon the NE. $\frac{1}{4}$ of Sec. 9, T. 10, R. 5 W., Concordia, Kans., on appeal

by McCarthy from your decision of November 18, 1881, allowing the entry to stand, with a view of submitting Darcey's final proof, when made, to the board of equitable adjudication.

This contest was commenced October 4, 1880, on the ground of abandonment, and the hearing was in November and December following.

The testimony shows that Darcey improved and cultivated the tract as required by law, and the only question involved is that of residence. The local officers found that he had failed to comply with the law in this respect, but in view of the short time intervening between the dates of entry and contest, recommended that the case be submitted to the board of equitable adjudication. Your decision follows that recommendation.

I have examined the testimony and reach the same conclusion as to Darcey's want of residence on the tract. Residence is a material requirement of the homestead law, and the reasonable time of six months is allowed the party for that purpose. Darcey had not only down to the date of initiation of the contest, but to the date of hearing (and to its continuance on December 8, a period of more than ten months) neglected to reside on the land. He offers no excuse for his laches, and was not ignorant of the requirement of the law in this respect, for he had already contested a prior entry on the same tract, and procured the cancellation thereof on allegations of abandonment, following which he made his own entry. I find no reason to justify his non-compliance with the law, and the case is not one, in my opinion, for the board of equitable adjudication. The statute (Sec. 2457 R. S.) does not authorize such reference in cases where the right of another claimant may be prejudiced, or where there is an adverse claim.

This contest having been commenced in October 1880, was subject to the provisions of the act of May 14, 1880, which gives to a contestant the preferred right to enter the tract, within a specified time from cancellation of the entry which he procures. The rights of McCarthy might be prejudiced by reference of the case to the board, and his is in the nature of an adverse claim.

I modify your decision, and direct cancellation of Darcey's entry.

SOLDIERS' DECLARATORY STATEMENT—RESIDENCE.

GEORGE H. GARDNER.

A soldier who files or causes to be filed a declaration of his intention to enter a tract of land under the homestead law must make a legal entry of the land within six months, and must remove to the tract so entered and reside upon it and cultivate it for the period prescribed by law before he can acquire title to the land. Filings or entries made by soldiers when they do not settle upon the land and have no intention of doing so are false and fraudulent.

Commissioner McFarland to Geo. H. Gardner, New York City, November 22, 1882.

I am in receipt of your letter, inclosing a copy of a circular purporting to be issued by Gazzam & Co., "relative to the procurement of sol-

diers' homestead entries." You state that yourself and several of your friends have given "Gazzam & Co." powers of attorney to locate lands for you, and paid them \$15 each; that you were afterwards called upon for an assessment of \$10; that "Gazzam & Co." have closed up their office and left town; and you wish to know whether there is any way by which you can recover the money so paid.

You are informed that the alleged firm of "Gazzam & Co." is unknown to this office; that the circular inclosed by you is a deception; and that the statements and assurances contained therein are false in many particulars and misleading in all.

A soldier who files or causes to be filed a declaration of his intention to enter a tract of land under the homestead laws must make a legal entry of the land within six months, and must remove to the tract so entered and reside upon and cultivate it for the period prescribed by law before he can acquire title to the land. Filings or entries made by soldiers when they do not settle upon the land and have no intention of doing so are false and fraudulent.

You were advised in this circular of the requirement of personal entry and residence; but it is dishonestly added that if "anything should prevent you from going on to perfect your entry, we can probably dispose of the right acquired by your declaratory statement and location on such terms as to make your investment a profitable one."

This is the gist of the whole matter. The proposition is that the professed attorney will file declarations of the intention of soldiers to make entries of public land and afterwards sell the soldier's right, ostensibly for the soldier's benefit.

The "investment" which is to be made profitable is the money paid to the attorney for his fees. The "right" which you are led to believe may be sold is the personal right of the soldier to make an entry of the land himself. This right is not transferable; consequently the soldier who does not go upon the land in person acquires no rights and has nothing to sell. The phrase "your location" is delusive. There is no "location" of land by the mere filing of a declaratory statement.

What the attorney has to sell, and what he does sell (unless he utilizes them otherwise himself), are your powers of attorney, which enable him, or some confederate to whom those powers are transferred, to make a fraudulent filing in your name.

When the filing is made, which is done by the last party in whose hands your powers fall, this last party sells his own relinquishment of your filing to some honest settler upon whose ignorance or credulity he can successfully impose.

The filing does not "hold the land" against an actual settler; but as many settlers are not aware of this fact, or do not wish to incur the risk of contesting a claim of the merits of which they are not informed, they are frequently induced to buy the attorney's relinquishment.

Thus the only results of your effort to avail yourself of the plausible promises of the "locating agent" are that you have been implicated in an illegal transaction, and have lost the money paid to the agent or attorney, while your powers of attorney have been used to defraud some other soldier or settler who is actually trying to find a home on the public lands.

I am in receipt of letters from soldiers in different parts of the country stating that they have been victimized in the same way as yourself, through similar circulars emanating from various sources, or upon the application of traveling agents making similar representations in person.

I desire earnestly to warn all soldiers against impositions of this character. It should be thoroughly understood that a soldier can acquire no right to 160 acres, or to any other number of acres, of public lands unless he wants to remove to the land, live upon it, and cultivate it. As he cannot sell what he does not possess, and as he has no land, nor any right to any land, in the absence of such removal, residence, and cultivation, there is no money to be made through the agency of land attorneys, and no land to be obtained by him unless he becomes a settler.

Whether there is any way by which you can recover the money paid by yourself and your friends to "Gazzam & Co." is a matter upon which I cannot advise you.

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ADDITIONAL HOMESTEAD ENTRY.

EDWARD R. CHASE.

The failure of the local officers to properly note upon their records an original application and amendment cannot jeopardize a claimant's right.

Secretary Teller to Commissioner McFarland, December 12, 1882.

I have considered the appeal of Edward R. Chase from your predecessor's decision of May 31, 1881, rejecting his application to make additional homestead entry under the provisions of the act of March 3, 1879 (20 Stat. 472), of lots 1 and 2 of Sec. 30, T. 36 N., R. 62 E., Eureka district, Nevada, such entry to bear date as of December 19, 1879.

It appears from the record that Chase filed declaratory statement No. 124, April 28, 1871, for the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 30, T. 36 N., R. 62 E., which tracts are not contiguous.

In May, 1875, he applied at the local office to so amend said filing as to embrace one hundred and sixty acres of contiguous tracts, but specified no particular tracts. Such application was allowed pursuant to your office letter of the 26th of said month, which prescribed "that he would be allowed to amend by taking forty acres adjoining the residue of his claim, in lieu of the NW. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of said section 30." August

11 ensuing, the register reported that Chase had appeared at the local office June 21 preceding and made homestead entry No. 63 of the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of said section in lieu of amending his filing. October 18 ensuing, he applied to so amend his entry as to embrace the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section; which application was allowed (pursuant to your office letter of July 19, 1877, deciding the case of E. R. Chase *et al.* v. Buron *et al.*, from which decision no appeal has been taken), as it appeared to be "the land he intended to enter, and which he supposed he had entered until the day he made his application, (and) that all his improvements, to the value of \$2,000, are situated upon the said E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 30."

Under date of January 11, 1879, your office advised the register and receiver that Chase's entry had been corrected upon your office records in accordance with his application to amend the same, but that his right to the tract claimed could not antedate June 21, 1875, the date of his entry, and that he would not be allowed to make final proof until the expiration of five years from said date, unless he could show that he was entitled to the benefit of section 2304, R. S. September 10 ensuing, your office modified the foregoing letter of instructions by directing the register and receiver to advise Chase to call at the local office and amend his homestead application by writing across the face thereof the correct description of his homestead claim, and to insert the words "or the act approved May 27, 1878," after "section 2304, R. S.," in said letter of June 11, 1879.

Under date of January 28, 1881, your office advised the register and receiver that "the homestead entry of Edward R. Chase is for the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 30, 36 N., 62 E., and he paid \$16 fee and commissions. The tract book sent to your office erroneously showed the government fee paid as \$5 only"; that said record, when sent, correctly showed the entry to be of the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of said section; that Chase amended his homestead application September 25, 1879, so as to describe the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$; that they were instructed by letter of November 13, 1879, to amend their record accordingly, which should have been done upon its receipt, and if this had not been done, that they should do so without further delay; and if Chase should present his entry papers pursuant to instructions aforesaid, "he will be entitled to make additional entry for lots 1 and 2 of NW. $\frac{1}{4}$, said section, without payment of fees, if said tracts remain vacant.

Thus it appears in the light of the foregoing summary of the history of this case that Chase's application in question was regularly and properly made at a time when the tract applied for was vacant public land, and therefore subject to such entry. The failure or refusal of the register and receiver to accept and properly note upon their office records his original application and amendment of the same could not jeopard his rights in the premises.

Your decision is accordingly reversed.

NATURALIZATION—CLERK OF COURT.

JOSEPH BARBER.

In view of the laws of the State of Ohio, the judge at a probate court therein who issues naturalization papers may be presumed to have a clerk.

Commissioner McFarland to register and receiver, Fargo, Dakota, December 16, 1882.

I am in receipt of your letter of October 17, 1882, in which you transmit appeal, and likewise the "rejected proof" of Joseph Barber, who made, June 28, 1880, homestead entry 6595, E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 30, T. 135, R. 56, and who now seeks to prove up under sections 2291 and 2305, Revised Statutes. Indorsed on said proof appears:

Proof rejected for the reason that there is no evidence filed to show that the probate court of Muskingum County, Ohio, is a court having common-law jurisdiction and a clerk and seal, and authorized to naturalize aliens, as required by section 2165, R. S., U. S.

Thirty days from September 16, 1882, were allowed for appeal. The rejected proof otherwise appears satisfactory, and the question seems to be whether an error was or was not committed in rejecting the certificate of the judge of the probate court of Muskingum County, Ohio.

The appeal of S. B. Pinny, esq., attorney for Joseph Barber, dated October 11, 1882, sets forth at length a statement of allegations of error on your part, and the same has been duly considered by this office.

In my letter to J. F. Hechtman, judge of court, La Plata County, Colorado, June 10, 1882 (9 C. L. O., 72), the principle is laid down that only courts having certain tests or qualifications are competent to naturalize; this would be of itself reason for your raising the question whether probate courts in Ohio were or were not qualified to naturalize citizens.

I find on investigation that the law of Kansas, construed in the Hechtman case (*supra*), is different from Ohio law. There is no provision in the Kansas law for a clerk of probate court. In Ohio the probate judge may appoint a deputy clerk, and as (in this case) the probate judge assumed jurisdiction in naturalization, I may presume he had a clerk.

You may issue the final certificate and receipt in this case, therefore, and advise Mr. Pinny of this decision.

HOMESTEAD—SETTLEMENT—ENTRY.

MURPHY *v.* TAFT.

Land awarded to Taft, who made prior settlement, notwithstanding prior entry was made by Murphy.

Secretary Teller to Commissioner McFarland, January 3, 1883.

I have considered the appeal of Edward Murphy from your decision of January 18, 1882, allowing the homestead entry of Charles W. Taft upon the SE. $\frac{1}{4}$ of Sec. 31, T. 117, R. 57, Watertown, Dak.

Murphy made homestead entry of the tract June 13, 1881, and Taft made like entry of the same tract June 15, 1881.

The testimony shows that Taft settled on the land March 20, 1881, with intention of claiming it under the homestead laws, since which time he has continuously resided thereon, and has valuable improvements. Notwithstanding, therefore, that Murphy made prior entry, Taft is within the provisions of the third section of the act of May 14, 1880, which grants to persons who settle on the public lands, with the intention of claiming the same under the homestead laws, the same time to file their homestead applications and perfect their original entries as is allowed to settlers under the pre-emption laws to put their claims on record; and their rights shall relate back to the date of settlement the same as if they settled under the pre-emption laws. As Taft made his entry within the time allowed a pre-emptor for filing a declaratory statement, his entry must relate back to the date of his settlement, and takes precedence of that of Murphy.

Your decision is affirmed.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

HERMAN L. PHELPS.

Where a single woman makes a homestead entry, and afterwards marries, her husband, in the event of her death, cannot purchase in his own name, under the act of June 15, 1880.

Commissioner McFarland to register and receiver, Gainesville, Florida, January 9, 1883.

Referring to the case of cash entry No. 1978, dated October 18, 1881, in the name of "Herman L. Phelps, heir at law of M. A. Daggett, deceased." It appears that M. A. Daggett, a single woman, made homestead entry No. 2281, Gainesville, Fla., October 25, 1875; that on the 1st of July, 1876, she inter-married with Herman L. Phelps, and continued the residence on the land with her husband until February 25, 1877.

On the 2d of July following, during the temporary absence of her husband, Mrs. Phelps died, leaving no child or children.

Mr. Phelps now seeks to obtain title to homestead made by his wife, by purchase under provisions of the act of June 15, 1880, claiming such right as the legal heir of his deceased wife.

Under act referred to, the homestead party or his transferee may purchase the land embraced by his homestead entry, and it has been decided that the widow or the heirs of a deceased homestead party are also entitled to the right of purchase; but there is no provision extending the privilege to the husband of a deceased settler.

The question as to whether Mr. Phelps is entitled to the right of purchase as an heir of his deceased wife, this office is not called upon to

decide, as his heirship is governed by the statutes of Florida, and is subject to numerous restrictions and limitations which may be left to be adjusted on a case arising in the courts. (See sections 1 and 3, chapter 92, McClellan's Digest of Florida Laws.)

The cash entry has therefore been suspended, and a patent cannot be issued in the name of Mr. Phelps; if, however, as the law allows a patent to issue to the heirs, Mr. Phelps is willing to allow the purchase to stand and patent to issue to *the heirs of M. A. Phelps, deceased*, the certificate will be returned to the district office for correction to that extent; but if not, the cash entry will be canceled, and he may apply for a return of the purchase money.

You will so advise Mr. Phelps, and request him to inform you at an early day, as above indicated.

PRACTICE—NOTICE BY PUBLICATION.

HEWLETT *v.* DARBY.

When notice by publication should be given by the contestant.

*Commissioner McFarland to register and receiver, Crookston, Minnesota,
January 27, 1883.*

I am in receipt of your letter of June 24, 1882, transmitting the papers in the case of Samuel Hewlett *v.* David A. Darby, involving T. C. entry No. 1714, made July 31, 1880, on NW. $\frac{1}{4}$ 18, 154 N., 43 W. Darby appeals from your decision refusing to dismiss the case on his motion, based upon the insufficiency of the affidavit and want of evidence of proper service. It appears that defendant made default at the hearing, and on the testimony offered you adjudged the entry forfeited. Some three weeks subsequent to the hearing defendant appeared specially by attorney and filed a motion to dismiss the case, alleging that the affidavit did not specifically allege failure to comply with the law; that it was not sufficient basis for a resort to notice by publication, inasmuch as it merely alleges that contestant, "does not know where said David A. Darby is or may be found."

I think the allegation of non-compliance with the law is sufficient.

As to the second count in the appeal, the rules of practice provide that "notice may be given by publication only where it is shown by affidavit of contestant, and by such other evidence as the register and receiver may require, that personal service cannot be made." It seems to me that the affidavit in this case fails to show that "service cannot be made." It merely alleges want of knowledge of the whereabouts of defendant. No mention is made of any effort to ascertain his place of residence. Diligence is of the essence of such a proceeding, and I believe that the usual practice in the courts is to require an affidavit that it was used before making an order for service by publication. And it appears that in this case the residence of defendant was found before the day of trial to be but a short distance from the local office. As the

latter did not appear at the hearing, and afterwards made special appearance and denies your jurisdiction, I am of the opinion that he is in time, and that his motion to dismiss should be granted.

Further, there appears to be no application to enter the tract by contestant, as required by the third section of the act of June 14, 1878.

For both these reasons the contest is dismissed.

22 ID 629

PRACTICE—PROTESTANT—HEARING.

How a party, not of record, may proceed to defeat a homestead claimant who has not complied with the law.

Commissioner McFarland to register and receiver, Humboldt, California, January 31, 1883.

In his letter of January 10, 1883, the register asks the following question, viz :

When a party, not on the record, desires to contest the right of a party who has advertised to make proof under the act of March 3, 1879, on a homestead or pre-emption, has he the right to cross-examine the applicant's witnesses, the same as a party of record? and if not, of what practical benefit is the act of March 3, 1879?

In reply, I have to state that in my opinion the notice required to be published under the act referred to is intended to give notoriety to the fact that the claimant intends to take the proper steps to complete his title to the land embraced in his claim, and to give ample time to any one having an adverse claim to take measures to protect the same; and also to enable any one knowing that the claimant has failed to comply with the requirements of the statute to protest against the issuance of patent. The protestant, in such case, however, should not be allowed to cross examine the claimant's witnesses, or to introduce the testimony of other witnesses. The protest, in the form of an affidavit duly corroborated, should be transmitted to this office, with the proof, for our consideration. If, from the allegations made, this office deems such action necessary, a hearing will be ordered.

Commissioner McFarland to register and receiver, Fergus Falls, Minnesota, February 9, 1883.

HOMESTEAD ENTRY—DEVISEE—CHILDREN.

PETER KACKMANN.

Under the homestead law, the widow of a deceased entryman stands first in the line of succession. But in considering her right to devise this homestead, other questions must be considered. By section 2292, Revised Statutes of the United States, it is provided that: "In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children," and it is held that a homestead party cannot, by will, defeat the rights of the children.

Commissioner McFarland to register and receiver, Fergus Falls, Minnesota, February 9, 1883.

I am in receipt of your letter of December 28, 1882, transmitting for consideration by this office final proof offered by Peter Kackmann in

support of his claim to patent for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ of Sec. 4, T. 134, R. 43, by virtue of homestead entry No. 3527, made by Wilhelm Lindemann April 21, 1877.

The records show that Lindemann made the entry as above stated, and the final proof shows that the entryman established a residence upon the land on April 7, 1877, and continued to reside upon and cultivate the same until the time of his death, in September, 1880; that he left a widow, Fridrike Lindemann, who remarried in the month of March, 1881, with Peter Kackmann, the claimant, and continued to reside upon and cultivate the land until October 2, 1881, when she died, leaving a will as follows:

I, Fridrike Kackmann, whose former name was Clausen, I give all my property, land, cattle, and all the house furniture, farming tools, to Peter Kackmann. This is my will.

This will is shown by the certificate of the judge of probate of Otter Tail County, Minnesota, wherein the land lies, to have been duly probated and recorded.

The final proof shows that Peter Kackmann, whose identity as the devisee is fully established, has resided upon and cultivated the land from the date of the death of his wife, Fridrike Kackmann, whose identity as the former widow of Wilhelm Lindemann is established beyond a doubt, up to October 9, 1882, the date of the final proof.

In your letter transmitting the final proof you say:

As we have never had a similar case before this office, and can find no decisions directly bearing upon this subject, we respectfully submit the proof for your office to decide whether or no said Kackmann is entitled to receive patent for above described tract.

A decision upon this case involves the question respecting the legal qualifications of the original entryman to make the entry, the rights of the widow to devise the homestead, and the qualifications of the claimant to receive patent under the homestead law.

With respect to the first, I have to state that the entryman alleged in his homestead affidavit that he had declared his intention to become a citizen of the United States, but filed no evidence corroborating the allegation. By letter C of January 13, 1883, your attention was called to the defect, and with your letter dated January 24, 1883, you transmitted a certificate from the clerk of the district court, seventh judicial district, State of Minnesota, showing that Lindemann declared his intention to become a citizen April 20, 1877, the day before the entry was initiated. He was therefore a legally qualified entryman under the homestead law.

Under the homestead law, the widow of a deceased entryman stands first in the line of succession. And in this case the widow of Lindemann, who afterwards became the wife of the claimant Kackmann, was undoubtedly entitled to all the rights respecting the land in question of which Lindemann died possessed, and by her remarriage forfeited

none of those rights. As the wife of Kackmann, she devised to him her rights and interests to and in said land. So far as the legal rights of Mrs. Kackmann, as a married woman, to devise property by will are concerned, no doubt can exist, inasmuch as it is provided by State law (Statutes of Minnesota, 1878, p. 567, sec. 1) that—

Any married woman may devise and dispose of any real or personal property held by her, or to which she is entitled in her own right, by her last will and testament in writing, and may alter or revoke the same, in like manner as if she was unmarried.

But in considering her right to devise this homestead other questions must be considered. By section 2292, Revised Statutes of the United States, it is provided that: "In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children," and it is held by this office that a homestead party cannot, by will, defeat the rights of the children. (See case of Sarah Leonard, 9-C. L. O.) If, therefore, at the date of the death of Mrs. Kackmann, infant children of the entryman—Lindemann—were living, the right inures to them, and the will devising the property to Kackmann, so far as it applies to the homestead, is of no force, and will not be recognized by this office.

The final proof under consideration fails to show whether infant children of the deceased entryman were living at the date of death of the widow, and final adjudication of the case must be deferred until proof upon this point shall have been submitted.

Kackmann is clearly shown to be the devisee named in the will; the authenticity of that document is satisfactorily established; his citizenship is shown by certificate from the clerk of the court before which he was naturalized, and he is in all respects duly qualified to receive a patent under the homestead law. In the event that no infant children of Lindemann survived Mrs. Kackmann, no objection can be made to the issuance of final papers in his name upon payment of commissions due. But should it be ascertained that infant children of Lindemann were living at that time, then the final papers and patent must be issued to them by name after the receipt of final proof made by them or in their behalf by a person duly authorized to act for them. No advertisement of intention to make final proof will be required of them, the intention of the act of March 3, 1879, having been fulfilled by the notice of intention given by Kackmann, and they may avail themselves of the proof already on file, except so far as relates to final affidavit.

Upon receipt of evidence respecting the existence of infant children, which is required by this letter, giving the ages and full names of all such, and payment of commissions due, you may issue final papers in the case either in the name of Kackmann or the infant children, as the

facts may justify. Remember, if there be infant children of the deceased entryman, a new final affidavit must be executed by or for them.

The final papers hereby authorized should be transmitted to this office with your regular returns for the month in which issued, and must be accompanied by the evidence required. A reference to this letter by initial and date should appear upon the final papers and your abstracts of entries and receipts.

CONTEST—RESIDENCE—FAMILY.

THOMAS *v.* THOMAS.

Residence is largely a question of intent. A contest by a divorced wife against her absent husband's homestead entry should be treated as between parties who were never married.

Commissioner McFariand to register and receiver, Salina, Kansas, March 7, 1883.

The case of Thomas *v.* Thomas involves H. E. No. 20,199 in the name of Wm. R. Thomas, and is before me on appeal from your decision adverse to the contestant.

It appears that the contestant, who was the wife of claimant, obtained a divorce from him, the decree being dated March 18, 1882. It was conclusively shown that W. R. Thomas abandoned the tract and his family in the spring of 1880, and at the date of the hearing—June 5, 1882,—had not returned thereto. You, however, decide against the contestant, for the reason that at the time of complaint, six months had not elapsed subsequent to the date of the decree of divorce. This apparently proceeds on the assumption that the prolonged absence from his land by a homestead claimant is not cause for cancellation, if his family continue to reside on the same. I do not consider this assumption well founded. The question of residence is one largely depending on the *intent* of the party. While, therefore, the residence of one's family may ordinarily be considered *prima facie* the residence of himself, in this case the absence of the claimant appears to have been intentional and willful; so much so, that, as before stated, the local courts have granted a divorce to his wife.

This seems to me to be good cause for the cancellation of his entry. Contests by a wife against her husband have been discountenanced on sound principles of public policy, in harmony with the general system of practice in the courts; but in this case the marriage relation has ceased to exist, and the parties have the same legal relations to each other as if it never had existed. I think, therefore, that there is no good reason why the contest of Mrs. Thomas should not be entertained. And in view of the foregoing, I am constrained to reverse your decision, and adjudge the entry forfeited.

*EFFECT OF PATENT; RESERVED INDIAN LANDS.**ROCKWELL v. INDIAN WIDOWS.*

The act of March 3, 1875, allows settlers, prior to 1874, to take one hundred and sixty acres of the reserved Indian lands on certain conditions.

The patent erroneously issued for the tract now in dispute can only be vacated by voluntary relinquishment through a proper instrument, or by proceedings in court.

Secretary, Teller to Commissioner McFarland, March 9, 1883.

I have considered the appeal of Charles Rockwell from your decision of December 23, 1879, holding for cancellation his additional homestead entry made February 11, 1876, for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 21, T. 18 N., R. 16 W., Reed City, Mich.

It appears that on July 31, 1879, the Acting Secretary of this Department, considering the appeal of Rockwell from your predecessor's decision of January 9, 1879, holding his entry for cancellation, found that the tract is within the reservation made for the Ottawa and Chippewa Indians, in the State of Michigan, by the treaty of July 31, 1855, and restored to market by the acts of June 10, 1872 (17 Stat., 381) and March 3, 1875 (18 Stat., 516); that on April 30, 1875, Wah-sah-din-o-qua and Mee-kis-sa-see qua, widows of Indians of said tribes, applied at the local office to enter respectively the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 21, as homesteads, and submitted proofs that they had occupied and improved the tracts since 1870; which applications were refused because they conflicted with soldiers' declarations Nos. 83 and 84, made April 10, 1875; that on August 31, 1875, your office directed a hearing to ascertain the qualifications of said applicants, but which hearing does not appear to have been held; that on December 16, 1878, the applicants renewed their applications, the former testifying to her settlement on the land she applied for in 1870, her continued residence thereon, and improvements consisting of a house and cultivation of five acres; and the latter of her settlement in 1870 on the tract she applied for, her continued residence thereon, and improvements consisting of a house and twelve acres under cultivation. These statements were corroborated by other testimony.

There being no conflicting claim of record to the E. $\frac{1}{2}$ of said NW. $\frac{1}{4}$ at the date of Rockwell's additional homestead entry of February 11, 1876, it was approved and patented; but the patent was returned from the local office, at your request, without delivery to him, and is now among the files of the case.

Your predecessor, by his decision of January 9, 1879, held the entry of Rockwell for cancellation, for the reason that the land embraced therein was not subject to his entry at that date, there being a valid

adverse claim, though not of record; and Rockwell in his appeal therefrom, alleging that the statements of the Indian applicants and their corroborating witnesses were untrue, and it not sufficiently appearing to the Acting Secretary of this Department, that the applicants were entitled to make entries under said acts of June 10, 1872, and March 3, 1875, he directed (July 31, 1879) a hearing to ascertain their qualifications, the date of their settlements, and the character and extent of their improvements.

In view of the testimony taken at such hearing, you find that the applicants, respectively, resided on the land applied for a long time prior to the date of their applications, to wit, since the fall of 1871, and continuously since, and had complied with the requirements of section 3 of the act of March 3, 1875, which provides that all actual, permanent, *bona fide* settlers on any of the lands reserved for Indian purposes, under the treaty with the Ottawa and Chippewa Indians of Michigan of July 31, 1855, shall be entitled to enter not exceeding 160 acres of land either under the homestead laws, or to pay the minimum price of land, on making proof of his or her settlement and continued residence before the expiration of ninety days from the passage of the act, provided . . . they shall have settled upon said lands prior to January 1, 1874; and you renew your predecessor's decision of January 9, 1879, and hold Rockwell's entry for cancellation, for the reasons formerly stated.

I have examined the testimony, and affirm your decision that Rockwell's entry was erroneously allowed and that he should be permitted, upon cancellation thereof, to make a new entry elsewhere, with credit for fees and commissions paid. It appears, however, that his present entry covers forty acres of each of the tracts embraced in the respective entries of the Indians, and that patent has issued therefor. Notwithstanding the non-delivery thereof to Rockwell, it was effectual to pass to him the title of the United States to the tract named therein (*U. S. v. Schurz*, 12 Otto, 378), and until set aside by action of the courts, or by his voluntary relinquishment thereof and his claim thereunder, his legal right to the tract must be admitted.

But in view of the erroneous issue of this patent, you will require from him a surrender of his rights by a proper instrument conveying to the United States the title he acquired thereby; and upon his neglect or refusal so to do you will report the facts to this Department, that measures may be taken in the courts to restore said title to the United States.

I affirm your decision, allowing the applications of these Indian women for tracts not embraced in the patent to Rockwell, and return the papers transmitted with your letter of June 10, 1882.

36 ID 576

HOMESTEAD—ADDITIONAL ENTRY.

JOSEPH BIRCHFIELD.

The act of March 3, 1879, contemplates an existing original entry on land to which the additional entry adjoins. If by reason of cancellation there is no original entry, the right of the applicant to an additional entry is extinguished.

Secretary Teller to Commissioner McFarland, April 2, 1883.

I have considered the appeal of Joseph Birchfield from your decision of April 25, 1882, rejecting his application to make an additional homestead entry under the act of March 3, 1878 (20 Stat., 472).

It appears that Birchfield made a homestead entry upon a tract of 40 acres, in the Montgomery, Alabama, land district, September 14, 1869, and that the same was canceled February 27, 1879, for failure to make final proof within seven years. He now applies to enter forty additional acres.

The act of March 3, 1879, provides that—

Any person who has, under existing laws, taken a homestead on any even section within the limits of any railroad (as Birchfield's former entry was) and who by existing laws shall have been restricted to 80 acres, may enter, under the homestead laws, an additional 80 acres adjoining the land embraced in his original entry, or if such person so elect he may surrender his entry to the United States for cancellation, and thereupon be entitled to enter lands under the homestead laws the same as the if surrendered entry had not been made, and the residence and cultivation of such person upon and of the land embraced in his original entry, shall be considered residence and cultivation for the same length of time upon and of the land embraced in his additional or new entry, and shall be deducted from the five years' residence and cultivation required by law.

This statute contemplates an existing original entry on land which that embraced in the new entry shall adjoin, and which may be surrendered, and credits the new entry with the length of residence and cultivation under the original entry, requiring, however, actual cultivation and residence on the land embraced in the new entry for at least one year. If there is no original entry in existence, there is no land to which that embraced in the new entry can adjoin, nor is there an entry which can be surrendered; and as all of Birchfield's rights are extinguished by cancellation of his original entry, he became thenceforth a stranger to the land, with no entry upon which to base his additional claim, and with no former residence or cultivation which the statute contemplates in connection therewith.

The case of Annie Anderson, cited by appellant (Copp, February, 1882), is not authority for this. In that case there was an existing original entry, and it was decided upon a wholly distinct question from that herein involved.

Birchfield has no right, in my opinion, to the entry applied for, and I affirm your decision.

ADDITIONAL HOMESTEAD ENTRY—RELINQUISHMENT.

M. V. B. MILLS.

An additional homestead entry under the act of March 3, 1879, is granted, notwithstanding a contest initiated for abandonment of the original homestead entry.

Commissioner McFarland to register and receiver, Gainesville, Florida, April 6, 1883.

Referring to your letter of October 18, 1881, transmitting appeal of M. V. B. Mills from your action in rejecting his application to make a new homestead entry under the act of March 3, 1879, I have to state that it appears from the records of this office that said Mills made homestead entry No. 4073, Gainesville series, September 23, 1876, for SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 6, T. 3, S. R. 14 E., within 6 miles limit of the Pensacola and Georgia Railroad. Mr. Mills sets forth under oath that he applied to you to be allowed to relinquish his present entry, and make a new one under the act above referred to, on the ground that he had attempted to make a residence on the land in question; that he built and erected buildings thereon, and they were torn down several times during the night; that he planted crops and trees upon the place, and they were destroyed by the same parties; and furthermore he was driven from his place through fear of being killed or receiving great bodily harm; but that you rejected his application on account of a contest pending against Mr. Mills's homestead for abandonment. In your letter transmitting the appeal of Mr. Mills, you state that the ground of rejection was, as stated by Mr. Mills, the pending contest.

The contest referred to, *Stephen Miller v. M. V. B. Mills*, was made July 15, 1881, and was reported to this office October 8, 1881, four days prior to your transmission of the appeal of Mr. Mills.

The question that now arises is whether Mr. Mills is entitled to the privilege of relinquishing his entry and making another under act of March 3, 1879, where a contest has been initiated for abandonment. If so, the contest must be dismissed, and the contestant would be deprived of his thirty days' right to enter the land under act of May 14, 1880, and the land in controversy would be subject to entry by the first legal applicant.

On a full consideration of this question, I am of the opinion that the act of March 3, 1879, gave from that date to Mr. Mills the privilege to relinquish his entry, if he so desires, and make another entry, and that the subsequent act of May 14, 1880, cannot be construed as in any manner interfering with the provisions of said act of March 3, 1879, from the fact that it is unnecessary, in making applications similar to that of Mr. Mills, to show any compliance with law as to residence and cultivation of the original homestead. Hence, if an abandonment was

shown by the contest, or the party acknowledged he had not complied with the law in every respect, it would not be considered as affecting his right under the act of March 3, 1879.

With this view of the case, your decision is not sustained, and you will advise Mr. Mills that he will be allowed to relinquish his entry No. 4073, and make a new one, as provided by the act referred to. When a relinquishment properly executed has been filed with you, you will allow the new entry to be made, after canceling the old entry on your records, and thereafter report the cancellation to this office, when the contest will be dismissed.

If, however, after a reasonable period, Mr. Mills fails to file such relinquishment, you will report the matter to this office, when action will be taken in the contest now pending.

24 I.D. 522

HOMESTEAD—COMMENCEMENT OF RESIDENCE.

BARNEY PHILLIPS.

The five years allowed in a homestead entry, date from entry and not from the commencement of personal residence on the land entered.

*Commissioner McFarland to register and receiver, Crookston, Minnesota,
April 9, 1883.*

I am in receipt of your letter of February 23, 1883, transmitting the appeal of Barney Phillips from your decision of January 26, 1883, rejecting final proof offered by him in homestead entry No. 915, S. $\frac{1}{2}$ SE. $\frac{1}{4}$ 14, 137, 43.

The facts are that Phillips made his entry November 6, 1877, established an actual *bona fide* residence on the land March 15, 1878, and had continuously resided thereon and cultivated the same up to date of final proof—January 14, 1883, a period of four years nine months and twenty-nine days from date of beginning actual residence, and of five years two months and eight days from date of entry.

Your indorsement upon final proof is as follows: "Rejected for the reason that the within testimony does not show an actual residence by claimant of five years." Phillips, through his attorney, M. B. Gibson, appeals from this decision on the ground that the same "is contrary to law and rulings of the General Land Office," and urges that inasmuch as his residence was established on the land within six months from date of entry, he was not in default, and his time of residence counts from the time he filed his homestead entry."

Your action in rejecting the final proof was erroneous, and the exceptions thereto by Phillips are well taken and are hereby sustained. The proof is satisfactory, and upon the payment of commissions due, you will issue final receipt and certificate in the case and transmit the same to this office with your regular returns for the month in which issued.

HOMESTEAD ENTRY—RESIDENCE—PUBLIC OFFICER.

GEORGE W. SHEPPARD.*

A homestead entryman, who cultivates and improves the land embraced in his entry, but who never resided thereon, is not excused because elected to a public office which requires his residence elsewhere.

*Commissioner McFarland to register and receiver, Bloomington, Nebraska,
April 12, 1883.*

I have received your letter of February 8 last, transmitting an application for the reconsideration of my decision of December 1, 1882, rejecting proof tendered by George W. Sheppard, on homestead entry No. 3101, covering the SE. $\frac{1}{4}$ Sec. 23, T. 2, R., 16 W. The party filed homestead declaratory statement No. 1088 for the land in question March 15, 1875, and the entry was made September 14, 1875. The proof shows that a house was built on the land during the following month; that about 75 acres are under cultivation, and that crops of wheat, corn, and rye have been raised each year since 1877, but no residence has been established on the tract by Sheppard or any member of his family. In March, 1876, he was appointed deputy county clerk of Franklin County; in January, 1877, he was appointed clerk *vice* former occupant resigned, was elected to the same office in the fall of 1877, and continued to hold the same until January, 1880.

The proof, which was made October 2, 1882, nearly three years after the expiration of his term of office, was rejected for the reason that he had not established a residence on the land embraced in his entry, and consequently his case did not come under the rule of the Department which permits a person, who after establishing an actual residence thereon is elected or appointed to a public office requiring his continuous residence at some place other than his homestead, to be temporarily absent therefrom during the term of such office.

In his application for a review, Mr. Sheppard refers to a decision rendered by the acting Secretary of the Interior, October 25, 1873, in the case of *Benson v. Western Pacific Railroad Company*; but a careful examination of this decision shows that the cases are not analogous. So likewise the case of *Solomon Males*, decided by this office July 10, 1876, and which is referred to by Sheppard, cannot be accepted as authority for allowing final papers to issue on a homestead entry where no residence is shown.

I therefore decline to modify my decision of December 1, 1882.

* See 2 L. D., 154.

34 ID 708

HOMESTEAD AND PRE-EMPTION—FINAL PROOF.

W. W. BURKE.

Witnesses must be persons entirely disinterested in the claim, and cognizant of their own knowledge of all the facts set forth in the proof during the entire period of the alleged residence and cultivation.

The fact that a homestead or pre-emption claimant cannot furnish the necessary proof by his neighbors, but has to depend upon his attorney and broker to make the same, casts suspicion upon the transaction, and tends to show collusion in the making of such proof.

Commissioner McFarland to W. W. Burke, Huron, Dakota, April 17, 1883.

I am in receipt of your letter of the 7th instant, calling attention to the fact that in many instances parties in making proof upon pre-emption and homestead entries have for witnesses their attorney or parties from whom they are borrowing money with which to perfect their claims, people who do not reside near the land covered by the entry, but generally reside in the towns.

You ask whether such persons are competent witnesses, being in a measure interested parties.

In reply I have to inform you that the intent of the law is that the corroborative testimony should be made by witnesses who actually reside in the immediate vicinity of the claimant and are fully acquainted with the land and all the facts as to the claimant's residence upon and cultivation of the same. The testimony of those who only occasionally pass the land, or only know by common repute that the claimant resides there, is not competent proof. Witnesses must be persons entirely disinterested in the claim, and cognizant of their own knowledge of all the facts set forth in the proof during the entire period of the alleged residence and cultivation.

The fact that a homestead or pre-emption claimant cannot furnish the necessary proof by his neighbors, but has to depend upon his attorney and broker to make the same, casts suspicion upon the transaction, and tends to show collusion in the making of such proof.

PURCHASE UNDER THE ACT OF JUNE 15, 1880.

SAMUEL M. MITCHELL.

The operation of this act is not affected by the cancellation of an entry. The tract in question was embraced in three homestead entries, which have successively been canceled. The second entryman applies to purchase. His application is permitted, subject to adverse rights.

Commissioner McFarland to register and receiver, Montgomery, Alabama, April 17, 1883.

I have considered the appeal of Samuel M. Mitchell by his attorney from your decision of March 15, 1883, rejecting his application to pur-

chase under the act of June 15, 1880, the land embraced in his homestead entry No. 3586, made April 19, 1871, for the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 24, 10 S., 11 W., on the following grounds, viz.: "1. The land is classed as coal. 2. The claimant voluntarily relinquished the entry August 25, 1874."

The records show said tract to be embraced in homestead No. 1320, made December 19, 1867, by William Masgrove, and canceled by voluntary relinquishment December 17, 1869. Said tract was subsequently entered by the appellant, *supra*, and canceled by voluntary relinquishment August 25, 1874. Subsequent thereto, to wit, November 2, 1874 said tract was entered by Mary A. Hyde per homestead entry No. 5620, which was canceled January 9, 1883, for failure to make final proof within the statutory period.

The first objection is cured by the act of March 3, 1883, which excludes the public lands in Alabama from the operation of the mineral laws, and provides for their disposal the same as agricultural lands. The mere fact of the land being classed as coal, or reported as valuable for minerals, is not *per se* an objection to entry, or to the issuance of patent therefor. The second objection, that the claimant voluntarily relinquished the entry, is no bar to an application to purchase under the act of June 15, 1880, as it can make no difference to the government whether the entry has been canceled or not, and it is of no consequence whether the cancellation, which was the act of the Department, was induced by the voluntary act of the entryman or not, as the mere act of cancellation has no effect to prevent an entry under the statute. The only question that presents itself in considering an application under the act, is, was the land properly subject to the original entry, and will the proposed entry interfere with the rights or claims of others who have subsequently entered such lands, etc.?

The case before me presents that of a tract of land, heretofore covered by three separate homestead entries, all of which have been duly canceled, and are presumed to have been legal; upon the cancellation of the last entry, the land reverted to the public domain, and was subject to entry by the first legal applicant thereafter. In the absence of any equities, as between the three entrymen, their rights as beneficiaries of the act of June 15, 1880, are equal, the first applicant being entitled to recognition. The appellant appears to be the second entryman: therefore, his rights are subservient to any adverse claim that may have attached subsequent to the cancellation of his entry, including any equities that may exist favorable to the later entryman.

Your decision is hereby reversed, and the application of Mitchell will be allowed, upon the payment of the government price for the land, subject to any adverse rights that may have attached.

26 ID 672
31 169
42-489
HOMESTEAD ENTRY—RESIDENCE—MILITARY SERVICE.

W. A. JONES.

A person now serving in the Army or Navy cannot make homestead entry if his duties would prevent him complying with the law as to residence.

Commissioner McFarland to Maj. W. A. Jones, San Francisco, California, May 9, 1883.

In reply to your letter of the 19th ultimo, referred to this office by the Hon. Secretary of the Interior, I have to state that a person now serving in the Army or Navy of the United States cannot make a homestead entry if his duties would prevent him from complying with the law as to residence.

In the case of Gen. Jeff. C. Davis, the Hon. Secretary of the Interior, under date of April 9, 1879, decided that section 2308 U. S. Revised Statutes 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 the 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.

ENTRY UNDER ACT OF JUNE 15, 1880.

INSTRUCTIONS.

Acting Commissioner Harrison to register and receiver, Taylor's Falls, Minnesota, May 21, 1883.

I am in receipt of your letter of May 5, 1883, as follows:

In case of a man dying and at the time holding a homestead, can an alien heir or heirs enter his homestead land under the act of June 15, 1880? An entryman has died here and his relations reside in Canada.

Before any heirs can legally be permitted to purchase the land embraced in the entry of a deceased homestead party it must be shown that the entryman left no widow. This fact being established, the rights of infant children under section 2292 R. S. must next be protected. If it be shown that neither widow or infant children survive the entryman, then the rights of other heirs may be considered, and they may be permitted to acquire title in any of the methods prescribed by law. In the event that they elect to purchase the land as provided by second section of act of June 15, 1880, it is immaterial whether they be citizens or aliens. There is nothing in the statutes prohibiting aliens from purchasing lands subject to private entry, and the effect of the second section of act of June 15, 1880, is to render lands affected by it subject to private entry by the persons entitled to the benefit of its provisions.

PATENT—BOARD OF EQUITABLE ADJUDICATION.

INSTRUCTIONS.

Secretary Kirkwood to Commissioner McFarland, December 12, 1881.

Referring to your request of June 8, 1881, for instructions respecting the requirement of the issue of final certificate before the submission to the board of equitable adjudication of homestead cases not proved up in due time, I have to state that I see no necessity for a positive rule on the subject.

Under the present practice, cases are submitted in some instances upon the final proofs offered, without the issue of the official patent certificate, and in others the final certificate is issued and accompanies the papers.

While the law creating the Board provides for the issue of patent directly upon the adjudication, thereby conveying a clear implication that the entries to be submitted are substantially in form for such immediate issue of patent, yet I am inclined to the opinion that the power of the Board to confirm may be exercised at any period after the defect, if the case is in such reasonable completeness as to render it possible in due ordinary course to carry it speedily to patent.

This may be done by directing the final certificate to issue after the confirmation, as well as by directing the patent to issue upon a certificate already returned.

In many cases hardship might result from a too stringent regulation in either direction, and I prefer to leave the matter open for your discretion as individual cases may arise, leaving the Board free to act upon both classes as they may be respectively presented.

ISSUE OF PATENT—MINOR HEIRS.

OWEN COTTON, DECEASED.

Before patent can issue to minor heirs the following evidence must be adduced :
The appointment of the guardian.
The names and ages of all children surviving the demise of the soldier.
The death or remarriage of the widow, with the date when either occurred.

Commissioner McFarland to Francis Howard, Magnolia, Wisconsin, February 28, 1882.

I am in receipt of your letter of the 15th ult., inclosing a copy of letter C from this office to the register and receiver at Worthington, Minn., respecting the homestead entry No. 9701, final certificate No. 4099, NE. $\frac{1}{4}$, 12, 102, 44, for the benefit of the minor heirs of Owen Cotton, deceased.

You state that "some mistake has occurred, as the mother of said heirs is still living." The deceased party was a soldier during the War of the Rebellion, and his right to make a homestead entry descended upon his death to his widow if living and not remarried. In the event of the death or marriage of the widow, then the infant orphan children, by duly appointed guardian, might initiate an entry. In the papers relating to the case under consideration there is no evidence of the death or remarriage of the widow and none of the appointment of a guardian for the infant orphan children, nor do the names or ages of the children appear. Before patent can issue upon this entry evidence must be filed in this office showing:

1. The appointment of the guardian.
2. The names and ages of all children surviving the demise of the soldier.
3. The death or remarriage of the widow, with date when either occurred.

This evidence must be transmitted through the district land office at Worthington, Minn., and so far as practicable should consist of certified copies from official records and of instruments in writing, relating to the facts to be established.

ADDITIONAL HOMESTEAD ENTRY—RESIDENCE.

JOSEPH D. SHARP.

The act of March 3, 1879, provides that no patent shall issue on new or additional entries made thereunder until the parties have actually and in conformity with the homestead laws occupied, resided upon, and cultivated the land at least one year.

The act does not exclude parties having made entries thereunder from paying for the lands upon homestead proof of inhabitation and cultivation of the homestead, treated as an entirety in cases of additional entry, for a period such as would evidence good faith in pre-emption cases.

*Commissioner McFarland to register and receiver, Denver, Colorado,
March 1, 1882.*

I am in receipt of yours of the 29th ultimo, with affidavit of Joseph D. Sharp, stating that he purchased the land embraced in the cash entry referred to below, November 15, 1880, and has since occupied the same, and desires patent to issue for the entire tract. The entry as to the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ Sec. 4, T. 4 N., R. 67 W., was suspended by letter to you the 10th of last June in the following language:

The original homestead entry of Frank Buffmire, No. 3649, January 28, 1878, and his additional entry, No. 4320, made October 6, 1880, under the act of March 3, 1879, covering the SW. $\frac{1}{2}$ of Sec. 4, T. 4 N., R. 67 W., were commuted to cash entry No. 3248, on November 13, 1880. The additional entry was made less than two months previous to the cash entry. The act of March 3, 1879, provides that no patent shall issue on

new or additional entries made thereunder until the parties have actually and in conformity with the homestead laws occupied, resided upon, and cultivated the land embraced therein at least one year; that is, one year from date of new or additional entry. The party is regarded as entitled to credit for the period of residence upon the original entry tract, and cultivation of the additional entry tract, so far as relates to the latter tract from October 6, 1880, and, therefore, in view of the provision of law mentioned, he will be required to make proof not sooner than October 6, 1881, showing such residence and cultivation for at least one year from October 6, 1880, in order to be entitled to a patent for this tract. When the proof is furnished the matter of issuing patent will be considered.

It appears by the affidavit of Sharp that Buffmire left the land immediately after cash entry. Sharp urges that Buffmire was entitled to commute his entry as to the latter tract under section 2301 of the Revised Statutes by reason of residence on the original entry tract.

Upon a review of my predecessor's decision above quoted, I have concluded to relieve the cash entry from suspension. The act of 1879 is not regarded by me as excluding parties having made entry thereunder from paying for the land upon homestead proof of inhabitation and cultivation of the homestead, treated as an entirety in cases of additional entry, for a period such as would evidence good faith in pre-emption cases—the period of inhabitation required by section 2301 of the Revised Statutes. Homestead entries are made under the general provisions of the original homestead law—the act of May 20, 1862, and while additional privileges have since been conferred with certain limitations, I hold that the 8th section of the original act (sec. 2301 of the Revised Statutes) not having been repealed or modified in express terms by subsequent statutory provisions, is applicable, according to its letter, to homestead entries generally.

Notify Mr. Sharp of the action taken.

INDIAN RESERVATION—COMMON INDIAN TITLE.

W. N. BRADEN.

A permanent Indian reservation, within the meaning of the act of March 3, 1857, is a territory with definite boundaries, set apart by the government for the use of Indians, to which an unlimited occupancy as to time is guaranteed by the government.

Secretary Teller to Commissioner McFarland, October 20, 1882.

I have considered the question presented to me in your communication of October 3, 1882, and submitted to you in a letter addressed to your office August 16, 1882, by Hon. W. N. Braden, auditor of the State of Minnesota, making inquiry as to what is understood by your office

“as permanent Indian reservation,” and what is understood “as reservation held by common Indian title.”

August 19, 1882, you reply to such a letter, and state “that the term permanent Indian reservation, as used in the act of Congress of March 3, 1857 (11 Stat., 200), is understood to mean lands allotted to Indians in fee. Lands held by common Indian title are lands subject to occupation in common by Indian tribes, but to which the paramount title remains in the United States.”

And in reply to a letter addressed to you August 26, 1882, by the same party, asking whether the Sioux and Winnebago reservations were regarded as permanent Indian reservations, you state that “they were not so regarded.”

By your communication of the 3d inst. to this Department, you submit a letter from Hon. W. S. Hahn, attorney-general of said State, addressed to this Department, and inquiring whether the views thus stated by you meet the approval of this Department.

I do not coincide with the views thus expressed by you. I am of the opinion that a permanent Indian reservation within the meaning of the act of March 3, 1857, referred to by you, is a territory of country with definite boundaries set apart by the government for the use of Indians, and to which an unlimited occupancy as to time is guaranteed by the government, and of which the Indians cannot be deprived, except by their own acts; and that a fee simple vested in the Indians is not essential to a permanent reservation.

The question was also submitted as to what is understood by “common Indian title,” and to which you reply that “lands held by the ‘common Indian title’ are lands subject to occupation in common by Indian tribes, but to which the paramount title remains in the United States.” This is, I think, correct, except in that it assumes that as to permanent reservations the fee is in the Indians.

The term “common Indian title” seems to have been used somewhat indiscriminately; but in its generally accepted use it refers to the reservation title, and is thus distinguished from the aboriginal right of occupancy recognized in the Indians as to the great mass of land originally occupied by them.

I have examined the several treaties under which the Sioux and Winnebago reservations were created, and am of the opinion that such reservations were permanent reservations within the meaning of the act of March 3, 1857.

This question does not now arise in any controversy to which the United States is a party, but the question has been entered upon by your office, and I have deemed it best to answer the questions thus submitted to me. The practice is not to be approved, nor are the views here expressed to prevent a full examination of any questions which may be presented to your office in the adjustment of any accounts with States for such five per cent.

FINAL PROOF—HEIRS.

LUCINDA HILL.

Where final proof is made for the heirs of a deceased homesteader the final affidavit should be made by one of the heirs.

Commissioner McFarland to register and receiver, Larned, Kansas, August 6, 1881.

Referring to Hd. entry No. 522, made March 18, 1876, for northeast quarter of section 32, township 23, range 16 west, by Lucinda Richardson, and to the final proof in the case (final certificate No. 1740), made by Samuel H. Richardson, "administrator of the estate of Lucinda Hill, née Lucinda Richardson, deceased," I have to state that in cases of this character the final affidavit should be made by one of the heirs for the heirs of the deceased party, and final certificate should issue to the "heirs of deceased." You will so inform the parties in interest, and when the final affidavit is made transmit the same to this office, refering to this letter.

PRACTICE—APPEAL—RELINQUISHMENT.

JOHN POWERS.

In this case, in view of the party's diligence, the defective appeal might be entertained so far as the question of the time allowed for filing the same is concerned. In order to give effect to a relinquishment as evidence in a contested case, so as to inure to the benefit of the contestant under the act of May 14, 1880, it must have been made before the closing of the testimony before the register and receiver on the allegation of abandonment.

Acting Secretary Bell to Commissioner McFarland, September 30, 1881.

I am in receipt of your report of the 19th instant, sending up under rules 83 to 85 of practice, the appeal of John Powers from your decision of March 29, 1881, holding for cancellation his homestead entry No. 10,624, Tracy, Minn., made July 1, 1880, upon the SE. $\frac{1}{4}$ of Sec. 10, T. 106, R. 44. His appeal was denied on the 10th of August last, for the reason that the same was not perfected within sixty days from notice of decision. He alleges, in support of his application to have it now considered, that he was misled by his attorney, who, being instructed to take the appeal, failed to do so in the form required, and that as soon as he (Powers) discovered the negligence, he employed another attorney, and perfected the same.

On looking at the papers, I find that the former attorney appears to have filed notice of appeal in the local office on the 13th of June, 1881, which was defective in not being accompanied by specifications of error. Whether or not this was actually within the time required does not appear, nor does it appear that he was notified of the defect and given the fifteen days allowed by rule 82. The record is very loose and unsatisfactory on these points; and I am not enlightened by your report as to the actual condition of the case. I should therefore be inclined to waive any technical objection on the ground of time, the fact being that he has proceeded with all possible diligence after being advised that his appeal had been considered defective.

The facts briefly stated are, that one Michael Kane entered this land as a homestead May 3, 1878; that William H. Walker contested the same for abandonment at a hearing on the 5th of January, 1880; that the register and receiver sustained the charge and recommended cancellation; that no appeal was taken by Kane; that subsequently, on the 29th of June, 1880, Kane relinquished his entry, and the land was entered by Powers, July 1, 1880, as above stated.

In the mean time, the act of May 14, 1880, was passed, giving a preference right of entry to any person who had contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead or timber-culture entry.

September 8, 1880, you closed the contest, thereby virtually affirming the decision of the register and receiver, and directed them to notify Walker of his preference right of entry as contestant, which notice was given, and his entry, No. 10724, was made September 27, 1880.

March 29, 1881, you held the entry of Powers for cancellation, from which action the present appeal is taken. The only point urged is that you erred in applying the act of 1880 to cases contested prior to its date. I do not think the objection well taken. When the act was passed the entry had not been canceled; but the case was, under the practice then prevailing, awaiting your decision. The contestant had paid the fees, and done what he could to procure the cancellation. If it was canceled in pursuance of his action, he was within the descriptive terms of the statute, and entitled to its benefits. I think, however, that your rulings of March 29 and August 10 should be modified so far as to require that, in order to give effect to a relinquishment of the land as evidence in the contested case, so as to inure to the benefit of the contestant under the act, it must have been made before the closing of the testimony before the register and receiver upon the allegation of abandonment. It is only upon the showing made by the contestant, while in issue before the proper tribunal as to the facts, that his preference right can be predicated. After acts of abandonment are not provable by him, except upon new allegation, and trial duly appointed; and if an after-obtained relinquishment be filed by a stranger, the contestant takes nothing thereby. In such case his right of entry must be

determined by the issue of his contest upon the evidence produced at the trial. That is the proceeding for which he had paid the expenses and gone to judgment before the register and receiver. He has thereafter only the right to demand a decision upon the record, and must abide the final determination. The decision of June 2, 1881, in *Johnson v. Halvorson* (Copp, vol. 8, p. 56), cited by you, is in harmony with the foregoing, although a cursory reading might perhaps lead to a broader construction. In this, as in all classes of contest, particular attention should be paid to rule 53 of Practice, and its requirements observed.

The appeal of Powers is dismissed.

PRACTICE—IMPEACHMENT OF WITNESS—CONTINUANCE.

PACKARD v. JACKSON.

In contest against homestead entries the character of a witness may be impeached and a continuance had to enable the opposite party to secure testimony in rebuttal.

Commissioner McFarland to register and receiver, Harrison, Arkansas, December 14, 1882.

I am in receipt of your letter of Nov. 30, 1882, relating to the case of G. W. Jackson, homestead entry No. 4837, contested by P. S. Packard. You state that at the close of the taking of testimony Jackson gave notice of his intention to introduce witnesses to impeach the character of Packard for truth and veracity; that Mr. Packard had no previous notice of such an intention on the part of contestant, and was from 100 to 125 miles from home; that you continued the case until January 9, 1883. You desire to be informed whether it is proper to take testimony touching the character of a witness in this class of contests, and whether your continuance of said case for that purpose was proper. I answer in the affirmative, as to both interrogatories.

I know of no reason why the ordinary methods of obtaining the facts should not be applied to these cases; and where a party finds himself liable to loss and injury through false testimony, the impeachment of the character of the witness is his only recourse. In the case cited, the question having been sprung upon the plaintiff when he had no opportunity for preparation to rebut the defendant's attack, it appears to me that a continuance was eminently just and proper.

PRACTICE—HEARINGS—CONTESTS.

INSTRUCTIONS.

Rule 15 of the Rules of Practice prescribes the mode of proof of notice, and must be strictly complied with.

Purchasers of homestead claims before patent are not recognized, and they have no standing in a contest.

No testimony is to be excluded by the local officers because of supposed irrelevancy.

Thirty days' notice is not allowed where continuance of a hearing is granted, but ten days are allowed to file cross-interrogatories where deposition of absent witness is to be taken.

How the affidavit required by rule 20 of Rules of Practice may be made.

Commissioner McFarland to register and receiver, Montgomery, Alabama, December 27, 1882.

I am in receipt of yours of the 12th instant, asking the following queries relative to proceedings in contests and hearings before registers and receivers, viz:

1. Is it necessary where hearings are ordered by the General Land Office for fraud in entry, or mineral character of land entered, that the officer (United States deputy marshal) serving the notice make oath as to service?

2. When hearing is ordered in cases for which final proof had been made, and notices issued to the homesteader, and on the day of trial third parties appear claiming to be holders of the land under the homesteader (innocent purchasers), and show that no notice was served on them, and that by mere accident they heard of the hearing before register and receiver only a few days before trial, and have therefore had no opportunity to prepare for a defense, can they be recognized and made a party to the contest, and allowed a sufficient time to prepare for trial?

3. Where at the trial of a case the register and receiver find that the attorney for the defense is asking a lot of irrelevant questions in order to prolong the hearing and to worry and to wear out the witness, can they reject such questions and refuse to allow them to be put to the witness and be reduced to writing?

4. Where a continuance is asked for and granted by register and receiver, can the opposing side claim thirty days' notice?

5. Can the affidavit required in rule 20, Rules of Practice, be made prior to the day of trial, and before an officer other than the register and receiver?

In reply I have to submit the following answers to each of your questions in their order, viz:

1. Rule 15 of Rules of Practice prescribes the mode of proof of service of notice.

If after trial and decision thereon the opposite party should base an appeal on the ground that the proof of notice was wanting in any of the essential points embraced therein, this office would be bound to take notice thereof; therefore it is the safest plan to comply strictly with the terms of the rule as made and provided.

2. No; this office does not recognize purchasers or third parties prior to issuance of patent. Parties who purchase of settlers before patent has issued, cannot maintain the position of innocent purchasers.

The doctrine of *bona fide* purchaser is not applicable to one who purchases of a settler before patent. As the settler has only an equity, such purchaser must abide by the disposition of the case made by this Department, irrespective of notice or recognition.

3. No; rule 41 prescribes that *no* testimony will be excluded, etc. It will be observed by this rule that it is not competent for the register and receiver to judge as to the relevancy or admissibility of the testimony, for the purpose of exclusion.

4. No; but in cases where the party so applying shall at the same time apply for an order to take the depositions of the alleged absent witnesses, ten days will be allowed the opposing party in which to file cross-interrogatories.

5. The most natural time to make the affidavit would seem to be on the day set for trial; but there could be no valid objection to the party making it at any time prior thereto. The proper time, however, to consider the affidavit is when the case comes up for trial. The rule presumes the affidavit to be made before the register and receiver. If the party is represented by counsel, an affidavit by said representative made before the register and receiver is satisfactory or it may be made before any other officer qualified to administer oaths and using an official seal.

PRACTICE—NOTICE BY PUBLICATION.

BRONSON *v.* SAWYER.

How notice to non-residents in a contested case should be given.

Commissioner McFarland to register and receiver, Gainesville, Florida, January 4, 1883.

In the case of contested homestead No. 2514, Jno. O. Bronson *v.* N. K. Sawyer, I have to state that on examination of the testimony transmitted in your letter of May 11, 1881, it appears that the contest was initiated January 5, 1881; that as the homestead party was not a resident of the county wherein the homestead entry was situated, notice of contest was given by publication, and that at the day of hearing the contestant appeared but the defendant did not. The evidence adduced shows that the homestead in question is unimproved land and has been abandoned by the homestead party. Mr. Sawyer, the defendant, files with the case his appeal from your decision in declaring a forfeiture of his entry on the ground that under the rules of practice he was entitled to *personal notice* (rule 10), where the party to be notified is a resident of the State and such residence was known.

Mr. Sawyer further alleges that he never received notice, either personal or by publication, that a contest had been initiated against his entry, and never knew of any proceedings until he received notice that his homestead was declared forfeited.

Furthermore, he alleges that he has resided in Jacksonville, Fla., for *eight years* last past, and that his residence in that place was well known to you and the contestant. Rule 10, rules of practice, requires personal service of notice when possible, if the party to be served is a resident of the State.

Rule 12 requires that when notice is given by publication, it must be based upon the affidavit of the contestant that personal service cannot be made.

Rule 14 requires that where notice is given by publication, a copy of the notice shall be mailed by registered letter to the last-known address of the party to be notified, and a like copy posted in a conspicuous place on the land during the period of publication, for two weeks at least prior to the day set for hearing.

There is no evidence that such notice was given as required, and therefore I am of the opinion that the points of exception made by the defendant are well taken.

In your letter transmitting the testimony in this case you state that this contest was ordered twenty-six days prior to the date that the rules of practice went into effect, viz, February 1, 1881; but it must be observed that the rules of practice approved October 9, 1878, were still in force and required notice to be given in the same manner as under the present rules of practice.

In view of the above points of exception as regards notice to the defendant, the contest is hereby dismissed; but as the evidence in the case shows that there are no improvements on the land, or any evidence that the land has ever been improved, and the defendant acknowledges that his residence for the last eight years has been in Jacksonville, Fla., about two hundred miles from his homestead entry, I am constrained, in the face of such an admission, corroborated by the testimony submitted, to hold the entry in controversy for cancellation, and it is so held, with the usual right of appeal for sixty days.

You will so advise the respective parties in interest.

FINAL PROOF—PUBLICATION OF NOTICE.

INSTRUCTIONS.

Notice of proof under act of March 3, 1879, must be published in a newspaper nearest the land by the usual traveled routes and not by an air-line measurement.

Commissioner McFarland to register and receiver, Leadville, Colorado.

Referring to yours of the 10th instant, in respect to publication of notices of applications of parties for patents, asking whether a paper published nearest the land must be designated, or one published at a place from which the land may be reached the quickest by the lines of travel, your attention is invited, in regard to publication of notices of applications for mineral patents, to the rule conveyed in my letter of

the 29th ultimo, "N," to Chas. P. Bellang, esq., Georgetown, Colo., as follows:

Referring to your communication of 31st ultimo, I have to state in reply that it is the duty of the register of the land office where an application for patent to a mining claim has been filed to direct the publication of notice thereof, "in a newspaper to be designated by him as published nearest the claim." (Sec. 2025 R. S.) The term "nearest" the claim means the place nearest the claim, which is to be ascertained by the register through the best sources of information at his command. It also means the nearest place by usually traveled routes and not always by an air-line measurement. In a mountainous country the nearest newspaper town in any air line from a mining claim may have an intervening range of mountains over which communication is difficult if not impossible, and in any event unusual, and the law, interpreted by its spirit, certainly does not design that publication should be made in a newspaper so situated.

Again, the register should designate a reputable newspaper of general circulation. (See decision of Hon. Secretary Chandler, case of Omaha mine. Sickel's Mining Decisions, p. 68.) A reputable newspaper may generally be defined as one of established business standing—one which derives from the community where situated a sufficient amount of business or patronage to make it self-supporting. It is not essential that it shall have a large circulation, but it should be generally circulated in the vicinity of publication.

It should be remembered that the duty of designating the proper newspaper for the publication of a mining notice is a ministerial one to be exercised by the register, over which this office can apply but general control.

Where that officer violates the provisions of the law to the prejudice of adverse claimants without actual notice, this office will take such action as the facts may warrant.

In regard to publishing notices of intention to make proof in pre-emption and homestead cases, the rule above laid down should be followed. The act of March 3, 1879, provides for such publication in a paper to be designated by the register as "published nearest to such land"; the mineral law employs the words "published nearest to such claim." In respect to the paper to be designated for publication of notices, the mining law and the act of March 3, 1879, contain provisions exactly alike in character.

PRACTICE—APPEAL—SPECIFICATIONS OF ERROR.

COLE v. PHELPS.

Appeal from Commissioners' decision must specify clearly the errors complained of therein and must show service upon the appellee, according to Rules of Practice, or it will be dismissed.

Commissioner McFarland to register and receiver, Los Angeles, California, February 6, 1882.

I have received your letter of the 27th ultimo, transmitting notice of appeal, by defendant, in the case of James A. Cole v. E. C. Phelps, from my decision of November 14, 1881, in favor of plaintiff.

The said appeal is defective in that it does not specify clearly the errors of which he complains in said decision. (See rule 88, rules of practice.) Notify Phelps that he is hereby allowed fifteen days from receipt of your notice in which to perfect his appeal. Evidence of service thereof upon appellee should accompany the papers. (See rules 94 to 96.) In default of compliance with these instructions the said appeal will be dismissed.

PRACTICE—NOTICE OF DECISION—SERVICE.

JOHN H. MOORE.

When notice of a decision of the General Land Office is sent by mail to local land offices to be served by them, ten days is allowed in addition to the sixty days allowed under the rulings of the Department.

*Commissioner McFarland to Hon. Montgomery Blair, Washington, D. C.,
February 10, 1882.*

On your motion of 20th ultimo, to dismiss the appeal from the decision of this office of October 4, 1881, in the case of certain Valentine scrip filings made by John H. Moore upon lands in T. 7 S., R. 1 E., M. D. M., San Francisco, Cal., which appeal was filed in this office, December 3, 1881, by J. O. Meloy, as attorney for said Moore, I have to advise you that I am now in receipt of a letter from the register at San Francisco, dated 26th ultimo, transmitting an appeal in said case filed in the local land office December 2, 1881, by T. H. Laine, attorney for said Moore, accompanied by a specification of the errors complained of.

The register states that he notified Mr. Moore of the Commissioner's decision on October 14, 1881. The papers do not show whether a copy of the specification of errors was served on the opposite party or not. A copy of the specification of errors filed by the resident attorney here was served on the resident attorney for the opposite party here, on December 24, 1881. You base your notice to dismiss the appeal on the ground that service of copy of errors and argument thereon was not made within the time allowed for that purpose under the rules of practice.

The rule allows seventy days, when notice is given through the mails by the register and receiver, five days being then allowed for the transmission of the letter from the local office, and five days for the return of the appeal through the same channel before reporting to the General Land Office.

My construction of this rule is, ten days are allowed as additional time to the sixty days allowed for appeal, when notice of a decision of this office is sent by mail to the local offices to be served by them, and that it is immaterial whether the time actually required for the transmission of the notice from the local office, or the return of the appeal

thereto, is less or more than five days in either case; and that it is also immaterial whether the appeal is returned through the same channel or not. The time is allowed for that purpose, and parties may have the benefit of that time, whatever may be the manner of service of notice or of the transmission of the appeal.

In the present case the notification is reported as of date of October 14, 1881. Whether this was the date of the actual notice, or the date of the letter containing the notice, or the date of the mailing of the letter, does not appear. But from October 14 to December 24, the date when copy of specification of errors and argument was served upon the resident attorney here for the opposite party, is seventy-one days.

In view of the uncertainty as to the exact date from which the seventy days allowed should be computed, and the fact that one day's time only is in issue, it is my opinion that sufficient cause for denying to parties the right to have the judgment of the appellate authority is not shown.

I so decide and decline to dismiss the appeal.

PRACTICE—REVIEW OF DECISION.

RICHARDS *v.* DAVIS.

A review of a decision, like a new trial, in the absence of new evidence will not be granted on the ground that the decision was against the weight of evidence, if there was contradictory evidence on both sides.

Secretary Kirkwood to Commissioner McFarland, April 12, 1882.

I have considered the motion of Charles A. Richards's attorney for a reconsideration of my decision rendered under date of the 20th ultimo, in the case of Richards *v.* Davis, holding that the contestant, Richards, had failed to prove his allegations touching Davis's abandonment of the NW. $\frac{1}{4}$ of Sec. 12, T. 4 N., R. 68 W., Denver district, Colorado.

Such motion covers the identical points that were raised on appeal and duly considered by me when the decision in question was rendered.

No new evidence is presented, nor is there even a pretense that any such evidence has been discovered, but said motion is based upon the ground of error in the finding of fact and application of the law.

Rule 76 of the rules of practice authorizes motions for a review or reconsideration of the Secretary's decisions when "in accordance with legal principles applicable to motions for new trials at law."

The rule of law is well settled that a new trial will not be granted on the ground that the verdict was against the weight of evidence, if there was contradictory evidence on both sides. (See citations in the matter of the Rancho Huasna survey, 2 C. L. L. 211.)

As I am able to discover neither error in the finding of fact nor in the application of the law, I must decline to disturb my decision in the premises.

The motion is accordingly denied and the same is transmitted herewith.

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PRACTICE—HEARING—CONTINUANCE.

JACKSON v. JACKSON. 38 SD-197

Where neither party appears at time and place as cited, the case should not be continued, but dismissed.

A homestead entry is not liable to contest after seven years from date of entry. In such case, after notice, if the homestead party fails to make proof, the would-be contestant has a preference right of entry if the sole occupant of the land.

Commissioner McFarland to register and receiver, Prescott, Arizona, December 22, 1882.

I have examined the case of Solomon Jackson vs. Jesse Jackson, involving homestead entry No. 33, made January 5, 1875, upon the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ 27, and N. $\frac{1}{2}$ NE. $\frac{1}{4}$ 34, 18 N. 5 W.

You find that the defendant has abandoned his entry, and therefore recommend the cancellation of the entry.

You also report that though duly advised of your decision, the defendant failed to appeal therefrom within the time prescribed by the rules of practice. Under the foregoing circumstances, your decision would become final were I satisfied that correct conclusions of law have been drawn by you from the facts in the premises.

But I am not so satisfied because—

First. It appears from the record that on the day set for trial (October 19, 1882) neither of the parties appeared, wherefore you continued the case to the 26th of said month, on which latter date plaintiff appeared and adduced evidence in support of his charge of abandonment. No appearance was entered by or in behalf of the defendant.

You erred, I think, in thus postponing the case in the absence of any motion from either party for a continuance, as prescribed by rule 20 of practice.

The plaintiff failing to appear and prosecute his case at the time designated for trial, the contest should have been dismissed.

Secondly. At date (September 12, 1882) of initiation of contest more than seven years since date (January 5, 1875) of entry had elapsed. Consequently the entry had expired by limitation of law, and was not liable to contest.

Your decision is therefore reversed and the case dismissed. You will so advise the parties, allowing the usual privilege of appeal.

In this connection you are instructed to call upon said Jesse Jackson, if you have not already done so, to show cause within thirty days why

his entry should not be canceled as having expired by reason of failure on his part to make final proof thereon within seven years from date thereof, as required by law and the regulations of this office thereunder.

In the event of the cancellation of said entry as having expired, the said contestant would be entitled to the preference right of entering the land embraced therein, under the act of May 14, 1880; provided he was the sole occupant thereof as an actual settler at the date of such cancellation; otherwise the land would be open to entry by the first qualified applicant, and you will also so advise him.

At the proper time report the action taken.

PRACTICE—ALLEGATION—JUDGMENT.

SHELTER *v.* OFF.

In contests under the land laws, proofs should be confined to the allegations, as in trials at law, and judgment rendered only on the questions raised by the record. A further hearing may be ordered on other questions raised unless the testimony submitted be accepted by the defendant in lieu thereof.

Secretary Kirkwood to Commissioner Williamson, June 9, 1881.

I have considered the case of Christian Schelter *v.* Charles F. Off, involving the latter's timber-culture entry made January 22, 1878, on the south one-half of south-east one-fourth, and south one-half of southwest one-fourth section 34, township 3 north, range 20 west, Bloomington, Nebr., on appeal by Off from your decision of October 19, 1880, holding his entry for cancellation, because the land was not subject to a timber-culture entry, and because, also the affidavit on which the entry was made was executed several months prior to the date of said entry.

The affidavit of contest alleges that Off "has wholly abandoned said tract, and that said tract is not cultivated by said party as required by law." As these were the sole charges made by Schelter, Off was required to answer these only, and there could properly be no other issues between the parties for trial. Testimony upon other matters not incident thereto was wholly foreign to the case, and should not have been considered, either by the local officers or by your office. In contests under the land laws proofs should be confined to allegations, as in trials at law, and judgment be rendered on the questions raised by the record only. A large portion of the testimony in this case, however, had reference to the character of the land, and whether it was subject to a timber-culture entry. This was a question impertinent to the issue, and was admitted against the objections of Off's counsel.

While I concur with you in the opinion that, under the testimony, the tract was not subject to Off's entry, by reason of the large number of natural timber-trees growing thereon, I am also of the opinion that

this question was not involved in the contest, because not so charged, and, hence, that Off was not required to defend the same, nor should it be regarded in the disposition of *this* cause.

Without, therefore, now deciding other questions raised by the appeal, I direct that a further hearing be ordered touching the character of said land, unless Off consents that, in lieu thereof, the present testimony may be considered in the adjudication of that question.

Your decision is modified accordingly.

PRACTICE—NOTICE—CHARGE—VARIANCE.

GOULD *v.* WEISBECKER.

Where the notice of contest against a timber-culture entry served upon the defendant contained the single allegation of "abandonment" and the affidavit filed before contest contained the charge of "abandonment," and that said "defendant had failed to cultivate said tract as required by law," no objection having been raised when the parties appeared for trial, it is too late after the trial has closed for the defendant to take advantage of the variance between the notice and affidavit.

Commissioner McFarland to register and receiver, Crookston, Minnesota, August 31, 1881.

The register in his letter of March 16, 1880, transmitted the record of contest in the case of Walter K. Gould *v.* Philip C. Weisbecker, involving the timber-culture entry of the latter, No. 80, dated June 23, 1876, embracing the NE. $\frac{1}{4}$ 22, 140, 48. The contest was initiated November 18, 1879, the charges set forth in the affidavit of contest being that said Weisbecker "has wholly abandoned said tract," and that said "tract is not cultivated by said party as required by law." The trial commenced on the 8th of January, 1880, all the parties attended by their respective counsel being present, and the taking of testimony continued from day to day until the 10th of the same month, when the trial ended. The case was submitted without argument.

In your joint report and opinion your finding, after consideration of the evidence, is that defendant has wholly abandoned his timber-culture entry," and "has failed to cultivate the land embraced therein as the law requires," and you decided that said entry should be canceled. From this finding and decision the defendant, through his attorney in this city, appeals to this office. The appeal is based on the following grounds: 1st. Error in hearing the case upon the charge made, that of abandonment, citing decision of this office rendered April 15, 1880, in the case of Woolpert *v.* Betts, (7 C. L. O. 25). 2d. Error in finding, upon the charge of abandonment, that defendant had not complied with the law. 3d. Error in finding that defendant has failed to cultivate the land as the law requires. 4th. Because the decision is contrary to the evidence.

It appears that the notice of contest served upon the defendant, instead of containing the two distinct allegations of the plaintiff, abandonment and failure, in the matter of cultivation, to comply with the law, contained only the charge of abandonment, and it is now contended that, at the trial, said defendant was not required to answer any other charge, or to prepare himself to answer any other; that he was not made aware that any complaint of want of cultivation had been made against his entry, but only that he had abandoned it; that, under the decision aforesaid, in the case of *Woolpert v. Betts*, the notice of contest was not good in law, and the case should therefore be dismissed. It is to be observed on this point, that, at the time of trial, no objection was made or question raised, by defendant or his counsel, to the notice served, or to the allegations contained in the affidavit of contest. Had the point been made when the trial commenced it would have been good in abatement, but, after pleading the general issue, it is too late to take advantage of a variance between the writ and declaration, or the notice served which answers for a writ, and affidavit of contest which fills the place of a declaration. This view is supported by the supreme court of the United States in the case of *McKenna v. Fisk* (1 Howard, p. 241), and your action in hearing the case is sustained.

In your finding that defendant "has wholly abandoned his timber-culture entry," a careful review of the testimony shows that you were in error in that respect. An abandonment is the relinquishment of a right. It implies some act of relinquishment done by the owner, without regard to any future possession by himself or by any other person, but with an intention to abandon. Mere non-user does not necessarily or actually constitute an abandonment. In this case abandonment is not proven.

The main question at issue, and the one to which the testimony was confined, was, Had there been a failure on the part of the defendant to cultivate the tract embraced in his entry as required by law? The entry was made June 23, 1876. The evidence shows that on the 25th of the same month defendant had ten acres broken, and that in the fall of the same year he back-set it. In 1877 he put in a crop. In 1878 he broke eleven acres more, and in May of that year he planted the ten acres first broken with elm-tree seed. It thus appears that he had complied with the law of 1874 up to the date of the passage of the act of 1878. The law of 1874 was mandatory upon him to plant ten acres during the second year; that is, between June 23, 1877, and June 23, 1878. He planted in season—May, 1878—but it appears from the testimony that the ground was quite wet and that the seeds did not sprout, whether from the wet season or otherwise witness cannot say. In June, 1879, he plowed up the ten acres and again planted with elm-tree seed.

After due consideration of all the facts elicited at the trial, and of the arguments offered by the respective counsel, I am of opinion that the defendant has complied with the law in the matter of cultivation in

such a substantial way that the cancellation of his entry is not warranted, and I therefore reverse your action on said entry. You will so advise all parties in interest, allow the usual time for appeal, and at the proper time make prompt report to this office of action taken.

PRACTICE—NOTICE—APPEARANCE.

MORSE *v.* PAYNE.

The general appearance of a respondent at a trial, without objection to irregularity of the notice, is a waiver of such irregularity.

Secretary Teller to Commissioner McFarland, May 3, 1882.

I have examined the papers in the case of Solon O. Morse *v.* Sanford D. Payne, transmitted with your letter of March 31 last, for the consideration of this Department under practice rule 83. It appears that Payne made a timber-culture entry of the tract involved, and that Morse initiated a contest against him for failure to comply with the requirements of the law. In view of the testimony, the local officers recommended a cancellation of the entry. Payne did not appeal from this decision, but subsequently applied for the reopening of the case, that he might move the dismissal of the same, for alleged defects in the notice of contest. His motion was refused for the reason that his personal appearance at the trial, and participation in the proceedings, without objection to the notice, cured any defect therein; which action you sustained. He appealed from your ruling to this Department, but you dismissed his appeal because it was upon an interlocutory matter, and therefore not appealable. He again appealed from your last action, and you again dismissed his appeal for the reason that practice rule 83 provides the proper method of bringing such matter before this Department; and the case is, upon his motion, transmitted accordingly.

The only material question involved is whether the general appearance of a respondent at a trial, without objection to the irregularity of the notice, is a waiver of such irregularity. The law in such case is well settled by the courts and by practice under the land laws.

The object of notice is, that the party defendant may have knowledge of the proceedings against him; and it is immaterial how his knowledge is obtained. If he appears at the trial, and takes part therein, without objection to defects in the notice—whether it be by personal service or by publication—he is deprived of no right, but has every benefit to which the law of trial entitles him. Whatever, therefore, may have been the defects in the notice in this case, they were cured by Payne's appearance, and he has no legal cause of complaint.

Finding nothing in the case to require the intervention of this Department, the papers are herewith returned to you.

PRACTICE—TIME FOR APPEAL.

THYEN *v.* BRYANT ET AL.

Ten days in addition to the usual thirty days will be allowed for appeal, where notice of the local officer's decision is sent by mail.

The planting as shown in this case is not *cultivation* within the meaning of the timber-culture law.

Commissioner McFarland to register and receiver, Watertown, Dakota, July 1, 1882.

I am in receipt of your letters of the 10th October last, transmitting testimony in the following cases, viz: Albert Marckus *v.* Irene B. Canedy, T. C. E. 3051 (S. Falls series), June 14, 1878, NW. $\frac{1}{4}$ 32, 118, 51. Herman Thyen *v.* Mary A. Bryant, T. C. E. 3224 (Sioux Falls series), July 8, 1878, SE. $\frac{1}{4}$ 20, 118, 51.

The proceedings in these cases appear to have been regular. You held that the entries should be canceled on account of a failure by the claimant in each case to cultivate during the second year after entry the five acres broken the first year, and from your decisions appeals are taken.

You report that the attorney of the claimant, in each case, was notified of your decision by letter mailed September 5, 1881, and the appeals were filed in your office October 7, 1881.

Contestants move to dismiss the appeals on the ground that they were not filed within thirty days from notice of your decisions.

This motion raises a question of practice which I think it proper to consider.

In communication to Hon. Montgomery Blair, of this city, dated February 10, 1882 (8 L. O., 188), this office held that in cases where notice of *its* decisions was given through the mails by the district officers, ten days, in addition to the sixty days allowed for appeals, should be allowed for the transmission of the notice and the return of the appeal.

Rule 44 of the rules of practice is indefinite relative to the time from which the thirty days allowed for appeals from decisions of local officers should be computed. Evidently parties should be allowed thirty days from date of receipt of notice, and not be limited to thirty days from the day of mailing the letter containing the notice, and I do not think that such limitation was contemplated by the rules of practice. But it is apparent that a more definite rule is required to meet cases of appeals from the decisions of local officers than the uncertain and frequently impracticable one of ascertaining the date on which notice of the decision is actually received.

As uniformity in practice is desirable, and as I see no good reason why a distinction should be made in the matter of time allowed for transmission of notices and return of appeals, between the decisions of this office and of local officers, when such notices are served by mail by

the local officers, I shall hold that the rule heretofore referred to in respect to appeals from the decisions of this office, is applicable to appeals from the decisions of local officers, and that ten days additional to the thirty days allowed for appeals from decisions of registers and receivers will be allowed for the transmission of the notice by mail and the return of the appeal to the local office.

The motion to dismiss the appeal in the present instance is therefore denied.

In the case of Mary A. Bryant, the second year after date of entry expired July 8, 1880, and in that of Irene B. Canedy June 14, 1880, the testimony in each case shows that during the month of June, 1880, the claimants had the land, broken the previous year, planted to corn. This planting was done with a two-horse corn-planter, without any previous preparation of the soil by harrowing or cultivating, and after the planting no cultivating was done. The only question to be considered is, was such planting "cultivation" under the timber-culture law? This question was considered by this office in the case of John Thyen *v.* Wm. E. Canedy, T. C. E. 3102 (Sioux Falls series), and by my letter to you of the 15th April last (C) it was held that by no reasonable construction of the law could such planting be considered as cultivation. Applying the principles of that decision to these cases, I am led to concur in your decisions, and the entries are hereby held for cancellation, subject to the right of further appeal.

SAME, ON APPEAL.

Under rule 44 of Practice, thirty days allowed from date of receipt by mail of notice of decisions of local officers, and ten days additional, should be allowed for transmission of such notice and the return of appeal to the local office.

Secretary Teller to Commissioner McFarland, May 17, 1883.

I have considered the case of Herman Thyen *v.* Mary A. Bryant, involving timber-culture entry No. 3224 (Sioux Falls series), of SE. $\frac{1}{4}$ of Sec. 20, T. 118, R. 51, Watertown district, Dakota Territory, on appeal by Bryant from your decision of July 1, 1882, holding her entry for cancellation.

Bryant made said entry July 8, 1878, and Thyen initiated contest against the same March 5, 1881, upon the ground of failure to cultivate during the second year the five acres broken during the first year after entry, as required by law. He failed, however, to apply to enter the tract, by reason whereof the contest was initiated without legal authority, and must be dismissed pursuant to departmental decision rendered November 14, 1882, in the case of Bundy *v.* Livingston (9 C. L. O., 172).

I concur with you in the opinion that under rule 44 of practice thirty days should be allowed from date of receipt by mail of notice of decis-

ions of registers and receivers, and that ten days additional should be allowed for the transmission of such notice and the return of appeal to the local office. But barring such holding, your decision is reversed.

PRACTICE—NOTICE TO ATTORNEYS.

WOOD *v.* SOUTHWICK.

Notice of decision to one of several attorneys of a party is notice to all as well as notice to the principal.

Commissioner McFarland to A. B. Webb, Washington, D. C., January 30, 1883.

In the case of James H. Wood *v.* George F. Southwick, involving timber-culture entry of the latter, No. 844, on the NE. $\frac{1}{4}$ 18, 11, 12 W., land district, Grand Island, Nebr., the Hon. Acting Secretary of the Interior, per decision rendered October 16, 1882, dismissed the contest, and directed that one John W. Collins, who filed the relinquished receipt, covering said entry, be allowed to enter the tract in controversy. Said entry was therefore canceled by this office October 27, 1882, and on the same day the local officers were directed to note the cancellation upon the records of their office and advise Mr. Collins that he would be allowed thirty days to make entry of said tract.

From the papers on file in this case it appears that on the 6th of November, 1882, the register of the local office gave due notice to Mr. Platt, one of the attorneys of said Collins, at Grand Island, regarding the aforesaid decision and preference right of thirty days in which Collins could make entry, and that on the 6th of December, 1882, said Platt, in behalf of his client, said Collins, filed an affidavit executed by himself, said Platt, on the same day in which he stated that diligent search had been made for said Collins; that he could not be found; that in his opinion he could be found within thirty days, and he therefore prayed that Collins be allowed thirty days additional time in which to make entry. In this affidavit Mr. Platt states that he received the notice above mentioned, given by the register, on November 6, 1882, the day of its issue. The register in his letter of December 12, 1882, transmitted said affidavit to this office.

The thirty days allowed having expired, after notice duly given and admitted as above set forth, on the following day, December 7, 1882, John R. Thompson, having made application in due form, made timber-culture entry No. 4331, embracing the tract aforesaid.

Stating in your letter of the 17th instant that you are attorney of record in the case, you request that the notice sent Mr. Collins to enter said land be revoked; that a new notice be issued and the same be sent to you.

It would seem from an examination of the records and papers that when the decision of the honorable Acting Secretary was made known to the local officers, as per letter of October 27, 1882, that, through some inadvertence on the part of the clerk having the case in charge, this office failed to inform you by direct letter of the action taken. I am of the opinion, however, that this inadvertence, if it may be so called, is of immaterial importance. It appears that Mr. Collins was not only represented before this office by yourself, but also by a firm of attorneys in Nebraska; and in such case, due notice having been given by the local office to one of the attorneys there and upon which he appears to have been vigilant as regards his and your client's interest, such notice must be considered as given to each and all of the attorneys representing said Collins, as well as to said Collins himself, the principal.

From all the papers submitted regarding said case I am unable to perceive that the failure to notify you in person at the time of the action taken, October 27, 1882, has resulted in detriment either to yourself or said Collins, and I have therefore to inform you that your application is denied. In closing this letter your attention is invited to rule 106 of the rules of practice.

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TIMBER CULTURE ENTRY—AGENT.

JAMES CASSIDY.

The timber-culture law is explicit in its requirements, and the General Land Office has no authority to modify its provisions or power to excuse any failure to comply therewith on the part of a claimant. Neither can it be responsible for any laches by an agent. It is immaterial whether the breaking, cultivating, and planting required by the law be performed by the claimant in person or through an agent; but, in either case, the claimant alone is held responsible for any failure that may occur.

*Commissioner McFarland to Maj. Gen. W. B. Hazen, Washington, D. C.,
August 3, 1881.*

I am in receipt, by reference from the honorable Secretary of the Interior, of your letter of the 20th ultimo, transmitting a communication from Jas. Cassidy, sergeant Signal Corps, U. S. A., stating that he has been ordered to Point Barrow, Alaska, and, in view of his enforced absence, requesting that he be not held responsible should his agent fail to do the necessary breaking and planting on his tree claim in Dakota. In reply, I have the honor to state that the timber-culture law is explicit in its requirements, and this office has no authority to modify its provisions or power to excuse any failure to comply therewith on the part of a claimant. Neither can it be responsible for any laches by an agent.

It is immaterial whether the breaking and planting required by said act be performed by the claimant in person or through an agent, but, in either case, the claimant alone is held responsible for any failure that may occur.

This office has no discretionary power in the premises.

TIMBER CULTURE ENTRY—WIDOW AND HEIRS.

CHARLES KING.

Under the timber-culture law the rights of a deceased claimant go to the heirs and not to the widow. A relinquishment to be recognized must be the act of all the heirs, those, if any, over twenty-one years of age acting in person, and minors through a guardian duly appointed by the proper probate court, and with full power to act in the premises.

Commissioner McFarland to register and receiver, Fargo, Dakota, August 6, 1881.

In reply to the register's letter of the 5th of January last, transmitting a communication from H. S. Back, esq., relative to the case of Charles King (deceased), who made timber-culture entry No. 2458, for the SW. $\frac{1}{4}$, Sec. 2, T. 133, R. 50, and asking what course the widow should take in order to relinquish and dispose of the claim, you are advised that under the timber-culture law the rights of a deceased claimant inure to the *heirs* and not to the *widow*.

In this case a relinquishment to be recognized by this office must be the act of all of the heirs, those, if any, over twenty-one years of age acting in person, and *minors* through a guardian duly appointed by the proper probate court, and with full power to act in the premises.

TIMBER CULTURE ENTRY—PRELIMINARY AFFIDAVIT.

45-598
DAVID H. MERRYMAN.

An affidavit accompanying an application to make timber-culture entry is unobjectionable because the date of execution thereof is prior to a relinquishment of another entry on same tract. Regard, however, must be had to the time within which it is received at the local office.

Commissioner McFarland to register and receiver, Grand Island, Nebraska, August 23, 1881.

I am in receipt of your letter of the 5th ultimo, transmitting the application of David H. Merryman, to enter, under the provisions of the timber-culture law, the SW. $\frac{1}{4}$, 24, 11, 15 W. It appears that on the 27th of June, 1881, timber-culture entry No. 1919, made by David Cool, was relinquished, and you canceled the entry upon the records

of your office, on account of such relinquishment. Cool's entry covered the tract herein indicated, and at the same time that the relinquishment was filed, Merryman's application to enter the land was submitted, and accompanying said application was the affidavit required in such entries, but which bore date of June 20, 1881, it having been executed before an officer legally qualified to administer oaths, in the county wherein the land is situated, on said date.

In view of the fact that this affidavit was made seven days before the land referred to became vacant and subject to entry, you held that you had no authority to entertain it, and a new one should be made before the party could be permitted to enter the land. You, therefore, returned the affidavit, and called upon the party to submit a new one made subsequent to the date of the cancellation of Cool's entry upon your records.

Said affidavit, however, was returned to you with information that Mr. Merryman left the State of Nebraska the day after he made the same, and it would be a great hardship to require him to return at this time for the purpose of making a new affidavit. You submit all the papers to this office for instructions.

Relative thereto I will state that under date of December 22, 1877, the Hon. Secretary of the Interior directed this office to issue a circular of instructions to the local officers upon this subject, and accordingly on the 8th of January, 1878, an official circular was issued, Copp's Land-Owner, Vol. 4, p. 167, in which you were instructed not to recognize affidavits "where you knew 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." In view of these instructions you acted correctly in refusing to entertain Merryman's affidavit, and you are fully sustained in said action by this office, but, in view of the passage of the act of May 14, 1880, entitled an "Act for the relief of settlers on public lands," I am of the opinion that the instructions referred to should be modified.

In my opinion this act of May 14, 1880, may safely be construed to make the simple fact of filing a relinquishment equivalent to cancellation, and you are, therefore, authorized to accept applications received simultaneously with relinquishments, whether by letter from the applicant himself or through the hands of an attorney, provided always that the application and affidavit are received within a reasonable time from the date they bear, with reference to the time required for transmission.

It is to be understood, therefore, that an application and affidavit can be accepted by you, when they bear a date prior to the date when the cancellation is made at your office, but such papers should, in all cases, be received at your office within a reasonable time from their date, as above indicated.

Mr. Merryman's application is herewith returned and you will allow the entry.

TIMBER CULTURE—CULTIVATION.

CHAPMAN *v.* ZWECK.

Breaking is frequently done in Colorado without irrigation. A party taking up land, in the arid country, without the means of complying with the stringent provisions of the law, does so at his own risk. Cultivation of trees, according to the law, would entitle a party to the relief provided, in the event of destruction of the trees by extreme and unusual drought.

Commissioner McFarland to register and receiver, Denver, Colorado, October 24, 1881.

I have considered the testimony, received with your letter of the 12th of last May, in the contested case of Clarence J. Chapman *v.* George Zweck, involving the timber-culture entry of the latter, No. 98, September 19, 1877, for NE. $\frac{1}{4}$ Sec. 20, T. 4 N., R. 69 W.

The contestant alleged in substance that claimant had failed to perform any act of timber culture, as required by the act of June 14, 1878, during the second and third years from date of entry. You decided that the allegation had been sustained, and from your decision defendant took an appeal.

A consideration of the appeal will involve a statement of the material points brought out on trial. In an exhaustive argument for defendant, John S. Hauke, esq., while admitting that Zweck failed to break any land embraced in the entry during the second and third years after entry, or plant trees during said period, urges that the contest should be dismissed because, first, the affidavit of contest first filed charged "abandonment" for twelve months prior to initiation of contest; and, second, because the amendatory affidavit charged failure to comply with the timber-culture act of June 14, 1878, notwithstanding that the entry was made in 1877, under the act of 1874; and, third, because the failure of Zweck should be regarded as not willful, but unavoidable by reason of lack of water to irrigate, and the drought prevailing in Colorado in 1879 and 1880.

The first point is well taken. *Twelve months* prior to initiation of the contest embraced only portions of the *third* and *fourth* years after entry. This being the fact, I need not consider any further points connected with this affidavit.

The second point should not, in my opinion, be sustained. A party having made a timber-culture entry, under the act of 1874, may make final proof under the act of 1878, by showing that he has had a specified number of growing trees on each acre of the number of acres required to be planted by the latter act. The first year after entry had not expired when the act of 1878 was approved. The party, having broken about five acres, in 1878, contented himself with having done that much. If he intended to comply with the act of 1874, and thus be entitled to plant trees the year following the breaking, instead of cultivating the

land to crop, or otherwise, the year following the breaking, as required by the act of 1878, why did he not break *ten* acres the first year? Mr. Hauke argues that claimant has shown by his acts at the commencement of the fourth year from entry that it was his intention to comply with the act of 1874. I do not think this conclusion correct. Judging by what claimant did the first year, he did not intend to bring his claim under the provision of the act of 1874. He does not state, in his testimony, that he intended to do this. If we are to judge of his intentions by his acts, there is more ground for the opinion that he intended to comply with the act of 1878 than there is that he intended to comply with the act of 1874. Testimony as to what he performed the fourth year is not relevant to the issue. Mr. Hauke thinks the proceedings should not have been aided by *presumptions*; that it should not have been presumed by contestant that an entry made under the act of 1874 could be attacked for failure to comply with that of 1878. But, the amendatory affidavit of contest charges that no cultivation had been performed during the second and third years. This charge, being proven, would involve a forfeiture of the claim under either act. The defendant acquiesced in a hearing based upon the amendatory affidavit of contest, and consented to a continuance and to go on with the hearing without objection. Certainly, under these circumstances, the contestant is entitled to consideration of the case on the testimony adduced.

And in regard to the third point made by defendant's attorney, if it be admitted that unusual drought prevailed in Colorado in the latter part of 1879 and the entire year 1880, it does not excuse the claimant's failure to break the required amount the second year. Returning to the testimony, it is found that the contestant and his witnesses described what had been done upon the tract at the date of examination thereof by them in the latter part of the year 1880, and expressed their opinion that no breaking had been done within three years after entry, except that performed in 1878, and that no trees had been planted within said period. Defendant admitted this and urged extenuating circumstances in defense. It is not alleged that unusual drought prevailed in 1878, nor in the early part of 1879, yet no attempt was made to break any portion of the land during the second year. It is not shown that it was impossible to break during the second year. How did he know that breaking could not be done the second year if he did not make the attempt? Was it absolutely impossible to break land not under ditch, in that locality, in the spring of 1879, upon the breaking up of winter? These are questions passed by without explanation by the defense. I do not think that he can plead good faith when he stood idly by awaiting the construction of an irrigating ditch at some uncertain time in the future. Breaking is frequently done in Colorado without irrigation. To do this requires a plow suitable for the purpose and a powerful team. This is a fact well known. A party taking up land

in the arid country without the means of complying with the stringent provisions of the law does so at his own risk. This office, while trying to administer the law fairly, cannot modify or change its imperative requirements, but must be governed by its provisions and the leading decisions of the Department thereunder.

Cultivation of trees according to the law would entitle a party to the relief provided therein, in the event of destruction of the same by extreme and unusual drought. The claimant in this case failed to bring his claim under this provision. Your decision is affirmed, and the entry is hereby held for cancellation.

TIMBER CULTURE—SECOND ENTRY.

W. A. LEWIS.

A party cannot be allowed to relinquish one timber-culture entry and thereafter make a second entry elsewhere.

Commissioner McFarland to W. A. Lewis, Russell, Kansas, November 5, 1881.

In reply to your letter of October 9, 1881, I have to inform you that there is no law under which this office can permit you to relinquish your timber-culture entry No. 465 for the SW. $\frac{1}{4}$ of Sec. 8 in T. 11 S., R. 27 W., because you have been unsuccessful in growing timber, etc., as required by the timber-culture act approved July 14, 1878, for the purpose of making a second entry elsewhere.

RELINQUISHMENT—ADDITIONAL ENTRY.

W. C. LATIMER.

A qualified party may relinquish a timber culture entry of eighty acres, and thereafter may enter the same under the act of March 3, 1879, as an additional entry, to his original homestead entry, as described in this case, provided he is the first legal applicant for the land so relinquished.

Commissioner McFarland to W. C. Latimer, Wilson, Kansas, November 7, 1881.

In reply to the inquiries contained in your postal of date September 28, 1881, I have to inform you as follows, viz:

1st. That if you have resided upon and cultivated the tract of land covered by your said homestead entry for the period required to perfect title under the homestead law, you may, after due publication of a notice of your intention to do so, make final proof thereon, in accordance with the practice of this office under the act of Congress ap-

proved May 14, 1880, *i. e.*, crediting you with benefit of residence upon the land prior as well as subsequent to the date of homestead entry.

2d. You may proceed under the first section of the act of Congress approved May 14, 1880 (copy herewith), relinquish your said timber-culture entry, containing 80 acres, and thereafter, if qualified to do so, enter the land so relinquished as an additional entry to your original homestead entry under the provisions of the act of Congress approved March 3, 1879; provided, however, that you are the first legal applicant for the land so relinquished, after the cancellation of the same upon the records of the district land office.

TIMBER CULTURE—BREAKING.

RICHARDSON *v.* KNIGHT.

Where, as in this case, a timber-culture claimant honestly believed that he had broken 10 acres during the first two years, but which lacked a fraction of an acre of being 10 acres, his entry will not be disturbed.

*Commissioner McFarland to register and receiver, Le Grand, Oregon,
November 22, 1881.*

I am in receipt of your letter of July 13, 1881, transmitting the testimony in the matter of the contest initiated by Gardner D. Richardson *v.* John Knight, who made timber-culture entry No. 164, December 20, 1878, for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 34, T. 3 N. of R. 32 E., Will. mer.

The contestant alleges in his affidavit, on which contest was initiated, that claimant had failed to comply with the requirements of the statute under which his entry was made, inasmuch as he did not break 10 acres the first two years. The hearing was ordered for May 16, 1881, due notice was given, and both parties appeared on the day set; the testimony was taken and the case closed. On the 15th of June, 1881, you rendered your joint opinion, in which you held that the allegation of failure to break the required number of acres had been clearly proven, and the entry should be canceled. From your said decision the defendant appeals to this office.

I find on examination of the testimony that the defendant broke more than 5 acres the first year; that he broke the second year what, according to his judgment, made 10 acres, but which was found when measured by a surveyor to be 9.05 acres; that the cultivation the second year was sufficient under the statute, and that the claimant labored under very embarrassing circumstances. The evidence, in my opinion, does not show such a state of facts as would justify me in the approval of your decision, and the same is therefore overruled, the contest dismissed, and the entry will remain of record, subject to the required proof at the proper time.

The decisions of this office, and the Department proper, in the cases of *Gepner v. Miller*, and *Gemmer v. Chandler* (6 C. L. O., 126), and *Lee v. Morgan* (7 L. O., 39), are not considered to conflict with these views, for while it is there stated that a full compliance with the law is required, yet I cannot construe that to mean an *exact* compliance with every particular, as this construction would fail to "meet the intentions of the law."

You will notify the parties in interest of this action, and advise the contestant that he will be allowed sixty days in which to take an appeal, and in due time make the proper report to this office.

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TIMBER CULTURE ENTRY—MARRIED WOMAN.

MARY E. LOCKWOOD.

A married woman cannot make a timber-culture entry under the act of June 14, 1878, unless she has been deserted by her husband, or for some other good and sufficient reason can be considered as the head of a family.

*Commissioner McFarland to register and receiver, Le Grand, Oregon,
December 10, 1881.*

You will call on the following-named parties who have made timber-culture entries under the act of June 14, 1878, to furnish supplemental affidavits, which must show whether or not they are married, as it is held by this office that a married woman cannot make a timber-culture entry unless she has been deserted by her husband, or for some other reason can be considered as the head of a family. A single woman over the age of twenty-one years, if a citizen, &c., may make a timber-culture entry. The affidavits submitted are not satisfactory as to these points.

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No. 603 by Mary E. Lockwood, for NW. $\frac{1}{4}$ of Sec. 4, T. 1 N., R. 27 E., all in Willamette meridian.

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TIMBER CULTURE ENTRY—HEIR—CULTIVATION.

COWAN *v.* WOODSIDE.*

Under the timber-culture laws, a father, as heir, can complete the entry of a deceased son.

If, at the expiration of three years from date of entry, but few trees are growing, want of cultivation should not be inferred therefrom.

Commissioner McFarland to register and receiver, Wichita, Kansas, January 6, 1882.

The case of *George W. Cowan v. the heirs of Hugh Woodside* before this office on appeal from your decision in favor of defendant, involves timber-culture entry No. 796, on the SE. $\frac{1}{4}$ Sec. 6, T. 21 S., R. 3 W.

* This decision was affirmed by Secretary Teller, June 26, 1882.

Said entry was made July 26, 1875, and the affidavit of contest filed December 19, 1879.

From the testimony offered it appears that Hugh J. Woodside was an invalid who went to Canada soon after he made the entry, and subsequently died there.

His father—claiming to be his heir—has had the management of his timber-culture claim since his death. No failure to break and cultivate is shown; on the contrary, the testimony develops the fact that a large area, thirty acres or more, was plowed and planted in 1876-'77, and 1878. It however appears that there were but few trees upon the tract at the date of the commencement of the contest, and the allegation is, that it was the result of careless, improper planting and cultivation. I think the testimony fails to fully substantiate the charges. The father of the original claimant testifies that trees or cuttings were planted upon more than a sufficient area to comply with the law. He denies that the trees failed to grow, to a great extent, and that the ground had been replanted each year up to the commencement of this case.

His testimony is largely corroborated by parties having knowledge of these operations, they having assisted therein.

But four full years had expired at the time the affidavit of contest was filed, and consequently acts subsequent to that time cannot be considered.

The act of June 14, 1878, requires no planting until the third year, hence to show a cause for forfeiture, failure to plant during the two years from July 26, 1877, to July 26, 1879, should be shown, or neglect to properly cultivate and protect the trees up to the date of the initiation of the contest.

Though, as before stated, the number of living trees upon the land was small, it is well known that they often fail from causes beyond human control, and neglect must not be inferred from that circumstance.

I affirm your decision, and you will so advise the parties, and also notify the contestant of his right to appeal to the Secretary of the Interior.

TIMBER CULTURE ENTRY—REPLANTING.

GEORGE W. COOK.

In timber-culture entries where the planting of trees on the first five acres have been destroyed by drought and other causes, the same must be replanted the next succeeding year together with the breaking and planting of an additional five acres.

Commissioner McFarland to G. W. Cook, Pomeroy, Iowa, January 9, 1882.

By your letter of the 26th ult., you state that last spring you planted the first five acres required to be planted on the tract covered by your timber-culture entry, and on account of drought the timber trees planted failed to grow, and you applied for an extension as provided by law,

and you desired to know whether you must next (this) year, in addition to replanting the five acres thus destroyed, plant the second five acres required by the law to be planted during the fourth year.

In reply you are advised that the extension referred to applies only to the first five acres, and in order to hold the claim, you must comply fully with the law and replant the first five acres, and also plant to seeds, nuts, or cuttings the second five acres.

PRACTICE—BURDEN OF PROOF.

FLYNN *v.* STILES.

The burden of proof is upon the contestant to prove his allegations, or show that the planting does not meet the requirements of the timber-culture law. The testimony failing to prove non-compliance in this case, the contest is dismissed.

Secretary Kirkwood to Commissioner McFarland, February 8, 1882.

I have considered the case of Stephen Flynn *v.* Albert W. Stiles, involving the latter's timber-culture entry of December 20, 1875, upon the fractional SW. $\frac{1}{4}$ of Sec. 30, T. 154, R. 50, Crookston, Minn., on appeal by Stiles, from your decision of July 26, 1881, holding his entry for cancellation. This entry was made under the act of March 13, 1874, and the contest was initiated October 17, 1879, upon Flynn's allegation of Stiles' failure to comply with the requirements of the timber-culture laws of March 13, 1874, or June 14, 1878.

The act of 1874 requires a party making a timber-culture entry of a quarter section of public land to break ten acres thereof the first year, ten acres the second year, and twenty acres the third after date of entry; and to plant to timber ten acres the second year, ten acres the third year, and twenty acres the fourth year, after date of entry.

The amendatory act of 1878 authorizes parties who have made entries under the act of 1874 to complete the same under the former act, which they may do by showing at the time of making their final proof that they have had under cultivation, as required by the act of 1878, an amount of timber sufficient make the number of acres required thereby, being one-fourth the number required by the former act, and showing, at that date, that they have on an entry for a quarter section 6,750 living and thrifty trees.

The testimony shows that, during the first year following his entry, Stiles broke ten acres of the tract, and (according to his own testimony) from eighteen to twenty acres the second year (ending December 20, 1877), and about eight acres in the spring of 1878—making in all about thirty-seven acres. According to other testimony, his whole breaking at the date of the contest amounted to but twenty-five acres. This difference is immaterial, because he was required to break but twenty acres prior to December 20, 1877, and as his third year did not expire

until December 20, 1878, he had complied with the requirement of the law of 1874 when the act of June 14, 1878 took effect, under which latter law he could complete his entry. There was no laches, therefore, on his part, under the act of 1874, in respect to breaking; and he had also broken, at the date of the initiation of the contest, all that was required to be broken by the act of 1878.

The testimony also shows that, during his second year, he planted ten acres to trees, which was all he was required to plant prior to December 20, 1877. His next year for planting did not expire until December 20, 1878, and in the mean while the act of June 14, 1878, took effect, of which he could avail himself, and show upon his final proof that, of the entire area embraced in his entry, he had cultivated in timber for the period required by the act of 1878 an area not less than one-sixteenth part, and had, at that date, the prescribed number of living and thrifty trees upon such cultivated area above named.

The testimony further shows that in 1877 he purchased several thousand young trees for transplanting to his land, which in the fall of that year were "heeled in" or buried, for temporary preservation, and that, also, in the spring of 1878, he purchased other thousands, about three thousand of which were planted near the line of his land. It does not appear how many acres they covered. The burden of proof was upon the contestant to show that this planting did not meet any requirement of the law incumbent upon Stiles, which he fails to do.

I am of the opinion that Stiles complied with the law of 1874, to the date of the act of 1878, and I find no proof that he not did comply with the latter act down to the date of the initiation of the contest.

In view of the facts, and the apparent good faith of Stiles, I modify your decision, and dismiss the contest.

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TIMBER CULTURE ENTRY—CULTIVATION.

ENOCH W. POOR.

Under section 2 of the act of June 14, 1878, "cultivation" is such care and attention as will best promote the healthy growth of trees; and if by properly mulching them that end is obtained, it will be considered a compliance with the law governing timber-culture cultivations.

Commissioner McFarland to Enoch W. Poor, Myrtle, Kansas, February 17, 1882.

I am in receipt of your letter of the 6th instant, in which you ask if *mulching* the trees the first, second, or third years, instead of cultivation, would be considered a compliance with the requirements of the timber-culture laws.

In reply I have to state that the act of June 14, 1878, after defining how and at what time the trees, seeds, or cuttings shall be planted on

land embraced in an entry under its provisions, provides that upon proof that he, she, or they "have planted, and, for not less than eight years, have cultivated and protected such quantity and character of trees as aforesaid," they shall receive a patent for the land.

The cultivation of the trees required by the last proviso of section 2 of the act referred to, is such care and attention as would best promote their healthy growth, and if by properly *mulching* them that end is obtained, it will be considered as cultivation in the sense used in said proviso. In fact, it would appear that in many localities such action would be better than plowing or hoeing, as the ground would retain moisture longer and there would be less danger of damage from frost.

The question of cultivating, mulching, or care of trees planted on a timber-culture entry is one of fact, liable to be raised at any time, and unless a case should be properly brought before this office, either in the way of final proof or testimony submitted in case of contest, it cannot be definitely determined whether or not the law has been complied with.

TIMBER CULTURE ENTRY—SINGLE WOMAN—MARRIAGE.

EFFIE J. THOMAS.

Where a single woman, after making and forwarding the required affidavit and application to make timber-culture entry, marries before the entry is completed at the local office, such entry will be legal if the law be fully complied with in other respects.

Commissioner McFarland to S. H. Bradley, Kirwin, Kansas, February 18, 1882.

I am in receipt of your letter of the 25th ultimo, relative to the timber-culture entry No. 1316, by Effie J. Thomas, for the NW. $\frac{1}{4}$ Sec. 26, T. 3, R. 11 W., 6th P. M., of Kansas.

You state that on the 13th of December, 1877, Effie J. Thomas, then a single person, and in every respect qualified to make a timber-culture entry, made application and affidavit for the above-described entry, before a notary public (duly commissioned) for county in which the land is situated, and on the afternoon of the 13th December, 1877, subsequent to her making said application and affidavit, she married. The papers in the case were sent by mail to the local office, and were received and "platted" December 15, 1877, which is the date of her timber-culture entry.

As attorney for the party, you ask to be advised whether the said entry is valid, in view of the above statements of facts.

In reply, I have to state that the case is not now before me for adjudication, but if the applicant shall in all respects comply with the law, it is my opinion that the entry will be held to be legal. I herewith inclose a copy of the timber-culture affidavit of said Effie J. Thomas, on file in this office, as requested by you.

PRACTICE—SECOND CONTEST—CONDITION PRECEDENT.

SCHNEIDER *v.* BRADLEY.

The act of June, 1878, does not limit the right of contest to one person or to one contest, nor forbid a second when the first has not been sustained.

Such contest may be initiated, notwithstanding a former contest may have resulted in favor of the claimant.

As a condition precedent to the right of an initiation of a second contest against the same entry, the former case must have been finally adjudicated, and this state of the case is not reached until determination of the question of appeal either by waiver, by failure, or by prosecution to a final decision.

The rulings governing homestead contests govern timber-culture contests.

Commissioner McFarland to register and receiver, Des Moines, Iowa, March 3, 1882.

I have considered the case of William Schneider *v.* Sidney S. Bradley, involving the latter's timber-culture entry, No. 254 (Sioux City series), made January 3, 1877, upon the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Sec. 28, T. 96, R. 42, on appeal by the defendant from your decision adjudging said entry forfeited, on the ground of non-compliance with the legal requirements.

The contest was initiated September 27, 1880, and the hearing appears to have been held before the clerk of the district court of O'Brien County, Iowa, commencing on the 13th and terminating on the 16th day of December following; the parties having been cited to appear before said clerk in accordance, you report, with the ruling of this office which sanctioned the taking of testimony in contest cases before any officer authorized to administer oaths, upon proper notice to the defendant. (W. T. S. May, 1 C. L. L., 251.)

In this you erred, for such was not the rule at the time Schneider filed his complaint. The rights of parties in contested cases were then, as now, determined upon evidence taken at trials before the register and receiver. Depositions of witnesses could, however, under certain circumstances, have been taken before an officer having the powers of a magistrate or commissioner, but it was only allowed upon due application to the local officers, and when the original notice fixed a *day certain* for a hearing before the said officers. (Hon. Secretary's decision, case of Day *v.* Bright, reported in Hill's Leading Land and Mining Cases, April, 1880, p. 23; and see also rules 33 and 35, Rules of Practice, approved December 20, 1880, and Commissioner's letter to register and receiver, Concordia, Kans., August 2, 1880.)

The proceedings were, therefore, irregular, but as both parties appeared at the place designated and no objection was made by the defendant to the manner of the hearing, your action will not be overruled on that account.

December 22, 1880, the testimony taken at the hearing, as above, was received and reviewed by you, and on the same day you rendered your decision in the case.

It seems that at the date of initiation of said contest the entry in question was in controversy in the case of *E. B. Pike v. Sidney S. Bradley*, which was then pending before this office, on appeal from your decision adverse to the defendant.

It also appears that said former case was dismissed by my decision of November 4, 1880, and the plaintiff therein allowed sixty days within which to appeal, and although you state, in reporting the case of *Schneider v. Bradley*, that the parties in the former waived all right of appeal from my said decision of November 4, 1880, and further represent that written relinquishments of such right accompany the record in the case of *Schneider v. Bradley*, a careful examination of all the papers transmitted by you in the matter fails to disclose any evidence of such relinquishments.

Besides, the action of the defendant, *Bradley*, in the second contest, in moving a dismissal thereof on the ground of the pendency of the former case, as mentioned below, would seem to negative the presumption that any such waiver of right of appeal was made by the parties in the former case.

In view of the premises and it appearing that when the case of *Schneider v. Bradley*, now under consideration, was called for trial, the defendant moved its dismissal on the ground that there was then pending a contest filed by *E. B. Pike v. Sidney S. Bradley*, and the sixty days allowed by law for appeal had not elapsed, the question arises as to whether the case should have been allowed to proceed, as was permitted, and the defendant compelled to adduce further testimony in rebuttal of the additional charges.

The proceedings, you hold, were warranted by the ruling of the Hon. Secretary in the case of *Huls v. Yielding* (7 C. L. O., pp. 3, 137), in which it was held that the timber-culture act of June 14, 1878, does not limit the right of contest to one person or to one contest.

In this view I do not concur, for the Hon. Secretary says in said case, it will be noticed, that the act of June 1878 "does not limit the right of contest to one person or to one contest, nor forbid a second when the first has not been sustained. . . . Such contest may be initiated, in my opinion, notwithstanding a former contest may have resulted in favor of the claimant." Furthermore, when the second contest against *Yielding's* entry was initiated the former case against it was not in existence; that case had been dismissed and closed several months previous.

On the other hand, when the case of *Schneider v. Bradley* was initiated (September 27, 1880), no decision on the appeal of *Bradley* in the former contest, then before this office, had been rendered.

Clearly, then, the former case had not "*resulted* in favor of the claimant," nor been unsustainable, within the meaning of the Hon. Secretary's ruling. In other words, the true interpretation to be placed upon the above quoted language of the Hon. Secretary is, I think, that as a condition precedent to the right of initiation of a second contest against the same entry, the former case must have been finally adjudicated, and this state of a case is not reached, it is argued, until determination of the question of appeal, either by waiver, by failure, or by prosecution to a final decision above.

And this view of the matter is strengthened, in my opinion, by the Hon. Secretary's subsequent decision in the case of *Van Ostrand v. Lange*, decided June 21, 1881.

In this latter case the Hon. Secretary sustained the action of this office, in rejecting the application of Van Ostrand to contest the homestead entry of Lange because of the pendency of a prior contest.

I think the principles enunciated are clearly applicable to the present case, and while it is true that but one of the decisions above adverted to had regard to timber-culture contest, yet the views therein expressed apply with equal force to timber-culture actions, for "the rulings governing homestead contests govern timber-culture contests." (Commissioner's letter to C. B. Mayer, May 11, 1875; *Copp's Land Owner*, June, 1875, p. 39.)

In the light of the foregoing rulings, I am of opinion that when a prior contest against an entry, whether timber-culture or homestead, has not been finally decided or disposed of at the date of initiation of a further contest against the same entry, and on the day appointed for trial of the second or further contest, a motion for its dismissal is made, such motion is good in abatement and should be sustained.

But these views would not apply, however, where the second contest had been initiated subsequent to the date on which the party in the prior case filed his waiver of right of appeal.

Your decision in overruling the motion of the defendant in the case of *Schneider v. Bradley* is, therefore, reversed, and said case is hereby dismissed.

You will advise all parties in interest of this decision, allow sixty days for appeal, and, at the proper time, report the action taken.

In this connection you are also instructed to report further relative to the alleged waiver of right of appeal by the parties in the case of *Pike v. Bradley*, so that appropriate action may be taken in that case and the same regularly closed. Such waivers, if any there were, would not, however, under the foregoing views, affect this decision.

[NOTE.—Dismissal of contest affirmed by the honorable Secretary under decision of April 24, 1883.]

TIMBER CULTURE—CULTIVATION SECOND YEAR.

CHALLACOMBE *v.* HOGUE.

Under the timber-culture act, the replowing during the second year of the five acres broken the first year is considered as a compliance with the requirements of the statute that the five acres broken the first year shall be "cultivated to crop or otherwise" during the second year.

Commissioner McFarland to register and receiver, Wa Keeney, Kansas, March 18, 1882.

With your letter of May 21, 1881, you transmit the testimony in the case of John Challacombe *v.* Hiram M. Hogue, timber-culture entry No. 1701, October 14, 1878, NW. $\frac{1}{4}$ Sec. 26, T. 18, R. 25.

The contest was initiated February 4, 1881, it being alleged in the affidavit of contest that the defendant had not broken five acres during the first year of his entry and had failed to cultivate the first five acres during the second year to any kind of farm crops.

You decided, from the testimony submitted, that the allegation as to the failure to break five acres during the first year was not fully or satisfactorily sustained by the evidence, and that the five acres broken the first year was replowed the second year, but adjudged the entry forfeited on the ground that the said five acres were not cultivated to any kind of crop during the second year, as required by law.

Having examined the testimony in the case, I affirm your decision as to the facts. Under the present ruling of this office, however, the replowing during the second year of the five acres broken the first year is considered as a compliance with the requirement of the statute that the five acres broken the first year shall be "cultivated to crop or otherwise" during the second year. (See case of Rhodes *v.* Avery, General Land Office Report for 1881, p. 55.)

Your decision is modified accordingly, and the contest is dismissed.

TIMBER CULTURE—THIRD YEAR—PLANTING.

MONDELBAUM *v.* TURNER.

Where the claimant fails to do the prescribed planting on the tract or tracts embraced in his timber-culture entry during the third year, the entry is forfeited.

Commissioner McFarland to register and receiver, Lincoln, Nebraska, March 20, 1882.

The case of Mondelbaum *v.* Turner, before this office on appeal from your decision in favor of the contestant, has been considered. The entry, T. C. No. 184, was made March 19, 1874. Affidavit of contest filed December 30, 1877. Upon the testimony taken at the original hearing, this office, on the 10th of June, 1879, adjudged the entry forfeited. October 13, following, a rehearing was authorized.

A very large amount of testimony was taken at various times and after many postponements. Three complete years had elapsed when

the contest was initiated. In order to be in a position to prove up under the provisions of the act of June 14, 1878, Turner need only have planted five acres to trees, in addition to the proper breaking and cultivating to crop. You found that defendant had done the required amount of breaking, and in this view I concur, there being no doubt that he had broken about 40 acres in 1874 and 1875. It is fully established, also, that the required cultivation to crop was done. This narrows the issue down to the question of the planting done during the third year. It is, however, shown that Turner had been instrumental in procuring a T. C. entry in the maiden name of his wife subsequent to their marriage. Said entry, T. C. No. 592, was canceled by this office September 21, 1877, it having been relinquished. As the law simply provides that "no person shall make more than one entry under the provisions of this act," Turner's entry cannot be affected thereby. The loss of his rights under the T. C. act is not the penalty provided by law, if any there be for such a transaction.

There is no doubt that Turner did some planting of cuttings during the third year, *i. e.*, the year expiring March 19, 1877. It also appears certain that some of these cuttings lived. The preponderance of testimony goes to show that the cuttings were set in sod land which had not been replowed, and not in that portion of the tract which had been cultivated to crop; that many of the cuttings were dead at the time they were planted. I therefore conclude that Turner has failed to comply with the law, and affirm your decision adjudging the entry forfeited.

TIMBER CULTURE ENTRY—WIDOW—HEIRS.

GEORGE TAYLOR.

The timber-culture entry of a deceased party can be relinquished only by the heirs or legal representatives. A widow or administrator can alone relinquish when shown to be the sole heir of the party deceased. How heirs may relinquish a timber culture entry.

Commissioner McFarland to register and receiver, Benson, Minnesota, March 21, 1882.

On September 18, 1873, George Taylor made timber culture entry No. 18, for SE. $\frac{1}{4}$ Sec. 30, T. 116, R. 32.

August 2, 1881, Frank Taylor, the duly appointed administrator of the estate of George Taylor, deceased, appeared before the clerk of the district court in and for the county in which the land is situated, and, pursuant to a special order issued by the probate judge of said county for the purpose of enabling him to do so, proceeded to execute a relinquishment of the timber-culture entry.

On the same day he executed before said clerk a homestead affidavit and filed an application to enter the land embraced in the timber-culture entry in his own right. The relinquishment and homestead papers, with amount required as fee and commissions, were transmitted to your office and became matters of record therein August 15, 1881. The re-

linquishment was reported by you on the date last mentioned under act of May 14, 1880, and the homestead entry was reported in your returns for August, 1881, as having been made on the 15th of that month and numbered 11084.

The proceedings in this matter respecting the relinquishment of the timber-culture entry and the initiation of the homestead entry were all irregular and without warrant in law. The timber-culture entry of a deceased person can be relinquished only by those authorized by law to make final proof thereon and complete the same; that is, "the heirs or legal representatives" of the deceased entry party. The right of a widow or administrator to make final proof or execute a relinquishment in a timber-culture entry, in the event of the death of the entry party, cannot be recognized, unless he or she shall be found to be at law the sole heir of the deceased.

The relinquishment in the case under consideration should not have been accepted by you, as it does not contain evidence that the party executing it was the sole heir of the deceased party, or that he is one of the heirs.

The original affidavit in this entry shows the entry party to have been the head of a family, and direct heirs may still be living. The party in interest will be allowed sixty days in which to show cause why his homestead entry No. 11084 should not be canceled, and the timber-culture entry No. 18 reinstated, subject to the right of the "heirs or legal representatives" of George Taylor, deceased, to make final proof. Inform him respecting the contents of this letter, and at the proper time report to this office whether any action has been taken in the premises.

Should the heirs of a deceased timber-culture entry-man desire to relinquish his entry, it will be necessary that all and each of such heirs shall be identified—a certificate from the proper probate court being deemed the best evidence upon this point—and the relinquishment must be duly executed and properly signed by each of said heirs.

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TIMBER CULTURE ENTRY—TIME—AGENT.

GAHAN v. GARRETT.

In a timber-culture entry there is no restriction upon an entryman as to the time when the work must be done, provided it is done within the required limit.

The work can be done by the entryman, his agent, or his vendor.

If one purchases land which has been in whole or in part broken, planted, or cultivated by another, the spirit of the law is as fully met as if he had personally performed the work.

Secretary Teller to Commissioner McFarland, April 1, 1882.

I have considered the case of M. J. Gahan v. James M. Garrett, involving the latter's timber-culture entry of February 7, 1876, upon the NE. $\frac{1}{4}$ of Sec. 4, T. 12 N., R. 8 W., Grand Island, Nebr., on appeal by

Garrett from your decision of July 8, 1881, holding his entry for cancellation for failure to comply with the requirements of the laws.

It appears that Gahan instituted a contest against this entry May 25, 1878, which, in view of the testimony, you dismissed July 31, 1879. Gahan did not appeal from this action, but on August 14, following, instituted another contest against Garrett for substantially the same reasons alleged in his first. Garrett's *laches*, therefore, if any, prior to the initiation of the first contest should strictly be held *res judicata* in the consideration of the present case. The testimony, however, at the second hearing travels confusedly through the same matter involved in the first hearing, and I will consider the whole question as if this were the only contest.

The testimony shows that Garrett, prior to his entry, purchased the improvements upon and the possessory right to the tract of a former timber culture claimant, who had broken and planted to trees seven acres, and broken enough other land to amount in all to about 40 acres. In 1877 he replanted the missing trees on the seven acres, plowed the ground between the trees, and broke about four other acres on which strips had been previously broken. In 1878 he planted additional trees, so that, at the date of the first contest, as also at the date of the second, he had about 13 acres of trees planted and cultivated, and in a thrifty condition.

Garrett's entry was made under the act of March 13, 1874, but the amendatory act of June 14, 1878, entitles him to all its benefits. This act requires a person making an entry of a quarter-section to break or plow five acres of the tract during the first year following his entry, and five acres during the second year; to cultivate by crop or otherwise during the second year the five acres broken the first year, and plant the same to timber during the third year; to cultivate during the third year the five acres broken the second year, and plant the same to timber during the fourth year.

Garrett had under plow and planted to trees, prior to the initiation of either contest, more than the ten acres he was required to break and plant by this act. There is no restriction upon an entryman as to the time when the work must be done, provided it is done within the required time. He may do it in advance of the required time, and the law will be satisfied. Garrett is, therefore, in no default in this respect, as he had 13 acres broken and planted when the present contest was commenced. Nor was he required to break land before unbroken, but he could avail himself of that plowed and planted by his vendor, provided he replowed and cultivated and replanted the same land.

The object of the law is "to encourage the growth of timber," and this purpose is accomplished whether the work be performed by the entryman, his agent, or his vendor. It is not a mere personal requirement, and if one purchases land which has been in whole or in part broken, planted, and cultivated by another, the spirit or intent of the

law is as fully met as if he had personally performed the work. The principle is analogous to that in *Lansdale v. Daniels* (10 Otto, 113), where the court says, speaking of a pre-emptor, "it is immaterial whether he built the dwelling-house himself or hired an agent to erect it for him, or whether he purchased it after it was built by another, provided it appears he was the lawful owner of the dwelling-house and made the entry and settlement in good faith, and continues to occupy and cultivate the land as required by the pre-emption laws."

I am of the opinion that Garrett has complied with the requirements of the act of June 14, 1878, and therefore reverse your decision.

TIMBER CULTURE—PLANTING—SLIGHT FAILURE.

KENNEDY *v.* OLSON.

The entry in this case should not be canceled for the slight failure on the part of the defendant in the matter of not having planted within the required time the requisite number of trees or cuttings, prompt action having been taken on his part in doing the planting immediately thereafter. The facts show a substantial compliance with the requirements of the timber-culture laws.

Commissioner McFarland to register and receiver, Benson, Minnesota, April 6, 1882.

I have considered the case of James A. Kennedy *v.* Andrew Olson, involving the timber culture entry of the latter, No. 680, dated May 11, 1877, embracing the NE. $\frac{1}{4}$ Sec. 2, T. 119, R. 39, the record having been transmitted in your letter of April 22, 1881. The contest in this case was initiated December 8, 1880, the charges being that defendant has wholly abandoned said tract and failed to plant 10 acres of trees thereon since making said entry, and that said tract is not cultivated by said party as required by law. The trial took place before you on the 20th of January, 1881, all the parties being present.

In your joint report and opinion you found, from the testimony, that during the summer of 1877 the defendant broke about 10 acres of the tract embraced in his entry aforesaid, and that he cropped the same during the season of 1878; that in 1879 he cropped one-half of the cultivated land, and summer-fallowed the remaining portion, and plowed the whole of it during the fall of that year; that in the spring of 1880 he dragged or harrowed it, and on May 9, 1880, he planted 9,400 cottonwood cuttings and 150 soft-maple trees; that this planting exhausted his supply of trees and cuttings, and during the following week he planted 4,000 cottonwood cuttings and 250 soft-maple trees, making in all 13,800 cuttings and trees; that most of the cuttings have died, but the trees all lived; that defendant cultivated the trees during the summer, but at the time he should have cultivated the cuttings he was prevented from doing so by reason of the sickness of his wife, which culminated in her death July 31, 1880.

You decided that, under the circumstances as developed by the testimony, defendant had made a reasonable compliance with the requirements of the law, and that the contest should be dismissed.

Having rendered your decision on March 3, 1881, you report that on the same day you duly notified the plaintiff by mail, addressing him at Montevideo, Chippewa County, Minn., and advised him of his right of appeal. Attached to the record is the appeal of plaintiff from your decision, service of which was admitted by defendant's attorneys March 18, 1881, but said appeal was not filed in your office until April 21, 1881, a period of forty-seven days after the date you rendered your decision. On the back of said appeal, defendant's attorneys, at Benson, on the 21st of April, 1881, made an indorsement to the effect that they had no objections to the same being filed in time. Such having been the action of defendant's attorneys, I have deemed it proper to consider said appeal.

A review of the record shows that the plaintiff admits the breaking by defendant of ten acres of the land in controversy, in 1877, and the cropping of the same in 1878 and 1879. Plaintiff also admits that, on the 9th of May, 1880, two days before the third year of the entry expired, defendant, with assistance, planted 9,400 cuttings and one hundred and fifty trees, covering in all a space of three or four acres, and that he returned in one week and planted 4,000 cuttings and two hundred and fifty trees on another part of the prepared ground.

Taking into consideration the aforesaid admissions and all the facts elicited at the trial, and there appearing to have been such a slight failure on the part of the defendant to meet the full and exact requirements of the law during the third year of his entry, I am of the opinion that it would not be within the intent or spirit of the law to hold the aforesaid entry for cancellation for such slight failure as shown by the testimony.

Your decision is therefore affirmed.

PRACTICE—CONTEST AFFIDAVIT—CORROBORATION.

SCHOFIELD *v.* COLE.

A hearing should not be granted where the corroborating witness swears to the facts set forth as true "to the best of his information and observation."

Commissioner McFarland to register and receiver, Kirwin, Kansas, May 13, 1882.

I have considered the case of *W. H. Schofield v. George N. Cole*, involving timber-culture entry No. 970, on SW. $\frac{1}{4}$ 2, 7, 14, on appeal by the plaintiff from your decision dismissing the case.

It appears that at the date set for hearing—January 18, 1882,—both parties appeared, and when the case was called the defendant's counsel

moved a dismissal of the same for the reason that the affidavit of contest and that of the corroborating witness do not set forth sufficient grounds to warrant the granting of a hearing. You sustained the motion and dismissed the case; wherefore the plaintiff appeals to this office.

The main point in issue and the one upon which it appears your action was based, is, whether the averment contained in the affidavit of the plaintiff's corroborating witness—that the allegations embraced in the affidavit of contest are true "to the best of his information and observation," is a sufficient substantiation of the plaintiff's charges to warrant the ordering of a hearing.

That hearsay evidence is inadmissible is a rule of law too familiar to require discussion. Hence, what the corroborating witness swears to through information cannot be accepted. Nor is belief derived from observation alone a sufficient corroboration. While it may be true that without observation an actual knowledge of the condition of the land cannot be obtained, yet, to be entitled to any weight, the belief derived from the observation made should be verified by actual measurement and counting of the number of acres broken, cultivated, or planted. Besides, the observation may have been restricted—may not have been had with regard to the whole area of the land. It is, at most, deceptive and unreliable. Hence I think that your action in dismissing the case on the grounds of insufficiency of affidavit of corroborating witness to affidavit of contest was proper; consequently it is hereby approved, and you will so advise the parties, allowing the usual privilege of appeal.

TIMBER CULTURE—BREAKING—DROUGHT.

TRUAX v. SEMPER.

A season of drought cannot excuse the entryman from doing the breaking required by the timber-culture laws.

Secretary Teller to Commissioner McFarland, June 30, 1882.

I have considered the case of James W. Truax *v.* Charles S. Semper, involving the NE. $\frac{1}{4}$ of Sec. 24, T. 2 S., R. 69 W., Denver district, Colorado, on appeal by the latter from your decision of August 25, 1881, holding his entry for cancellation.

It appears from the record that Semper made timber-culture entry No. 359 of the tract, January 22, 1880, under the provisions of the act of June 14, 1878 (20 Stat., 113).

Under date of March 21, 1881, Truax initiated contest against said entry, alleging failure on the part of Semper to break or plow five acres during the first year, as required by the second section of the act. Hearing was had April 28 ensuing, when both parties appeared with their witnesses. The contestant's allegations were sustained by the testimony,

and Semper himself admits the truth of the same, but pleads the unprecedented drought during the spring and summer of the year 1880, in extenuation of his failure to comply with legal requirements. The interposition of such plea can avail him nothing, as the only relief provided for by the act in question is contained in the first proviso of the said section, to wit:

That in case such trees, seeds, or cuttings shall be destroyed by grasshoppers, or by extreme or unusual drought, for any year or term of years, the time for planting such trees, seeds, or cuttings shall be extended one year for every such year that they are so destroyed.

Manifestly such relief cannot be applied to Semper, who is, by reason of his laches, precluded from invoking the same.

Your decision is accordingly affirmed.

TIMBER CULTURE CONTEST—DEFAULT CURED.

GALLOWAY v. WINSTON.

There is no distinction between the requirements of the pre-emption and timber-culture law as respects the principle of their requirements. The one requires the party to file his declaratory statement within a certain time, and the other requires that certain work shall be performed within a limited time.

The court declares that, notwithstanding the statute, if the pre-emptor files his declaratory statement after the required time, but before another claim has intervened, his right will be saved, because it is then a question between the government and the party only, and no one is harmed.

The object of the law—the growth of timber—is attained if at the date of final proof the party has growing on the land the required number of thrifty trees.

Although an entry is subject to contest whenever the party is in default, there is no valid reason for subjecting him thereto when the fault is cured.

The honest efforts of entrymen will be guarded by the Department.

Secretary Teller to Commissioner McFarland, July 24, 1882.

I have considered the case of *H. H. Galloway v. Byron C. Winston*, involving the latter's timber-culture entry made September 24, 1877, upon the S. W. $\frac{1}{4}$ of Sec. 2, T. 139, R. 80, Bismarck, Dakota, on appeal by Winston from your decision of August 25, 1881, holding his entry for cancellation for failure to comply with the requirements of the law.

This contest was initiated September 25, 1880, upon allegations that Winston had "not broken up and planted to trees the number of acres required by law," but the only seriously litigated question relates to Winston's failure to break the number of acres required the first year after his entry. The entry was made under the act of March 13, 1874 (18 Stat., 21), which requires a party making an entry of a quarter-section to break ten acres of the land, covered thereby, during the first year following the date of his entry.

The amendatory act of June 14, 1878, reduces the number of acres required to be broken or plowed during the first year, on a like entry,

to five acres, and authorizes one making an entry under the former act to complete it under the latter. It is not necessary, in this case, to consider the relation of the two acts to each other, in their practical operation, because Winston was deficient in his work the first year, under both acts, the testimony showing that he broke about three and a half acres only during that year.

Your decision holds that, as the statute is imperative in its requirement as to the first year's work, and this was not done by Winston, his entry should be canceled, and you cite rulings of this Department in support of that general proposition. After careful consideration of the question involved, and the peculiar facts of the case, I think your decision was erroneous, and that this and cases hereafter arising on similar facts should be disposed of under the analogous doctrine held by the supreme court in the case of *Johnson v. Towsley* (13 Wall., 72).

In discussing pre-emption rights under the act of March, 1843 (Secs. 2265-6, Revised Statutes), which requires a claimant to file his declaratory statement within three months from the time of his settlement, "*otherwise his claim shall be forfeited,*" and the tract awarded to the next settler in the order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law, and it having been argued that as Towsley did not file his declaration within three months from the time of settlement, his claim was forfeited and gave him no right, the court held that the words "shall have given such notice" presuppose a case where some one has given such notice before the party who has thus neglected seeks to assert his right. "If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months; and if at any time after the three months, while the party is still in possession, he makes his declaration, and this is done before any one else has initiated a right of pre-emption by settlement or declaration, we can see no purpose in forbidding him to make his declaration, or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right. As Towsley's settlement and possession were continuous, and his declaration was made before Johnson or any one else asserted claim to the land or made a settlement, we think his right was not barred by that section, under a sound construction of its meaning."

There is no material distinction between the requirements of the pre-emption and the timber-culture law, as respects the application of this principle. The one requires the party to file his declaratory statement within a certain time, and the other requires that certain work shall be performed within a limited time. But the court holds that, notwithstanding the statute, if the pre-emptor files his declaratory statement

after the required time, but before another claim has intervened, his right will be saved, because it is then a question between the government and the party only, and no one is harmed. I see no reason why this principle should not be equally applied to the timber-culture law, and prevent forfeiture of an entry, if, before contest and the intervention of an adverse claim, the party has cured the deficiency in the first year's work, by putting the land in the required condition, as to plowing, cultivation, and the planting of trees or seeds, so that at the date of the initiation of the contest, it is in the same condition it would have been had the first year's work been duly performed.

The testimony shows that Winston, being a non-resident of Dakota, employed his agent there to break five acres of the tract during the first year, ending September 24, 1878—being the amount required by the act of 1878, of which act he had the right to avail himself; that this agent employed and paid another to do such work, who represented that he had broken the five acres, whereas, in fact, he broke but about $3\frac{1}{2}$ acres. During the next year, ending September 24, 1879, Winston plowed 25 acres, of which, including said $3\frac{1}{2}$ acres, he put about 15 acres into crops; and that during the third year, ending September 24, 1880, 20 acres of plowing, done in the spring of that year, were "back-set" in the fall; and that, also, in the same spring, 23 acres of the land plowed the second year were put into crops, eight or nine more acres were broken, and five acres were planted to trees; so that at the date of the initiation of the contest, September 25, 1880, the land was in the condition required by law, notwithstanding Winston's failure in the requirements of the first year's work. As the pre-emptor's rights are saved, by filing his declaratory statement before attachment of another's claim, so, I think, under the same principle, should a timber-culture entry be saved, if the land is in the required state at or before the initiation of the contest, and the party has acted in good faith, without speculative purposes, and with an honest purpose to observe the legal duties incumbent on him.

The object of the law—the growth of timber—is attained if at the date of final proof the party has growing on the land the required number of thrifty trees. Although, undoubtedly, an entry is subject to contest whenever the party is in default, I see no valid reason for subjecting him thereto after the default is cured. A different rule would permit designing persons, with knowledge of the first year's default, to wait until near the time for final proof before initiating a contest, for the very purpose of availing themselves of the entryman's further labor and improvements instead of initiating it during the continuance of the default, and would countenance a practice against equity and not in accordance with the principle announced in *Johnson v. Towsley*. Such indefensible practice is well illustrated in the present case, where it appears that Galloway well knew of Winston's deficiency the first years and then measured the land plowed, for the very purpose of a future

contest, and also permitted himself to be employed by Winston the second year in breaking and cultivating the land, for which he was paid \$147 and a span of horses, but delayed his contest until expiration of the third year, when Winston had expended large means in improving the tract, and when he had cured his *laches* of the first year. A construction which admits of such conduct should not, in my opinion, be longer adhered to.

If, on the other hand, a contest is allowable only when the party is in default, the administration of the law will be equally effective, and the honest efforts of entrymen will be guarded against the endeavors of unscrupulous parties to rob them of their nearly completed titles. The growth of timber on *timberless* land is an object of national as well individual interest; and so long as an entryman in good faith meets the requirements of the law with substantial accuracy, and his deficiencies are technical merely without intent to avoid any duty imposed upon him, his *laches* should be leniently regarded. When, however, it appears that his entry is for speculative purposes, and with dishonest intent, and he fails to meet the requirements of the law, it matters not how soon he is subjected to contest, and the land appropriated by one more worthy of the generosity of the government.

As Winston's entry was not at the date of the initiation of the contest under any default, except his failure to comply with the requirements of the first year's work, which had been then cured, I reverse your decision, and allow his entry to stand.

CONTEST—RELINQUISHMENT—PREFERENCE RIGHT.

HASKINS *v.* NICHOLS.

Without reference to the fact that the allegation is that the timber-culture entry was illegal at inception, the contestant—the entry having been transferred and relinquished, and no claim made under the transfer—is allowed the preference right of entry.

Secretary Teller to Commissioner McFarland, August 1, 1882.

I have considered the appeal of Susan R. J. Buck from your decision of July 12, 1881, allowing Edward Haskins to enter the tract in dispute, under the second section of the act of May 14, 1880.

It appears that Peter Nichols made timber-culture entry of the NW. $\frac{1}{4}$ of Sec. 6, T. 8 S., R. 2 W., Concordia, Kans., September 21, 1876, and that on May 12, 1879, Haskins initiated a contest against the same, alleging Nichols' failure to comply with the law in respect to breaking and planting the land, and that, also, the tract was not subject to a timber-culture entry, because not devoid of timber. He also applied, at the same time, to enter it under the homestead law, as a preferred claimant. The local officers rejected this claim for the reason that a preferred right

cannot be acquired upon allegation and proof of the illegality of a timber-culture entry.

Without reference to the question of the illegality of said entry it is sufficient for the purposes of this decision that the testimony shows Nichols' failure to comply with the requirements of the law.

Susan R. J. Buck was permitted to become a party to the contest, having filed affidavit that she had bought the improvements on the tract from said Nichols, her father; and it appears that about the middle of April or the 1st of May, 1879, he transferred to her, for her sole use and benefit, his claim to the land and improvements, but without any money consideration; and thereafter, on May 16 following, he filed in the local office his relinquishment of the tract, in the expectation that she would make claim thereto, which she has not done; for the reason, probably, that (as appears from affidavits filed since the hearing) she has married. As *ex parte* affidavits these cannot be considered. But it is sufficient that she has not made any claim of record, without inquiry into the reasons therefor.

As Haskins commenced his contest prior to Nichols's relinquishment of the tract, the relinquishment relieved him from producing evidence in support of his allegation, and he had the right to continue the contest to final determination, and thus secure a preference right to enter the tract, as held in *Johnson v. Halvorson* (Copp, July, 1881).

Being, therefore, the first and only applicant for the tract, and having duly prosecuted his contest, he is entitled to the benefit of the second section of the act of May 14, 1880, and his preferred right of entry must be allowed.

Your decision is affirmed.

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TIMBER CULTURE CONTEST—PROOF—AGENT.

EWING *v.* RICKARD.

Overruled -
6 L. D. 483.
1 " " 153

In a contested timber-culture entry where the entryman endeavors in good faith to comply with legal requirements in point of breaking or having the requisite amount done within the prescribed statutory period by an agent, though the agent fails in the performance, the *laches* is cured if the entryman takes the necessary steps to procure the performance of the same before the initiation of a contest.

In a proceeding involving forfeiture, the same strictness of proof is invariably required as under a penal statute. The whole burden is on the party alleging want of compliance, and the acts of abandonment or failure to comply with legal requirements must be affirmatively shown.

Secretary Teller to Commissioner McFarland, October 9, 1882.

I have considered the case of William H. Ewing *v.* L. M. Rickard, involving timber-culture entry No. 257, made by the latter June 24, 1876, on the SE. $\frac{1}{4}$ of Sec. 18, T. 24 N., R. 4 W., Norfolk district, Nebraska, on appeal by him from your predecessor's decision of March 29, 1881, adjudging his entry forfeited.

It appears that Rickard made the entry in question under the provisions of the act of March 13, 1874 (18 Stat., 21); that Ewing initiated contest against the same on April 22, 1879, alleging Rickard's abandonment of and failure to settle upon and cultivate the tract as required by law, and that Ewing also filed his application to enter said tract.

Notice was first published the same day, and the hearing was had May 19th ensuing, when both parties appeared.

The testimony shows that no breaking was done until July 17, 1877, when one Thomas Eberly commenced to break about ten acres of the land; that the breaking was fairly done; that trees were first planted in April, 1878, but the ground was not properly prepared therefor; that corn was planted with the trees, but it was neither cultivated nor harvested; that the first ten acres were replanted in the spring of 1879, and the trees planted in 1878 were plowed up and reset. The act in question requires entrymen of a quarter section thereunder to break or cause to be broken ten acres of the land thus entered during the first year following the date of such entry. The amendatory act of June 14, 1878 (20 Stat., 114), reduces this number to five acres, and authorizes a claimant under the former act to complete his entry pursuant to the requirements of the latter act. It will thus be seen that both of said acts require that the breaking be done during the first year after entry thereunder.

Rickard interposes a plea of confession and avoidance, admitting his failure to comply literally with the said requirements, but alleging in extenuation of such failure that he was necessarily absent from his claim, running a ferry-boat across the Niobrara River from April to the summer of 1877; that he had an agreement with W. H. Duncan—one of the contestant's witnesses—to break the requisite 10 acres prior to June, 1877; that he first learned July 5, 1877, upon his return to his claim, that the breaking had not been done, and thereupon made arrangements the next day with Thomas Eberly to have the requisite breaking done. Duncan admits having had some conversation on the subject with defendant, but states that there was only a verbal or "partial agreement," no time for the breaking having been specified; that he neither knew when the defendant made his entry nor when the breaking should have been done, and that he never fulfilled such agreement.

It further appears that about the middle of June, 1877, while defendant was on the Niobrara, he wrote to Duncan advising him when the breaking should be done, and requesting him to do it forthwith. Duncan, however, denies having received such letter; on the other hand, one J. A. Gilbert testifies in behalf of the defendant that he delivered a letter to Duncan's wife, purporting to have been written by defendant. Duncan's testimony must be regarded as an express admission of a conversation had with the defendant, and as corroborative of the latter testimony touching said agreement between himself and Duncan.

Thus it appears that Rickard endeavored in good faith to comply with legal requirements in point of breaking or having the requisite amount of breaking done within the prescribed statutory period; and that so soon as he learned that such breaking had not been performed by his agent, Duncan, he immediately thereafter took the necessary steps to procure the performance of the same. This was done and his *laches* cured before the initiation of contest.

The object of the law—the growth of timber—is attained if at the date of final proof the party has growing on the land the required number of thrifty trees. Although undoubtedly an entry is subject to contest whenever the party is in default, I see no valid reason for subjecting him thereto after default is cured. (*Galloway v. Winston*, *The Reporter*, Vol. 2, page 121.)

In a proceeding involving forfeiture the same strictness of proof is invariably required as under a penal statute. The whole burden is on the party alleging want of compliance, and the acts of abandonment or failure to comply with legal requirements must be affirmatively shown. This Ewing has failed to show, and the contest is therefore dismissed.

Your decision is accordingly reversed.

TIMBER CULTURE—GOOD FAITH—AGENT.

CURTIS *v.* GRIFFES.

Good faith is one of the essential elements in timber-culture entries.

A timber culture entryman is not compelled to reside in the State or Territory wherein the land embraced in his entry is situated.

Acting Secretary Joslyn to Commissioner McFarland, October 27, 1882.

I have considered the case of William W. Curtis *v.* James A. Griffes, involving the latter's timber-culture entry made September 4, 1873, upon the SE. $\frac{1}{4}$ of Sec. 4, T. 10, R. 16 W., Grand Island, Nebr., on appeal by Griffes from your decision of September 3, 1881, adjudging his entry forfeited for failure to comply with the requirements of the law. This contest was initiated in December, 1879. The testimony shows that Griffes broke 10 acres of the tract in 1874, which he replowed in 1875; and that during the latter year he broke 10 additional acres and planted more than 6,000 trees, which, although properly cultivated, failed to reach a healthy stand by reason of fire and grasshoppers. In 1876 he broke 20 additional acres, and planted 6,500 trees; but the season was dry and they did not grow well. In 1877 he replowed 20 acres and replanted the trees. In 1878 he caused 10 acres to be planted in tree seed; but these were not cultivated in 1879, although he paid an agent for the purpose. Griffes is a minister of the gospel, and was located in Nebraska at the date of his entry. In 1876, or thereabouts, he moved to Kansas. In May, 1879, his church edifice was destroyed by a tornado, and he passed most of the remainder of that season in East-

ern States, soliciting subscriptions for its rebuilding, which fact he assigns as a reason for not giving the land closer supervision during the year 1879. He did not learn until the fall, when too late for cultivation of the land, that his agent had neglected the same.

The local officers, although commending Griffes's good faith, and charging his non-compliance with the law in 1879 to the laches of his agent, recommend, nevertheless, cancellation of his entry, because of said non-compliance, and because, also, he is a non-resident of Nebraska.

The latter reason is without merit as the timber-culture law does not require an entryman to be resident of the State where the land is located. Your decision, without notation of facts, finds that the local officers "reached correct conclusions," and affirms their recommendations. This entry was under the act of March 3, 1873 (17 Stat., 605), which was amended by the act of March 13, 1874 (18 Stat., 21), which was amended by the act of June 14, 1878 (20 Stat., 113). The latter act permits entries made under the two former acts to be completed under its own provisions, which requires only that the entryman may show, on final proof, that he has cultivated in timber for the period required by the act, an area not less than one-sixteenth part of the entire area embraced in his entry, and that he then has growing upon such cultivated area the number of "living and thrifty trees" thereby prescribed.

In view of Griffes's good faith, and of all the facts, he should be allowed to complete his entry under the act of 1873, and I modify your decision accordingly.

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TIMBER CULTURE ENTRY—WIDOW AND HEIRS.

SALLY HICKOK.

Under the Kansas statute the widow is entitled to a moiety of her husband's estate—real and personal.

It does not appear that the widow or heirs, if any, authorized the administrator to relinquish their right in the premises; and without such authority it was not competent for him to relinquish said entry.

Acting Secretary Joslyn to Commissioner McFarland, November 9, 1882.

I have considered the appeal of Sally Hickok, from your decision of November 12, 1881, re-instating timber-culture entry No. 1221, made by her husband, Thaddeus W. Hickok, deceased, June 30, 1877, of the NW. $\frac{1}{4}$ of Sec. 24, T. 5 S., R. 7 W., Concordia district, Kansas.

It appears from your recital of facts that the appellant's husband died, and that one A. G. Storrs, as administrator of decedent's estate, relinquished said entry. The record shows that the register and receiver thereupon canceled the same August 1, 1881, and that appellant made timber-culture entry No. 2425, of the tract, on the 27th of the same month.

As under the timber-culture law, the rights of a deceased claimant inure to the benefit of the heirs, if any, they only can relinquish the entry of such decedent.

Under the Kansas statute the widow is entitled to a moiety of her husband's estate—real and personal.

It does not appear that the widow or heirs, if any, authorized the administrator to relinquish their right in the premises; and without such authority, it was not competent for him to relinquish said entry.

Your decision is accordingly affirmed.

20 ID 276
22 " 318
26 " 363

LOCAL OFFICE—REGISTER AND RECEIVER.

CHRISTIAN F. EBINGER.

The duties of registers and receivers are distinct, and neither can discharge those of the other in the absence of express authority therefor, but the action of each is necessary within their appropriate sphere, to the administration of the office.

Acting Secretary Joslyn to Commissioner McFarland, November 13, 1882.

I have considered the appeal of Christian F. Ebinger from your decision of October 27, 1881, rejecting his application to make a timber-culture entry on the SW. $\frac{1}{4}$ of Sec. 23, T. 3, R. 17 W., Bloomington, Nebr., and allowing Daniel Hearl to enter the same tract.

It appears that on May 19, 1881—there then being a vacancy in the office of receiver of the land office, by the death of its late incumbent—Ebinger presented his application to the register, who rejected it for that reason.

On June 23 following—a new receiver having been appointed—Hearl applied to enter the tract under the timber-culture laws. His application was rejected by reason of the application of Ebinger, but the officers recommended Ebinger should be allowed thirty days from the reopening of the office, within which to perfect his application. He renewed his application on June 27 following.

It was held by this Department in the case of the Dean Richmond Mine (Reporter, August, 1882) that, where your office suspended the register, and directed the receiver to take charge of the district office, which he did, performing the duties of the register, his acts were valid as to the public and third persons having an interest therein, under the general doctrine that the acts of an officer *de facto* must be recognized from considerations of necessity and public policy. The reasons for that rule do not apply where there is a mere vacancy in the office of one of these officers.

The duties of registers and receivers are distinct, and neither can discharge those of the other in the absence of express authority therefor, but the action of each is necessary within their appropriate sphere, to the administration of the office.

I affirm your decision that Ebinger acquired no right by presentation of his application during the vacancy in the office of the receiver, and hence that the tract was vacant and unappropriated at the date of Hearl's application, and subject thereto.

1871 D 139
22 " ✓ 4

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PUBLIC OFFICIAL—ERRONEOUS ADVICE.

SCHMIDT *v.* STILLWILL.

Where a party acts upon the suggestions of the officers of the government he should lose nothing, unless required by the absolute demands of the law, especially when the adverse claim is inequitable.

Acting Secretary Joslyn to Commissioner McFarland, November 13, 1882.

I have considered the case of Andrias Schmidt *v.* Charles H. Stillwill, involving the latter's timber-culture entry made August 11, 1880, upon SE. $\frac{1}{4}$ of Sec. 30, T. 96, R. 58, Yankton, Dak., on his appeal from your decision of December 14, 1881, holding his entry for cancellation.

It appears that in January, 1879, Schmidt purchased, at an expense of several hundred dollars, the improvements and possessory right of a former timber-culture claimant to the tract and received a relinquishment thereof, which he afterwards filed in the local office, and at the same time applied, verbally, to enter the tract under the timber-culture laws, and tendered the fees therefor. His application was refused, pending action by your office upon the relinquishment, but he was instructed by the officers that his rights would be protected, and his name was entered on their records opposite the tract to indicate his claim. He repeatedly afterwards visited the office for the purpose of perfecting his entry, each time renewing his verbal application, and was each time advised as at first. Notice of the cancellation of the former entry reached the local office August 11, 1880, on which day the officers in pursuance of their promise to that effect, notified Schmidt thereof by mail. Upon the same day Stillwill made his entry. On or about August 17, as soon as he received said notice, Schmidt again applied to enter the tract, but his application was refused by reason of Stillwill's entry.

I think this case is fairly within the spirit of the ruling of the supreme court, in case of Lytle *v.* Arkansas (9 How., 314), where it was held that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails through the misconduct or neglect of a public officer, the law will protect him. Or, if not fully within that decision, it is manifestly covered by the ruling in Morrison *v.* Stalnaker (104 U. S., 213), the register and receiver having, for a reason entirely independent of any want of technical completeness, declined to permit his entry, while at the same time recognizing him as an applicant for the tract and entitled to the usual notice of a

preferred claimant after cancellation by your office of the previous entry. Schmidt visited the land office for the purpose of making his entry and tendered the fees, and it must be presumed that he would have made a written application but for the advice of the officers that it would not be favorably considered. Although there appears no neglect or misconduct on their part, yet their advice undoubtedly induced Schmidt to neglect that which he purposed to, viz, to make a legal application for the tract. The objection that he did not make a written application is technical, and not equitable, for had he, when filing the relinquishment also filed a written application, his preference right might probably have been secured. Where a party acts upon the suggestions of the officers of the government he should lose nothing, unless required by the absolute demands of the law, especially when the adverse claim is so inequitable as is that of Stillwill.

Schmidt, upon his purchase, entered into immediate possession of the tract, on which were about twenty-three broken acres, and he broke fifteen additional acres, which facts, as well as Schmidt's claim, Stillwill appears to have well known at the date of his entry. Schmidt is a Russian by birth, having been in this country but two years and ignorant of its language and land laws; and the Department will protect such persons, so far as it can within the law, from the rapacity of those who would take advantage of their ignorance to acquire their rights and appropriate their property.

Your decision is affirmed.

Overruled -
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 TIMBER CULTURE CONTEST—APPLICATION TO ENTER.

61 D 284
 BUNDY v. LIVINGSTON.

Section three of the act of June 14, 1878, restricts a contest against a prior timber-culture entry to one who seeks to enter under the homestead or timber culture laws, and in the absence of any such application there is no right of contest.

Acting Secretary Joslyn to Commissioner McFarland, November 14, 1882.

I have examined the appeal of Frank Bundy from your decision of December 13, 1881, allowing George Livingston to contest the timber-culture entry of N. P. Burgason upon the SW. $\frac{1}{4}$ of Sec. 10, T. 4, R. 28, Oberlin, Kans.

It appears that Bundy and Livingston presented applications to contest said entry simultaneously. That of Livingston was sworn to upon the day of, but prior to, presentation, before a clerk of a court of record.

That of Bundy was incomplete when presented, not having been sworn to until after presentation. Your decision holds that the entry of Burgason "was liable to contest by him who should first present an application to contest conforming in all essential respects to the rules"—"that the application filed by Livingston so conforming, the same should

have been allowed," and hence that "Livingston should be allowed the preference right to contest said entry," by which latter expression I understand you to mean that Livingston should have the preference right to enter the tract if successful in his contest.

I concur with you in the opinion that Livingston's application, as a mere affidavit, was complete when presented, and that Bundy's was incomplete, and hence that, were this the only question, Livingston would have the superior right. Your decision, however, overlooks section three of the act of June 14, 1878, which provides—

That if at any time after the filing of said affidavit, and prior to the issuing of the patent for said land, the claimant shall fail to comply with any of the requirements of this act, then, and in that event, such land shall be subject to entry under the homestead laws, or by some other person, under the provisions of this act: *Provided*, That the party making claim to said land, either as a homestead settler or under this act, shall give at the time of filing his application such notice to the original claimant as shall be prescribed by the rules established by the Commissioner of the General Land Office; and the rights of the parties shall be determined as in other contested cases.

This statute restricts a contest against a prior timber-culture entry to one who seeks to enter it under the homestead or timber-culture laws. In the absence of such application there is no right of contest. The record fails to show that either Bundy or Livingston applied to enter the tract, but simply to contest the former entry. The application of each must therefore be rejected because unauthorized by law, and your decision is modified accordingly.

TIMBER CULTURE CONTEST—BURDEN OF PROOF.

CORNELL *v.* CHILTON.

Original -
6 L D 483.

The evidence shows that the requisite amount of work was done during the first year, and as the second year had not expired a contest should not have been permitted. As recently held by the Department in the case of *Ewing v. Rickard*, "in a proceeding involving forfeiture the same strictness of proof is invariably required as under a penal statute. The whole burden is on the party alleging want of compliance, and the acts of abandonment or of failure to comply with legal requirements must be affirmatively shown."

Secretary Teller to Commissioner McFarland, November 21, 1882.

I have considered the case of Charles F. Cornell *v.* James Chilton, involving timber culture entry No. 528, made by the latter May 31, 1878, of the fractional SW. $\frac{1}{4}$ of Sec. 6, T. 137, R. 47, Crookston district, Minnesota, on appeal by Cornell from your decision of November 25, 1881, in favor of Chilton.

It appears that Cornell initiated contest against said entry May 26, 1880, by filing the usual affidavit, wherein he alleged abandonment and failure to settle upon and cultivate the tract pursuant to legal requirements. Citation issued June 26, 1880, fixing August 5 ensuing, for the

hearing. Both parties were present pursuant to notice, and testimony was adduced in behalf of each; whereupon the register and receiver found contestant's allegations sustained.

The evidence shows that the requisite amount of breaking (10 acres) was done during the first year, and as the second year did not expire until May 31, 1880, contest upon the ground alleged was not permissible until the expiration of the latter period. Hence the testimony adduced by virtue of such contest was inadmissible, and is not, therefore, entitled to consideration. But if it were competent for me to consider such testimony, I would be constrained to hold that the contestant had failed to sustain his allegations because, as was recently held by the Department in the case of *Ewing v. Rickard*—

In a proceeding involving forfeiture the same strictness of proof is invariably required as under a penal statute. The whole burden is on the party alleging want of compliance, and the acts of abandonment or of failure to comply with legal requirements must be affirmatively shown. This, *Ewing* has failed to show, and the contest is therefore dismissed.—(The Reporter, vol. 2, p. 145.)

Your decision is accordingly affirmed.

TIMBER CULTURE—ILLEGAL ENTRY.

BENEDICT *v.* BOYER.

Entry under the timber culture law is restricted to sections devoid of timber.

Secretary Teller to Commissioner McFarland, November 22, 1882.

I have considered the case of *Wallace Benedict v. Frank D. Boyer*, involving the latter's timber-culture entry made September 26, 1877, upon the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 12, T. 14 N., R. 43 E., Colfax, Washington Territory, on appeal by Boyer from your decision of December 15, 1881, holding his entry for cancellation.

The affidavit of contest alleges that the tract is not exclusively prairie land, and is not devoid of timber. This is the only issue in the case.

The testimony of Boyer shows that there was at the date of his entry from twenty to thirty growing pine trees scattered over the hillsides of the section, varying in height from twenty to one hundred and twenty feet, and fifty-five stumps of trees.

Other witnesses testify to pine, birch, balm and other trees, some of which measure five feet in diameter, and also to be a growth of several hundred young pines from one to fifteen feet high.

I concur with you in the opinion that a section, containing such trees and stumps of trees, is not, nor any part thereof, subject to entry under the timber-culture laws, because not devoid of timber, and hence that Boyer's entry should be canceled.

Your decision is affirmed.

PRACTICE—SIMULTANEOUS CONTESTS.

SMITH *v.* OAKES.

Proceedings where a relinquishment is filed by one of simultaneous contestants of a timber-culture entry, and preference right of entry accorded.

Commissioner McFarland to register and receiver, Oberlin, Kansas, December 1, 1882.

Your letter of September 8 last was duly received, transmitting the duly executed relinquishment of the timber-culture entry No. 2177, on the NW. $\frac{1}{4}$, 4, 3, 29 W., involved in the case of Robert C. Neeper *v.* Allen B. Oakes; together with the record in the further contest initiated by said Neeper and the record in the contest instituted by Watson Smith against said Oakes, simultaneously on July 7, 1882.

It appears that on said date of July 7, 1882, and before the receipt at your office of such information, this office dismissed the contest first initiated by Neeper against Oakes and allowed the plaintiff therein the usual sixty days within which to appeal.

At the date of the filing of the simultaneous contests, therefore, the entry was in controversy in a prior contest then awaiting final adjudication.

You erred therefore, I think, in allowing the same to proceed to a hearing—which the record in each contest discloses was the case—as your action was in violation of the ruling, then in force, of the office in the case of *Schneider v. Bradley* (Copp's L. O., vol. 9, p. 64) wherein it was held that—

As a condition precedent to the right of initiation of a second contest against the same entry, the former case must have been finally adjudicated, and this state of a case is not reached until determination of the question of appeal either by waiver, by failure, or by prosecution to a final decision.

The said simultaneous contests are therefore dismissed, and you will so advise the respective parties.

As you report no appeal by the plaintiff in the first initiated contest of *Neeper v. Oakes*, from my decision of July 7, 1882, that case is this day closed.

With regard to the relinquishment submitted, it appears that the same was filed by said Smith (one of the simultaneous contestants) who submits that in view of the same he is entitled to the preference right of entry.

The matter is brought before this office on appeal by Smith from your action in rejecting the said relinquishment and his two applications to enter the land under the provisions of the timber-culture law, which were presented subsequent to the initiation of his contest and the two cases of *Neeper*, viz: on August 7 and September 7, 1882.

You rejected the relinquishment and applications to enter, the first time it seems, "because of the pendency of the other contests" and that the relinquishment "was not properly acknowledged before an officer having a seal"; the second, for the reason that said "other contests" were still pending. I approve your action so far as it had reference to the first initiated contest of Neeper as that was the only legal contest then pending and your action was in accordance with rule 53, of practice.

This may seem to be at variance with the departmental ruling in *Johnson v. Halvorsen* (8 C. L. O., 56) that "when a relinquishment is filed before the final disposition of a contest, it should be treated as proof of abandonment, and the contestant notified of his preferred right of entry," under section 2 act of May 14, 1880.

But such is not the case as it was held by the Department in the case of *John Powers* (8 C. L. O., 178) that "in order to give effect to a relinquishment as evidence in a contested case, so as to inure to the benefit of the contestant under the act of May 14, 1880, it must have been made before the closing of the testimony before the register and receiver on the allegation of abandonment," and that the "decision of June 2, 1881, in *Johnson v. Halvorsen* is in harmony with the foregoing, although a cursory reading might perhaps lead to a broader construction." Particular attention was also called in *Powers* to said rule 53, and a strict observance of its requirements enjoined.

The first section of the act of May 14, 1880, provides—

That when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office.

It would thus appear that the said rule does violence to the strict letter of the law. But violence is done the letter in order to give effect to what would seem to be the true intent of the law. It is held that the summary action enjoined in its first section was intended to apply to those cases only where there were no adverse claims pending or adjudicated. A less liberal interpretation in cases like the present would lead to vexatious complications and confusions, for should the contestant have proved his case, the entry would necessarily be subject to cancellation as a result thereof, irrespective of the subsequent filing of the relinquishment, and be entitled to the preference right of entry under section two of said act. As such right of the contestant is only determinable on the final adjudication of his case, however, it is obvious that to permit him to enter on the filing of the relinquishment pending final action after the hearing would be to prejudice the case in his favor peremptorily and without sufficient warrant. On the other hand, to throw the land open to entry or settlement by the party filing the relinquishment or any other qualified applicant before final action on the contestant's case would render said section two inoperative.

The said entry is hereby canceled on the relinquishment presented by Smith, and you will so note on your records.

You will also advise the parties of such cancellation and that Smith will be entitled, under the usual restrictions, to enter said land as a preferred claimant, under office decision in the case of Salem F. McKinney (7 C. L. O., 6). In this case it was held that—

When a party secures a written relinquishment of a timber-culture claim and files it in the proper land office with his own application to enter, under the timber-culture laws, the land therein described, such party will, upon cancellation of the claim, be allowed to make entry as sought.

You will advise the respective parties of this decision, allow sixty days for appeal, and, at the proper time, report the action taken.

36 L D 356

TIMBER CULTURE—SIMULTANEOUS APPLICATIONS.

MELVILLE & KELLY.

Where applications to enter under the timber-culture law are simultaneous, the rule in *Helfrich v. King* applies.

All applications presented at the opening of a new land office may be considered as simultaneous.

The affidavit and application, in timber-culture cases, are considered as one paper, and if the affidavit is sworn to before the township plat is on file, the application fails.

Commissioner McFarland to register and receiver, Huron, Dakota, December 16, 1882.

I am in receipt of your letters of October 26 and November 24 last, transmitting appeals of Messrs. Mellville and Kelly and Horace Comfort, attorney for claimants under certain rejected timber-culture applications. You rejected said applications because a tract on the same section therein described had been previously entered under the timber-culture act. It appears that the affidavits accompanying the applications on which the tracts hereinafter mentioned were allowed by you to be entered, were executed prior to the date on which the township plats were filed in your office. You state that the plats aforesaid were received and filed on the evening of October 18, *after business hours*. It is now held by this office that the application and affidavit must be considered *as one paper*, and that there can be no legal application where the affidavit is executed *prior* to the filing of the plat in the local office, as in such case there is no record therein by which to identify the tract, consequently nothing to apply for. It follows that you erred in allowing said entries, and the same are hereby canceled. Notify the parties in interest accordingly and allow the usual time for appeal. The entries referred to are the following, to wit:

* * * * *

I find, upon examination of the entry papers submitted with the appeals, that the affidavits were all executed prior to the date on which the plat was filed in your office, excepting that of William H. Cooper, which bears date October 23, 1882.

The applications were premature and illegal at the date of presentation, and the same with the appeals are therefore dismissed. Your action in the case of Wm. H. Cooper aforesaid is sustained; allow the parties in interest the usual time for appeal from this action.

It is proper here to treat incidentally of the point raised in the appeal as to the simultaneousness of applications.

Ordinarily the local officers are permitted to exercise their best judgment in determining such questions, but in order to establish a uniform rule for your guidance under certain circumstances the following is laid down: All persons in the office immediately after opening of the same for business, who have written applications for entry of a tract on the same section under the timber-culture law, shall be considered simultaneous applicants, and you will accordingly dispose of the right of entry under the rule laid down in *Helfrich v. King* (2 C. L. L. 378), which is as follows:

1st. Where neither party has improvements on the land, it should be sold to the highest bidder.

2d. Where one has actual settlement and improvements and the other none, it should be awarded to the actual settler.

3d. Where both allege settlement and improvements, an investigation must be had and the land be awarded to him who shows the prior actual settlement and substantial improvements so as to be notice on the ground to any competitor.

In explanation, I will state it appears that the attorneys of appellants and one Van Horn (also an attorney), immediately upon the opening of your office for the transaction of business on the morning of October 19 last, entered, each having in his possession timber culture applications for entry of a tract on the same section. You allowed entries of the said tracts, under the Van Horn applications. It is a fact when new plats of public lands are filed in the local offices, there is an unusual "rush" of claimants in person and by attorney, each striving to secure an entry of the tract or tracts desired.

It appears that your office counter is protected by a wire netting, in which is a small aperture through which to pass applications and other papers for consideration by you.

On the morning of October 19, the crowd was so great that it was impossible for all claimants to pass their applications to you at the same time through the small opening aforesaid. Under the circumstances of this case, and had the application been legal, it was error to regard them other-than simultaneous. It was also error to accept Van Horn's for the reason hereinbefore stated, to wit, the affidavits having been executed prior to the filing of the plats in the local office.

AMENDMENT—ERROR IN PLAT—OCCUPANCY.

BENNETT *v.* COTTNACH ET AL.

Entry changed to correspond with occupancy and improvement.

Secretary Teller to Commissioner McFarland, December 23, 1882.

I have considered the case of *W. H. Bennett v. Duncan Cottnach*, together with the case of *G. B. Hart v. said Duncan Cottnach*, both involving timber-culture entry No. 2048, made by Cottnach, and on appeal from decisions made by you in both on the 17th of January last. The facts appear as follows: Cottnach, on the 17th of June, 1878, made timber-culture entry No. 2048, upon the NE. $\frac{1}{4}$ of Sec. 23, T. 9 S., R. 20 W., Kirwin, Kans. His entry papers properly describe the tract, but the entry was erroneously platted on the NW. $\frac{1}{4}$ instead of the NE. $\frac{1}{4}$ of said section, and Cottnach's improvements under his timber-culture entry have been entirely on the NW. $\frac{1}{4}$.

G. B. Hart contested Cottnach's right to said NW. $\frac{1}{4}$ on the ground of non-compliance with the law in the matter of cultivation and improvement. Having directed the local office to correct the plats so as to agree with Cottnach's entry papers, you on the same day dismissed the contest on the ground that the testimony therein erroneously specifies the NW. $\frac{1}{4}$ of Sec. 23, T. 9, R. 30, as the tract abandoned by Cottnach. Your decision leaves said NW. $\frac{1}{4}$ open to entry by the first legal applicant, and in effect sends Cottnach to the NE. $\frac{1}{4}$ specified in his entry papers. But we find the NE. $\frac{1}{4}$ occupied as a homestead.

As a result of the error in platting which made it appear that the said NE. $\frac{1}{4}$ was vacant, W. H. Bennett was on the 1st of October, 1878, allowed to make homestead entry No. 7803 thereon. This gave rise to a conflict between Cottnach's entry and that of Bennett, in considering which you decide adversely to the latter, and hold his entry for cancellation.

In that decision I am unable to concur. So far as the facts are presented it appears that Bennett has under his entry been acting in strict compliance with the homestead law as to residence and cultivation. He has built a house, dug a well, and broken about 50 acres. There has been no fault nor default on his part. His entry and improvement were the result of the combined error of the local office and of Cottnach—of the former in platting, and of the latter in following and adopting the error by going upon and improving the NW. $\frac{1}{4}$ instead of the NE. $\frac{1}{4}$ for two years or more after the date of entry.

It has been usual, when a party found himself upon a different tract from that described in his entry papers, for such party to have his entry changed so as to cover the tract on which his improvements have been made; and if no rights were thereby interfered with, it has been, I believe, the practice to grant such request; but it is somewhat unusual for a person to voluntarily throw away two or three years' improvements, and ask to be permitted to go upon land on which he has

made no improvements whatever. Such a course, if permitted in this case, would not only cause the loss to Cottnach of his improvements but would work injury to Bennett by depriving him of the benefit of cultivation and improvements which he has made under his entry, as a result in part of Cottnach's negligence in not at the proper time going upon and claiming the land under his entry. Even if the said NE. $\frac{1}{4}$ were not covered by the homestead entry of Bennett, I think it doubtful whether Cottnach should be allowed to go upon it at this late day, unless it were made to appear that he has in good faith been complying from year to year with the law as to improvements and cultivation of the tract which he has actually occupied.

As to the NW. $\frac{1}{4}$ of said Sec. 23, in the case of *Hart v. Cottnach*, I find that after due notice of contest the register and receiver decided upon testimony to the effect that the timber-culture law had not been complied with, in the matter of cultivation and improvement, that Cottnach's entry should be canceled; and so recommended.

The question involved in that contest appears to be still an open one before your office, as your decision was based upon the inapplicability of the testimony to the entry of record, and not on the question raised in the contest. In view of all the facts, I am of opinion that, by the occupancy and the improvement of the NW. $\frac{1}{4}$ for two years or more without protest, Cottnach should be held to have accepted and elected said tract as the one he desired to enter, his right to patent therefor being subject of course to his fulfillment of the requirements of the law in the matter of improvement, which question, as already stated, was before you on appeal, and is undecided.

I shall therefore not now decide that question, but direct that Cottnach's timber-culture entry be changed on the record to the NW. $\frac{1}{4}$ of Sec. 23, T. 9, R. 20, leaving him to pursue his right to said tract under the law and regulations.

As to Bennett's entry on the NE. $\frac{1}{4}$ of said Sec. 23, it will be recognized as valid, and will stand subject to his continued compliance with the homestead law.

Your decisions are modified accordingly.

TIMBER CULTURE CONTEST—PREFERENCE RIGHT.

BARTLETT *v.* DUDLEY.

The timber-culture law of June 14, 1878, third section, is not inconsistent with the act of May 14, 1880, second section. The contestant under the later act is defined by the earlier law.

Proceedings where parties deprived of their preference right by the decision in case of *Bundy v. Livingston* desire new contest.

Secretary Teller to Commissioner McFarland, February 2, 1883.

I have considered the case of *Albert L. Bartlett v. Edwin Dudley*, involving the latter's timber-culture entry, made March 24, 1877, upon the NE. $\frac{1}{4}$ of Sec. 4, T. 17, R. 23 E., Visalia, Cal., on appeal by Dudley

from your decision of June 26, 1882, holding his entry for cancellation for failure to comply with the requirements of the law. As Bartlett did not, at the date of initiating his contest, apply to enter the tract under either the homestead or timber-culture laws, he was not entitled to his contest under my construction of the third section of the act of June 14, 1878, as held in the case of Bundy *v.* Livingston (9 C. L. O., 173). It is, however, urged by his counsel that the decision in that case is in violation of the preference right given a contestant by the second section of the act of May 14, 1880, which 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," etc., and hence that Bartlett's preference right cannot be impaired by any construction of the earlier act of 1878.

The act of 1880 does not repeal that of 1878. They are both in force, and relating to the same subject matter, must be constructed *in pari materia*, so that, if possible, even though there were apparent inconsistency, both may stand. (Potter's Dwaris, 183.) But I find no inconsistency in these acts. That of 1880 grants to the *person who has contested* a former timber-culture entry a certain named right. This person is the contestant, but *who* may be a contestant of such an entry is not determined by this act, but by that of 1878.

When the latter enactment is worded in affirmative terms only, without any negative, expressed or implied, it does not take away the earlier law. The governing principle in all these cases is to construe the acts, if possible, as reconcilable and capable of coexistence. (Maxwell on Interpretation of Statutes, 136.)

A general later law does not abrogate an earlier special one. Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless it manifests that intention in explicit language. (*Ib.*, 157.)

I am aware that the decision in the case of Bundy may have deprived persons contesting timber-culture entries in some cases of the preference right to which they thought themselves entitled, but—

Courts must look at hardships in the face rather than break down the rule of law, and if, in all cases of ordinary occurrence, the law, in its natural construction, is not inconsistent, or unreasonable or unjust, that construction is not to be departed from merely because, in some particular case, it may operate with hardship or injustice. (*Ib.*, 183.)

Further consideration confirms me in the opinion that the decision in the case of Bundy was a correct interpretation of the third section of the act of 1878, as respects a contestant, and that it is not inharmonious with the second section of the act of 1880.

In order, however, that a contestant whose contest has been or hereafter may be dismissed for failure to file an application to enter the

contested tract at the date of initiating his contest may yet have opportunity for entering it under a valid proceeding, I know of no objection to his initiation of a new contest with an application to enter the tract, or that, in such case, in order to the saving of expense and delay, the parties may stipulate in writing that the testimony formerly taken may be used in the new contest, with such other testimony as they may see fit to submit.

The new contest will, of course, be subject to any intervening right initiated prior thereto; and, in view of the time which has elapsed since the initiation of the former contest, should receive your early consideration.

The contest of Bartlett is dismissed (with the right to a new contest as above indicated), and your decision is modified accordingly.

CONTEST—CANCELLATION—RIGHT OF ENTRY.

SHANLEY v. MORAN.

The first legal applicant permitted to enter the tracts, subject to the right of the contestant to enter within the time allowed by law.

Secretary Teller to Commissioner McFarland, March 12, 1883.

I have considered the case of Charles B. Shanley v. Patrick Moran, involving the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lot 1 of Sec. 10, T. 124, R. 47, Benson, Minn., on appeal from your decision of January 20, 1882, holding the entry of the defendant for cancellation.

The land in contest was formerly covered by timber-culture entry No. 913, made by John Shanley March 9, 1878. Such entry was contested by C. S. Moran, and as a result thereof was canceled by your letter of October 1, 1881, and said Moran, contestant, was advised, by the register, of such cancellation by letter of October 13, 1881.

November 14, 1881, Charles B. Shanley, the plaintiff, applied to make timber-culture entry of said land. This application was refused by the register, upon the ground that the contestant, C. S. Moran, had forty-five days' preferred right to make such entry; that is, that he had thirty days under the act of May 14, 1880, and fifteen additional days according to the custom in such register's office, because the notice was served by mail.

It is not necessary to consider the question presented in your decision as to the authority of the register under the rules of practice to allow any time additional to the statutory time on account of service being made by mail, because in this case it appears that the contestant has never applied to enter such land.

The plaintiff, being the first legal applicant under the well-established practice of your office, should have been permitted to enter, even dur-

ing the thirty days, subject to the right of such contestant to enter within the time allowed by law.

Your decision is therefore affirmed, and the plaintiff, Charles B. Shanley, should be allowed to enter, and the entry of Patrick Moran be held for cancellation.

22 ID 26
29 " 561

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PRACTICE—WITHDRAWAL OF CONTEST.

DE LANEY *v.* BOWERS.

When a contest has been regularly initiated and the contestant withdraws at or before the day fixed for the trial, he will be regarded as in default, and the case will proceed and be decided accordingly.

The same party will not be permitted to renew the contest on the same ground.

Commissioner McFarland to register and receiver, Grand Forks, Dakota, April 9, 1883.

I am in receipt of the register's letter of the 29th ultimo, stating the following facts and asking the instructions of this office upon the matter presented:

It appears that on November 21, 1882, William E. De Laney filed an affidavit of contest against the timber-culture entry of Charles Bowers, No. 3127, Fargo series, made August 7, 1879, for the NE. $\frac{1}{4}$ Sec. 11, T. 163, R. 54, alleging failure of compliance with law, and that the tract was held for speculative purposes and not for the cultivation of trees; that citation was duly issued, hearing being fixed for March 22, 1883.

That on March 16, 1883, De Laney filed notice of withdrawal of this contest, assigning no reasons therefor, but filing at the same time another affidavit of contest on the same grounds as before.

That on the day fixed for hearing in the first case Bowers appeared at your office and filed a statement under oath, which you transmit, setting forth that he is a farmer and actual settler upon a homestead where he has resided for four years last past, within one mile of his timber-culture claim; that he made his timber-culture entry in good faith; that he has fully complied with the law in every particular; that he has planted the required number of trees, and has about 100 acres of the land under cultivation.

He further states that De Laney has made propositions to permanently withdraw his contest for a consideration, and that he has refused to buy off the contest.

It appears from other statements accompanying the papers in this case that De Laney offered to settle with Bowers for \$100, and that Bowers was advised not to settle in this manner, but to submit his case to you.

The register states that great abuses are being practiced in a similar manner in many cases; that parties initiate contests, withdraw before the day of trial, then renew the contests, and so harass contestants and involve them in continued expenses.

You are advised that such contests cannot be regarded as made in good faith, and that oppression and extortion under color of contest cannot be sanctioned by this office.

When a contest has been regularly initiated and the contestant withdraws at or before the day fixed for trial, he will be regarded as in default, and the case will proceed and be decided accordingly.

The same party will not be permitted to renew the contest on the same ground.

You will dismiss De Laney's second contest against the entry of Bowers, and will be governed by these instructions in similar cases hereafter.

19 ID 37
20 " 225
22 " 276

ENTRY—PRELIMINARY AFFIDAVIT.

JOHNSON BARKER.

An affidavit made as the basis of an entry while the land is under appropriation by a timber-culture entry cannot be received. And where an adverse claim has intervened, as in this case, a supplemental affidavit cannot be permitted.

Secretary Teller to Commissioner McFarland, April 10, 1883.

I have considered the appeal of Johnson Barker from your decision of May 9, 1882, holding for cancellation his timber-culture entry made March 4, 1879, upon the SE. $\frac{1}{4}$ of Sec. 25, T. 3, R. 23, Bloomington, Nebr.

It appears that one Jones formerly made timber-culture entry of the tract, but, failing in his efforts to comply with the law, relinquished it, intending upon cancellation of his entry to re-enter the tract under the homestead law. His entry was canceled by your letter of February 21, 1879, but it does not appear when it was so noted on the local records except that Barker was permitted to enter it March 4, under an affidavit made before a notary public in the State of Nebraska March 3, and it was therefore, presumably, so noted prior to the date of his entry.

Jones thereupon, March 10, applied for a hearing to enable him to show that, on March 3 and 4, Barker was actually resident in the State of Iowa, and did not and could not have made the affidavit on the day it purported to have been made.

The testimony shows that Barker went from Iowa into Nebraska the latter part of January or early in February, and returned thence to Iowa between the 12th and 20th of February, 1879, and there remained until June following. It follows either that he did not make the affidavit and that the jurat is false, or that he made it prior to cancellation of the former entry on the local records. Having been in Iowa from February 20 to June, he could not have made it in Nebraska on March 3. The proof that he made it prior to cancellation of the former entry, although apparently made subsequently, is satisfactory, and, as held in the case of Hiram Campbell (5 C. L., O. 21), an affidavit, as the basis of an

entry, made while the land is under appropriation by a timber-culture entry, cannot be received.

Except for Jones's application to enter the tract, Barker might be permitted to file a supplemental affidavit and perfect his entry. But Jones's application must be considered as an adverse claim, which excludes such right.

I affirm your decision.

TIMBER CULTURE—ENTRY UNDER ACT OF MARCH 13, 1874.

CUDNEY v. FLANNERY.

A timber-culture entry, otherwise legal, made on land containing a growth of cotton-wood trees, at the time when such trees were not regarded by the Department as timber trees, is a legal entry on land "devoid of timber." Later rulings holding such trees as timber trees, cannot affect such entry or rights acquired thereunder.

Secretary Teller to Commissioner McFarland, April 20, 1883.

I have considered the case of P. W. Cudney v. William Flannery, involving the latter's timber-culture entry made December 15, 1876, upon the W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 4, T. 1 S., R. 5 E., Bozeman, Mont., on appeal by Flannery from your decision of April 21, 1882, holding his entry for cancellation. This contest was commenced April 21, 1880, upon allegation that the tracts are not subject to entry under the timber-culture law. It is not claimed that Flannery has failed to comply with the requirements of the law in respect to planting of trees and cultivation of the tracts, nor is it necessary to consider in the present case the force of testimony which shows a scattering growth of "scrubby" cottonwood trees along the banks of a creek, running through the section, the area of which is estimated at from ten to seventeen acres, and the number of trees large enough for fence poles at from four hundred to one thousand, nearly all of which are less than six inches in diameter, and about one hundred and fifty of larger size. Without reference to this the case must be decided on other grounds.

This entry was made under the act of March 13, 1874, which contained no provision relative to the character of the land allowed to be entered, but authorized the Commissioner of the General Land Office to prepare and issue such rules and regulations, consistent therewith, as should be proper and necessary to carry its provisions into effect. Under this authority, a form of affidavit was prescribed requiring the applicant to swear that the tract was composed exclusively of prairie land naturally devoid of timber. What trees were *timber* trees within the meaning of the act, so as to exclude the tract from the operation of the act, became a question of frequent occurrence, but I find no ruling by your office or by this Department that in 1876, the date of Flannery's entry, cottonwood trees were held of this character.

Indeed, as late as September, 1879, this Department held in the case of Noel *et al.* (2 C. L. E., 673), that such trees were not timber trees, and did not exclude a tract from entry. Although later decisions include this variety as among the trees which may exclude a tract from the operation of the act, the regulations and rules of your office and of this Department in force at the date of Flannery's entry, had the force of law as respected a tract subject to entry. There was then no objection to such an entry, and Flannery's was allowed as legal and made in accordance with what was considered a correct interpretation of the statute. He thereby acquired rights which cannot now, legally or equitably, be repudiated—especially after his compliance with the law for more than three years—even though such an entry might not now be allowed. The latter rulings cannot have this retroactive effect.

I reverse your decision and allow Flannery's entry to stand.

PRIVATE CLAIM—RESERVATION.

PASO DE LAS ALGODONES.

Notwithstanding the withdrawal of the claim from before Congress, it not having been finally disposed of nor abandoned, the lands covered by it remain in a state of reservation.

Commissioner McFarland to U. S. surveyor-general, Tucson, Arizona, September 13, 1881.

Your letter of August 27 ultimo, addressed to this office and relating to certain lands embraced within the limits of the alleged Mexican private claim "Paso de las Algodones," is before me. In it you inquire, in view of the facts that said claim has been reported by you adversely, and that because of said report you are requested by representative citizens interested in the welfare of Yuma County to restore said lands to settlement and entry, whether you have a right, under the circumstances, to comply with said request, and to make an order restoring said land to settlement and entry, prior to action of Congress on the "Paso de las Algodones" case.

In reply I have to say that your inquiry was evidently made upon the supposition that the claim was pending in Congress upon your adverse report. If that were its condition, most clearly your inquiry should be answered in the negative; but it appears by the proceedings of the House of Representatives of February 16 last (to which branch of Congress the record was transmitted) that on that day leave was granted to the claimants to withdraw from the files of the House the papers in the case, no action having been taken by the House upon the claim other than its reference to committee.

This withdrawal of the claim from the action of Congress might be supposed to place the question submitted in doubt, but the claim is

evidently not abandoned. It is still in existence undetermined. Its withdrawal by the claimants from before Congress was, presumably, for the purpose of endeavoring to procure its recognition by the government in some other manner, and, however desirable it may be to relieve the land in question of the existing impediment and make it eligible to settlement, premature action to that end might only result in subjecting the government to future embarrassment, and individuals who might avail themselves of the opportunity to settle, to injury and loss.

It is presumed that Congress will take action at an early day looking to the adjudication and determination of all outstanding Spanish and Mexican private claims, or their quietus by lapse of time, and until such claims shall be adjudicated and determined or legally abrogated, I am of opinion that neither public nor individual interests would be subserved by inviting or permitting settlement upon lands embraced within their limits.

You will therefore be governed in your action touching the lands covered by the alleged claim "Paso de las Algodones," by the views herein expressed, and hold said lands in reserve until the final determination of said claim.

PRIVATE CLAIM—RESERVATION PENDING FINAL ACTION.

SAN JUAN DE LAS BOQUILLAS Y NOGALES.

The lands covered by the claim, *as presented by the claimant for confirmation*, are reserved from disposition by the government until the rejection, or (if confirmed) final location of the claim; notwithstanding a preliminary survey has been made by the surveyor-general, excluding portions of the land within the boundaries so claimed.

Commissioner McFarland to U. S. surveyor-general, Tucson, Arizona, April 2, 1883.

Your letter of the 20th ultimo is received, in which you state that the claimants of the San Juan de las Boquillas y Nogales grant represent that the granted tract was described by boundaries, but was surveyed under direction of the late Surveyor-General Wasson for the quantity of four leagues, cutting off certain lands on the north and on the south belonging to the claim, although they pointed out to the deputy surveyor the monuments and bounds of the land granted; that the public surveys have been extended over a part of the land so excluded from the survey, and that the claimants now ask you to suspend from entry the land excluded, which has been already surveyed, and not to extend the surveys over the portion excluded which has not been surveyed; upon which you request to be informed what action it is proper for you to take in the premises.

You are aware that the claim is before Congress upon the report of the late surveyor-general, awaiting its action. By reference to the act

of July 22, 1854 (10 Stat., 308), to establish the office of surveyor-general for New Mexico, etc., the provisions of which were extended to Arizona by the act of February 21, 1863 (12 Stat., 664), you will see that the eighth section, which prescribes the duties of the surveyor-general in regard to the examination and reporting of private land claims, provides, in its closing lines, that "until the final action of Congress on such claims all lands covered thereby shall be reserved from sale or other disposition by the government," etc. This provision of the statute substantially answers your inquiry. The land covered *by the claim* is reserved; its bounds and extent, while awaiting the action of Congress to be determined by the presentation of the claimants in their petition to the surveyor-general for confirmation; the reservation to continue until the claim is disposed of by Congress.

The survey, to which reference is made, was merely preliminary, for the information of Congress. It does not determine either the boundaries or extent of the claim. The extent may be affected by the confirmation if confirmation should be made. Final location cannot be made until after confirmation. The reservation of the land claimed therefore, in justice to the claimants and in the interest of the public and of individuals who wish to settle upon public land, should preclude the extension of the public surveys over the land reserved, as well as permission to settle upon it, until the claim is either rejected or its boundaries determined by final location.

PRIVATE CLAIM—FINAL ACTION.

PRESIDIO MILITARY RESERVATION.

The question of what was intended by the words, "as established by the United States authorities," having been passed upon by the proper officer, the head of the Department having control of the subject matter, is thereby settled, such decision being the final act of the Executive.

Secretary Teller to Commissioner McFarland, August 2, 1882.

I have considered your decision of February 13, 1882, upon the survey of the eastern boundary of the Presidio military reservation in California, brought before me by your report of April 14, on protest of the honorable Secretary of War, dated March 29, referred to you March 30, 1882. This survey was made in August and September, 1881, by G. F. Allardt, deputy surveyor, under instructions from the surveyor-general of August 19, pursuant to your directions of May 3, 1881, communicated to him upon request of the military authorities. The order had particular reference to the establishment and marking of the southeastern corner of the reservation, according to the decision of my predecessor, Mr. Secretary Schurz, rendered March 3, 1881, in the matter of the Stratton survey of the Pueblo lands of San Francisco.

The act of May 9, 1876 (19 Stat., 52), provided "that all the right and title of the United States to the following described portion of the military reservation known as the Presidio or Fort Point Reservation," etc., "be and the same are hereby relinquished to the said city and county and its successors, assigns, and vendees," for the benefit of persons, etc., under certain ordinances of the corporate authorities, ratified by the legislature of the State.

The land released is described by the act as—

Commencing at the southeasterly corner of the said Presidio, or Fort Point Reservation, and thence running in a direct line due north to the shore-line of the Bay of San Francisco; thence westerly along the said shore-line to a point eighty feet west of the easterly line of the said Presidio, or Fort Point Reservation, as established by the United States authorities, said eighty feet being relinquished for a public highway or street, named Lyon street; thence southerly to a point on the southerly line of said reservation, where the west line of Lyon street intersects said line; thence easterly to the point of commencement, to conform as near as possible to the plan of the city map of streets of San Francisco outside of reservation, said plan being now on file in the office of the War Department of the city of Washington: *Provided*, That Lyon street shall be extended to the Bay of San Francisco eighty feet wide, and is hereby dedicated for a public highway and street forever: *Provided further*, That Broadway, Vallejo, Green, Union, Filbert, Greenwich, Lombard, Chestnut, Francisco, Bay, North Point, Jefferson, Tonquin, and Lewis streets, as laid down on the official map of the city and county of San Francisco, be extended westerly to intersect the easterly line of Lyon street as herein provided, be, and are hereby dedicated as public highways and streets forever.

The only point involved in the present proceeding relates to the true meaning of the clause fixing the point "80 feet west of the easterly line of the said Presidio or Fort Point Reservation, as established by the United States authorities."

Your decision holds, for extended reasons therein stated, drawn from statements of official action by the War Department prior to the Executive order of December 31, 1851, establishing the boundaries, that the line referred to is a line parallel with Larkin street, drawn through the southeastern corner of the reservation as marked by a monument previously established.

The War Department contends that the line referred to is the line of the government fence erected by the authority of the department commander of the Pacific, on what was at that time supposed and intended to be the line parallel with Larkin street, but by erroneous measurement and calculation, resulting from the rough and unimproved condition of the intervening grounds at that time, actually deflecting several feet to the eastward of a true parallel.

The entire matter of the occupation and establishment of the military reservation was, as matter of course, controlled by the military authorities under direction of the War Department. The order of 1851 fixed by description the location of the reservation, and by its words of de-

scription the eastern boundary was a true north and south line. This was a necessary fact from the words employed. The language was: "all the land north of a line running in a westerly direction from the southeastern corner of the Presidio tract." Nothing not north of it was included, and everything north of it was included. The sketch on file with the original order in your office, furnished as a part of it by the Secretary of War, also shows a red line mark for the proposed survey, running parallel with the arrow denoting the true meridian.

In 1870 the reservation was officially platted by Lieut. Geo. M. Wheeler, of engineers, and the map was placed on official file in the War Department. It was also submitted to your office, and by your predecessor, Mr. Commissioner Drummond, critically examined and approved on the 19th of August, 1872, and so remains on your files. This survey shows the eastern line as a true meridian, and also exhibits the city plan of streets outside and adjacent to the reservation.

The Stratton survey had been made in 1866, exhibiting another boundary in connection with the Pueblo lands of San Francisco, but the work was objected to by the War Department as not properly locating the southeastern corner, and has also been rejected by my predecessor's decision as wholly inaccurate.

In 1850, upon claim of an owner of an interest in the alleged "Rancho de los Lobos" grant, since rejected as entirely false, fraudulent, and antedated, and while the whole question of the necessary occupation of the coast defenses in California was under consideration by a joint commission of army and naval officers, a recommendation was made to accept from this claimant a deed of release of land westward of a line through the southeastern corner, parallel with Larkin street, and withdraw the military occupation from the lands east of such line.

This recommendation was expressly disapproved by the Secretary of War, June 19, 1850, on the ground that the true title to all the ground was then in the United States; but while the subject was pending, and previous to his decision, an order had been made by the department commander of the Pacific to vacate the ground east of the line, and occupy only the grounds proposed to be released to the government by deed of the claimant, who had already offered a bond for such purpose.

The ground was vacated accordingly, and a fence placed upon the line by the military, up to which the occupation was afterwards maintained—private parties and owners under city and State titles occupying the vacated grounds and making improvements thereon more or less valuable.

By mistake this fence deflected to the east from the true parallel with Larkin street, and from this deflection arises the present controversy.

The solution appears to me very simple. On the 1st of June, 1876, immediately following the passage of the act of Congress, Mr. A. Morell, representing himself as the authorized agent of the city and county of San Francisco, applied to the Secretary of War for the issuance of or-

ders to carry out the law and make formal release of the relinquished lands. Orders to that effect were accordingly given, after reference to the Judge-Advocate-General and the rendition of an opinion from the Bureau of Military Justice, to the effect that the only duty incumbent upon the military department was "the verification and marking of the boundaries and a discontinuance, as soon as conveniently practicable, of such occupation of the premises as may [might] be still maintained."

Upon transmission of the order to the local military authorities the surveying engineer reported that he could not carry it into effect, as the newly created Lyon street would be immediately along the true north and south line, already deflecting far to the eastward of the occupied boundary, and throw back into the reservation the lands occupied by the city and individuals between that and the established fence—a result which it could not have been the intention of Congress to effect.

On this report the Chief of Engineers furnished the Adjutant-General, on the 10th of July, 1876, a traced plat, marked Z, showing the position of the lines and streets according to his construction of the act, and stating as follows:

The words of the act "the easterly line of the said Presidio or Fort Point reservation, as established by the United States authorities," means undoubtedly the present boundary fence. If any doubt, however, exists concerning the interpretation of the act of May 9, 1876, put upon it by the Department, it is suggested that the matter be referred to the Attorney-General for his opinion.

On submission of this report to the Secretary of War he again, on the 13th of July, referred it to the Chief of Engineers with his indorsement as follows:

The boundary as traced on map Z (Engineer's Report), is approved.
Copy of map to be furnished Mr. Morell.

J. D. CAMERON,
Secretary of War.

On the 17th of July the Engineer Department returned the papers to the Secretary with following indorsement: "A copy of the map has been sent to Mr. Morell this date, as directed." The Secretary on the following day ordered the Adjutant-General "to carry out the decision of the Secretary of War as contained in the fifth indorsement hereon"—being the indorsement cited.

Orders were given accordingly, plats and surveys were completed, Lyon street was established, the fence was removed to the new west line of the street, fixed as the eastern boundary of the reservation, and under date of the 21st of October, 1876, the following letter was received by the Secretary of the Interior from the War Department:

SIR: I have the honor to transmit herewith, for file in the General Land Office, two maps of the Presidio Military Reservation, California.

Upon map A (a tracing of the map of the official survey of the reservation), the eastern boundary, as defined by the act of Congress of May

9, 1876 (copy inclosed), has been marked. Map B shows, upon a larger scale, the location of the new eastern boundary.

These papers were acknowledged and referred by indorsement to your office, where they still remain on file. They show that the question of what was intended by the words "as established by the United States authorities" was passed upon by the proper officer, the head of the Department having control of the subject matter, upon whose action and reports to Congress the act had been passed, and who must of necessity take the proper action to execute it. His decision was the final act of the Executive, and is binding on this Department, as the history of the reports shows it to have been upon the city and county; and it was so accepted by their agent, who was furnished a copy of the plat.

But even were I at liberty to call in question the right of the War Department to decide for itself the proper construction of the act, and to declare what, in fact, was the line assumed therein to have been "established by the United States authorities," I should be of opinion that the meaning of the words was correctly interpreted. The act refers to a "plan of the city map of streets of San Francisco outside of reservation on file in the office of the War Department of the city of Washington." Inquiry at the Department establishes the fact that the only map thus on file was the Wheeler map of survey, on which was clearly marked the line of government fence, and a stone monument at its shore-line extremity—no map showing any line parallel to Larkin street having ever been filed or made. The documents and records of that Department also show that copies of said map were furnished to the committees of Congress in connection with the proposed release of portions of the reservation, and were reported as exhibiting the true and established boundaries. The reports, as well as the papers now before me, also show that the whole basis of the claim of private parties to have the land released was the stated fact that the occupation had been already actually surrendered *beyond the fence*, and settlements and improvements had been made on the portions so vacated. It was never asserted that the government use and occupation was limited by any other line than the fence so erected to mark the intended eastern boundary.

These facts being ascertained, it is clear to my mind that all Congress intended to do was to recognize the equities claimed on the one hand and conceded on the other; and to further provide both for the city and the government a free and unbroken street of liberal width—extending along the whole eastern boundary, and connected by intersecting streets, dedicated by the act, with the already established surveys of the city.

To execute this intention the War Department has already re-established the boundary of the reservation, relinquished the outside portion, fixed the west line of Lyon street, and given to the city and county, upon express application, the possession of the tract described. All that was asked of this Department was the permanent marking of the

southeastern corner, already established and accurately identified. The surveyor has done more, and attempted to run a new line extending far inside the established reservation.

You are instructed to direct him to identify and mark the line of the presidio as established by the proper Department, and close the lines of the Pueblo survey upon such boundary.

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PRIVATE CLAIM—JURISDICTION.

RANCHO ALISAL.*

A survey made and approved before the passage of the act of June 14, 1860, published and ordered into the United States district court under that act, and pending therein at the passage of the act of July 1, 1864, was within the jurisdiction of said court, and its approval thereof was final.

Secretary Kirkwood to Commissioner McFarland, January 4, 1882.

I have examined the case in the matter of the survey of the Rancho Alisal, Maria Teresa de la Guerra Hartnell and others, the widow and heirs of William E. P. Hartnell, deceased, confirmees, made by United States Deputy Surveyor J. E. Terrell, in May, 1859, on appeal from your decision of January 15, 1880, declining to approve the same, and ordering a new survey according to prescribed instructions.

The proceedings relating to the grant by the Mexican authorities, and the final confirmation of title by the United States district court for the southern district of California by a dismissal of the appeal on stipulation of the Attorney-General of the United States and the attorney for claimants, at the December term 1856, are all matters of record, and sufficiently set forth in your decision.

The present appeal relates solely to the matter of survey, and the conformity thereof to the decree of confirmation.

This survey was regularly approved by the United States surveyor-general of California, November 4, 1859, advertised in August and September, 1860, under the act of June 14, 1860 (12 Stats., 33), ordered into court on the 19th of September, 1860, and approved by the district court December 9, 1865.

No appeal from the decree having been taken, the surveyor-general, on the 21st of May, 1872, forwarded to your office for patent the survey and papers in the case.

April 5, 1873, your office decided, on the authority of *The United States v. Sepulveda* (1 Wall., 104), that the district court had no jurisdiction of the survey, under the act of June 14, 1860, and directed the surveyor-general to make publication under act of July 1, 1864 (13 Stats., 332).

* See Rancho de Napa, 5 L. D., 320.

This decision was affirmed by my predecessor on appeal, October 8, 1873; and the survey was accordingly published under act of July 1, 1864, and upon objections thereto a hearing was had before the surveyor-general, the record of which was transmitted September 1, 1877, with the opinion that the survey became final on the approval of the district court; and if not so, that on the objections presented it ought not to be set aside.

The decision of your office overrules that of the surveyor-general, and requires a new survey, embracing a larger tract of land.

The first matter to be considered in this case relates to the question of jurisdiction. My predecessor having ordered the present hearing expressly upon the ground that the act of July 1, 1864, required him to treat as void the approval of the district court, and hold the survey solely subject as to its correctness to the final decision of the Department, it is necessary to inquire, the question of jurisdiction having been again presented, whether or not I am concluded by that order from investigating for myself the condition of the survey in all its bearings, preparatory to the issue of an order either to pass it to patent or to return it to the surveyor-general for correction.

The order was based on the assumption that the court had no jurisdiction over the final survey; such conclusions being drawn from the absence of record evidence in your files to show that the antecedent conditions existed on which the jurisdiction was conferred by the act of June 14, 1860. This absence was held to be presumptively conclusive that no such conditions did exist; and that, therefore, the judgment must be treated by you as *coram non judice*, and consequently void. It was further stated by my predecessor that the court could take no jurisdiction under the act of 1864 because that act only "saves the jurisdiction of said court over cases then properly pending before it." This was a decision in affirmance of the right of the Department to have a publication under the act of 1864, and thus try the question of the correctness of the survey; and would not ordinarily be reopened if fully presented and considered. But the question of jurisdiction is one that may be raised at any stage of the proceedings and upon slight suggestion in all tribunals; and where doubt of such jurisdiction arises, it is usual and proper to look fully into the reason and authority of the matter, in order that a judgment may not be improvidently rendered, which may have no binding force on account of a want of jurisdiction in the case.

Very little consideration seems to have been given in the present case, and no conclusive reasons set forth for declaring void the decree of the district court. Merely declaring that the facts bring it within the decision of the Sepulveda case, and that no new authority to pass upon the survey was granted by the act of 1864, because it was wrongfully before the court at that date, and without discussing the reasons for so deciding upon the facts, or the power of the Department to dis-

regard the judicial decree or collaterally set it aside, the order was given for a new publication. In my opinion, I am not concluded from again examining the question of jurisdiction, and thereafter taking such action in the case as shall be required by law.

Two inquiries naturally present themselves in the consideration of this question:

1. Was the question of jurisdiction in fact rightfully determined?

2. If so, was it competent for this Department to review the decision of the court for the purpose of disregarding its decree, or treating it as void?

The case may be said to have been similar to the Sepulveda case in the fact that the survey was approved before the passage of the act of June 14, 1860, and not ordered into court until after that date. But it is not shown that no proceedings were pending either before the court or the surveyor general for the purpose of contesting or reforming the survey, that fact being merely assumed from the absence of documents specifically reciting or showing the pendency of such proceedings. There is among the papers a protest against the survey, filed by Mrs. Hartnell in behalf of herself and children as early as May, 1859, soon after the return of the plat by the deputy surveyor.

There is also a petition found on file in the district court asking its intervention to pass upon the survey, which it is shown, by affidavit of the clerk, bears no date of filing, and which, consequently, so far as this Department knows, may have been before the court at the date of the passage of the act. The statute specifically provides—

That all surveys and locations heretofore made and approved by the surveyor-general . . . in which proceedings are now pending for the purpose of contesting or reforming the same, are hereby made subject to the provisions of this act.

With the well-settled presumption in favor of the jurisdiction when exercised by a judicial tribunal, it can hardly be reasonable on the part of a tribunal having no authority to review the proceedings, to declare that the necessary facts to sustain it were wanting, simply because they are not set out with complete certainty in the record. It is to be presumed that the court examined the question for itself, and if anything appears which renders it probable that the facts did exist, it is sufficient to support the presumption that they were found, although not specially recited in the decree. There is nothing, therefore, sufficient to show that the jurisdiction was not properly assumed in ordering the survey into court.

But whatever question there may have been prior to the enactment of July 1, 1864, there can be none since its passage. That statute in terms provides—

That where proceedings for the correction or confirmation of a survey are pending on the passage of this act in one of the said district courts, it shall be lawful for such district court to proceed and complete its examination and determination of the matter, etc.

My predecessor construed this language to include only such cases as were "then *properly* pending before it." But the act does not say "properly" pending. The word is used without qualification, and the grant of authority in terms makes it "lawful for such district court to proceed and complete its examination."

Even if unlawful before, there is by this act a new jurisdiction conferred. This point is clearly settled in *United States v. Halleck* (1 Wall., 453-4) with reference to suits pending at the date of the passage of the act of 1860. The court say :

The new survey was accordingly returned, and exceptions to it were filed by the claimants and purchasers under them; and proceedings upon the exceptions were pending on the passage of the act of June 14, 1860. Whatever question might be raised as to the jurisdiction of the district court to supervise the survey previous to that act, there can be none since its passage. That act applies not merely to surveys subsequently made, but also to such surveys as had been previously made and approved by the surveyor-general, and returned into the district court upon objections to their correctness.

And in *Henshaw v. Bissell* (18 Wall., 269) it is said :

The objection to the authority of the court to pass upon the survey, because ordered into court before the act of June 14, 1860, is untenable. The act in terms applies to surveys which had been previously returned into court, and in relation to which proceedings were then pending.

This is in accordance with the declaration in the case of *Sepulveda* (1 Wall., 108), that "the act of 1860 creates a new jurisdiction in the court, which cannot be assumed independent of the act, and under it should be exercised only in cases arising clearly within its language," and in which case the jurisdiction was denied, because not coming within such language.

These cases are here cited to show that the term "pending," used without qualification, means actual pendency, without reference to the question of original jurisdiction. The opinions expressly declare that proceedings were pending at the date of the passage of the act, and that the new jurisdiction at once attached, whatever question might have been raised against the original jurisdiction up to that period. Now, the act of July, 1864, in the language before cited, refers to cases in which proceedings were pending at the date of its passage, and declares that it shall be lawful to proceed therein and complete their determination. The language is identical with that passed upon and judicially construed by the supreme court under the act of 1860. The acts cover the same subject-matter, and are *in pari materia*. An authoritative construction of the meaning of this language in the earlier statute applies with controlling force to the latter, and governs it, even in case it would otherwise have a different interpretation.

But in these cases there is no apparent ambiguity of measuring. Suits are continually pending in court which are finally dismissed for want of jurisdiction, but such dismissal does not declare that they were

not "pending" because wrongfully before the court. Any order of the court embracing "pending cases" would necessarily include them. And the same is true of a statute so describing them. They are within its language. In *Newhall v. Sanger* (2 Otto, 761), where the word "claimed" was used in a statute attempt was made to obtain a decision that the true meaning was "lawfully" claimed. But the court said that "there is no authority to import a word into a statute in order to change its meaning." So the decision of my predecessor, holding that the word "pending" only included cases "properly" pending seems to have changed the meaning by importing a word not found in the act, and consequently to have expressed a conclusion inconsistent with the construction of the same phraseology in the cases before the supreme court to which I have referred.

With reference, therefore, to the act of July 1, 1864, I conclude, in the language of the court, that "whatever question might be raised as to the jurisdiction of the district court to supervise the survey previous to that act, there can be none since its passage." Having jurisdiction to approve the survey, its decision was final as to its correctness. This leaves it unnecessary to consider the second question in its relation to the case in hand; but as it has been to some extent a practice in this Department to assume jurisdiction over surveys already approved by the court, on the ground of a want of jurisdiction in that tribunal, and thereby to disregard its decrees, it seems proper to inquire into the legality of this practice, and to determine the competency of the proceeding, in order to its correction if unauthorized by law. In the case of the Rancho Napa, decided by your predecessor April 21, 1879, and affirmed by the Department September 20, 1879, it was held that, as the claimed jurisdiction resulted from special statutory enactment, the judgment or decree may be treated as an absolute nullity by any person, notwithstanding the fact that every court is the judge of its own jurisdiction, and the same must be presumed until the contrary is shown by the record.

But I do not find anywhere a decision or statute authorizing an executive officer of the United States to set aside the decree of a federal court, where the United States was itself a party to the suit, represented by the proper United States attorney, consenting by such attorney to the proceedings, and submitting to the judgment, on a proceeding substantially *in rem* (see case of *Henshaw*, *supra*), and brought for the very purpose of ascertaining and determining the respective rights of the government and private claimants. And I must be permitted to say that a very strong showing should be made before asserting a power extremely doubtful, if not entirely wanting, to set aside a decree favorable to the government, fairly obtained by its officers, against the objections of the claimant, himself setting them up and invoking the intervention of the court, for the express purpose of enlarging the decree by giving him what the court on a full showing has denied him,

and to which, it is insisted on the part of the government, he was never entitled.

I cannot conceive any reason why the judgment of the court should not be treated and respected as the action of a regular and competent tribunal, so far as presumption is concerned, whose jurisdiction must be reviewed only upon error or appeal, and whose decrees while unreversed are binding upon all parties and privies. This was held in *McCormick v. Sullivant* (10 Wheat., 192) and I am not aware that the doctrine as laid down has been modified. In speaking of proceedings which it was alleged were *coram non iudice*, on account of a want of a sufficient showing of jurisdiction in the proceedings, the court say:

This reason proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not on that account inferior courts in the technical sense of those words, whose judgments taken alone are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments are erroneous, and may upon a writ of error or appeal be reversed for that cause. But they are not absolute nullities.

And further on, the doctrine appears as stated in the syllabus, that "until reversed they are conclusive evidence between parties and privies."

The same doctrine is asserted with a full citation of authorities, in *Grignon's Lessee v. Astor et al.* (2 Howard, 319). On page 341 it is said that the jurisdiction of the courts of the United States—

Is limited and special, and their proceedings are reversible on error, but are not nullities, which may be entirely disregarded (3 Peters, 205). They have power to render final judgments and decrees which bind the persons and things before them conclusively in criminal as well as civil causes, unless revised on error or by appeal.

And again:

There can be no judicial inspection behind the judgment save by appellate power.

And on page 342:

If the jurisdiction of the court in a civil case is not alleged in the pleadings the judgment is not a nullity, but though erroneous is obligatory as one (Peters, 206), and in a proceeding *in rem* an erroneous judgment binds the property on which it acts; it will not bind it the less because the error is apparent, and the judgement is of complete obligation (3 Peters, 207).

It seems unnecessary to add suggestions on this point. There is no power in this Department to review the decisions of the court in cases like the present. Those surveys not confided to the jurisdiction of the court are by the statute to be passed upon by the Commissioner of the General Land Office, while in court the United States is represented by the district attorney, and he is recited in the proceedings as present at the rendering of the decree. No appeal being taken by either party the same becomes final. It may have been erroneous for any other cause

as well as for want of jurisdiction, but it is not for the parties to complain. The law provided a remedy by appeal and none was sought. This Department should accept as final what was so regarded by the proper Department having charge of the interests of the government, and not arbitrarily attempt to review the proceedings or set them aside, at the request of the disappointed suitor.

The decision remanding the survey for further correction is reversed, and you will issue patent upon the same as finally approved by the United States district court.

PRIVATE CLAIM—CONTROL OF LOCATION.

RANCHO SAN JACINTO NUEVO Y POTRERO.

The location of a confirmed Mexican grant, within limits embracing larger quantity, may be controlled by the General Land Office, as against the selection of the conferee.

In making the survey, however, reasonable and not arbitrary discretion should be exercised.

Acting Secretary Bell to Commissioner McFarland, February 17, 1882.

In view of the facts and considerations stated in your letter of September 17, 1881, respecting the survey of the Rancho San Jacinto Nuevo y Potrero, I directed, on November 19, 1881, a further survey to be made by said rancho, which should not embrace the land patented to Gustave Mahe in 1880, within the limits of the San Jacinto tract, and should also be within the O'Farrell survey of said San Jacinto rancho.

A motion is now filed by John Mullan, esq., in behalf of the conferees of said rancho, for a modification of my said direction so that said further survey may include the lands (or a portion thereof) sold and patented to Mahe. The motion is based on the claim that the conferees of said Jacinto Nuevo have the right to select the quantity confirmed to them, within the boundaries of the O'Farrell survey.

This claim is not well founded, in my opinion, as against the authority of your office to control the location. In the case of *United States v. Armijo* (5 Wall., 444) it was held that—

Where a grant was for a specific quantity, within exterior limits embracing a much larger quantity (as in the present case), there was no obligation on the part of the former government, nor is there any obligation on the part of the present government, to allow the quantity to be selected in accordance with the wishes of the grantee. The duty of the government is discharged when the right conferred by the grant to the *quantity* is attached to a specific and defined tract.

Under our system, the right of the grantee to direct a selection of the *quantity* granted is admitted, subject only to the restriction that the selection be made in one body and in a compact form. This right, we say, is admitted, though strictly it is not a right; it is only a privilege given by the generosity of the government. . . . The exercise

of the right of selection given to the grantee is not permitted by the political authorities, and when a location is subject to the control of the courts, is never permitted by them so as to defeat the equitable prior rights of others.

That the General Land Office, and not the grantee, may select the confirmed lands for patent is held in the case of *Van Reynegan v. Bolton* (5 Otto, 33), in which the court says :

Even if the limitation to one square league (as in that case) should ultimately be held correct, that square league might be located in a different portion of the tract, by direction of the land department, to which the supervision and correction of surveys of private land claims are intrusted. The confirmees could not measure off the quantity for themselves, and thus legally segregate it from the balance of the tract. The right to make the segregation rested exclusively with the government, and could only be exercised by its officers.

These principles were adopted by Secretary Chandler in his decision of August 8, 1876, in the case of the survey of the California private land claim "Piedra Blanca," wherein he said, *inter alia* :

Whether it [the right of selection by a confirmeer] be called a right or a privilege, it is subject to the control of the proper authorities for the protection of prior equitable rights, and, in my opinion, must be held subservient to the public good. The claimants are entitled to their full quantity of eleven leagues, but if the interests of the public require that it be located in a certain place, it is the duty of this Department to direct such location.

It seems well settled, therefore, by the decisions of the supreme court and of this Department that the location of a confirmed Mexican grant, within a tract embracing a larger amount, may be controlled by your office as against the selection of a location by the confirmeer. The discretion of the officers, however, upon whom the duty of making the survey is imposed by law, should not be arbitrary, but should be reasonable, and should be so exercised, in view of the record of the case, the situation of the land, the improvements and possession of the claimants, and all other circumstances proper and necessary to be considered, as to fulfill the requirements of the decree of confirmation according to its true intent, and thus do substantial justice as between the United States and the confirmees.

I am advised that the sale to Mahe in 1870 was made after survey of the San Jacinto Nuevo grant, and after publication thereof without objection, and when apparently satisfied, so that the lands were supposed to be subject to sale. The survey was afterwards found to have been prematurely made (the original San Jacinto grant being pending in the supreme court, not yet confirmed), and subsequently set aside, and a new survey directed; and hence the error in the sale to Mahe at the date thereof. It appears also that Mahe has conveyed portions of the land patented to him to other parties; and that also the confirmees may receive the quantity confirmed to them in a compact form without interfering with his and their interests.

Although the sale to Mahe may have been erroneous because the grant was prematurely surveyed, the original grant to Estudillo not having been confirmed until 1875, and the land embraced therein not being subject to settlement under the pre-emption or other laws for the disposal of the public domain, so long as the claim of the grantees remained undetermined, yet it is within the jurisdiction of your office so to control the selection and location of the grant lands that the rights of Mahe and his grantees may be preserved, as between them and the government, and at the same time the confirmees be secured in the quantity of land to which they are entitled. There is no inconsistency in thus harmonizing the application of the two rules.

The motion is denied, and the survey will be made as directed by my letter of November 19, 1881.

PRIVATE CLAIM—DECREE OF CONFIRMATION.

RANCHO EL SOBRANTE.

The translation of the original title papers, adopted in the decree of confirmation is the official translation, and cannot be changed in construing the decree.

The term *sobrante*, means simply surplus; a grant for a "*sobrante*," is not a grant *by name*, necessarily including *all* the surplus of the tracts referred to; but is subject to words of limitation designating the particular location of the surplus granted.

As to boundaries and extent, the decree of confirmation must be the guide in making the survey.

Secretary Kirkwood to Commissioner McFarland, February 23, 1882.

I have considered, on appeal from the decision of your office of February 26, 1881, the matter of the survey of the California private land claim known as El Sobrante rancho, situate in the counties of Contra Costa and Alameda, and confirmed to Juan José and Victor Castro by the Board of Land Commissioners and the United States district court for the northern district of California, under the act of Congress approved March 3, 1851 (9 Stats., 631).

Such facts, appearing of record in your office, as are necessary to a proper understanding of the main questions presented for consideration, will be stated as briefly as practicable.

On the 26th of May, 1852, the said Juan José and Victor Castro, by their attorneys, H. W. Carpenter and John Wilson, filed in the office of the said Board of Land Commissioners a petition in which they set forth, among other things, that on the 22d of April, 1841, they presented their joint petition to Juan B. Alvarado, then governor of Upper California, "for a grant of all the vacant (*sobrante*) land lying between the ranches San Antonio, San Pablo, Pinole, Valencia, and Moraga, being the surplus or overplus left between the said ranches after the boundaries to the ranches" should "be ascertained and settled"; that "on the 23d of April, 1841, the said Alvarado, so being governor, and having

full power and authority to do so, granted the land as prayed for in the said petition," and directed the petitioners "to appear anew before the proper authority with a map of the land so asked as soon as the boundaries of the ranches named in said petition should be ascertained, regulated, and settled"; that they had always been ready to comply with the direction of the governor to present themselves anew to the proper authority, with a map of the land thus conceded to them, but that the boundaries of the ranchos named had not been ascertained and settled; that "the said Victor, several years before the date of the grant, had settled upon the land so granted them, had built and resided in a house, and cultivated fields thereon"; that both the petitioners "pastured their cattle, horses, etc., upon it," the land granted, "before the grant was made," and had continued to do so ever since; that the said Victor had "constantly since resided thereon," and had cultivated three different ranchos thereon, and had, for the last fourteen years (prior to presentation of the petition to the Board), "had and held (and which was known to the owners of the neighboring ranches mentioned in the grant) exclusive and continued possession thereof"; and the petitioners prayed that they might "be allowed to intervene in the cases arising out of the said ranches when the boundaries thereof" were to be investigated, so that justice might be done them and they obtain "all the vacant (*sobrante*) land lying between the said ranches after their boundaries are properly adjudged and regulated," and that their grant might be confirmed and made valid to them "according to the full intent of the grant at the time the same was made." (Record of Petitions, vol. 1, p. 460, *et seq.*, Land Commission of California.)

On the same day, to wit, May 26, 1852, the Castros filed another petition, in which they represented, as before, that they had petitioned for a grant April 22, 1841, of "all the vacant (*sobrante*) land lying in between the ranches of San Antonio, San Pablo, Pinole, the ranch of Valencia and the ranch of Moraga, being the overplus lying between these several ranches, which lie in the county of Contra Costa"; that on the 23d of April, 1841, the governor granted the same to them, "as they petitioned," and directed them to "present themselves anew before the proper authority, accompanied by a map of the land so granted, so soon as the boundaries of the ranches named should be ascertained and settled; but that the boundaries of the said ranches" had never been ascertained and settled. They therefore prayed the Board to ascertain and settle said boundaries, and then they would comply with all their duty in the premises. They also stated that they would prove that they had been "in the actual possession of said (*sobrante*) or vacant land so granted them ever since the date of the said grant," and that they had "had on it a large stock of cattle, horses, sheep, etc."

They further alleged that the grant had not been approved by the departmental assembly, "because the boundaries of the adjoining

ranches had not been ascertained," and set forth other matters not necessary to be stated here.

They again prayed the Board to confirm their claim, etc. *Ibid*, p. 634-5.)

Whether this petition was to amend the one first herein referred to, or *vice versa*, does not appear; but the two may be taken together as the petition of the Castros to the board of Land Commissioners.

It may be well here to state that about the year 1853, after said petition to the Board was filed, and before the claim was confirmed, the county of Contra Costa, in which the petitioners alleged their land to be situated, was divided, and part of it included in the county of Alameda. There is, consequently, no variance between the general location called for in the petition as in Contra Costa County, and that in the Board's decree as in the counties of Contra Costa and Alameda.

In support of their claim the petitioners introduced in evidence the original petition and concession, or grant, and a translation thereof, which translation was certified as correct by George Fisher, secretary to the Board. This official translation of said petition and grant reads as follows:

PETITION.

To his Excellency the GOVERNOR:

The citizens, Juan José and Victor Castro, natives of this department, and residents within the jurisdiction of San José de Alvarado, present ourselves before your excellency in the most proper and respectful manner, and represent that, being desirous of being finally settled upon land of our own, for the purpose of devoting ourselves to the labors of agriculture and the raising of cattle, in order by these means to obtain the very necessary means of subsistence for our numerous increased families, which is of such vital importance, we beseech your excellency that you will deign to grant unto us a piece of vacant land which is situate on the immediate limits (*immediaciones*) of San Antonio, San Pablo, Pinole, the farm (*ranchito*) of Valencia and the farm of Moraga, which land is the overplus (*sobrante*) of the ranches aforesaid.

Wherefore we humbly pray, etc.

JUAN JOSÉ CASTRO,
VICTOR CASTRO.

MARGINAL CONCESSION OR GRANT.

MONTEREY, *April 23, 1841.*

As the parties interested petition for in this representation so the land of which they make mention is granted unto them, they remaining under obligation to present themselves anew, accompanied by a map of the land, so soon as the boundaries of the neighboring land-owners shall be regulated.

ALVARADO.

(Record of evidence, vol. 19, p. 107, Land Commission, California.)

Testimony was introduced to prove the genuineness of the grant, its character, the settlement of Victor Castro thereon, the possession of the

Castros as alleged in the petition, and also some testimony concerning the boundaries of the Peraltas' grant of San Antonio, and the case was submitted for decision, whereupon, on the 3d day of July, 1855, the following opinion and decree were rendered by the Board of Land Commissioners:

OPINION.

No. 96, JUAN JOSÉ AND }
 Victor Castro }
 v. } For a *sobrante*, in the county of Contra Costa.
 THE UNITED STATES. }

The evidence in this case establishes the following facts: That the petitioners presented their expediente for a *sobrante* of land lying between ranches named in said expediente, and in pursuance of said expediente, Juan B. Alvarado, governor of California, on the 23d day of April, 1841, issued a grant to the petitioners, and requiring them to report a plat of the same as soon as the adjoining ranches could be surveyed and the extent of the *sobrante* ascertained, which survey has not been had of said ranches so as to enable the petitioners herein to define with certainty the boundaries of their said *sobrante*, and a large amount of testimony has been taken for the purpose of settling the boundaries, which is rendered inapplicable to the merits of this claim by the decision of the Supreme Court of the United States in the case of Fremont.

The grant offered in evidence is proven to be genuine, and the proofs in the case go to show that it was issued to the grantees in consideration of services rendered to the nation and for supplies furnished for the use of the Mexican Government.

We think this claim a valid one, and a decree will be entered confirming the same

DECREE.

JUAN JOSÉ CASTRO AND VICTOR CASTRO }
 v. } No. 96.
 THE UNITED STATES. }

In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the said petitioners is valid, and it is therefore decreed that the same be and hereby is confirmed.

The land of which confirmation is hereby made is situated in the counties of Contra Costa and Alameda, and is the surplus (*sobrante*) which, on the 23d of April, A. D. 1841, the date of the decree of concession to the present claimants, existed, lying between the tracts known as ranchos of San Antonio, San Pablo, Pinole, Moraga, and Valencia, reference being had to the original expediente on file in this case. (Record of Decisions, vol. 3, pp. 106 and 107, Land Commission, California.)

The case was taken to the proper United States district court, as provided in section 9 of the act of 1851, above referred to, and such proceedings were had before, and decree entered by, the court as made the decree entered by the Board the final decree in the matter.

The contest now here on appeal arose over a survey of the claim thus confirmed, which was executed by Deputy Surveyor William Minto, in 1878, under contract with the surveyor-general of California, approved by your office. The field notes of the survey were returned to the surveyor-general's office August 26, 1878, and from them a plat was made, after which, in September and October, 1878, notice of the execution of the survey and plat was duly published under section 1 of the act of July 1, 1864 (13 Stats., 332), and the survey and plat were retained in the office of the surveyor-general for inspection, as required by law.

Many objections to the survey, protests against the surveying of the claim as demanded by the owners thereof, and interventions in the case were filed, some before and others after the period of ninety days from the first publication of notice had expired; and thereunder a vast amount of testimony was introduced before the surveyor-general, which was forwarded with the appeal. It is unnecessary to pass upon the status of the various objectors, protestants, and intervenors, or to specify those who appeared in time and showed such interest as entitled them to be heard, and to dismiss the proceedings of all others, under the rule laid down by the Department May 28, 1879, in the matter of the survey of the Rancho El Corte de Madera del Presidio (6 L. O., 52), for the reason that the case is appealed by parties having a proper standing therein, who have raised every point, it seems to me, that the circumstances of the case admit, or that arises in the case.

I need not further recite connectedly the history or facts of the case, enough having already been stated to develop the principal questions involved; but such other matters of record in your office as shall seem proper to be considered will be referred to and discussed as occasion may require.

It is proper here to state my reasons for not using and discussing the testimony of witnesses taken before the surveyor-general. I have not done so for the reason that as to one branch of the case no such testimony is admissible, and as to the other, from my view of the case, none of it is needed. The explanation is this: The decree is said to be ambiguous. Now, if there is a patent ambiguity, it cannot be explained by testimony unless the terms used are wholly indefinite and equivocal and convey on their face no certain or explicit meaning, and the decree itself furnishes no materials by which the ambiguity thus arising can be removed. In such a case, rather than the claim which has been adjudicated upon the principles of equity (sec. 11, act of 1851, 9 Stats., 633) should entirely fail, the light of extrinsic evidence may be brought in to ascertain the intention of the Board. But, in my opinion, the decree is not in such a condition. I think that any patent ambiguity in the expressed decree can be explained by reference to such matters, as, under the rules of interpretation applicable to this case, may properly be examined for that purpose as a part of the decree. It follows, therefore, that any ambiguity appearing upon the face of the decree itself must

be removed by construction and not by averment, and hence upon this branch of the case the testimony aforesaid is inadmissible. .

The latent ambiguity of the decree can, in my opinion, be sufficiently explained by the records of your office or those of the surveyor-general's office, and therefore the testimony of witnesses was not, and is not, needed in this case. In other words, that which was confirmed by the decree of the Board can be so surveyed as to do substantial justice from light afforded by the records of the Land Department, and no testimony *dehors* the records would make the matter more certain.

The decree of confirmation in this case is final and conclusive as between the United States and the Castros, or those claiming under them. If there were error or mistake in it the only remedy was by appeal. The appeal from the decree of the Board having been dismissed by the district court, the decree must forever stand as the court thus made and left it. There is no authority or jurisdiction in any tribunal to correct, alter, amend, or annul it. Nothing remains to be done except to execute it according to its true intent as the law provides. If it is ambiguous and requires construction, then this must be done under the rules of the common law. The decree must serve as the guide to the surveyor-general in making a survey in execution of the same. It is the duty of the Commissioner of the General Land Office to see to it that the survey conforms as nearly as practicable to the decree, and finally, the Secretary of the Interior, by virtue of his supervisory powers and appellate jurisdiction, has authority to review the action of the Commissioner in the premises and direct how the survey shall be made. Each of these several propositions of law will be found fully sustained by some one or more of the following authorities: *Higuera v. The United States* (5 Wall., 827, 828, 830, 832, 834); *United States v. Halleck* (1 Wall., 439); *United States v. Billings* (2 Wall., 444); the *Fossatt Case* (*ibid.*, 649); *United States v. Fossatt* (2 How., 447); *United States v. Sepulveda* (1 Wall., 107); 12 Opins. Attorneys-General, 250; *Snyder v. Sickels* (8 Otto, 203); sections 13 and 15, act of 1851, 9 Stats., 633, 634; sections 1, 6, 7, act of 1863, 13 Stats., 333, 334; section 1, act of 1812, 2 Stats., 716; section 1, act of 1836, 5 Stats., 107; section 3, act of 1849, 9 Stats., 395; section 453 Revised Statutes; and Decisions of this Department of March 3, 1881, in the matter of the survey of the pueblo lands of San Francisco, and of May 21, 1881, in the matter of the survey of the Rancho San Jacinto Nuevo y Potrero.

It has been contended in argument by some of the able counsel that the claim of the Castros was not such as, according to the decision of the supreme court in numerous cases, should have been confirmed; because the paper constituting the petition and concession was in the hands of the Castros until the organization of the Board of land commissioners, and until it was filed in the office of the board; because there was no map accompanying the petition, no reference by the governor of the petition for information, no report upon the petition by any gov-

ernment officer, and the grant was not made matter of record in the archives of the Mexican government; and hence, that the only title to consideration which the claim has is the decree of confirmation. For these reasons it is contended that, as to the claim, the construction of the decree should be *strictissima juris*. Others contend that the doctrine applicable to public or legislative grants should be applied in construing this decree; that it should be strictly construed as against the confirmees. On the other hand, counsel for claimants contend that the doctrine above mentioned does not apply to decrees, especially not to a decree under the act of 1851, founded upon the principles of equity, and that as to such a decree the doctrine of liberal or equitable construction should be applied.

As to the first point, it is only necessary to say that the tribunal created by law to execute the decree cannot go behind it. The presumption is that the Board and the United States district court did their duty in the premises, and adjudicated the case upon the laws and principles by which they were required to be governed as provided by section 11 of the said act of 1851, and hence, that the decree is valid and binding upon all parties thereto. Therefore, if construction is necessary, the decree must be considered as entitled to the same respect and consideration as any other final decree of confirmation under said act.

As to all the foregoing propositions it may be said that the decree must be executed according to its true intent and meaning, and that construction should not be employed to any other end.

Sedgwick, in his work upon Construction of Statutes, etc., after having examined many decisions of courts bearing upon the subject of strict and liberal construction, concludes a long chapter by giving the judiciary and the legal profession, in the form of rules, the benefit of his extended researches, from which I make the following quotations:

The intent of the legislature should control absolutely the action of the judiciary; where the intention is clearly ascertained, the courts have no other duty to perform than to execute the legislative will, without any regard to their own views as to the wisdom or justice of the particular enactment.

The idea that an act may be strictly or liberally construed without regard to the legislative intent, according as it is viewed either as a penal or remedial statute, either as in derogation of the common law or beneficial innovation, is, in its very nature, delusive and fallacious.

In cases where the intent of the legislation is ambiguous, and the effort to arrive at it is hopeless, and in these cases only, does the power of construing a statute strictly or liberally exist. (Sedgwick, on the Construction of Statutory and Constitutional Law, 325 and 326.)

The supreme court of the United States, in discussing the doctrine of strict construction as applicable to legislative grants, held that the grant being considered by them could not extend beyond the intent it expressed; that—

It should be neither enlarged by ingenious reasoning, nor diminished by strained construction. The interpretation must be reasonable, and

such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting them; but if they admit of different meanings—one of extension, and the other of limitation—they must be accepted in a sense favorable to the grantor. (*Leavenworth, &c., R. R. Co. v. U. S., 2 Otto, 740.*)

The harmony between the doctrine expressed by the court and that referred to above is at once apparent. Both agree that the intention must prevail, but when the terms employed are so ambiguous as to render it impossible to ascertain the intention of the framers of the act, then the doctrine of strict or liberal construction may be applied according to the nature of the case. The supreme court, in the particular case, held that when the terms admitted of different meanings, one of extension and the other of limitation, they must be accepted in the sense favorable to the grantor. The court supposed a case wherein it was hopeless, from the ambiguity of the terms employed, to arrive at the intent of the legislature, in which case it was authorized to employ the doctrine of strict construction as to the grantee, or to take that meaning which was favorable to the grantor. A meaning of extension and another of limitation are certainly diametrically opposed to each other, in which case one could be taken to the exclusion of the other. But where no such condition of affairs exists—where the intent can be reasonably ascertained from the whole act or instrument being interpreted—then there is no choice left, and the intent must govern.

In this connection it may be well to advert to the fact that the decree refers to "the original expediente and grant on file in this case." That instrument, therefore, may be read with the decree as a part of it (*Sedgwick on Construction, &c., 2d edit., 229 and 230; and Broom's Legal Maxims, 7th edit., 673 et seq., and the numerous cases cited therein*); not, however, for the purpose of opening anew any question adjudicated by the board and district court, nor for giving to the instrument referred to any other construction or force than that given by the Board and court as expressed in their decree; hence, not for the purpose of changing the meaning of terms that are clear and unambiguous in the expressed decree, but only to explain any ambiguity in the decree itself (*United States v. Halleck, 1 Wall., 455; decision of this Department of May 21, 1881, in matter of survey of Rancho San Jacinto Nuevo y Potrero*). Wherein the decree on its face is clear so far as it relates to the subject-matter of the original petition and grant, it must be held to be the construction of the Board and court upon those instruments, which cannot be questioned here. Furthermore, in referring to the petition and grant in this decree, we can only look to the official translation thereof. We cannot take any other translation and by it undertake to explain any dubious expression of the decree. The Board had the services of a secretary "skilled in the Spanish and English languages," a part of whose duty it was to act as interpreter to the board

as the law provided (sec. 1, act of 1851, 9 Stats., 631). The secretary certified the translation of the petition and grant above given to be correct. The Board and the district court gave consideration to the petition and grant, and adjudicated the case in view of that official translation. It follows, upon reasons too apparent to require explanation, that the expert testimony of witnesses before the surveyor-general, giving a different translation to some of the words in the original petition and concession than that certified by Secretary Fisher, is wholly inadmissible, and that all efforts to inject into the case now any other translation than that which the Board and court adopted must fail.

The points raised by the objectors, protestants, etc., are very numerous and need not be recited here. They are all, in some way, embraced in the three following general questions or propositions:

First. It is contended by the owners of the grant that the decree confirmed to them all the land within the exterior boundaries of the five ranchos named as colindantes, which should be left or result as surplus upon the final survey of said ranchos; that their grant is not limited, except as by the exterior boundaries of said ranchos and their finally surveyed limits, and therefore that the locative call in the decree for land "lying between the tracts known as ranches of San Antonio, San Pablo, Pinole, Moraga, and Valencia" should be disregarded in making a survey under the decree.

Second. Some of the contestants insist that the claim confirmed was a piece of vacant land never within the exterior boundaries of the five ranchos referred to, or any of them, but outside thereof and bounded by them.

Third. Other contestants admit that the land confirmed was surplus of said five ranchos, or some of them, but insist that it must, from the terms of the decree, lie between those ranchos as finally surveyed, in the sense of being surrounded, or partly surrounded, and bounded by them.

The better to understand the situation, a short explanation of the location of the five ranchos mentioned is necessary.

The San Antonio rancho has the bay of San Francisco for its western boundary, the ridge of the coast range mainly for its eastern boundary, and extends from a small stream called the Cerrito Creek, on the north, to the San Leandro Creek, on the south, a distance of about 12 miles. This was a grant by specific boundaries, and was surveyed and patented as such.

To the north and northeast of San Antonio, at a distance of about 5 miles, is the rancho El Pinole. This, as confirmed, surveyed, and patented, was a grant of quantity within larger exterior boundaries. The calls for the exterior boundaries of this grant were natural fixed objects, leaving no uncertainty as to the lines thereof.

San Pablo was a grant of quantity to be located within the boundaries mentioned in the grant, which were the ranchos of San Antonio,

El Pinole, and the bay of San Francisco; the southeastern boundary being thus necessarily uncertain.

To the east of San Antonio, the southeast of San Pablo, and south of El Pinole, was the rancho of Valencia, called Acalanes. It was a grant of quantity, to be measured within the general boundaries mentioned in the grant as San Pablo, San Antonio, and El Pinole.

South of the Acalanes and east of San Antonio was the Moraga rancho, called Laguna de los Palos Colorados. It was a grant of quantity, to be measured within the exterior boundaries described in the governor's formal grant, which virtually, though not expressly, called for San Antonio and Acalanes as colindantes.

The foregoing brief explanation, and the connected map prepared by the surveyor-general in compliance with telegraphic order from your predecessor of October 24, 1878, from data on file in his office, which map was certified by the surveyor-general November 22, 1878, or the map subsequently substituted therefor by the surveyor-general, will give a tolerably correct idea of the country occupied by said ranchos, and their relative situation both as regards their exterior and their finally surveyed boundaries; but as to a part of the exterior boundaries there is some question as to their being accurately delineated on said maps, which will be discussed hereafter.

It will be seen that a large tract of land is left nearly surrounded and bounded by said ranchos as finally surveyed and patented, in addition to which there were numerous other smaller tracts excluded by final surveys, not surrounded by nor lying between said ranchos, but within the exterior limits of some of them, most of said tracts being entirely disconnected with the large tract and with each other, and scattered about in various parts, mainly on the outskirts of the general tract embraced by the exterior boundaries of the five ranchos mentioned in the decree.

Your predecessor, having decided that the decree confirmed to the Castros all the surplus land of the ranchos aforesaid—that is, all the land within their exterior boundaries excluded by final survey—and that the said ranchos were coterminous as to their exterior boundaries in the central portion of the general tract embraced by them all, set aside the Minto survey, and directed a new survey to be made, which should include not only the large tract nearly surrounded by the ranchos as finally surveyed, but all the other tracts excluded from the final surveys, limiting his award only by the quantity of twenty-two square leagues.

In this, it seems to me, your office did not follow the decree of confirmation, assuming that the tract confirmed was surplus of some of the said ranchos resulting upon final survey thereof.

The error in the decision proceeds from premises, which, to my mind, are not supported by the relevant facts and the law of the case, to wit, first, that the word "*sobrante*," as used in the grant and decree of con-

firmation necessarily meant all of the *sobrante* of said ranchos, and could not be limited by the words designating the particular location of the *sobrante*, nor by the words designating it as a piece—one piece—of land; and, secondly, that it was a grant by name of the *sobrante*, and hence included all of the *sobrante*.

It cannot be maintained upon general principles that power was wanting in the governor to grant, or in the board and court to confirm, as *sobrante* any portion of the surplus of grants of quantity, and define its location and boundaries. As a matter of fact the records of your office will show that more than one such grant has been made of the *sobrante* of a single grant, and the grants thus made have been confirmed and patented accordingly. Now, that the tract confirmed in this case, admitting it to be *sobrante* of some of the ranchos mentioned in the decree, was limited, seems clear to me, and that the surveyor has no authority to locate or survey any land in any other locality than that mentioned in the decree cannot be successfully questioned. In view of the authorities hereinbefore mentioned no one will deny that the decree of confirmation must be the guide in making the survey, or that the surveyor must follow it. In the *United States v. Fossatt* (21 How., 449), the supreme court, in speaking of the powers and duties of the Board and courts under the act of 1851, said:

But, in addition to these questions upon the validity of the title, there may arise questions of extent, quantity, location, boundary, and legal operation, that are equally essential in determining the validity of a claim.

This doctrine was reaffirmed in the *Fossatt* case (2 Wall., 707). In *United States v. Sepulveda* (1 Wall., 107 and 108) the court said:

It is true, for the determination of the validity of claims presented, some consideration must have been had of their extent, location, and boundaries. The petition of the claimants must necessarily have designated, with more or less precision, such extent and location.

In the light of these decisions no one can consistently say that the surveyor-general, your office, or this department can disregard the words of the decree that point out the locus of the land confirmed, in making or directing a survey thereof. The decree recites, that the land of which confirmation is thereby made—

is the surplus (*sobrante*) which, on the 23d day of April, A. D. 1841, existed lying between the tracts known as ranchos of San Antonio, San Pablo, Pinole, Moraga, and Valencia.

Is it possible that any land that does not lie between those ranchos can be surveyed under this decree? By what authority can the surveyor-general look for land under this decree, except in that locality?

But the Commissioner suggests that the words "lying between," etc., constitute a false description of the land, and that it grew out of the mistaken meaning of the words "en las inmediaciones," in the petition for the grant, which he says were carelessly taken to be translated by

the word "between"; and he further says that the board did well to refer for greater certainty to the original grant.

The answer to this has already been anticipated. The board having thus translated and interpreted the grant, there is no tribunal that has the power to change it. Certainly it does not lie with the claimants to object to the translation, for the record shows it to be their own, notwithstanding it was adopted as the official translation. The regulations of the commissioners, found in journal, vol. 1, p. 24, required every claimant to accompany his petition "by a copy of the original grant and a translation," and the petition of the Castros shows that this regulation was complied with, and the records do not show that said copy and translation were rejected or objected to. Unless the board was to adopt the translation, if found correct, there was no object in requiring it to be filed.

But the idea that there is repugnance in the language of the grant and that of the decree on this point is not well founded. Referring to the official translation of the petition and grant, it will be found that the Castros petitioned for "*a piece* of vacant land which is situated *on*" (not "*in*" as the commissioner has it) "the immediate limits (inmediaciones) of San Antonio," etc., "which land is the overplus (*sobrante*) of the ranchos aforesaid."

Here we find that this tract must be "on the immediate limits of" all of the said ranchos. Now, from the very meaning of these words, taking the actual situation of the grants named, the land must lie between them all in the sense of being surrounded, or partly surrounded, and bounded by them. The word "immediate," as here used, means "not separated in respect to place by anything intervening." (See any standard dictionary.) It was one tract that was granted and the same tract was confirmed; and it was not a tract of land, vacant or otherwise, that surrounded all these ranchos and bounded their outer limits. The bays of San Francisco and San Pablo and the strait of Carquinez put an end to such an idea, even if the absurdity of the proposition in itself does not. Where else, then, than in the midst of these ranchos can a tract of land be found that can lie on the immediate limits of each and all of the ranchos named in actual contact with all of them. There is not the slightest repugnancy between the description in the grant and that of the decree, so far as the words "lying between" are concerned.

But it is urged that the word "between" can refer to but two objects, and hence was not the proper expression to use to convey the idea above expressed. Perhaps in a literal, narrow sense this may be true; but a definition is given it in dictionaries like this, "in the immediate space of"; "having mutual relation to two *or more* of"; in fact, the word is quite commonly used with respect to more than two persons or things, as "between us, to go no further, I will tell you something," the pronoun "us" embracing, perhaps, twenty individuals. But, "*qui hæret in litera hæret in cortice.*" Such verbal criticisms as are indulged in upon

the words "lying between," as used in the decree, are of little value in the interpretation of written instruments. The well-known general and comprehensive rule for the interpretation of written instruments is that where the intention is clear, too great a stress should not be laid on the strict and precise signification of words. One who will consider for a moment what other word can be found to describe the locality of a tract of land surrounded, or nearly so, by a number of ranchos, will soon discover that no form of expression in the English language is better adapted briefly but clearly to define its location than that it lies between them. But if there could be any doubt as to what the board meant by the use of the words "lying between," in the connection in which they were employed, it would be at once resolved by reference to the petition and grant, as has already been demonstrated.

Suppose, however, that the petition and grant did not make clear the terms in the written decree, and that the Department were required to look beyond them, then I should turn to the Board's finding of facts in the opinion preceding the decree. The Board there says that the evidence establishes the fact that the petitioners presented their expediente for a "sobrante" of land "lying between ranches named in said expediente." If this were not satisfactory, then I should read the petitions of the Castros to the Board. In the first one they describe the land as "lying between" the said ranchos, and, as if to leave no room for doubt as to what they really meant, in their other petition to the Board they describe it as "lying in between" said ranchos. No one knew better than the Castros where the land was for which they petitioned. Now, with this expression so oft repeated, it seems to me that no other locality than the intervening space inclosed (or partially inclosed) by all these ranchos could be sought for the location of the piece of land confirmed, even if the original grant did not so effectually settle the question.

But there is no confusion in the decree about this matter. The meaning of the Board and court as to the locality of the land is plain, especially when the papers referred to in the decree are read.

It is hardly necessary to say more on this point. The mere mention of the rule, which is applicable to this decree as well as to other written instruments, that the whole instrument must be construed together, so that, if possible, every part shall stand, that no words are to be rejected as meaningless and none interpolated or added, would perhaps have been sufficient to answer all that has been said in favor of the rights of the owners of El Sobrante to have other land surveyed than that found to lie between the five ranchos in the sense in which the Board clearly employed the word "between," that is, within the surroundings of the five ranchos; not between any two, or three, or four of them, but between all of them.

Whatever the land may be, whether an independent, vacant tract (vacant in the sense of never having been included within the exterior

limits of any of the ranchos named) or vacant surplus land (sobrante, in the sense of having been included in some of the exterior boundaries named in the grants, and vacant in the sense of being subject to grant), it must be found in the locality designated in the decree as above defined.

I am supported in this view by the supreme court of California. In the case of *Tewksbury v. Derosier*, decided November 11, 1881 (The Pacific Coast Law Journal, vol. 8, No. 17, p. 683), the court, speaking of this very decree, said:

The confirmation of El Sobrante was of lands "lying between the tracts known as ranchos of San Antonio, San Pablo, Pinole, Moraga, and Valencia." The lands in controversy are not between the ranchos above named, or any of them. On the contrary, they are on the shore of the bay of San Francisco, and between it and the rancho San Pablo. They are not even in the vicinity of any of said ranchos, unless it be the ranchos San Pablo and San Antonio.

The land in question before the court, and of which the court was speaking, is one of the tracts which your office directed to be included in the new survey.

After so much has been said, it is hardly necessary to discuss the proposition that this is a grant *by name*. Surplus is undoubtedly a name, because it is a noun, but it was not a *proper* noun as used by the Castros in their petition. There is nothing in the case to show that it was ever the name of this rancho at or before the date of this grant. *Sobrante* means in English surplus or overplus. The three words mean the same. There is probably no foreign word that can be translated into our English with more exactness of definition than the Spanish word "sobrante" by the English word "surplus." If the Board in its decree had put in parenthesis the word "overplus" instead of "sobrante," after the word "surplus," the decree would have meant exactly what it does now, each word being the exact equivalent of the other. The use of the word "sobrante" in parenthesis simply shows that the Board translated it by the word "surplus." The Castros asked for vacant, surplus land.

Whether surplus of vacant public land left in the general tract occupied by the five ranchos outside of and defined by their exterior boundaries, or of that which should remain within the exterior boundaries, after the quantities of said grants should be surveyed, will be determined next in order. They did not ask for a place known by the name of Surplus, or La Sobrante, or El Sobrante; but for *a piece* of vacant, surplus land. That is all the name the rancho had. That does not fill the well-known definition of a Mexican grant, by name of the place granted, nor the old common law case or illustration of "Black Acre."

The second proposition above set forth presents more difficult questions than the one just disposed of.

The expressed, recorded decree describes the land confirmed as the surplus—

Which, on the 23d day of April, 1841, the date of the decree of concession to the present claimants, existed, lying between the tracts known as ranchos of San Antonio, San Pablo, Pinole, Moraga, and Valencia.

The supreme court of the United States has, in several instances, described the different kinds of grants which could be made under Mexican law and regulations by governors of the Department of California, thus: 1st, grants by specific boundaries where the donee was entitled to the entire tract described; 2d, grants by quantity, as of one or more leagues situated at some designated place, or within a larger tract described by out-boundaries, where the donee was entitled out of the general tract only to the quantity specified; and 3d, grants, or places by name, where the donee was entitled to the tract named according to the limits, as shown by its settlement and possession, or other competent evidence. (*Higuera v. United States*, 5 Wall., 828; *Alviso v. United States*, 8 *Id.*, 339; and *Hornsby v. United States*, 10 *Id.*, 224.)

The claim of the Castros, having been decreed to be valid, should belong to one of the kinds of grants thus defined. It is clear upon the face of the decree that it was not a grant of quantity nor one of place by name. It therefore necessarily falls into the category of grants by boundaries; and as no calls are given for boundaries, except the five ranchos named, it must be limited by their boundaries and lie between them all. If this be not so, then, although confirmed as valid, the claim is void for uncertainty.

In *United States v. Fossatt* (21 How., 449), the supreme court said that "in affirming a claim to land under a Spanish or Mexican grant to be valid within the law of nations, the stipulations of the treaty of Guadalupe Hidalgo, and the usages of those governments, we imply something more than that certain papers are genuine, legal, and translativ of property. We affirm that ownership and possession of land of definite boundaries rightfully attach to the grantee." See also *Fossatt's case* (2 Wall., 707), and *United States v. Sepulveda* (1 Wall., 107 and 108). In *United States v. Grimes* (2 Black, 613), the court, speaking of the duty of the land commissioners under the act of 1851, said: "It is their duty to establish the boundaries as well as the validity of the Mexican grant as between him (the grantee) and the government." The Board and court, then, had power to fix the boundaries as they did.

Now the presumption in favor of the validity of the decree, and that the Board and court performed their duties under the law, forces the conclusion that the decree in some manner indicates the boundaries of the claim with more or less certainty, which in executing it must be ascertained with reasonable exactitude; for not to ascertain them would render that void which the Board and court have affirmed to be valid; hence the decree must be construed, if possible, so as not to make void that which has thus been affirmed as valid, whether the construction be as to patent or latent ambiguity. In doing this, so far as ascertaining the boundaries is concerned, that which is certain should be preferred to that which is uncertain.

Now, as regards these boundaries, the expressed decree seems to be ambiguous, but the ambiguity is mainly latent, and, wherein it is so, it

may be explained by matters *dehors* the decree or the documents referred to therein.

While there may be no uncertainty as to the ordinary meaning of the word "surplus" or "sobrante," yet, when applied to land, it seems to me that it may embrace lands differing in condition or status, although it is strongly maintained that it cannot. The ordinary definition of "surplus" is that which remains when use is satisfied; excess beyond what is prescribed or wanted—overplus. Now, was the land confirmed surplus of vacant public land which was left of the general tract out of which the said five ranchos were to be satisfied, and which was never within the exterior bounties mentioned in the governor's grants of the said surrounding ranchos, and bounded by their exterior boundaries; or was it surplus of those ranchos, or any of them—that which should remain of the larger tracts when the quantity to which the donees were severally entitled should be satisfied—bounded by said ranchos after they should be measured off and segregated?

The decree does not clearly state of what the land confirmed was surplus. But it is insisted that what here may appear to be *ambiguitas latens* and subject to explanation by extrinsic evidence is explained by subsequent terms in the decree, and no other evidence is admissible; that wherein the decree describes the surplus as that "which on the 23d day of April, A. D. 1841, existed, lying between the tracts known as ranchos of San Antonio," etc., the board and court necessarily meant a tract of vacant public land, in the sense of lying without the exterior boundaries named by the governor in the grants of said tracts, and hence surplus of the general tract of public land out of which the several ranchos mentioned were taken, and bounded by their exterior boundaries; that in describing the land as surplus, which existed in 1841, lying between *tracts known* by the names mentioned, those tracts must have had known boundaries, and that a grant of quantity which might be located anywhere within the exterior limits mentioned would not have been referred to as a *known* tract.

But it will be seen that these subsequent terms necessarily lead for explanation and certainty to matters outside the decree itself. To ascertain what surplus existed in 1841, we certainly must look to matters not set forth in the decree. Were the ranchos mentioned grants from the Mexican government? Were they completed grants? Were they grants by names of places, or by specific boundaries, or of quantity within larger exterior limits? If of quantity, had they been set off and segregated? If not, what were their exterior boundaries? These and divers other necessary questions are not answered by the decree, and the decree itself necessarily refers us to extrinsic matters. This is latent ambiguity, and the decree is by no means peculiar in this respect.

It is well settled that even the instruments referred to in the decree cannot be read to vary the natural import of the language used, if there be no uncertainty therein, nor to control the description of boundaries

are certain and free from ambiguity, but only to explain an ambiguity (*United States v. Halleck*, 1 Wall., 455; decision in *San Jacinto Nuevo y Potrero*, above cited), and the same may be said of all extrinsic evidence resorted to.

Now, looking at the petition and grant referred to in the decree we find that the Castros petitioned for "a piece of vacant land which is situated on the immediate limits (*immediaciones*) of San Antonio, San Pablo Pinole, the farm (rancho) of Valencia, and the farm of Moraga, which land is the overplus (*sobrante*) of the ranchos aforesaid." Here we find the land described as both "vacant" and "sobrante"; but in terms as *sobrante* of the ranchos mentioned in the petition. What is meant by the word "vacant" as used in the petition? Does it mean land that was vacant in the sense of not being or having been within the exterior limits of any of the ranchos mentioned, or vacant in the sense that it was not occupied by any of the grantees of the said ranchos, nor claimed as being included in the quantity to which they were respectively entitled and hence subject to grant? It would appear from the further description thereof, "which land is the overplus (*sobrante*) of the ranchos aforesaid," that the latter was meant.

The governor granted to the Castros the land of which they made mention in the petition, and by no other description than that which they had employed, holding them "under obligation to present themselves anew, accompanied by a map of the land, so soon as the boundaries of the neighboring ranchos should be regulated."

It would appear from this that the boundaries by which the tract was to be defined were not then fixed and certain, and that the lines of the neighboring ranchos had not then been regulated.

As has been explained, San Antonio was a grant by boundaries, which were as certain then as now; but San Pablo, Pinole, Acalanes, and Laguna de los Palos Colorados were grants of quantity, which quantity had not been segregated in 1841. Enough appears in the records of the land commissioners to show that as San Pablo and Acalanes were claimed and occupied in 1841, there was land in the locality named by the Castros which would not be taken to satisfy the quantity to which these grants were respectively limited.

The establishment of the Castros, owners of San Pablo, was on the part of the rancho adjoining the bays of San Francisco and San Pablo, and that of Valencia was considerably east of the western exterior boundary of the large tract. It was well known that there was more land lying between these ranchos as thus possessed than would be required in satisfying the quantity to which the respective donees were entitled. The northern limit of Moraga's rancho would not interfere with this *sobrante*. The boundaries of San Antonio and the exterior boundaries of Pinole, as defined in the grant 1842, were natural objects; and if surplus was thrown off of neither of them there would still be a large tract between them, surplus of San Pablo and Acalanes. Now,

if all the exterior boundaries of San Pablo, Acalanes, and Moraga's rancho were clear, then there would have been no difficulty in presenting a map of the *sobrante* asked for, if it was composed of a tract bounded by the exterior boundaries of the five ranchos mentioned. But it does not appear that it was customary to regulate exterior boundaries of grants of quantity in the sense of establishing them permanently. Consideration was, of course, to be given them, so far as to locate the quantity granted within them: but I think it cannot be questioned that the boundaries to be regulated were such as defined the quantity of the land actually granted, and remained as the boundaries of the land to which the donee was legally entitled under the grant.

This seems to be the view taken by the Board and the court; for in the finding of facts the commissioners say that Alvarado issued a grant to the petitioners "requiring them to report a plat of the same as soon as the adjoining ranchos could be surveyed and the extent of the *sobrante* ascertained, which survey has not been had of said ranchos so as to enable the petitioners herein to define with certainty the boundaries of their said *sobrante*." If the exterior boundaries of the adjoining ranchos were the ones to be regulated, then that could have been done much better in 1841, when witnesses were living who would be more likely to know of them than those that can be produced at this late day. Moreover, if the Board had supposed that such boundaries were to be regulated, then it was their duty to fix the boundaries with as much certainty as the case would admit, and having the governor's grant of the said ranchos before them, and living witnesses to point out their boundaries, they would have found them and set them forth in the decree. But they found that the boundaries to be regulated were to be ascertained by surveys. No survey, to this day, has been made of those exterior boundaries of the grants of quantity. When will the surveys that were to make these boundaries clear and develop the extent of the *sobrante* be made, if the exterior boundaries of the grants were the ones intended? There will have to be further legislation by the government to accomplish this, for there is no provision for surveying other than the land confirmed by the decrees of the Board of Land Commissioners and the courts, and the five ranchos have been surveyed and patented. Undoubtedly the governor referred to the regulation of boundaries that took place under the Mexican land system upon juridical measurement, for that was the "regulation" of boundaries required by law and ordinance, and which usually was expressly provided for in grants. In all cases in which the juridical measurement had not been had under the Mexican government, this duty of measuring and segregating the lands granted was transferred to and devolved upon our government; and it is fully performed by our final surveys and patents. Our official surveys take (or rather fill) the place of the juridical measurement required under Mexican law. This has been settled beyond question by the decisions of the supreme court. It would therefore appear that

the boundaries to be regulated or the surveys to be made, which were to develop the *sobrante* granted and show its boundaries and extent, are those carried into the patents of the said ranchos.

But suppose this view should be incorrect; then, looking into the condition of the surrounding ranchos in 1841, no independent, vacant tract, with certain boundaries can be found. The San Pablo grant was to be located within the following limits, taking the description in the governor's concessions of 1834 and 1835: "Bounded by the ranchos of San Antonio and El Pinole, and by a portion of the port of San Francisco." The southeastern boundary, according to these calls, was clearly not definite and certain. It is suggested that the *diseño* accompanying the petition will make the southeastern boundary more certain, but examination thereof throws very little light on this matter. It will not indicate from what points on the boundaries of El Pinole and San Antonio a line should be drawn to form this boundary. The map or *diseño* here referred to is found in volume 2 of maps, Land Commission Records, page 421, on which the southeastern portion of the tract, within which the quantity was to be surveyed, is limited only by the border of the map.

The southeastern exterior line of Pablo, drawn on the Boardman map attached to the objections of Edson Adams, does not agree with that drawn by the surveyor-general upon the connected map hereinbefore referred to. So it seems that, with all the light afforded by the surveyor-general's office, and by actual examination in the field (see surveyor-general's certificate on connected map), skilled surveyors cannot to-day agree as to the southeastern exterior of San Pablo.

In the third and fourth conditions, both in the decree of 1834 and that of 1835, the donees were to solicit juridical possession of the proper judge, who should measure the tract according to law, for the purpose of having the boundaries of the grant marked out, the surplus to remain to the nation for proper uses.

But this measurement was not made by the Mexican government, and it devolved upon our government to finish the work that was left undone by the former government. Our government has measured the quantity and given it certain boundaries. Were not these certain boundaries the one that the governor and the Board referred to as requiring regulation in order to define the boundaries and show the extent of the *sobrante* granted and confirmed, rather than boundaries that are never to be regulated in the sense of being accurately surveyed and established, that are shown to be uncertain and possibly impossible of ascertainment?

Again, take Valencia's rancho, Acalanes. The governor's grant describes it as "the tract of land known by the name of Acalanes, bounded by the ranchos of San Pablo, San Antonio, and El Pinole."

It is contended that the large tract out of which the quantity granted to Valencia was to be measured was not bounded by San Pablo, notwithstanding the calls in the grant; because in limiting the quantity in

the fourth condition, and directing the judge who should give Valencia possession to measure it conformably to ordinance, the overplus remaining for the use of the nation, etc., it was said that the tract to be measured was "one league in length by three-quarters of a league in width, according as is explained on the map," which was with the record of proceedings; and the map had written on its margin that the place asked for was "situated between the arroyo Galindo and the arroyo Grande," those streams being delineated on the map or *diseño*. In other words, that the map, on which was sketched the country to the northwest as far as the coast, should control, instead of the aforesaid calls of the grant, because it showed the situation of the three-quarters of a square league that was granted as being between the arroyos aforesaid. Upon this showing it is insisted that a vacant tract is developed between the line formed by those two arroyos (Galindo being a tributary to the arroyo Grande or San Pablo Creek, with junction southeast of the claimed southeastern exterior line of the rancho San Pablo) and the southeastern exterior of San Pablo.

Now, if this were true, there would still be the uncertainty as to San Pablo's southeastern boundary; and it is not clear how this boundary could be "regulated" so as to define such tract. But the vacant tract disappears, admitting the arroyos Grande and Galindo to be the northwestern exterior boundary of Acalanes, for then the southeastern exterior line of San Pablo becomes certain, and comes up to said arroyos. The grant of Acalanes ought not to be held repugnant in its terms if they can be made harmonious. Then if the arroyos Grande and Galindo are the western and northwestern boundaries of Acalanes, the call expressed in the grant for San Pablo as a boundary should not be repugnant thereto; and as the southeastern boundary of Pablo was uncertain, this call brought it to the arroyos aforesaid. But I look upon the language of the fourth condition in Valencia's grant as simply a more specific designation of the locality in which the quantity was to be measured, and not as contradicting the general boundaries within which it was to be located.

It follows, then, that the mentioned ranchos had coterminous boundaries, and that the land confirmed was the surplus of some of them that should be defined by their boundaries as established or regulated by final survey.

This fulfills the legal proposition that the grant, having been confirmed as valid, necessarily has definite boundaries; and this was its condition in 1841, under the well-known rule that in law that is certain which is capable of being rendered certain. Any other conclusion would result, it seems to me, in inextricable confusion.

It is contended that the tract confirmed could not have been *sobrante* of any of the grants, because the grantees had the right of possession of the entire tract until segregation of quantity, and hence the Castros could not have had possession of other than land not within the exterior

boundaries of the grants of quantity. Such an objection might be made to any grant of *sobrante*; still *sobrante* grants have been confirmed, surveyed, and patented. While it is true, as held by the supreme court in *Van Reynegan v. Bolton* (5 Otto, 33), that the right to make selection of the quantity granted rested exclusively with the government, and could be exercised only by its officers, and that until segregation the grantee had the right of possession of the entire tract within which the quantity was to be measured, yet the discretion to be exercised by the officers charged by law with the execution of decrees in such cases was not arbitrary but reasonable, and was to be so exercised, in view of the record of the case, the situation of the land, the improvements and possession of the donees, and all other circumstances proper and necessary to be considered, as to fulfill the intent and requirements of the decree and thus do substantial justice between the United States and the confirtees.

For example, no survey would be deemed a proper one that excluded the improvements and actual possession of the donee against his selection of land thus improved and possessed, provided it was within the boundaries called for.

Now, notwithstanding the donees of the grants of quantity in the case might have had the right of possession to the limits of the larger tracts, yet they did not object to the occupancy and possession of the Castros in this case. Why they permitted the Castros to occupy the land is not a matter of just concern of this Department. The Castros received a concession of a tract of vacant, surplus land, and the claim thereunder has been confirmed, and the regulation of boundaries of the neighboring ranchos has developed such a tract in the place called for in the grant and decree. Beyond this it is not profitable nor pertinent to inquire.

A tract or piece of land, no portion of which shall lie east of the western line of Acalanes, or south of the northern line of Moraga, or west of the eastern lines of San Antonio and San Pablo, or north of the southern line of El Pinole, as those lines have been established by the final surveys and patents of said ranchos, will substantially fulfill the decree, and do justice according to the record of the case as between the United States and the owners of the *sobrante* grant.

The next question for consideration is, should the survey of El *Sobrante* embrace any portion of the rancho La Boca de la Cañada del Pinole?

As regards the La Boca tract, it is contended by the owners of the *sobrante* title that it was a part of the *sobrante* which existed April 23, 1841, and which on that date was granted to the Castros, and subsequently confirmed to them under the act of 1851; that as it is the duty of the surveyor-general to follow the decree of confirmation, he has no right to look at the fact that said tract has been patented in making survey of the *sobrante*; that it is the duty of the Land Department,

under the act of 1864, to include in the survey all the lands included in the decree.

Against this the owners of the La Boca tract refer to the fact that the survey of their claim was ordered into court under the act of 1860 (12 Stats., 33); that the owners of El Sobrante intervened in that matter and were made parties thereto; that the decree of the court approving the final survey of that claim was entered by consent of all the parties; and that, therefore, the sobrante claimants are estopped from demanding that any portion of the La Boca shall be included in their survey, and your predecessor so decided. Cases are cited as supporting this proposition.

As against this position, the *sobrante* owners, some of them at least, argue in effect that under the act of 1851 the land commissioners and courts had no jurisdiction to adjudicate upon title as between third parties, but only as between the United States and claimants; that the primary object of the said act was to separate lands owned by private individuals from the public domain; that confirmation under the act of 1851 simply affirmed that the land embraced by the decree was private land; that the patent of the United States under said act is but a relinquishment of claim, or a quit-claim, to the tract confirmed, and record evidence of the action of our government upon the claim, operating by relation from the time when the claim was presented to the Board of Land Commissioners; that such patent is simply conclusive as between the United States and the claimants and the privies of the respective parties; that the district court of California, under the act of 1860, had no greater jurisdiction, to say the least, than the tribunal created by the act of 1851, for ascertaining and settling private claims; that the matter before the court under the act of 1860 was simply upon the question of the correctness of the survey; in other words, to determine the question as to whether the survey was an execution of the decree of confirmation, the same as that of the surveyor-general now under the act of 1864, or formerly under the act of 1851; that parties to proceedings before the court upon approval of a survey under the act of 1860 are only bound by the decrees, and estopped as to the subject-matter before and within the jurisdiction of the court, and that all questions of title between third parties claiming under grants of Mexican origin were necessarily referred to the judiciary; and cases in support of these propositions are cited.

The foregoing statement is made in order to develop the positions of the contending parties in this matter. However, I do not think myself called upon, as I understand the case, to decide or express an opinion as to which is the correct one. It would undoubtedly be necessary to decide the question were it shown that the land patented as the La Boca de la Cañada del Pinole was vacant, *sobrante*, land within the meaning of and embraced by the decree in the Sobrante case. To my mind not only is this not shown, but it seems to me that the records of

your office and of the surveyor-general's office show beyond question that the land patented to the La Boca claimants was not *vacant*, *sobrante*, or *surplus* of any of the five ranchos mentioned, *existing* as such April 23, 1841, within the true intent and meaning of the decree of confirmation of this case.

The records prove with reasonable clearness that it was neither vacant nor *sobrante* at that time, and it was well said by one of the contestants in argument, that as the government has patented the La Boca, the survey of the *Sobrante* should not, in any view of the case, invade such patented territory except upon clear proof that the land so patented is embraced by the decree of confirmation to the Castros.

The question whether the La Boca was vacant and *sobrante* or surplus land of any of the ranchos mentioned in 1841, and is embraced by the decree of confirmation, is one to be determined by the officers or tribunal upon whom the duty of executing the decree is imposed by law; as only vacant, surplus land, within the meaning of the decree, can be surveyed.

In the first place, the La Boca was not a grant of the surplus or *sobrante* of El Pinole, or any of the other ranchos mentioned as boundaries of El *Sobrante*. It was not a *sobrante* grant in any sense, according to its terms; but it was a grant of quantity to be surveyed within designated boundaries.

The land commission record shows that Ignacio Martinez claimed to have received a grant of the place called El Pinole as early as 1823. He so represented to the Mexican authorities in 1834, stating that he had lost his title papers, and soliciting a renewal of the same. Record evidence was not found to support his allegations, and he was required to petition anew, which he accordingly did November 10, 1837, stating that as he had mislaid or lost the grant issued to him in 1823, and as it was impossible for him to make it appear that such a grant had been made, he was under the necessity of making a second petition. In this petition he described the land as "three sitios, which are 'Cañada del Pinol,' and that which is called 'La Hambre,' straits of Carquinez, running towards the 'Mar de la Norte,' that is called the Bay of Sonoma, adjoining the mouth of the same Cañada del Pinole, as is explained in the adjoining plan." For reasons set forth in the petition he asked for an additional league. (Record of Evidence, vol. 15, p. 427.)

Thus it will be observed there was nothing in the archives of the Mexican Government in 1837 designating boundaries to the place known as El Pinole; and, as proceedings on the petition of Martinez were pending in 1841, when the grant was made to the Castros, and were not terminated until June 1, 1842, when the first and only recorded grant to Ignacio Martinez was issued, it follows that El Pinole had no boundaries recognized by the Mexican Government in 1841, and consequently that the boundaries declared in the grant to Martinez in 1842, are the true boundaries of El Pinole, within which the four leagues granted to

Martinez were to be surveyed, and within which the boundaries of quantity were to be regulated, as provided in the grant and decree in the Sobrante case. That these boundaries did not include La Boca de la Cañada del Pinole will appear from what follows.

While proceedings were pending upon the petition of Ignacia Martinez, Felipe Briones, on the 24th day of July, 1839, petitioned for a grant of the place known by the name of El Pinole, stating that it was then more than ten years that he had possessed said place, comprising three "sitios de ganado mayor," more or less, as designated upon the plan accompanying the petition. Briones further alleged that he had built a house on the land prayed for, "planted a garden of much consideration, and cultivated some lands," by which and "some milking cattle" he had maintained his family, composed of eighteen persons. This petition was referred to Ignacio Peralta, a justice of the peace, who reported thereon July 29, 1839, that the rancho of El Pinole had been occupied by Don Ignacio Martinez since 1824, by order of the governor pro tem., Don Luis Arguello, and that Briones, in his petition, did not make mention of the land that he (Briones) had occupied, called "El Corral de Galindo," where he kept his cattle, and hence that it would appear as though his petition operated injuriously by asking for the Cañada del Pinole, and not stating that he held the aforesaid "Corral de Galindo." Peralta further reported that Briones went on the land under an arrangement with Martinez, entered into in 1831, the parties "agreeing that their ends should meet"; that Briones "should assist at rodeos, and place his small houses immediate for company."

The report of Peralta does not make it clear whether Briones intended to procure a grant for all the land occupied by Martinez and himself, or only for that occupied by himself, giving the land he desired the wrong name. But the tract called "Corral de Galindo," embraced a part of the Cañada of Pinole and it is probable that Briones intended to ask for the land occupied by himself, known as well by the name of La Boca de la Cañada del Pinole and San Felipe, as Corral de Galindo, as facts hereinafter mentioned will show. However this may be the matter of the several petitions was pending when the governor made the grant to the Castros, and was not finally settled until more than a year afterward by the issuance of grants to Martinez and the widow of Briones, respectively (Briones having died about the year 1840). That the governor considered Briones entitled to the land occupied by him, and so decided before he issued a grant to Martinez; that Martinez so understood the matter, and acquiesced in the governor's decision; and that it was well understood that the tract known as La Boca de la Cañada del Pinole, in the possession of Briones, was not included within the exterior boundaries named by the governor in his grant of El Pinole to Martinez, will appear from the following:

On the 1st of June, 1842, evidently in view both of the petitions of Martinez and Briones, and of the report of Peralta, the governor, Alva-

rado, who made the grant to the Castros, issued a grant to Ignacio Martinez. In the concession of that date, the tract within which the quantity was to be surveyed was described as "commencing at the mouth of the Cañada del Pinole, eastwardly along the same *until it adjoins with the Corral de Galindo*, from *this place* to La Cañada de la Hambre, and from thence to the straits of Carquinez."

In the formal title issued the same day the four square leagues granted were to be surveyed within the following boundaries: "By the name of Pinole, its limits being from the mouth of the ravine (Cañada) of the same name, in an easterly direction by the same *until it joins with the 'Corral de Galindo'*; from *this place* to the Cañada de la Hambre, and along the same to the straits of Carquinez, the boundaries to terminate at the mouth of said Cañada del Pinole into the Bay of San Francisco."

Evidently this description was not to include the "place" called "Corral de Galindo," otherwise La Boca, etc. The ravine (Cañada del Pinole) was to be followed *until* it adjoined with the "Corral de Galindo; from *this place* to the Cañada de la Hambre," etc.

The same facts appear, and are placed beyond doubt, by the language of the grant to the widow Briones, made twenty days after the grant to Martinez.

The grant to Maria Manuela Valencia, widow of Briones, was made upon her petition of the 8th of June, 1842, in which she set forth *inter alia* that she was the "widow of the late Felipe Briones, and established *in the mouth of the Cañada of Pinole* (en la Boca de la Cañada del Pinole)"; that for *more than eleven years* she had "lived in peaceable possession of said place, with a considerable amount of stock, consisting of four hundred head of cattle, having also an adobe house, and more than one thousand grapevines, together with some fruit trees"; and she prayed the governor to concede to her "the legal ownership of the said place, containing three square leagues, as shown by the accompanying *diseño*." The accompanying *diseño* distinctly called for the land of Ignacio Martinez as a northwestern, northern, and northeastern boundary (see Record of Maps, vol. 2, p. 489). Her allegations accorded with those of her husband in his petition of 1839 as regards possession and the length of time that the Briones family had occupied the place, as also with the report of Peralta upon the petition of Briones. The widow's petition, having been referred to the proper judge for investigation and report, was presented to Ignacio Martinez, adjoining owner, who stated concerning the same, June 13, 1842, as follows: "The Señora Manuela Valencia, who petitions for the place, as shown by the annexed *diseño*, is worthy of being heard, and what she asks may be granted to her *since it does not prejudice my land*." (The underscoring in the foregoing quotation is my own.)

On the 14th of the same month, the judge to whom the petition was referred, Guillermo Castro, reported that in view of the report of Ignacio Martinez, the tract asked for might be granted to the petitioner.

On the 21st of June, 1842, the land was granted to the widow of Briones, the governor stating that, in view of the petition, the foregoing reports, "and all other matters necessary to be considered (the other matters necessary to be considered undoubtedly included all the former petition of Briones and Peralta's report thereon), Doña Maria Manuela Valencia is declared owner of the place named Boca de la Cañada de Pinole, bounding with the rancho of Don Ygnacio Martinez, with that of Don Julio Wil, and with that of Candelario Valencia"; and in the formal grant of the same date the land is described by the same boundaries, being limited in the third condition to three square leagues, as shown by the *diseño*, annexed, the *sobrante* remaining to the convenient uses of the nation. (Exhibit 32, Adams, from the archives in the surveyor-general's office.) In bounding the general tract out of which the quantity should be surveyed to Mrs. Briones with "the rancho of Don Ygnacio Martinez," the boundaries of El Pinole, as declared by the governor a few days before in the grant to Martinez, were unquestionably meant.

When this claim was before the district court upon petition for confirmation, the testimony of José de Jesus, son of Ignacio Martinez, was taken. Being asked what he knew in regard to the boundaries of the tract, the witness stated that on the north it was bounded by the rancho of Ignacio Martinez, father of the witness, called El Pinole; that the original map (*diseño*) was made by him in 1841, and that it was correct; that it was the original map presented by Doña M. M. Valencia to the governor when she petitioned for the land, and that he made it for that purpose; and that when he made it the houses, corral, and garden were on the rancho as represented on the map. The witness further stated that he became acquainted with the boundaries of La Boca by going over the land with a son of Mrs. Briones for the purpose of making the map; that he had lived on his father's rancho since April, 1830, and ridden over the La Boca rancho "thousands of times," and that he was well acquainted with everything connected with it. (Exhibit 58, Blum, from archives in surveyor-general's office.)

From the foregoing I conclude that the La Boca rancho was not within the boundaries of El Pinole as established by the governor's grant in 1842, the first official definition of the exterior boundaries of that place. And taking the facts above stated in connection with the testimony of William Richardson (vol. 5, 245, Evidence), C. Briones, and Napoleon B. Smith (vol. 4, pp. 561 and 720, Evidence), delivered to the board in the case of El Pinole, and the location of the tract called Corral de Galindo, and the Cuchilla de Chemisal, as laid down on the connected map hereinbefore mentioned and on the official map of Mr. Minto's survey, it would appear that the northern patented line of La Boca very nearly represents the calls of the grant and decree in the Pinole case for Pinole's southern exterior boundary in this locality. It follows, therefore, that La Boca was not surplus (*sobrante*) of El Pinole,

and as the district court decreed the claim of Mrs. Briones to be good and valid to the land known by the name of "La Boca de la Cañada del Pinole" to the extent of three square leagues "within the boundaries so described in the grant and map on file in the records," and as the grant and *diseño* call for Acalanes and Pinole for boundaries, and as Acalanes calls for Pinole as one of its boundaries, it necessarily follows, from the situation of these several grants, that La Boca was not surplus of any of the five grants mentioned in the grant to the Castros of 1841, the presumption of law being that La Boca was located within the boundaries called for in the decree of confirmation.

Again, La Boca was not vacant land in 1841, withing the meaning of the decree of confirmation in the *sobran'e* case. The evidence in the case of the La Boca upon petition for confirmation, as well as that of José de Jesus Martinez, hereinbefore referred to, and that of Peralta in his report, show a continued occupancy and possession from about 1831 till long after April, 1841, by the Briones family, the widow continuing in occupancy and possession after the death of her husband, and that the land was improved by them as alleged in the petitions therefor of 1839 and 1842. It was the very land occupied and in the possession of her husband that Mrs. Briones petitioned for, and it makes no difference whether it is called La Boca de la Cañada del Pinole, San Felipe, or Corral de Galindo.

In the opinion of the Board in that case, it was stated that the depositions on file showed a long residence on the land by the grantee, and established very clearly a substantial compliance with the conditions of the grant, and that the only obstacle to confirmation was to be found in the proof of boundaries. The decree of the Board rejecting the claim was reversed by the district court, and the claim was decreed to be good and valid, and it has been surveyed and patented accordingly.

It was manifestly against the policy of the Mexican government to grant lands to one party that were improved and in possession of another; and petitions were referred to the proper magistrate for the purpose of ascertaining whether they called for lands occupied by others. In the very matter of the petition of Martinez it is seen that, although he asked for land by the name of a place that might have embraced the establishment of Briones, and Briones had no grant from the government, yet the possession of Briones was recognized as well as that of Martinez, and the land possessed by him was carefully excluded from the grant to Martinez.

Now, as the governor recognized and protected the possession of Briones; as that possession was continued by his widow, and was of the same land; as proceedings were pending before the government for a grant of this land at the time of the grant to the Castros; as upon the death of Briones the claim for the grant was continued in the name of his widow, she alleging the possession that had continued since 1831; and as the grant to the widow was made in view of all the proceedings

mentioned, and necessarily in consideration of the uninterrupted possession by the Briones family since 1831; it follows that the possession was not a trespass. The presumption is that the final survey followed the decree of confirmation; that it embraces the quantity of land thus possessed as limited in the decree; that it correctly shows the boundaries thereof, and that the land was surveyed within the boundaries mentioned in the decree; and, as the possession which continued from 1831 was not a trespass, it extended to the boundaries of the claim as surveyed and patented; all of which results in this conclusion: That in 1841 the land surveyed as the rancho La Boca de la Cañada del Pinole was not vacant.

Finally, it seems to me that the Mexican authorities, having jurisdiction in the premises, decided, in 1842, that the land known as La Boca de la Cañada del Pinole was not embraced within any former grant. The reference of the petition of Mrs. Briones to the auxiliary judge of Contra Costa required him to report whether "the land referred to belonged to any individual, with all other matters that may be necessary." His report, as well as that of Martinez and that of Estrada, the señor prefect of the district, and the action of the governor thereon in making the grant to Mrs. Briones, which, he stated, was in consideration of those reports, and all other matters necessary to be considered, amounted to a decision that the land granted was not included in any former grant.

In view of the facts and the legal conclusions relative to this matter, it would be just as consistent to hold that the land surveyed under the grant to Martinez was vacant *sobrante* land in 1841, as to hold that that which was surveyed under the Briones grant was vacant *sobrante* land at that time; and the survey of El Sobrante might as well include the one tract as the other. The grants of Pinole and La Boca are precisely similar in character, and were virtually the result of the final determination of the same proceedings before the Mexican government pending and undecided April 23, 1841.

I therefore decide that no part of the rancho La Boca de la Cañada del Pinole should be embraced in the survey of the rancho El Sobrante.

The Minto survey not only embraces the larger portion of the La Boca, but also a small part of the rancho Laguna de los Palos Colorados (Moraga's claim) as patented, and does not include all of the land embraced in the decree as herein construed. It is therefore set aside.

The remaining question is with regard to the tract marked "No 7" on the Boardman map, and as public land on the Minto plat of survey of El Sobrante. I do not consider that that tract lies between the five ranchos mentioned, within the meaning of the decree, and it will accordingly be excluded from the final survey.

You will therefore direct a new survey to be made of the following boundaries: Beginning at post S. P. No. 67, at the terminus of course

No. 195 in the patented line of the San Pablo rancho; thence in a direct line to post P. R. No. 4, terminus of course No. 4, in the patented line of El Pinole rancho; thence with the patented line of El Pinole to a point therein at which the westernmost line of the rancho La Boca de la Cañada del Pinole as patented extended northwardly intersects said line of El Pinole; thence with the patented line of the rancho La Boca de la Cañada del Pinole to the point at which the western patented line of Acalanes intersects the same; thence with the said line of Acalanes to the north patented line of the rancho Laguna de los Palos Colorados; thence with the last-named line and the same extended west to the eastern patented line of the rancho San Antonio; thence north, with the patented lines of the ranchos San Antonio and San Pablo to the place of beginning.

The decision of your office is modified accordingly.

ON APPLICATION FOR REHEARING.

Rehearing will not be granted when the case is not brought within the rules and principles relating to new trials.

On the merits the arguments and briefs do not show reason for dissent from the decision in the case.

Secretary Teller to Commissioner McFarland, April 4, 1883.

The decision in this case upon its merits was rendered by my predecessor on appeal from your office February 23, 1882.

A petition for a rehearing on behalf of said rancho was made and filed on the 17th day of April thereafter.

April 28, 1882, a motion to dismiss the motion for a rehearing was made by counsel for contestants and a printed brief filed.

On the 7th day of March, 1883, an oral argument was made before me in behalf of the petition for a rehearing.

I have considered such argument and the brief submitted therewith. The case presented does not bring it within the rules upon which rehearings are generally granted, nor do I think that any ground is disclosed that, under the rules and well-established principles relating to new trials, would justify me in opening the case and directing a rehearing.

Counsel for the petition, in his oral argument and brief submitted at that time, dwelt at length upon the merits of my predecessor's decision. I have considered such argument and brief in that respect also, and have taken occasion to examine the briefs and papers used before my predecessor at the time of his said decision, and see no reason to dissent from the general conclusions and result reached by him.

The motion for a rehearing is denied.

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PRIVATE CLAIM—DECREE—SURVEY—PUBLICATION.

RANCHO BUENA VISTA.

When the decision of the United States district court confirming a private land claim was announced, but formal decree not entered, a decree *nunc pro tunc* has the same force and effect as if entered at the time of the decision.

A survey of such a claim, approved by the surveyor-general, is the official survey and must be taken as the foundation for perfecting the location. A survey made and published subsequently, without regard to it, is of no validity.

Commissioner McFarland to U. S. surveyor-general, San Francisco, California, April 9, 1883.

In the matter of the survey of the Rancho Buena Vista, Jesus Machado confirmee, it appears by reference to the record that the claim was confirmed by the Board of Land Commissioners; that the decree of the Board was taken on appeal to the United States district court for the southern district of California, and on the 1st of February, 1856, a decision rendered by the court affirming the decree of the Commission, but no formal decree of the court was signed or entered; that an appeal from said decision of affirmance was taken to the supreme court of the United States; that at the December term of said district court, 1856, upon the letter of the Attorney-General of the United States and stipulation on the part of the claimant and of the United States, a decree was entered dismissing said appeal and permitting the confirmee to proceed on the decree of confirmation as a final decree in the case; that in pursuance of said decree a survey of the claim was made by United States Deputy Surveyor John C. Hays in September, 1858, and approved by Surveyor-General Mandeville October 19, 1858, and the plat and field notes thereof then or subsequently filed in the surveyor-general's office; that afterwards a succeeding surveyor-general, overlooking the facts that a survey had been made *and approved* as aforesaid, directed another survey of the claim, which was made by United States Deputy Surveyor Max Strobel in September, 1868. This last-mentioned survey was published under the act of July 1, 1864; no objections were made thereto; it was approved by Surveyor-General Day March 25, 1870, and returned to this office under date of February 25, 1871.

In 1875 United States Deputy Surveyor Goldsworthy, in subdividing T. 11 N., R. 3 W., made a relocation of the claim of Buena Vista. A connected diagram of the three surveys herein mentioned was transmitted here from your office with letter of December 29, 1881.

The decree of confirmation by the United States district court being wanting in the proceedings returned with the Strobel survey, and the record therefore imperfect, action upon the survey in this office was

withheld. In the mean time the United States district court for the southern district of California having been abolished, and its jurisdiction, powers, and duties transferred to and imposed upon the United States district court for the district of California, the said last-named court, on April 15, 1879, in a decree entered *nunc pro tunc* as of February 1, 1856, affirmed the decree of the Board of Land Commissioners and confirmed the claim in question to Jesus Machado, in accordance with the decision of the United States district court, made on the day last above mentioned.

Subsequently, on request of this office, a traced copy of the plat of the Hays survey was returned by your predecessor to this office. The field notes of that survey have also been received. The plat shows the approval of the survey by Surveyor-General Mandeville, as above set forth.

The case being now taken up for action, the question first arises as to the legal validity of the Hays survey, it having been made before the entry of the decree of confirmation. Any doubt arising upon that ground applies equally to the survey of Strobel.

That the decision of the court hearing the case was reached and declared at the date named there can be no question. Appeal was taken from it, and subsequent proceedings founded upon it had, resulting in the dismissal of the appeal and a supplemental decree declaring it final. That the decision was made and announced is settled by the action of the court which succeeded to the jurisdiction, in directing the entry of the *nunc pro tunc* decree, by which the valid rendering of the decision confirming the claim is fully recognized.

The principle upon which the entry of a decree or judgment *nunc pro tunc* is allowed is expressed in the rule that "the delay" (omission) "of the court shall prejudice no one"; and the effect of such a decree is (with the exception of the rights of third persons, which it will not affect) that—

It must be everywhere received and enforced in the same manner and to the same extent as though entered at the proper time. (See Freeman on Judgments, 2d ed., §§ 56, 66, 67.)

The Hays survey, then, as regards the status of the case at the time of its execution, being an authorized and valid proceeding, the effect of its approval by the surveyor-general upon the subsequent action in your office, relating to the location of the claim, is to be considered. The rule is well settled that upon the approval of the survey of a private land claim in California by the surveyor-general, his control over it ceases. It becomes the official survey of the claim, and as to its correction, either by amendment or by new survey, the surveyor-general has no power of direction. The case has passed from his jurisdiction.

In the matter of the survey of the Rancho Huasna, a survey was made by United States Deputy Surveyor Henry in February, 1859, and ap-

proved by Surveyor-General Mandeville November 4, 1859. Without further action upon that survey (except its erroneous publication under the act of June 14, 1860, it not coming within the provisions of that act), another survey was made by United States Deputy Surveyor Harris in 1872, which was published under the act of July 1, 1864, afterwards amended by Surveyor-General Hardenburgh and returned to this office.

By the decision of this office of March 17, 1875, it was held that the Henry survey of 1859 was the official survey in the case; that having been approved by the surveyor-general prior to the passage of the act of July 1, 1864, under the mandatory provisions of that act, it must be published in accordance therewith; that no question of convenience to this office or the parties in interest, and no agreement between the claimants and contestants, could warrant this office in disobeying the plain requirements of the law. Publication of the Henry survey, under the act of 1864, was accordingly directed. On appeal to the Department this decision was affirmed October 7, 1875.

In the case of the Rancho Mission de la Purisima, the first survey was made by United States Deputy Surveyor Terrell in November, 1860, and approved by Surveyor-General Mandeville April 9, 1861, but not published. Surveyor-General Beale, succeeding Mandeville, amended the Terrell survey, approved the amended survey, and published it under the act of June 14, 1860. The published survey was returned to this office and held to have become final by the publication, it not having been objected to thereon.

On appeal to the Department the honorable Secretary of the Interior referred the matter to the United States Attorney-General and it was examined by the Assistant Attorney-General, who gave the opinion that the survey made by Terrell and approved by the surveyor-general after the passage of the act of June 14, 1860, his sole remaining duty was to publish the plat in the manner specified in said act, and that so far as correcting the survey was concerned he was thereafter *functus officio*.

This opinion was adopted by the Department, and in accordance therewith the decision in the Huasna case and the mandatory provisions of the act of July 1, 1864 (the act of June 14, 1860, having been repealed). The Terrell survey was directed to be published under the act of 1864 as the official survey in the case.

These decisions, as applicable to the present case, establish the official character of the Hays survey, and require its publication as the foundation for perfecting the location; also the fact that the Strobel survey, having been unauthorized, is of no legal force or effect.

You are therefore instructed to give notice of this decision to the parties interested, and, if no appeal is taken within the time allowed by the rules, to publish the Hays survey in accordance with the act of 1864, and at the proper time make the usual return to this office.

PRIVATE CLAIM—BOUNDARIES—RES JUDICATA.

RANCHO SANTIAGO DE SANTA ANA.

Where the boundary of a claim is a river which has changed its course, cutting off a part of the claim, the change does not deprive the claimant of the excised land; the boundary remains where the river ran at the date of the grant.

A boundary which is to terminate at the sea-shore, reaches its termination where it intersects the line of ordinary high water, at the head of an inlet, or arm of the sea.

The Commissioner of the General Land Office has authority to direct an investigation, the taking of testimony, and a further report by the surveyor-general in the case of a survey, notwithstanding exceptions have not been taken thereto.

In case of contiguous claims the Commissioner is not estopped by the adjudication and location of one, from determining a location of the other that may cause them to overlap. The previous decision is only *res judicata* as to the claim to which it relates. It is made the Commissioner's duty by statute to see that the location of the claim under examination by him, conforms to the decree of confirmation as closely as practicable. Any conflict between the two locations must be determined by the courts.

Secretary Teller to Commissioner McFarland, April 14, 1883.

I have considered the matter of the survey of the Rancho Santiago de Santa Ana, Bernardo Yorba, and others, confirmees, on appeal from your decision of May 25, 1882.

The survey in question was made in November and December, 1857, by United States Deputy Surveyor Henry Hancock. It was approved by Surveyor-General Mandeville, June 3, 1859, and published by Surveyor-General Stratton, in October, 1874, under the act of July 1, 1864 (13 Stat., 332).

No objections were filed before the surveyor-general within the time prescribed by the act.

March 4, 1878, John Huntly and others, as owners and residents upon lands belonging to said Rancho Santa Ana, filed protest and objections before Surveyor-General Ames against said Hancock survey, on the grounds that it wrongfully excluded, on the west and on the southeast, lands which were embraced in the said Santa Ana grant, and included by the juridical possession.

You state that the surveyor-general transmitted to your office, on January 4, 1879, the plat and field-notes of said Hancock survey, with his report thereon, and also a report and sketch by United States Deputy Surveyor Minto. The surveyor-general, in his report, stated that he refused to consider the protest and objections of Huntly and others, for the reason that they were not presented within the time allowed by law for that purpose; but he expressed an opinion, formed from personal examination upon the ground and from the report of said Surveyor Minto of an examination made by him, that the survey returned was erroneous, in that the survey as to the west line did not follow the bed of the river which was made the boundary of Santa

Ana; and as to the east line from the point on the estuary, it should follow the tide line thereof to the sea-shore, instead of crossing such estuary and continuing in a direct line to the shore as in said survey.

Counsel having appeared for the claimants of the adjoining Rancho Las Bolsas and for the claimants of Santa Ana respectively, counsel for Las Bolsas filed objections in your office against the consideration of the protest of said Huntley and others, for the reason (among others) that it was not presented in time.

Your office, however, in view of the doubts existing as to the true bed of the Santa Ana River, and as to the proper location of the said eastern boundary, under the authority of the act of July 1, 1864, aforesaid, on the 3d day of July, 1880, instructed the surveyor-general to notify the parties in interest and proceed to take testimony for the purpose of proving the location and course of the Santa Ana River in 1801, or as far back as the knowledge of witnesses might extend, and to show the changes that had taken place since that time in the courses of said river, and to designate such changes and courses so as to show the relation to the official survey; also to take proofs in reference to the character of the inlet and the said eastern boundary connected therewith.

Counsel for Rancho Las Bolsas thereupon, in a communication to this Department, asked for an arrest of the proceedings to be taken under the instructions aforesaid, upon the ground before stated, that no exceptions had been taken to said survey within the prescribed time, and upon the further ground that because no exceptions had been taken by the claimants of either Las Bolsas or Santa Ana, they would not be parties to the record so as to enable them to appeal from the decision, present or future, of your office in relation to the survey.

July 14, 1880, this Department made a decision to the effect that your office had undoubted authority, under the act aforesaid, to require a further report from the surveyor-general, and to direct the taking of testimony touching the survey, and as the inquiry instituted was for the purpose of ascertaining whether the west line of Rancho Santa Ana did not lie to the west of the east line of Las Bolsas, as established by the survey, the owners of the latter rancho were among the parties interested and entitled to notice, to submit proofs, to be heard, and to appeal from decisions adverse to their interest.

Thereupon, under the instructions of your office aforesaid, an investigation was had of the matters submitted, and a large amount of testimony was taken before a special United States commissioner at Santa Ana, near the lands in question, commencing October 11, 1880. Such testimony was taken on behalf of the aforesaid applicants for a resurvey, but the claimants of the Rancho Las Bolsas and Santiago de Santa Ana introduced no evidence. At such hearing counsel appeared in behalf of Rancho Las Bolsas and of the United States, and for the claimants of the Rancho Santa Ana.

The surveyor-general then allowed the parties in interest until June 1, 1881, to file documentary proofs; and under that permission several exhibits were filed. The surveyor-general also instructed Deputy Surveyor Minto—

To make such an examination of the ground as would enable him to report from topographical features as to the course of the river Santa Ana in the year 1801, or as far back as practicable, and as to the character of the inlet as to its being tide-water or otherwise.

Surveyor Minto made the examination required, except as to the inlet, and whereupon the surveyor-general instructed Deputy Surveyor Richard Egan to make such examination. This duty he performed, and the reports of both deputies were duly filed.

The report of the surveyor-general, made upon an examination of the testimony upon the reports of Deputies Minto and Egan, and upon the documentary proofs in the case as to the western boundary, was in favor of a line beginning at station 78, on the northern boundary of Las Bolsas, and running southerly to the mouth of the present river Santa Ana by what he deems to be "the old river bed, designated on Minto's sketch as the channel A, D, E, H."

You decide in favor of the Minto line from the point La Posa (station 78) to the point of intersection with the present river marked D on the Minto map, and to this extent you agree with the surveyor-general. From the point of intersection D your line follows the present river to the sea, while the surveyor-general, as we have seen, from D to the sea follows what he describes as "the old river bed of 1823-4." The line so preferred by the surveyor-general lies to the east of the present river, and gives to Rancho Las Bolsas many hundred acres more than the line followed by you.

Only a part of the eastern boundary line of Rancho Santa Ana is in controversy. As to this part both the surveyor-general and your office agree in favor of a line beginning at the "small butte at the head of the inlet, at or near the point marked B on the Coast Survey map (Ex. C)," and from that point following "the line of ordinary high-water mark along the west line of the inlet to the sea."

From your decision an appeal has been brought in behalf of the owners of Rancho Las Bolsas, and for Irvine and others, to this Department.

The Rancho Santa Ana is situated in Los Angeles County, California. As to its southern portion, it is bounded on the west by Rancho Las Bolsas, on the east by San Joaquin, and on the south by the ocean. This controversy relates only to the boundaries between Santa Ana and Las Bolsas on the west, and Santa Ana and San Joaquin on the east.

The respective dates of these several grants were as follows: Santa Ana, July 1, 1810; Las Bolsas, May 22, 1834; San Joaquin, May 13, 1842. The junior grants, Bolsas and Joaquin, were, however, first sur-

veyed and have been patented. The official survey of the senior grant, Santa Ana, conforms to the patented lines of said junior grants. The Las Bolsas was founded upon a previous grant to Manuel Nieto, 1784, and the title was derived through that grant; but the proceedings under the petition of Grifalba and the decree of confirmation in effect make it a grant junior to Rancho Santa Ana.

The Santa Ana claimants ask that the official survey shall be amended so as to include some fourteen thousand additional acres on the west and about a thousand acres on the southeast.

The Las Bolsas and San Joaquin claimants insist that such survey shall be maintained and confirmed by this Department.

Counsel for Rancho Las Bolsas upon this appeal argues at length the proposition that the adjudication and location of the eastern boundary of that rancho in legal effect estops the claimants of Rancho Santa Ana from denying that it was correctly located and that the doctrine of *res judicata* must be applied.

The same question was ably and elaborately argued in the motion before recited to arrest the proceedings which have resulted in bringing the case to its present standing in this Department; such question was decided by my predecessor adversely to the claimants of Las Bolsas, and an order was made dismissing the motion.

The question now in hand, and which I am required to consider is, what is the correct location of the boundaries of the Rancho Santa Ana?

Independently of the location of the boundaries of Las Bolsas and San Joaquin, the claimants of Santa Ana have a right to a hearing and an adjudication of the location of that rancho.

Section 7 of the act of July 1, 1864 (13 Stat., 334), provides :

That it shall be the duty of the surveyor-general of California, in making surveys of private land claims finally confirmed, to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries of the claim. . . . And it shall be the duty of the Commissioner of the General Land Office to require a substantial compliance with the directions of this section before approving any survey or plat forwarded to him.

The Rancho Santa Ana was confirmed by specific boundaries, and it therefore became your duty to see that the survey as made substantially complied with the decree of confirmation as to such "specific boundaries" "as closely as practicable." This duty was independent of the action of your office in locating the boundaries of adjacent ranchos under their decrees of confirmation. The location of those boundaries can not be regarded as *res judicata*, except as to those ranchos. The survey of the Rancho Santa Ana under the decree of confirmation must have come to your office and have been the subject of an express and independent adjudication. The boundaries of the other ranchos cannot now be considered "except in the subordinate relation of consequences."

Surveys must necessarily follow the decrees of confirmations, and patents must conform to surveys as approved by your office (Rancho Entre Napa, 6 C. L. O. 37). If, after all this has been done, it be found that the ranchos overlap and patented boundaries are in conflict, the question of title must then be determined by the courts. The patents to the several parties place them in those tribunals upon an equal footing.

Since the title to these Mexican grants was never in the United States, such patents are in the nature of quitclaim deeds only. By these proceedings of survey and patent the United States does not undertake to determine the title. The title derived from another government, when thus in conflict, must be determined by the courts. (*Miller v. Dale*, 92 U. S., 477; *Adam v. Norris*, 103 U. S., 543; *United States v. Morillo*, 1 Wall., 709.)

The fifteenth section of the act of March 3, 1851 (9 Stat., 631), under which these proceedings are had, provides that "any patent to be issued under this act shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons." And the patents issued to the claimants of Las Bolsas and San Joaquin contain the clause that "neither the confirmation of this said claim nor this patent shall affect the interests of third parties." This clause was provided for by the act probably in anticipation of conflicts which must follow the proceedings aforesaid. (*Rodriguez v. United States*, 1 Wall., 582.)

The difficulties which this case presents and the causes of the conflicts I have referred to are well stated by Mr. Justice Miller in the case above cited. He says:

No class of cases that come before this court are attended with so many and such perplexing difficulties as these locations by survey of confirmed Mexican grants in California. Some idea of the difficulties which surround these cases may be obtained by recurring to the loose and indefinite manner in which the Mexican government made the grants which we are now required judicially to locate. That government attached no value to the land, and granted it in what to us appears magnificent quantities. When the grant was made no surveyor sighted a compass or stretched a chain. Indeed, these instruments were probably not to be had in that region. . . . These difficulties have rather been increased than diminished by the act of Congress of March 3, 1851, and the course of proceedings adopted under it by the board of commissioners and the courts. Before this Board every person having a claim derived from the Mexican government appeared, and in his own way and to the best of his ability established his right. . . . But no other private claimant was made a party to the proceedings, and it may well be supposed, and indeed we know, that it has often happened that two or three claims for the same land or parts of the same were progressing *pari passu* in the same court, and the land has been confirmed to each claimant, and probably each has received a patent for it.

I have been led to an examination of these questions at some length, because it is strenuously urged by counsel for Las Bolsas and San Joaquin that the line of survey of Santa Ana cannot now be extended so as to fall within the surveyed and patented lines of those ranchos.

The views thus expressed lead me to an examination of the survey and the consideration of the proper boundaries of Santa Ana under the decree of confirmation of that rancho. The western boundary will be first considered.

The original petition for Santa Ana was in 1801, and the grant was made in 1810. It is undisputed that the river Santa Ana formed the western boundary of the grant. The question of fact, and a very difficult one to determine, arises because of frequent changes in the bed of that river. Such changes taking place many years ago render it difficult to determine the actual course of the river at the time the grant was made.

It hardly need be stated that a sudden change in the course of a river by which part of the estate of one man is cut off and joined to that of another does not deprive the original owner of the land thus separated from his estate. Such change is known in the law as avulsion, and is the opposite of alluvion.

The decree of confirmation of Santa Ana recognizes the fact of a change in the river. The petition for such decree ascribes the boundaries as "commencing at the mouth of the river Santa Ana, where it empties into the sea; thence running up the bends and *old bed* of the eastern bank of said river." And the decree on dismissal of appeal adjudged that "the claim of the petitioners is valid, and it is therefore decreed that the same be confirmed." The testimony shows that the river as it existed in 1801 was changed, and a new channel formed by the flood of 1811. A change took place in 1823-'24 which produced the new or present river. The bed then left is known in the proofs and proceedings as the river bed of 1823 and 1824, or the "old river."

Another old channel quite well defined lies a little more than a mile to the west of the present river; and still another, even better defined, lies much further to the west, being to the west of the present town of Anaheim. This last channel is evidently quite ancient, and was probably the channel of the Santa Ana River long before the Santa Ana grant was made. In addition to these channels there are beds more or less defined which may have formed the channel of the river for a part of the distance at least between La Posa (station 78) and the sea, or they may have been "wash-outs" or overflow channels formed at the time of very high water in the Santa Ana River.

The cause of these numerous changes will be seen by a glance at the report of Surveyor Minto, before referred to, who was required by the surveyor-general to examine the ground, and "to report from topographical features as to the course of the river Santa Ana in the year 1801." He says:

The Santa Ana River, where it forms the boundary between the Ranchos Santiago de Santa Ana and Las Bolsas, runs through a sandy plain with an average slope of about 10 feet per mile toward the sea.

In times of high water the river rises to a level with the banks, at times overflowing them and covering the land for great distances. The overflow, when continued for any length of time, forms auxiliary chan-

nels somewhat varying in direction from the main river and from each other, but of course flowing in a general way toward the sea.

The light, sandy soil is carried down by the water in such quantities that in times of flood the stream presents the appearance of a river of moving sand. Any obstruction at such a time might cause a change in the main channel of the river, and all the topographical features show that such changes have often occurred.

But while it is very easy to see that changes in the bed of the river have occurred, it is extremely difficult to determine by observation whether, in many cases, a given channel has been the river bed or only an overflow channel.

The formation of the country, considered in connection with the testimony in the case, proves quite conclusively that the changes in the river have uniformly been from west to east.

The change of 1811 was proved before the Board of Land Commissioners. We are only interested in ascertaining what channel the river pursued next before that change.

In view of the conflicting opinions, and the difficulties which beset the inquiry, if the Hancock survey could be sustained by the evidence I should favor its approval; but since that survey, in pursuance of your order, a large amount of testimony has been taken and careful examinations made upon the ground; and after a careful consideration, I am satisfied that in view of all the proofs, as well those taken at the time of the Hancock survey as since, that survey cannot be sustained.

I shall only refer briefly to the lines of that survey and the objections to it. The Santa Ana River broke away from its channel many years ago, at a point some 3 miles north of La Posa (station 78). From the point of departure the new channel was a considerable distance to the east of the bed from which it then departed. Station 78 is on this old bed; and although the point of departure was some 3 miles further up, we are only interested in tracing the line of the old bed southward from station 78, as that is at the beginning of the boundary between Las Bolsas and Santa Ana, and to this point also all the surveys agree.

It is conceded that from station 78 (Exhibit D,) we must follow the old bed for some distance, because the old bed is recognized as a boundary in the confirmation proceedings, not only of Santa Ana, but also upon the *diseño* of the Nieto tracts, of which Las Bolsas was one, and in the proceedings of juridical possession of the last-named rancho as granted to Catarina Ruiz.

From station 78 to station 79, in the Hancock survey, the course is a little south of east, nearly straight, and almost at right angles with the course of the old bed at and north of station 78. The proof to my mind is quite conclusive that the river never ran between those points (stations 78 and 79). Station 79 is a point on the present river, as it has been since 1825. It is proved that the river of 1825 and the present river are identical. Between these two points (78 and 79) there is an elevation of ground, the highest point being about half a mile from station 78. Surveyor Ellis thinks this elevation 12 or 13 feet. The levels

he took were what he calls "flying levels" and he does not claim them to be accurate; but other proof in the case, taken with that of Ellis, establishes the fact that the ground between the two points was high, and that there was no reliable indication that the bed of the river was ever there. It cannot be found, from all the testimony, that such line was ever the bed of the Santa Ana River; and that part of the Hancock boundary or survey is evidently incorrect.

Resuming again the line of the official survey, from station 79 to a point between stations 81 and 82, the survey follows the present river. It may be said that there is absolutely no proof in the case to show that the old bed of the river was ever along or near that line.

From the last-named point the line of survey leaves the present river, and by various courses reaches an inlet of the sea at station 149. As to a part of this line, from near said station 82 to near station 118, there is evidence of the bed of a stream; but it is well established by the testimony of Surveyors Ellis and Minto that such bed is a washout formed by the overflow of the Santiago Creek. Ellis had surveyed such creek. It is a stream running from the mountains in a southwesterly direction, crossing the Rancho Santa Ana and entering the river of that name, and is so located as to have naturally caused such bed or washout.

As to the remainder of the line of survey there is little or no evidence of a river bed.

As before stated, in the light of all the testimony in the case it is impossible to approve the official survey.

As regards the western boundary, it now only remains to be considered whether the line fixed by Surveyor-General Wagner or the one found by your office shall be adopted—since I am satisfied that one of such two lines should be approved.

As has been already stated, from said station 78 (marked A on sketch accompanying Minto's survey to D on same sketch) your line and that of the surveyor-general agree. D is the point of intersection with the present river. From D to the inlet of the sea you pursue the present river, while the surveyor-general from that point to the sea follows what he deems to be the old bed of the river, his line being indicated on the sketch by D E H.

I am satisfied that the part of the line thus fixed from A to D is correct, as shown by the evidence. Minto says that it is more distinctly marked upon the ground than any other channel, except that of the present river. The surveyor-general in his report, after referring to Minto's report just cited, says:

From the point D, however, the country has less grade, and the channels are more numerous and less distinctly marked. There is one which, leaving D, runs nearly south to E, where it is joined by the slight depression followed by the survey of the Rancho Santiago de Santa Ana from about section 110, and then follows a swampy channel to the inlet H.

Minto himself, in reference to the line reported by the surveyor-general, says:

After passing the point D it is very difficult to arrive at any satisfactory conclusion.

And again he says:

After passing the point D I consider it impossible from topographical data alone to arrive at any definite conclusion as to the channel of 1801 or of 1825. The evidence relating to this part of the line is contradictory and indefinite, and it seems to me that the documentary evidence of the archives affords the only solution of the question.

Minto does not examine any such documentary evidence, but reports in favor of continuing the line from D to H, indicated upon his sketch; and the surveyor-general follows such report and favors such line.

It will be found, however, by examination of the reports of Minto and the surveyor-general, and the testimony in the case, that such line from D to the sea (H) has but little to support it. And the case is almost destitute of proof that the river ever ran east of that line. West of that line, and between it and the present river, there are two or three old beds quite well defined for some distance. These beds depart from the present river at several points west of D, and extend in a southerly direction. It is quite probable that these beds and that at D were made by overflows of the present river; and this view is strengthened by the form of the river, which from D to the sea pursues a direction first southwest, then south, then southeast, describing in its course nearly an arc (about one-fourth) of a circle, with convex side facing westward.

It remains to consider whether the line of the river as it now runs from D to the sea, fixed by you as the correct line of the survey, is sustained by the proofs.

The present river is the river of 1825, formed by the change of 1823--24. The break which then formed the new channel was several miles above La Posa (station 78). The other great change was in 1811; and we are inquiring for the river or bed of the river as it was in 1810—the year of the concession of rancho Santa Ana.

It is not proven that the change in the course of the river was of its entire length from the point of departure to the sea at the time of either change. The latest of those changes was so long ago that the oldest witnesses were then quite young, and the oral proofs are conflicting, indefinite, and uncertain. The topographical examinations are quite unsatisfactory. The old beds are many; they were formed long ago, and the nature of the soil is such that great changes must have taken place in them since their formation.

In this state of the case it is important to examine some of the "documentary evidence of the archives" referred to by Minto, but not considered by him nor mentioned by the surveyor-general in his report. Of these the *diseño* of the Rancho Bolsas is, I think, properly regarded by you as highly important. This map was made in 1834, and is referred to in the decree of confirmation of Las Bolsas. It is drawn to a scale,

and bears evidence of being more accurate than most Mexican diseños. It was made long before the present controversy arose, and is an impartial witness. The several Nieto tracts are included in it. It shows the present river from a point far above the break from the old bed in 1823-'24 to the sea. The old bed, from a point that seems to be identical with the break aforesaid to a point where it unites again with the present river, is distinctly marked upon said diseño by dotted lines, and is designated "Caja vieja del Rio" (the old bed of the river). The old bed thus marked forms part of the boundary between Bolsas and Santa Ana, and the River Santa Ana the remaining part. The point La Posa (station 78) is about midway on this old bed, and shown on the diseño. From La Posa south to the junction with the river must be nearly the same distance as from La Posa to D, on the Minto sketch. It should be stated that north of Bolsas lies another of the Nieto tracts, also bounded on the east by Santa Ana, and the part of the old bed as shown on the diseño north of La Posa forms part of the boundary between Santa Ana and such other Nieto tract. Juridical possession of Las Bolsas seems to have been given in accordance with this diseño. The elm tree (álamo), from which a branch was broken, mentioned in the proceedings of juridical possession, seems to have been identical with La Posa (the springs), as described in the surveys. This diseño being made in 1834, the year of the grant of Las Bolsas, and at a period so comparatively early after the conceded changes in the river, entitles it to great weight as evidence in establishing the old bed of the river. This diseño is not consistent with the Hancock survey, nor with the line south of D, fixed by Minto and approved by the surveyor-general; it is only consistent with the line from D, approved by you.

No continuous channel is proved by witnesses or topographical examinations to exist east of the present river; and I concur with you that—

The weight of evidence is in favor of the Minto line from La Posa to its intersection with the present river, marked on the Minto map A. D; and that the channel as it shall be found located on the ground, with continuation by the present river from the point of intersection to the sea, should be taken as the western boundary.

The controversy with San Joaquin as to the eastern boundary of Santa Ana involves about one thousand acres of land. This body of land lies to the west of a navigable arm of the sea, recognized as such upon a Coast Survey chart submitted with the proofs, and known on such chart as Newport Bay. This arm disconnects the land from Rancho San Joaquin, and it cannot be reached from the other parts of that rancho except by transportation across an inlet or arm of Newport Bay, or by passing for a considerable distance across the lands of Rancho Santa Ana.

The testimony of Andromio Sepulveda, a son, and Salisbury Haley, a son-in-law, of José Sepulveda, original grantee of San Joaquin, Domingo Yorba, son of José Antonio Yorba, grantee of Santa Ana, Eduardo Poyo-

reno, and Antonio F. Coronel, proves that the inlet was recognized by the original proprietors of the two ranchos as separating them, and that they occupied accordingly. It also proved that when San Joaquin was sold it was with notice to the purchasers that such bay and inlet formed the boundary between the said ranchos.

The eastern line of Santa Ana, as described in the title papers, is quite indefinite; its terminal point, however, was the sea-coast. The line of official survey reached the inlet at a point below tide-water, being the small butte at the head of the inlet. There it should have stopped. Instead of that it crossed the inlet and included in Rancho San Joaquin the body of land already mentioned on the west side of the inlet. This was erroneous. When that point was reached the sea-coast was found, and the inlet and Newport Bay should have formed that part of the boundary between the two ranchos.—(United States *v.* Pacheco, 2 Wall., 587.)

The result thus reached as to the eastern boundary is clearly in accordance with the rights of the parties as understood and recognized by the original owners.

The western boundary, as hereby approved, still leaves to Las Bolsas, as stated by you, about the quantity of land, seven leagues, originally granted to that rancho, including the part thereof granted by Catarina Ruiz to her brother.

I approve your amendments to the official survey and affirm your decision.

PRIVATE CLAIM—SPECIAL JURISDICTION.

PETER SHERREBACK CLAIM.*

The United States circuit judge having attended and held a term of the district court, it will be presumed that the formalities prescribed by the second section of the act of March 2, 1855, to enable him to do so, were complied with, though not specifically appearing in the record; especially so, as the provisions referred to appear to be merely directory.

As a judgment or order void for want of jurisdiction is no protection to parties or officials acting thereunder, it is competent to examine as to the question of jurisdiction; particularly when the subject is not embraced in the general powers of the court; the jurisdiction being created by a special statute, for a special purpose. The record showing the essential facts, the objection of want of jurisdiction will be overruled.

Patent for a private claim in California cannot issue under Revised Statutes 2447.

That section only applies to cases where no provision is made for patent. The several acts providing for the confirmation of such claims in California authorize patent to issue for all confirmed claims.

Commissioner McFarland to U. S. surveyor-general, San Francisco, California, April, 1883.

It appears from the record in the case of the Peter Sherreback claim, situated within the limits of the Pueblo of San Francisco, that applica-

* See 2 L. D., 364.

tion for the confirmation thereof, made to the Board of Land Commissioners, was denied; but on appeal from said decision to the United States district court, before Hon. Ogden Hoffman, judge of said court, it was confirmed to the claimant for eight varas square by decree of December 5, 1859;

That afterwards in the same court held by Hon. M. Hall McAllister, United States circuit judge, under section 6 of the act of March 2, 1855 (10 Stat., 636), upon application on the part of the United States filed on the 26th of May, 1860, and upon hearing of both parties, by order of June 2, 1860, the decree of confirmation was vacated and set aside, and a new trial and hearing granted; at which, as directed by said order, both parties were to be permitted to present further proofs; said order also recognizing a motion, on the part of the claimant, to reinstate the decree of December 5, 1859, and setting the same for hearing, without further notice, on the first Monday of July, 1860;

That the motion to reinstate the vacated decree was heard in the district court held by Hon. Ogden Hoffman, district judge, on the 28th day of August, 1860, the United States and the claimant being represented, and denied;

That on the 20th day of June, and the 14th and 30th days of July, 1862, orders were made in said district court by Judge Hoffman, extending the time for closing the proofs in said case; the order of the 14th of July having been made on motion of claimant's counsel, and it not appearing upon whose motion the other two orders named were granted.

It does not appear in the case that further proofs were produced, or that a new trial or hearing was ever had therein, in pursuance of the order of the court, by Judge McAllister, of June 2, 1860.

On the 21st of October, 1882, the present claimants, by A. Everett Ball, esq., their attorney, made application to your office for a survey of the claim, under the decree of confirmation of December 5, 1859, as foundation for a patent of the same; alleging that the order setting aside said decree was void, etc.; which application was referred by you to this office, by your letter of October 21, 1882, for direction in the premises.

December 1, 1882, L. D. Woodworth, esq., entered appearance before this office for the claimants, and, on the 21st of the same month, filed a brief and argument in support of their application for a survey and patent, claiming:

That patent should issue under 2447 Revised Statutes; setting forth, as ground for the application, that the statute under which the court was held by Judge McAllister, in which the vacating order was made, required as preliminary steps to be taken before a judge of the circuit court could sit in the district court:

First. That in his opinion the business of his own court must permit, and that of the district court require it;

Second. That a notice of thirty days must be given by the clerk of the district court to the circuit judge; and

Third. That the district court must be engaged in the exercise of its appellate jurisdiction from decisions of the Board of Land Commissioners.

And objecting:

1st. That the evidence of the "opinion" required from the circuit judge is conspicuously absent from the record;

2d. That the record nowhere shows that the clerk of the district court gave the notice required;

3d. That the only evidence in the record of the purpose for which the court was sitting, is the entry in the minutes of the opening of the court, to wit, "for the trial of land cases"; but not showing that they were cases pending on appeal from the Land Commission, of which only the court as constituted could have jurisdiction.

These objections are severally and forcibly urged by the counsel; the summing up of the argument being, "that the vacating order was *ultra vires*; and that the decree of December 5, 1859, is in full force."

The question presented is as to the jurisdiction of the court, and the points of objection thereto naturally divide themselves into those that relate to form, and that which has regard to substance. Of the former class are the first and second objections stated in the brief of the counsel; and of the latter, the third. They will be considered in their order.

First. The section of the act referred to, under which the court making the vacating order was held, authorizes the circuit judge "at any time when, in his opinion, the business of his own court will permit and that of the courts of the northern and southern districts of California require" to sit in the district court, etc.

It is hardly to be supposed that the circuit judge would attend and assume to hold the district court, unless *in his opinion* the business of the two courts presented the conditions contemplated by the statute. On the contrary the presumption arising from his act forces the conclusion that he entertained the required opinion. The statute did not require him to make either written proclamation or record of it.

Second. The statute in the cases contemplated by it makes it the duty of the clerk of the district court "to give thirty days written notice to the judge of the court organized under this act," (to wit, the circuit judge) "of the time and place of the sitting of such district court for the discharge of such appellate jurisdiction"; etc.

The notice required was for the information of the judge merely; it had no relation to parties; and the judge having attended and held the term, it must be presumed that he had the prescribed notice.

The same may be said of the holding the court by the circuit judge *alone*, which is not made a point of objection by the counsel.

The statute provides that—

In case the judge of such district court shall fail, from sickness or other casualty, to attend at such time and place, the judge of the court organized under this act is hereby authorized to hold said court, etc.

The circuit judge having, by himself alone, constituted the court, the contingency enabling him legally to do so, though not set forth in the record, will be presumed to have occurred.

With regard to what must appear in the record to justify and uphold judicial action, a distinction is made between the judgments of superior and inferior tribunals. The district courts of the United States, though their decisions are subject to review on appeal, are not, nevertheless, as to their construction, action, and ordinary jurisdiction, though the latter is entirely statutory, inferior courts.

In *McCormick and wife et al. v. Sullivant et al.* (10 Wheaton, 192), the supreme court held, as per head-note:

The courts of the United States are of limited jurisdiction, but they are not technically inferior courts; their judgments and decrees are binding until reversed, *though no jurisdiction be shown on the record.*

It may be urged that the rule here stated applies to cases and subjects coming within the scope of their ordinary jurisdiction only. This will be considered further on.

In *Grignon's lessee et al. v. Astor et al.* (2 Howard, 319), which was a case in a county court having probate jurisdiction, for license to sell the decedent's estate, one question being, whether the record sustained the jurisdiction of the court, the supreme court held as follows:

The granting the license to sell is an adjudication *upon all the facts necessary to give jurisdiction*, and whether they existed or not, is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns.

It may also be fairly assumed, as to the objections under consideration, that the provisions of the statute upon which they are founded are merely directory; and, the main object of the statute, the holding of the court in the manner and for the purpose intended, having been attained, that its action cannot be defeated nor prejudiced by the want of literal compliance with the preliminary directions, if such want of compliance occurred.

The following is the rule applicable to this view of the subject:

When statutes direct certain proceedings to be done in a certain way, or at a certain time, and a strict compliance with these provisions of time and form does not appear essential to the judicial mind, the proceedings are held valid, though the command of the statute is disregarded or disobeyed.—(Sedgwick on Construction of Statutory and Constitutional Law, 316.)

Directory acts are said to be those which are *not of the substance of the things provided for.*—(*Id.*, note a, citing *McKune v. Weller*, 11 Cal., 49, and see same note for examples of statutes held to be directory.)

Where the words are affirmative, and relate to the manner in which power or jurisdiction vested in a public body [and *semble*, a public officer] is to be exercised, and not to the limits of the power or jurisdiction itself, they may be, and often have been, construed to be directory; but negative words which go to the power or jurisdiction itself have never,

that I am aware of, been brought within that category. A clause is directory, says Taunton, J., "when the provisions contain mere matter of direction and no more, but not so when they are followed by words of positive prohibition."—(Wells on the Jurisdictions of Courts, 56; citing *Bladen v. Philadelphia*, 60 Pa. St., 466.)

The provisions contained in the act in question in this case, preliminary to the exercise of the jurisdiction conferred by it, are clearly within the rule as declared by the authorities here cited.

The first and second objections of the counsel are overruled.

Third. The third objection goes to the substance or subject-matter of the order vacating the decree of confirmation; and though it has been held that courts, properly constituted, determine their own jurisdiction, and that their judgments are conclusive and binding upon all parties, courts, and public officers, until set aside or reversed on appeal by judicial authority, I apprehend that there is some distinction to be made; that the broad rule here stated has application more especially to subjects of ordinary or general jurisdiction, and that where the jurisdiction is special, as where created by special statute and directed to a special purpose, it should affirmatively appear by the record, tested by the provisions of the statute. There is such a thing as judgment void for want of jurisdiction; and if *void*, of course *no judgment*, and no legal protection to parties or officials acting under it. Whoever is called to execute it, must act upon his peril. (See Wells on Jurisdiction, quoted above, p. 11, and cases cited.) It must therefore be competent, when action is required having reference to a judgment or order founded upon a technical and special authority, to be exercised by a court specially constituted, to examine as to its validity.

The statute referred to, under which the court granting the vacating order of June 2, 1860, was held, provides:

That the judge appointed under this act [the circuit judge] shall from to time . . . form part of, and preside over, the said district courts [the district courts for the northern and southern districts of California] when either of them is engaged in the discharge of the appellate jurisdiction vested in it over the decisions of the Board of Commissioners for the settlement of private land claims in the State of California, etc.

And said judge is authorized to sit alone, and by himself constitute the district court in the contingency before considered.

The record in the present case shows the following proceedings: The decree of confirmation of December 5, 1859, is headed in the usual manner, with a statement of the term of the court, the presence of the judge, and the title of the case; the latter being as follows: "Peter Sherreback *v.* the United States, No. 356." It then proceeds: "This cause came on to be heard on appeal from the final decision of the Board of Land Commissioners to ascertain and settle the private land claims in the State of California," etc., and is signed, "Ogden Hoffman, district judge."

The order of June 2, 1860, vacating the above decree is headed: "In the district court of the United States, in and for the northern district of California." The case is entitled, "Peter T. Sherreback v. the United States, No. 356, district court, No. 795, Land Commission." After preliminary recital it proceeds: "It is hereby ordered that the decision and decree heretofore entered in this court, in this cause, on the 5th day of December, 1859, be, and the same is hereby, vacated and set aside, and that there be a new trial and hearing in this action," &c. The order is signed, "M. Hall McAllister, judge, circuit court United States, district of California."

The minute of the court, a certified copy of which is produced by the claimants, simply shows that the term was held by the circuit judge "for the trial of land cases." The title and number of the case are given, with this entry: "Order entered setting aside decree and granting a rehearing."

The decree of confirmation, the order of June 2, 1860, vacating it, and the minute of the court above constitute the whole record as far as relates to the subject-matter of the jurisdiction of the court making the vacating order. The claimants do not seek to go back of the decree of December 5, 1859, but rely upon it, making it the object of their application. The statement in that decree, quoted above, shows explicitly that, in making it, the court was "*engaged in the discharge of the appellate jurisdiction vested in it over the decisions of the Board of Commissioners for the settlement of private land claims in the State of California*"; being the precise subject of jurisdiction as to which the circuit judge was authorized to sit and act in the district court.

The order of June 2, 1860, was but a continuation of the former proceeding, opening the case by vacating the decree and granting a rehearing, with permission to the parties to produce further proofs, etc. This is shown by the title and number of the case in the order and its express reference to the decree by its date. There was no new jurisdiction invoked, and that exercised was that which the act expressly conferred upon the circuit judge when sitting as the district court.

The jurisdiction being shown affirmatively by the record, the claimant's third objection is overruled, and the order of June 2, 1860, held to be valid.

Patent could not issue in this case in any event under Rev. Stat., 2447, as supposed by claimant's counsel. That section applies only to cases where no provision is made in the confirmatory statute for the issue of a patent. The several acts which have provided for, or had reference to, the confirmation of private land claims in California authorize the issuing of patents on all claims confirmed under them.

The application of the claimants is denied. It would seem that their remedy must be sought in the United States district court, under the order of the court granting them a rehearing in the case or otherwise.

You will notify the parties interested or their attorneys of this decision, and advise this office of the date of giving such notice.

PRIVATE CLAIM—PATENT—JURISDICTION.

RANCHO CASMALIA.

Where a survey has been approved and carried into patent, so far as the segregation of the private land claim is concerned this Department has exhausted its powers. If corrections are necessary by reason of mistakes or frauds, they must be sought for in the courts.

Commissioner McFarland to U. S. surveyor-general, San Francisco, California, September 30, 1882.

I have examined the case in the matter of the survey of the Rancho Casmalia, Antonio Olivera confirnee, and find the following facts to exist:

The rancho was first surveyed by United States Deputy Surveyor Terrell, in 1860, in which survey he located the southeastern corner (which became corner C. No. 3 of the subsequent survey) in the entrance of the Cañada Verde, as he ascertained the same to be situated. The survey, however, not being approved another was ordered, and was also made by Deputy Terrell later in the same year.

At about the same time he also made a survey of the contiguous Rancho Todos Santos, making one of the corners (T. S. No. 5) at the southeastern corner aforesaid (C. No. 3) of the Casmalia survey.

Of the second survey of Casmalia made by Terrell, the northern boundary was by a line beginning at a rocky point on the sea-shore, called the Cerrito del Medio, at a post marked C. No. 1, and from thence running north 75° east 188 chains to a live oak tree marked C. and B. T. No. 2, and continuing on the same course 18 chains farther, 206 chains in all, to a post marked C. No. 2.

The east line was run from station No. 2 south 50° east 395.55 chains to an old post in the entrance of the Cañada Verde, marked T. S. No. 5 and C. No. 3, being the southeastern corner aforesaid of the first survey.

This second survey was approved and carried into patent in 1863.

Partial surveys of the rancho have been since made by Deputy Surveyors Harris and Von Schmidt, the latter under instructions from your office, authorized by my predecessor, which surveys will be referred to hereafter.

In 1876 a modified survey of the Rancho Guadalupe was made by United States Deputy Surveyor Thompson, and subsequently carried into patent. The second course of that survey coincides with the first course of the patented plat of Casmalia, running in reversed direction from C. No. 2 south 75° west to the sea-shore at C. No. 1, which is marked on the plat "High Rocky Point, El Morrito or Cerito del Medio (old corner)."

The case comes before me on application of the grant owners for a relocation of the northern and eastern boundary lines of the rancho, or the recognition of lines different from those described in the patented

survey; in effect, to change the northeastern and southeastern corners so as to correspond substantially with the Von Schmidt survey, on the ground that the northern line of the patented survey is wrongly described, the live oak tree on the line, 18 chains from station C. No. 2, being in fact, as alleged, reached by a line north $63^{\circ} 13'$ east, and the corner at a distance from the Cerrito del Medio of 200.26 chains instead of by a course of N. 75° east and a measurement of 206 chains to the corner, as in the patented survey, which would place the corner C. No. 2 above five-sixteenths of a mile northeasterly from the patented corner; and as to the southeastern corner C. No. 3 and T. S. No. 5, that it is wrongly located, the entrance of the Cañada Verde being as claimed farther to the northeast, so that the corner No. 3 should be placed about five-sixteenths of a mile northeasterly from the patented corner.

The northeasterly and southeasterly corners, and the line from one to the other, are illustrated by Von Schmidt's survey.

But it will be observed that neither he nor Harris, whose northern lines very nearly agree, make the Cerito del Medio the starting point of their northern lines. The identity of the Cerrito del Medio is not controverted by any one. The claimant's counsel says of it in his brief: "There is no question as to the location of the Cerrito del Medio." Cerrito means "little hill."

The point is described in the field notes of Terrell as "a rocky point." It constitutes, as before mentioned, the southwest corner of the Rancho Guadalupe as located and patented, and is there designated as a "morrito" (little overhanging lip), and is described in the report of R. C. Hopkins in that case, made on personal examination, as "a bunch of dark-looking rocks overhanging the sea."

Taking the Cerrito del Medio, as located and unquestioned, as the point of beginning, and running the northern boundary line on the course adopted by Von Schmidt and contended for by the claimants, and fixing the corner No. 2 at the distance indicated on Von Schmidt's line, would locate the corner half a mile northerly from C. No. 2 of the patented survey and seven-sixteenths of a mile northwesterly from the corner No. 2 of Von Schmidt's survey and that distance within the patented Rancho of Guadalupe.

The same is true as to the survey of Terrell. If he had run from the cerrito on the course designated by Von Schmidt, instead of reaching his own or the Von Schmidt corner his line would have terminated as above.

The only way in which Von Schmidt and Harris could reach the corner C. No. 2 as located by them, running the northern line upon the course adopted by them, respectively (N. $63^{\circ} 15'$ E. and N. $63^{\circ} 30'$ E.), was by making their starting point on the sea-shore, not at the cerrito, the acknowledged corner, but nearly half a mile southeasterly from it, where no formation answering to a cerrito is shown or claimed to exist.

There can be no doubt that Terrell made an actual survey upon the ground; that he found and marked a live-oak tree upon his line, 18 chains short of the corner he established; and though Von Schmidt professes to have found Terrell's tree and stake upon a different course and line, it is not shown that the tree and stake described by Terrell are absent from the line and course described by him, though a stake might readily be removed. It is easier to believe, under the circumstances appearing, that Von Schmidt was mistaken in his identification of the tree than to suppose that Terrell, an experienced surveyor and familiar with the locality, made the mistake attributed to him, and while running one line described another largely variant from it, and that Deputy-Surveyor Thompson repeated his mistake in the subsequent location of the boundary of Guadalupe.

The southeastern corner, as located by Terrell in both of his surveys, was adopted by Harris in his survey as correctly located. It is made a corner, as before mentioned, in the survey of the coterminus Rancho Todos Santos.

The corner as located by Von Schmidt, which the claimants contend for, is about a quarter of a mile within the patented limits of Todos Santos.

The result of the changes contended for by the claimants would be to place the eastern boundary line a quarter of a mile or more outside of the patented line, including lands settled upon and claimed as public lands; to include also within the Rancho Casmalia a parcel of the patented Rancho Guadalupe on the northeast and a parcel of the patented Rancho Todos Santos on the southeast producing conflicts with both these ranchos and with the settlers interested in the lands on the east over boundaries long since definitely and finally located.

I see no valid reason for the change asked for. I am satisfied that the corners and boundary lines in controversy are substantially correctly located by the Terrell survey, as described in the field notes and patent; but if errors of the character claimed have been made, I see no way of correcting them here. The survey has been approved and carried into patent, and, as far as concerns the segregation of the private claim, this Department has exhausted its powers.

If corrections are necessary by reason of mistakes or frauds they must be sought for in the courts. The survey by Von Schmidt is therefore rejected.

The only change that can be directed by this office will be to close the public surveys upon the lines of the private claim as patented.

44-585, 587, 589
 45-48
 PRIVATE CLAIM—CONFIRMATION—SURVEY.

RANCHO CORTE DE MADERA DEL PRESIDIO.

Decree of Board of Land Commissioners confirmed claim by boundaries.

Decree of United States District Court affirmed decree of Board "in all things".

Decision of Department (Delano, Secretary) on appeal, directing a survey conforming to juridical possession, was final upon the questions of quantity and boundaries (unless, within some rule of review, it could be properly opened for revision), and it only remained to conform the survey to the decision.

The technical objection to the survey made under this decision, as to manner of its execution not sufficient to impair its validity.

Decisions of the Department of December 31, 1877, and May 3, 1880, revoked; and that of the Commissioner of September 18, 1878 (modified so as to exclude from the survey Peninsular island and the small island occupied as a military reservation), affirmed.

Secretary Teller to Commissioner McFarland, July 28, 1882.

I have considered the application for reconsideration of my predecessor's decisions of December 31, 1879, and May 3, 1880, in the matter of the survey of the California private land claim known as Corte de Madera del Presidio, heirs of Juan Read confirmees. This was a grant made by the Mexican authorities in 1834 to said Read, followed by juridical possession in 1835, which grant was duly presented to the Board of Land Commissioners in 1852, and was by that tribunal adjudged and confirmed by specific boundaries on the 13th of June, 1854.

The decree is as follows:

HEIRS OF JUAN READ }
 vs. }
 THE UNITED STATES. }

In this case, on hearing the proofs and allegations, it is adjudged by the commission that the said claim of the petitioners is valid, and it is therefore hereby decreed that the same be confirmed. The land of which confirmation is hereby made is the same on which said Juan Read resided in his lifetime is known by the name of Corte de Madera del Presidio; is situated in Marin County, and bounded as follows, to wit: Commencing from the solar which faces west at a point at the slope and foot of the hills which lie in that direction, and on the edge of the forest of redwoods, called Corte de Madera del Presidio, and running from thence in a northwardly direction four thousand five hundred varas to an arroyo called Holom, where is another forest of redwoods call Corte de Madera de San Pablo; thence by the waters of said arroyo, and the bay of San Francisco, ten thousand varas to the Point Taburon, said point serving as a mark and limit; thence running along the borders of said bay and continuing in a westerly direction along the shore of the bay formed by Point Caballos and Point Taburon, four thousand seven hundred varas to the mouth of the Cañada and the point of the "Sansal" which is near the estero lying east of the house on said premises which was occupied by said Juan Read in November, 1835, and thence continuing the measurement from east to west along the last line

The United States having waived appeal this decree was made final by order of the court April 2, 1857, and in 1858 a survey was executed by R. C. Matthewson, deputy surveyor, embracing one square league within the given boundaries, which survey and plat were approved by United States Surveyor-General Mandeville, September 19, 1859. Had this survey been regularly transmitted to you and a patent been issued thereon under the thirteenth section of the act of March 3, 1851 (Stat. 9, p. 631), there would have remained no further question for this Department in the case. But on the 14th of June, 1860, Congress passed an act (12th Stat., p. 33) which the surveyor general understood to require publication of the plat, and it was published accordingly.

The district court also understood the act to confer jurisdiction upon it for the approval of the survey, and ordered it into court upon objection filed by the claimants, and proceeded to final decree of approval in 1865, but subsequently, on notice of the district attorney that he would move to dismiss the case for want of jurisdiction, the motion was argued, the decree set aside, and the case dismissed.

This closed the judicial proceedings, and remitted the survey for the action of the surveyor-general and this Department under the act of July 1, 1864. By the second section of that act the survey in question, not having been approved by the Commissioner or the court, was made subject to the provisions of section 1, which required publication, and proceedings thereunder as set forth in the act. This publication was had in 1868, and after objections filed, and full compliance with the statute, the survey came before your office, with the opinion of the surveyor-general dated February 26, 1870, and on the 6th of May, 1871, the Commissioner rendered his final decision that the survey should be approved, subject to the right of appeal within thirty days.

Appeal was taken; and after full discussion the Secretary of this Department, January 6, 1872, reversed the decision, disapproved of the survey, and directed that another be made conforming to the juridical possession, holding that the grant was one of boundary, not of quantity, and therefore not limited to one square league, as surveyed by Matthewson.

Under this decision a new plat of survey was executed by Leander Ransom, deputy, in September and October, 1873, and, he having deceased, completed by G. F. Allardt, deputy, in June, 1874, which was published in 1875, in supposed conformity to the requirements of the act of 1864. During and following such publication, numerous objections were interposed by the claimants, by the United States district-attorney, by the War Department, and by several parties, settlers upon lands included in and adjoining the boundaries of said survey.

This survey, as stated in the decision of your office of September 18, 1878—

Adopts for its initial point a place at the southwest corner of the tract designated as the Solar (the initial point of the juridical posses-

sion), and from thence runs south, 2.45 chains, to the center of the Arroyo Corte Madera del Presidio, the northerly boundary of the Rancho Saucelito; thence follows down said arroyo to its mouth, and thence by the shore of Richardson's Bay, Raccoon Strait, and San Francisco Bay, by the several courses, easterly, northerly, and westerly, to the mouth of the Arroyo Holon, at the northwest corner of the tract; thence following up said arroyo to the point where it changes from nearly north and south to an almost due east and west course; and thence southerly to the place of beginning. It includes an area of 6,033 acres, excludes the several adjoining tracts of salt marsh tide lands, and the peninsula known as Peninsular Island, and includes the small peninsula or island known as De Silva's Island.

Another plat, which was not published, appears to have been executed by Ransom in November and December, 1873, and likewise completed by Allardt in June, 1874. This plat agrees with the first as to the monuments called for in the description, but includes the salt marsh above ordinary high tide, and also Peninsular Island, which were excluded from the published survey.

By my predecessor's advisory letter of May 28, 1879, your office was instructed that the publication of 1873 was unauthorized by law, not being required by the act of 1864; and it follows that each of these respective surveys was properly before the Department under the order of 6th of January, 1872, and subject to approval or rejection as it might be found in conformity to or variant from that instruction.

Your predecessor decided that the Ransom survey of September and October, 1873, completed by Allardt in 1874, should be approved, after modification, by adding thereto the marsh lands on the north and Peninsular Island on the south, and excluding what is known as De Silva's Island. This, with a slight correction, would adopt the second Ransom-Allardt survey referred to, executed in December, 1873, and June, 1874.

December 31, 1879, my predecessor, Mr. Secretary Schurz, reversed this decision and held the survey defective because, although compiled from previous actual surveys and referring by the field notes to monuments already established, and although conceded to represent accurately the land and its boundaries, it was not run and marked in the field at all points by the deputies at the time it was executed. He also held as the principal objection that the plat did not conform to the judicial decree, and embraced land not within the grant and confirmation.

At the same time he declared himself bound by the decision of Mr. Secretary Delano, rendered January 6, 1872, which declared the grant one of boundary and not of quantity, and which directed a survey to be made conforming to the juridical possession given by the Mexican authorities, as sanctioned by the Board of Land Commissioners.

He appears to have held, although not definitely stating his opinion, that the decision of 1872, declared by him to be final, only went to the extent of declaring that the grant was one of boundary, and did not, in

terms, declare that the description of boundary set out by the Board was included in the confirmation of the district court.

Going from this point to the decision of the court he decided that—

The court confirmed to the heirs of Read the grant as made upon the evidence produced, but did not attempt to fix the boundaries of the grant as the Board had done, but left that question to be determined by the grant and expediente.

He then proceeded to again express his dissent from the decision of Mr. Secretary Deiano, already declared final, and said:

The court evidently did not regard the grant as a grant by boundaries, but rather as a grant of quantity.

And, after citing the language of the decree, he further said:

Whether the boundaries described by the Board contained more than one square league could not be determined by the court, and hence, instead of adopting the boundaries given by the Board, it directed that "the boundaries called for in the said grant and the map to which the grant refers" should govern in ascertaining "the extent and quantity confirmed to the claimants."

Upon application for a rehearing, the Secretary, on the 3d of May, 1880, declined to reconsider this decision, but on the 25th of the same month he gave verbal direction to your office to suspend its execution, and it was suspended accordingly.

After repeated propositions of various kinds, including a resort to Congress by the claimants, Mr. Montgomery Blair, of counsel for some of the heirs, and claiming to represent their entire interest, filed on the 25th of January, 1881, a proposition to accept as a compromise a patent upon the Matthewson survey rejected by Mr. Secretary Delano in 1872. On the 7th of March following, Mr. Schurz endorsed upon this paper his decision declining to accept the proposition because of inability for lack of time to examine into the propriety of granting it, adding to his indorsement that he would consider the letter as a motion for a reconsideration of his decision in the case. This carried the proceeding before my immediate predecessor, Mr. Secretary Kirkwood, who, after hearing oral argument on the proposition for compromise, declined to accede to it, not being satisfied that all the interests of the grantees were represented by the offer—a distinct demand having been filed for a patent upon the whole claim as allowed by the decision of your office, and also a claim that the decision of 1879 was without jurisdiction—that of 1872 having been made final by survey executed in accordance with its directions. He accordingly made on the 14th of April last, an indorsement on the files of the case to the effect that he had determined to hear argument on all points as a guide to his judgment in making final disposal of the whole case, including the question of jurisdiction as, of course, preliminary to all others.

This being the condition of the matter as it comes before me, I have heard the argument submitted in accordance with the arrangement

last recited, and from all that has been gathered will proceed to dispose of the various questions involved.

It was said in case of the Rancho Alisal, January 4, 1882 (Reporter, vol. 1, p. 72; 9 C. L. O., 11), that the question of jurisdiction—

May be raised at any stage of the proceedings and upon slight suggestion in all tribunals; and where doubt of such jurisdiction arises it is usual and proper to look fully into the reason and authority of the matter, in order that a judgment may not be improvidently rendered which may have no binding force on account of a want of jurisdiction in the case.

Applying this to the present proceeding it becomes important to determine what, if anything, has been already settled in order to see what yet remains of executive duty and discretion. And first, it is conceded that the Board of Land Commissioners took jurisdiction of the questions of extent and boundaries, and incorporated them in its decree. That it was competent for it so to do is no less certain. *United States v. Fossatt*, 20 H., 413; 21 H., 445; and 2 Wall., 649; *United States v. Sepulveda*, 1 Wall., 104; *United States v. Halleck*, 1 Wall., 439; *United States v. Billing*, 2 Wall., 444; *United States v. Pacheco*, 2 Wall., 587; *Van Reynegan v. Bolton*, 5 Otto, 33; Act of July 1, 1864, section 7 (Stats. 13, p. 334).

Second. The boundaries thus set out by a tribunal of competent jurisdiction, based upon its examination and findings with all the papers and testimony before it, are conclusive upon all parties, unless declared erroneous upon appeal (see Abbott's Digest—"Operation and effect of judgment").

It is not necessary to decide whether any other boundary might in the judgment of the Department better answer the calls and measurements of the grant. That question was within the jurisdiction of the land commissioners, was considered by them, and, if not overruled by the higher court, was concluded by their decree. The out boundaries of the Corte de Madera del Presidio were thereby conclusively defined, and nothing remained in locating the exterior limits but to follow the calls of the decree.

But one further question could in the nature of things follow this inquiry into the scope of the action of the Board. This was whether or not the same was affirmed by the final decree of the district court. This was disputed; and it was asserted by parties opposing the claim, and held by the commissioners of your office, that the decree of confirmation made the grant one of quantity and not of boundary, and limited it to one square league to be located by reference to the grant and map without reference to the lines described by the Board, or, rather, to be taken for quantity within those boundaries, as mere exterior boundaries beyond the restricted limits of confirmation.

The question, *in this form*, was brought by appeal to the Department. It was considered in all its bearings. It was the sole competent ques-

tion involved in the case presented, and was brought up at the time and in the manner contemplated by the act of July 1, 1864 (13 Stat., 332,) viz: upon "objections to the survey," and by regular process of appeal.

That it was his duty to decide it and that it was the proper question for his final judgment, see *Van Reynegan v. Bolton* (95 U. S., 35,) where it is thus stated:

In the case at bar, the surveyor-general for California disregarded the boundaries established upon the juridical possession delivered to the grantee. He proceeded upon the conclusion that the confirmees were restricted by the decree to one square league, to be measured out of the tract within those boundaries, which exceeded that amount by about 1,500 acres. Whether the terms of the decree justified his conclusion is a question upon which it is unnecessary for us to express an opinion. That is a question which must, in the first instance, be determined by the Land Department in carrying the decree into effect by a survey and patent. It is sufficient that the survey made was contested by the confirmees, and the contest was undetermined when this action was brought.

This was the very contest declared sufficient to bring the matter to a final determination by a decision on the point in question.

It was necessarily ripe for action, properly pending under regular form of appeal, and must result in a *final* decision. This judgment was in no sense interlocutory. When rendered nothing remained but to conform the survey by strictly mechanical processes to the boundaries declared to have been intended by the decree.

Was this decision open to review by Mr. Secretary Schurz in 1879, upon a survey purporting to have been duly made in execution of the final order?

In his advisory letter of May 28, 1879, in this case, he laid down the general proposition that the statute of 1864 contemplated a full and final settlement and decision of all questions touching the extent and boundaries of a private grant, upon presentation of the objections to the first survey under publication; and that thereafter no objections could be filed against such decision, under cover of objections to the reformed or modified survey, whether it be a corrected plat or an entirely new one. And I am of the opinion that this is the true scope, purpose, and intent of the law. Measured by this judgment, the decision of 1872 was the final and conclusive action of the Land Department upon the question of quantity as fixed by the decree of the district court, and is equally binding in this Department upon the United States and the other parties in the case.

But in view of the strenuous objections urged against this proposition, and the able arguments of counsel in support of the opposite doctrine, I deem it proper to consider briefly the reasons upon which the opinion is based.

The first reason may be found in the strong mandatory terms of the statute itself. The investigation of the questions put in issue commences with the examination of the surveyor-general, after the putting

in writing, duly signed by him or his attorney, of the objections of the party in interest, and the filing of the proofs and affidavits in support of them. The surveyor-general must send all these with a copy of the survey and plat, accompanied with his own opinion, to the Commissioner, whose examination and disposal of all the questions are next required with minute specification. *After* such disposal he shall approve the plat. *After* the survey and plat have been approved, "it shall be the duty of the said Commissioner to cause a patent to issue to the claimant as soon as practicable."

The only interlocutory matter that can intervene here must be while the case sent up by the surveyor-general is under examination. If a decision be reached it is final; and after decision, if not arrested by appeal to the head of the Department, he must (after correction or new survey when necessary), approve the survey and plat. And after such approval he must cause the issue of patent. These are ministerial and mandatory acts which follow at once, "as soon as" the final decision is reached—not before—and not as a part of such final decision. Manifestly the judgment of the appellate tribunal is also final; and if the Secretary requires a new survey conforming to specific boundaries, such requirement must be held to embody the law governing the Commissioner under which "a new survey and plat are made to conform to his direction," and upon which "he shall indorse" his certificate of approval. As to the survey itself, its execution becomes a mere ministerial act, requiring only practical knowledge and skill, without any discretion whatever in the officer who performs the service.

But it is said that this is a decision which the Secretary may recall, and by giving a new construction to a statute, or a different conclusion upon the effect of the evidence, he may change his award and set aside the former decision. Admit that he may do this arbitrarily and upon the suggestion of parties either prejudiced by or disposed to object to the decision made without any new facts or other reasons which would support a motion for review in a court of justice, and you at once reach an end of all stability and all value in the decisions of the Executive Departments, and open the barriers of well settled practice to the shifting opinions of whoever in the examination of a case may chance to discover or fancy that his predecessor in the inquiry, either himself or another, has erred in some point of judgment upon the matter confided to his discretion and decision.

But the rule of *stare decisis* is well known and recognized in this Department, and it is not necessary to restate the fact that a review of its decision will not be entered upon, except in accordance with the general principles governing rehearings, new trials, and bills of review in the courts. In the present case no foundation had been laid for requesting a review of the former decision. The matter in appeal came up on objections to the survey made in supposed conformity to the former decision—no attempt to vary the same therefrom having been

made by your office or the surveyor-general. It was a question of identification of established boundaries. Only the new matter arising in the case could properly be brought up by the appeal (12 Pet., 488; 5 Cranch, 316; 10 Wheat., 431; 7 Wheat., 58; 15 How., 466; 20 H., 481; 12 Wall., 129). See also, on the question of final decisions and review (1 Otto, 143 and 149; and 2 Wall., 525).

For further authorities respecting the power of one Secretary to review the decisions of his predecessor, see 13 Opins., 33; 14 do., 602; 14 do., 253; 2 do., 9; 13 do., 387, and cases there cited; 10 do., 457. See also the well-digested opinion of Mr. Secretary Chandler, of December 20, 1875, in case of the heirs of Murray McConnel (2 C. L. O., 149), and authorities therein cited. I may add that a marginal reference to the decision in question, in the opinion of the court in *Van Reynegan v. Bolton* (3 Otto, 33), indicates that in the judgment of that tribunal this was the final decision of the Land Department, previously mentioned as necessary to a determination of the case.

From the foregoing it is clear that whatever was decided in 1872 must stand unless within some rule of review or manifest reason it could be properly opened for revision. And this was what my predecessor himself decided. He says:

While I cannot concur in the conclusions reached by my predecessor that this grant as confirmed was a grant by boundaries and not of quantity, still that question was settled by his decision, and I find nothing in the case now which authorizes me to set it aside and adopt such a construction of the grant as I think should have been adopted when the case was first presented to the Department.

Then, without appearing to notice the exact import and scope of the decision of Mr. Secretary Delano, he proceeded to declare, as already cited, that your office erred in following the boundaries given by the Board, because those boundaries were (upon the theory that the grant was "of quantity") not confirmed by the district court.

But it is manifest that the construction given by the Secretary in 1872 extended to every portion of the decree of the court and found that it was an unqualified affirmation of that of the Board, and included all its findings. He says:

I am clearly of the opinion that the construction should be adopted which gives full force and effect to the action of the Mexican authorities as sanctioned by the Board of Land Commissioners.

And again:

The Assistant Attorney-General in his opinion (copy herewith) discusses at length the questions of law and fact involved in the case, and I fully concur in the conclusion at which he arrives.

What was that conclusion? The opinion says:

With reference to this decree of the Board there can be no controversy. The description of the land is simply perfect. The boundaries of the judicial possession are accurately described. * * *

This confirmed all the lands within the boundaries named. * * *

A careful consideration of the decree of the district court as a whole shows, I think, that the clause in question was not intended to limit and does not limit the general words of confirmation. * * *

The proviso was, in my opinion, intended to limit the amount of land finally confirmed to the exterior boundaries as given. * * *

I therefore recommend that the decision of the Commissioner be reversed, and that the surveyor-general be directed to make another survey, including the land within the boundaries particularly described in the decree of the district court by reference to the confirmation by the Board of Land Commissioners.

These are a part of the conclusions which "in full" were concurred in and made also a part of the Secretary's decision. As by settled construction the adoption of a document by stated reference in another requires them to be read as one, so this opinion must be read as part of the decision in the case; and so must the words "the boundaries particularly described by reference to the confirmation by the Board of Land Commissioners" be also read together as a part of the decree of the district court as construed by the said decision.

It follows that as to all matters in issue the decision in 1872 was intended by the Secretary as a final adjudication, and by this decision the boundaries "named"—and they are nowhere else named except in the decision of the Board—were considered as fixed by the decree and adopted by this Department.

In so far, therefore, as the decision of 1879 ignored that of 1872, at the same time professing to be bound by it and to follow it, such ignoring was error on the face of the record and open to review, either upon suggestion of the parties or by voluntary action of the Secretary. And it appears that he must have doubted the propriety of proceeding under his own decision, even after he had in form denied a review; for he suspended the execution of the order for survey, and finally left the whole question open by his indorsement already cited.

I am accordingly at liberty to do whatever he might have done upon the record before him; and having heard all the additional matters presented, I am at liberty to say that in my opinion the survey should have been examined as to its conformity to the directions of Mr. Secretary Delano, and if found to conform, your predecessor was required by the statute of 1864 to indorse upon it his certificate of approval. And as upon appeal it is the simple duty of the higher tribunal to direct the subordinate to do what he should have done in the first instance, all my predecessor had before him was the question of conformity to the order embodied in the previous decision, and judgment upon that question should have controlled the case.

Upon this view of the case I might simply direct that the decision of 1872 be followed and, upon the rule of *stare decisis* alone, vacate those of 1879 and 1880. But as my predecessor clearly expressed his belief that there was error in the decision of 1872, that the decree of the district court was one for quantity and intended to overrule and limit the

decree of the Board, I deem it proper to say that I do not concur in that opinion.

It is to be observed that by the decision of the district court it was "ordered, adjudged, and decreed that the said decision be and the same is hereby in all things affirmed," etc. The opinion of the court on which the decree was rendered had unqualifiedly asserted that this was one of the few cases where "every requirement of the law has been fully complied with," closing with the words: "A decree must therefore be entered affirming the decision of the Board of Commissioners." (Hoffman's Reports, 74). I cannot bring myself to the conclusion that the subsequent mention of quantity was more than a mere estimate; nor do I believe that the reference to the grant and map was intended to substitute them as the only guide to the survey without reference to the description by the Board, but conclude that they were mentioned as exhibits to lead to the actual lines on the ground already traced on the *diseño* described in the grant and defined by the Board. Any other conclusion would violate the decree affirming the decision of the Board "in all things," and compel us to regard it as in effect reversing the decree in all things except the naked fact of a one league grant with indefinite exterior boundaries, which would compel a surveyor to go back over all the ground traversed by the Board and find the location, by the Commissioners declared certain, in some other and uncertain locality, without the power to enforce testimony, and with no guide but the title papers alone, which had formed but a part of the evidence within the power of the Board to reach.

As the decision of 1872, in which I have also stated my own concurrence, requires a reference to the decree of the Board of Land Commissioners in making the survey, the boundaries therein are fixed by authority of the Department as well as the courts, and must be considered as controlling.

And I am the more ready to adopt this conclusion as it seems to be demanded by every principle of justice and fair dealing toward these grantees, some of whom, for more than a generation, have had their home upon the land excluded by the late ruling, and whose all is centered upon the spot. During all those years no question of its being within the grant had intruded itself upon the attention of this Department up to the time of final decision of 1872.

It was included in the Matthewson survey of 1858, had been partitioned among the heirs, and was recognized by all the authorities as a part of the grant. The only controversy was whether or not more land should also be included. This leaves nothing to be determined except the question of conformity to that decree as a matter of fact in the survey under consideration, as I do not consider the technical objection raised against the manner of its execution sufficient to impair the validity of the plat.

After careful examination of the evidence, I am satisfied that the questions of boundary have in the main been correctly decided; and whatever of uncertainty may exist is not sufficient to justify another expensive and prolonged attempt to remove. That the line of ordinary high-water mark is the limit of the grant upon its water boundary is clearly sustained by the authority of the *United States v. Pacheco* (2 Wall., 587) and numerous other cases. That the Point Taburon must be found at the water's edge is clear from the language of the decree. We follow "by the waters of said arroyo and the bay" to the Point, and, having reached it, we proceed "*thence* running along the borders of said bay." We cannot both reach and leave it by running along the bay and find it far inland in another locality.

But I do not concede that the phrase "along the borders of said bay" was intended to include islands therein, nor did it probably include what was laid down as such on all the maps and charts, and is even now called Peninsular island, though shown by this testimony to connect by a narrow causeway, not over 60 feet in width, with the main land. "Running along the borders of the bay" would the rather exclude this land situated far out in the water, and (unless intended to be indicated by a small circular tracing, claimed by some of the witnesses to represent a rock in the bay) not shown on the *diseño*. If so intended it is excluded; and, if not shown, it is not necessarily included in the call. I must, therefore, hold it as outside the grant, and direct that it be excluded from the survey, together with the other small island or peninsula now occupied as a military reserve by the United States.

The decisions of December 31, 1879, and May 3, 1880, are accordingly revoked, and that of your predecessor, as herein modified, is affirmed; and you will direct the survey and plat to be corrected accordingly.

ON REVIEW.

Reconsideration of decision of July 28, 1882, and direction to include, in survey, Peninsular Island and a small peninsular east of it, which were excluded by that decision.

Secretary Teller to Commissioner McFarland, January 31, 1883.

In the case of the private claim known as the "Corte de Madera del Presidio," heirs of Juan Read confirmees, I rendered a decision on the 28th of July last, directing a survey to be made in accordance with the boundaries fixed by the decree of the district court by reference to the description given by the decree of the Board of Land Commissioners.

In relation to these boundaries I was in doubt whether or not the peninsula called Peninsular island and another small peninsula to the eastward, near the point of the mainland, were properly included in

the calls for boundary, and I ordered them to be excluded. This doubt arose from an apparent failure on the part of the original claimant to show such peninsula on the diseño, the water-line of indentation not being carried up into the body of land sufficiently to mark the actual separation to the extent shown on the maps of the survey.

On the 4th of September last, B. S. Brooks, attorney for the claimants, filed a petition of Thomas B. Valentine, an assignee, for a portion of the claim embracing these tracts, asking a further examination of the matter, with a view to including them in the survey, on the ground that the diseño and evidence connected therewith show them to have been as matter of fact shown on the same and in the occupation of Read, the original grantee, and necessarily included in the decree of the Board.

At the time of the oral hearing before me I was in some manner impressed with the idea that the parties did not especially press their claim to the peninsula, and would be satisfied with its exclusion. Consequently I did not so thoroughly examine the evidence respecting the actual showing of the same upon the diseño as I otherwise should have done.

Having now made such examination I am relieved of all reasonable doubt, the contour of the diseño and the location objects adjacent to the land delineated as the claim being found to comport substantially with the fact of the inclusion of the peninsula, while its exclusion would render the map essentially inaccurate and unreliable. The failure to show the full extent of the indentation is explained by the fact that the diseño is, as appears on its face, a nautical chart, with the surroundings of the bay marked thereon, and evidently made at low tide, by Read, who was a sailor, and whose map or chart of the shore would be most likely to show the extreme outline of the land at low water, with a view to keeping his course around the point in the deep, permanent, navigable channel of the bay.

I am also in receipt of a motion, filed 27th ultimo, by J. W. and A. St. C. Denver, attorneys for Peter Gardner, for further modification, so as to exclude the marsh lands above ordinary high-water mark, and an argument in support of the same.

Mr. Gardner does not allege any specific interest, and the argument relates to the general subject, ostensibly in behalf of a number of purchasers from the State of California under her tide-land segregations, none of whom are definitely named or represented by the counsel.

I have, however, considered the general argument in connection with the protest of J. W. Shanklin, the State surveyor-general, and other papers accompanying your letter of November 10, 1882, and must decline to grant the modification prayed for.

You will accordingly direct the correction of the survey to conform to the decision of July 28, 1882, as herein modified, so as to include the two peninsulas heretofore excluded.

*PRIVATE CLAIM—CONTROL OF LOCATION.***RANCHO SAN JACINTO NUEVO Y POTRERO.**

Where a private claim for quantity, within exterior limits containing larger quantity, was ostensibly satisfied by a survey, and while so apparently satisfied the United States sold and patented lands within the exterior limits as public lands, which (the original survey of the private claim being set aside) were included in a new survey thereof: *Held*, on objections to said new survey on the part of said patentee, there being still ample space within the exterior limits to satisfy the private claim without including said patented lands, that it should be so satisfied, and new survey ordered accordingly.

Secretary Kirkwood to Commissioner McFarland, November 19, 1881.

I have considered the statements in your letter of September 17, 1881, from which it appears that, under the decision of the Acting Secretary of this Department on May 21, 1881, respecting the survey of the Rancho San Jacinto Nuevo y Potrero, you returned the survey of said rancho to the surveyor-general with directions to ascertain whether the larger tract, as located by the Thompson survey (being that then under consideration), was not within the boundaries of said rancho as described in the O'Farrell map of said survey, it appearing from the descriptive notes that the O'Farrell map was ignored in said survey. You state that the surveyor-general has made report to you, and that it is manifest (for reasons stated in your letter) that the Thompson survey of said rancho extends beyond and includes land on the north not embraced within the boundaries of the San Jacinto tract as designated on the O'Farrell map referred to in the decree of confirmation. You, therefore, suggest that the conclusions of the surveyor-general, that said survey fulfills the required conditions, is incorrect.

You also state that parts of T. 3 S., R. 3 W., S. B. M., including 12,800 acres thereof, which, with other parts of the township not included in the survey, amounting to 14,116 acres, are included in the Thompson survey, were sold and patented by the United States to Gustave Mahe, in 1870; and that there is ample space within the prescribed boundaries to locate and satisfy the quantity of land confirmed, without including the land so sold and patented. You also state that the location of the claim, as made by the Thompson survey, does not meet the requirement that the measurement be commenced from the line of juridical possession of Estudillo; and that a location of the tract so as to make it adjoin to a greater extent than at present the line of the Estudillo possession would conform it more nearly to the measurement directed by the decree of confirmation, and to the compactness of form required by the act of July 1, 1864.

In view of these statements you will give the proper directions for carrying them into effect, so that the lands surveyed may not embrace said patented lands, and shall also be within the lines of the O'Farrell survey.

PRIVATE CLAIM—RES ADJUDICATA.

RANCHO DE NAPA.

On application by parties in opposition to confirmee that patent issue to him on survey published under act of 1860, and approved by United States district court, (claiming the case to be within the Alisal decision), notwithstanding republication under act of 1864, had been ordered by Commissioner, and affirmed by Department: *Held*, that the case proceed before the surveyor-general in the usual way.

That, though the questions involved might be similar to those in the Alisal case, the confirmee should have the right to present his side, notwithstanding the decision in that case.

Secretary Teller to Commissioner McFarland, July 25, 1882.

I have considered the question of issuing a patent for part of Rancho Napa, confirmed to Otto H. Frank, upon the application of J. A. Robinson, esq., attorney for the estate of R. B. Woodard, deceased, submitted by your letter of May 17, 1882.

Under the act of Congress of March 3, 1851, the title to Rancho de Napa, in Napa County, California, was finally confirmed to Otto H. Frank and others, by the United States district court for the northern district of California. In October, 1858, a survey was made of the whole Rancho confirmed to Frank and others. This survey was approved December 19, 1859. At the same time, and by the same deputy, a survey was made purporting to exhibit the particular portion of the rancho to which Frank was entitled. This survey was approved by Surveyor-General Mandeville January 4, 1860. These surveys were not published, nor were they ordered into court until after the passage of the act of Congress of June 14, 1860. February 13, 1862, certain surveys were published by Surveyor-General Beale, successor to Mandeville; and among them the one to said Otto H. Frank. March 11, 1862, an order was made by the United States district court requiring the surveyor general to return into court the surveys above mentioned. In obedience to this order, May 5, 1862, Surveyor-General Beale filed a copy of these surveys in court. In April, 1871, an order of the court was made confirming these surveys, with certain modifications. It appears that in the proceedings in court Frank did not appear by attorney or take any part. On the 26th of March, 1878, Frank made a written application to the surveyor-general for a publication of the survey under the act of July 1, 1864, treating the proceedings in court and the publication of the survey under the act of 1860 as nullities, under the decision of the supreme court in *United States v. Sepulveda* (1 Wall. 104). This application was denied. On such refusal an appeal was taken to your office, and April 21, 1879, a decision was rendered overruling the opinion of the surveyor-general, and instructing him to proceed to publish such survey in accordance with section 1 of the act of July 1, 1864, and to transmit to your office a copy of survey and plat, with certificate

of publication as required by said act. On appeal from such decision to this Department your decision was, on the 20th day of September, 1879, affirmed. The surveyor-general, in compliance with such decision, advertised the survey as required by the act of July 1, 1864. Objections were filed by several parties against the survey, and a large amount of testimony had been taken before the making of the motion hereafter mentioned, and the case is still pending before the surveyor-general.

February 9, 1882, J. A. Robinson, esq., attorney for the estate of R. B. Woodard *et al.*, made application to your office for issue of patent of Rancho Napa—part confirmed to Otto H. Frank—upon the survey now before your office, alleging as ground of such motion that the case came within the late decision of this Department in the matter of the survey of Rancho Alisal. The motion was submitted by your office to the Secretary of the Interior for instructions, and March 1, 1882, you were instructed to—

Allow a limited period for showing cause why such application should not be granted, confining the argument to a showing of reasons, if any there be, why the same does not fall within the doctrine announced in my decision of January 4 last in the matter of El Alisal.

March 6 last you directed the surveyor-general to serve due notice of such instructions on all the proper parties, and notice that Frank, confirnee, or his attorney, Mr. Aldrich, be allowed thirty days from service of notice to show cause why the motion should not be granted. Such notices having been duly served, and the time on the part of Frank to show cause properly extended, on the 5th day of May last Mr. Aldrich, on behalf of Frank, confirnee, filed his reasons and arguments against granting such motion. His reasons, briefly stated, are:

That the case on the point involved in El Alisal has been before the Department on application of Frank for publication, and that the Department decided that the surveyor-general, and not the district court, had jurisdiction; that such has been the settled practice in this Department since the decision in Sepulveda case (1 Wallace, 104); that notwithstanding the decision in El Alisal may have overturned such practice, Frank should be allowed a full trial and hearing of the case as it now stands; that his case should not be summarily disposed of because of an adverse decision in another case; that the questions of jurisdiction should be decided by you, and if you held that a patent should issue under the late decision in El Alisal, Frank should have his right to appeal and argue the question before this Department; that great injustice will be done to Frank if the case is thus summarily disposed of and not heard upon its merits, and that the ruling of my predecessor in the Alisal case may not, upon a full hearing in this case, be sustained.

Upon a careful consideration of the question thus presented I am of the opinion that the case pending before the surveyor-general should be permitted to proceed in the usual manner, and if Frank, confirnee, desires to present the questions arising in his case, although they may

be similar to those in the Alisal case, he should have the privilege of doing so, notwithstanding the decision in that case. I therefore direct you to decline to issue the patent asked for in the application of February 9, 1882. You will please give notice of this order to the surveyor-general, and direct him to give proper notice to the attorneys of the parties interested.

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PRIVATE CLAIMS—SURVEY—PUBLICATION.

RANCHO MISSION DE LA PURISIMA.

Construction and application of the term "sobrante," as used in the decision of the Department of July 21, 1873, in the "Lompoc contest."

A survey approved by the surveyor-general is the *official survey* in the case, and must be published as such. A survey subsequently made and published independently of the former is invalid.

Whatever construction may be put upon the Lompoc decision, *the grant cannot be extended beyond the decree of confirmation.*

Survey directed to correspond with terms of decree.

Secretary Teller to Commissioner McFarland, July 19, 1882.

I have examined the case of the survey of the private land claim of Rancho Mission de la Purisima, on appeal from the decision of the Commissioner of the General Land Office of May 31, 1881, addressed to the United States surveyor general for California.

A brief history of the mission may be essential to a clear understanding of the questions involved in the case. The establishment of missions in remote provinces was a part of the colonial system of Spain. The Mission la Purisima was established in 1787. At that time Upper California was inhabited mainly by wild Indians. The object of this and other similar missions was to civilize and Christianize these Indians. As fast as they were converted they were gathered into villages and taught to labor, etc. The priests and other ecclesiastics exercised a temporal as well as spiritual authority within the territorial limits of the mission. But the missionaries and Indians did not own the lands within the limits of the mission. No title was recognized in them either by the government of Spain or Mexico. They had only a usufruct, an occupancy, and even that was liable to be terminated at any time by the will of the sovereign (*United States v. Cruz Cervantes*, 18 Howard, 555).

The early history of California shows that La Purisima as late as 1834 was in a condition of thrift, and its lands largely and actually occupied for the purposes of the mission. There were within its limits "900 neophytes, 15,000 head of horned cattle, 2,000 horses, 14,000 head of sheep, and harvested 6,000 fanegas (bushels) of cereals." (*Explorations of Oregon and California, by Mofras, vol. 1, p. 375.*)

The missions of California generally had no defined boundaries. The boundaries of the Mission La Purisima were not closely defined; the nature of the establishment and the purposes of its use only required

that the limits should be general; yet, from the testimony in the case, particularly the deposition of José A. Carrillo, the boundaries of La Purisima could be ascertained with reasonable certainty.

August 17, 1834, the Mexican government proceeded to secularize the missions of the Upper and Lower California.

Article 2 of the provisional regulations declared that "the missionary priests will be exonerated from the administration of temporalities, and will only exercise the functions of their ministry in matters pertaining to the spiritual administration" (Doc. No. 17, Thirty-first Congress, first session, p. 149), and thereafter, as was declared in *The United States v. Ritchie* (17 Howard, 525), the authorities dealt with these mission establishments the same as with any other portions of the public domain; the clergy, who previously had the charge and control of them, being confined to the spiritual government of the mission.

In 1841 La Purisima was, as a mission, both spiritually and materially, nearly in ruins. Within its limits were about "60 Indians, 100 head of cattle, 300 horses, and 3,500 sheep, and it had no missionary." In 1845 the departmental government, regarding La Purisima and some other missions as abandoned, after allowing thirty days to the Los Neofitos Indians to reunite for the purpose of occupying and cultivating the missions, and upon their failure to do so, caused public notice to be given that on the 4th day of December, 1845, in the city of Los Angeles, "the principal edifice of the Mission La Purisima, the two vineyards of Jalama, the lands and movable property belonging to the mission, excepting therefrom the temple or church," would be sold to the highest bidder. At such sale Don Juan Temple became the purchaser on the final bid of \$1,110. On the 6th of the same month, the governor, Pio Pico, executed to Temple a formal deed, which recited and declared, "by these presents, that the said Don Juan Temple is the legal owner of the edifice of the Mission of La Purisima, of the two vineyards, of the lands and movable property which was sold to him for the sum of \$1,110." It further recited that the purchaser should be "allowed to take juridical possession of the improvements, vineyards, lands, and movable property referred to, which shall be given by the respective judge." Juridical possession was never in fact given.

September 27, 1850, for the consideration of \$1,500 by an instrument in writing, Temple transferred his interest in La Purissima to Don Ramon Malo in the following words:

All the right and title that I may have by title or purchase in the Mission of La Purissima.

In November, 1852, José Ramon Malo petitioned the United States Board of Land Commissioners for confirmation of his title. This petition sets forth—

That he claims the principal edifice of the Mission of La Purisima, together with the lands and chattels thereunto belonging, situated in the county of Santa Barbara.

It further alleges, that since the conveyance to him by Temple, September 27, 1850, "he has been in peaceable possession, without the knowledge of any interfering claimant."

October 17, 1854, Malo asked and obtained leave of the Board that his petition—

Be so amended as to read, instead of the principal edifice of the Mission of La Purisima and the lands thereunto belonging, the principal edifice of the Mission de la Purisima, and the lands thereunto belonging, amounting to between two and three square leagues, having for boundaries the lines of former or previous grants, viz: Mission Vieja de la Purisima, Rancho Maria, Lompoc, Los Alamos, and Santa Rita.

Upon the hearing before the Board of Commissioners, Alpheus B. Thompson was examined as a witness, and his deposition is of some importance as bearing upon the extent of the grant, as it is referred to both in the opinion of the Board and in the decree of confirmation. He states that he is acquainted with the mission; that he knew it in 1831; that at the time of the sale to Temple—

There were some lands then belonging to the mission, and which were sold with the buildings. These lands were called the *sobrante* or lands then remaining to the mission after deducting the lands which had been granted. These lands (*sobrante*) I understood amounted to about two or three leagues.

Question. State more particularly in reference to the location.

Answer. The rancho of Lompoc, which comprises the old Mission of La Purisima, is situated about one mile south-southwest of the present mission building; the rancho of Santa Rita, belonging to Ramon Malo, is situated southeast of said mission, on the north side of the river Santa Ynez; the Ranchos of Todos Santos and Los Alamos are situated to the north of the Mission of La Purisima.

Upon the close of the hearing the following decree was made and filed December 31, 1855:

JOSÉ RAMON MALO }
 v. }
 THE UNITED STATES. }

In this case, on hearing the proofs and allegations, it is adjudged by the Commission that the claim of the said petitioner is valid, and it is therefore decreed that the same be confirmed to him.

The land of which confirmation is made is situated in the county of Santa Barbara, and is known as the principal edifice and lands of the Mission of La Purisima, to the extent of between two and three square leagues, excepting therefrom that portion of said premises which belongs to the church, and bounded by the Rancho of Lompoc, which comprises the old Mission of La Purisima, the Ranchos of Santa Rita, Todos Santos, and Los Alamos, reference being had to the original grant and the deposition of A. B. Thompson, filed in the case, for a more particular description.

The decree of the Board of Land Commissioners was taken by appeal to the United States district court, and at the June term, 1857, upon motion of the United States district attorney, the appeal was dismissed

and an order made that the claimant have leave to proceed under the decree of the commissioners as a final decree.

At this point in the history of the case the real controversy begins. The difficulty arises in ascertaining the amount and boundaries of the land conveyed by the deed of Governor Pio Pico to Don Juan Temple, and confirmed to José Ramon Malo.

For the purpose of executing the decree of confirmation, several surveys have been made.

The first was made in November, 1860, by Deputy Surveyor J. E. Terrell, and was approved by Surveyor-General Mandeville, April 9, 1861; it embraced an area of 14,927.62 acres. No publication of this survey was made. Surveyor-General Beale amended this survey in respect to its western boundary, extending that boundary from the "Low Hills," and "low, broken Chamisal Hills," described in the plat of the Terrell survey, to the eastern boundary of the Rancho Jesus Maria. This extension increased the area to 16,455.54 acres. The survey, as thus amended, was approved by Surveyor-General Beale, and publication thereof made by him, and upon transmission to the General Land Office in 1870 was held by Acting Commissioner Curtis, November 8, 1872, in the Lompoc contest, to have become final by such publication. From such decision an appeal was taken to the Secretary of the Interior, who referred the case to the Assistant Attorney-General, who held the publication defective, and that the survey was also in conflict with the Ranchos Lompoc and Mission Vieja La Purisima, in that it extended the southern boundary of La Purisima to the river Santa Ynez, when in fact the northern boundary of Lompoc and Vieja, as held by him, extended across and north of that river. This opinion being approved, and a further survey ordered, a new survey was made in November, 1874, by Deputy Surveyor W. H. Norway. This survey embraced a large quantity of land lying east of the west line of Santa Rita, and a triangular piece on the north, lying between Jesus Maria, Todos Santos, and La Purisima, as surveyed by Terrell, embracing an area of 34,012.56 acres.

The surveyor-general refused to advertise the survey so made, and ordered Norway to return to the field and modify his survey, which he did. This survey was duly advertised, as provided by the act of July 1, 1864.—(Surveyor-General Rollins' opinion, April 5, 1877.)

The Norway survey, as modified, corresponded with the Terrell survey as to its eastern and northern boundaries, and made the patented Rancho Jesus Maria the western boundary, and Lompoc and Vieja, as patented, the southern boundary, and embraced an area of 14,735.76 acres, leaving as public land the triangular piece above mentioned and the large parcel on the east.

Protests were made to this survey by claimants and settlers, and testimony was taken in behalf of all parties interested, and a hearing had before Surveyor-General Rollins, who transmitted the record with his

opinion in April, 1877. In this opinion he disapproves of the modified Norway survey, and recommends the adoption of the first Norway survey of 34,012.56 acres as the correct survey.

Upon examination made of the case in the General Land Office, the conclusion was reached that the first survey made by Terrell, in November, 1860, and approved by Surveyor-General Mandeville, April 9, 1861, embracing an area of 14,927.62 acres, was, according to the opinion of the Assistant Attorney-General and Acting Secretary, the official survey, and if found inaccurate should be amended, instead of a new survey being executed. That survey never having been advertised, the surveyor-general was, October 3, 1877, instructed to publish it, according to the act of July 1, 1864, and such publication was thereupon duly made.

Several objections to and protests against said survey have been made and filed in the office of the surveyor-general. The claimants of La Purisima object and allege:

1. That in the decision of the Lompoc contest La Purisima was held to be a *sobrante* grant; that the present survey is not of the *sobrante*, but only a small part thereof, and is not in accordance with such decision; that this survey was made long before the decision holding said ranch to be a *sobrante* grant; and that the survey of Rancho Lompoc was wrong, such grant never having been extended beyond the River Ynez, and that since the Department goes behind the decision in respect to La Purisima being a *sobrante* grant, the owners of La Purisima claim to the Ynez river.

2. The owners of the Ranchos Lompoc and Vieja de la Purisima protest because the survey overlaps and conflicts with their northern boundaries, as established by the patents issued therefor, and that the questions relating to such northern boundary have been fully examined and adjudicated by the Secretary of the Interior.

3. The owner of Rancho Jesus Maria protests because the survey overlaps the southeast line of said rancho as patented.

4. Certain settlers upon lands claimed by the owners of La Purisima, but included in said survey, protest against any change in said survey that would interfere with their pre-emption rights.

Such objections being made, a hearing was had before the surveyor-general, and testimony produced on behalf of the claimants of La Purisima, the owners of Ranchos Lompoc and Vieja de la Purisima and the settlers aforesaid, and Surveyor-General Ames transmitted the case to your office with his opinion, signed the 13th day of February, 1878.

The surveyor-general is of the "opinion that the survey under consideration is wrong in overlapping the Ranchos Lompoc and Mission Vieja de la Purisima," and that La Purisima is "necessarily limited by the northern boundary of Lompoc and Mission Vieja de la Purisima, as aforesaid," by the decision of October, 1873, and the patents issued. He is also of the opinion that the Terrell survey of 1860, under considera-

tion, correctly established the eastern boundary of La Purisima. He says:

The original grant of the Rancho Santa Rita establishes such line as its westerly boundary, and consequently limits the *sobrante* of Mission de la Purisima in that direction. . . . No objection having been filed against the north line of the Rancho Mission de la Purisima, as shown by the Terrell survey of 1860, and now last advertised, and the same being in conformity with the southern boundary of the Rancho Los Alamos, the same is no doubt the correct northern boundary.

The western boundary of the Rancho Mission de la Purisima, as fixed on the plat of the Terrell survey now advertised, does not extend to the eastern boundary of the Rancho Jesus Maria as patented, and the plat should be amended by extending it to such patented line of Jesus Maria, as has already been done on the amended plat of the Terrell survey, and in the Norway survey of June, 1875.

Supposing the lines and boundaries above described to be the proper limits of the (*sobrante*) Rancho Mission de la Purisima, then the survey of the same made by Deputy Surveyor W. H. Norway, in June, 1875, and approved by United States surveyor-general for California, January 14, 1876, is the correct survey and plat of the same.

The claimants of La Purisima insist that the decision of the Secretary of July 21, 1873, determined that the grant in question was a *sobrante* or grant, of what remained of the mission at the time of the grant, and that Temple by his purchase and grant took all the lands of the Mission La Purisima that remained after taking out the grants made prior to his purchase.

It will be seen upon a review of the facts that the grant in question was not claimed as a *sobrante* grant until after the decision of 1873. At the time of the public sale, in 1845, it was not described as a *sobrante* grant, nor is it so described by Malo in his petition for confirmation before the Board of Commissioners. In his amended petition the grant, as he claims it, is—

The principal edifice of the Mission de la Purisima, and the lands thereto belonging, amounting to between two and three square leagues, having for boundaries the lines of former or previous grants, viz: Mission Vieja de la Purisima, Rancho Maria, Lompoc, Los Alamos, and Santa Rita.

A large proportion of the lands now claimed as the *sobrante* lie outside of the interior boundaries of the above ranchos as they then existed.

The decree of confirmation is made as—

Bounded by the Rancho of Lampoc, which comprises the old Mission of La Purisima, the Ranchos of Santa Rita, Todos Santos, and Los Alamos, reference being had to the original grant, and the deposition of A. B. Thompson, filed in the case, for a more particular description.

The deposition of Thompson described the land as amounting to about "two or three leagues," and gives the Ranchos Lompoc, old Mission of La Purisima, Santa Rita, Todos Santos, and Los Alamos as boundaries. If the grant is limited by the surrounding ranchos as they were known at the time of the grant, and as since ascertained by actual survey, the

amount of land in La Purisima is about three leagues. The owners of La Purisima, construing it to be a *sobrante*, claim about eight leagues under the Norway survey of 1874, but in addition to that amount they claim a large tract of land bounded north by Rancho Guadalupe, east by Rancho Punta de la Laguna, south by Rancho Casmalia, and west by the Pacific Ocean; they also claim a very large tract lying entirely north of Los Alamos, making in all more than 20 leagues. La Purisima, regarded as a tract of about three leagues, inclosed and limited by the surrounding ranchos as their boundaries existed at the time of the grant, lies in a compact form; as a *sobrante*, in the sense claimed, there must be added to this compact piece irregular and detached parcels lying outside of the boundaries of the surrounding ranchos. These detached and irregular parcels were lands remaining after surveys were made and patents issued for grants other than La Purisima, lying within what is claimed to be the exterior limits of the Mission of La Purisima as granted in 1787. All the ranchos mentioned above described as boundaries of La Purisima have been surveyed and patented. The compact tract of La Purisima, comprising about three leagues is, I understand, occupied by its owners.

Malo, in his petition to the Board of Commissioners for confirmation, states that he has been in peaceable possession since the conveyance to him by Temple, September 27, 1850. The parcels outside of that piece are mainly occupied by settlers claiming under the pre-emption and homestead laws of the United States, and this controversy as to title is substantially between the claimants of La Purisima and the United States.

The southern boundary of the claim in question must be regarded as settled by the decision of this Department in the Lompoc contest, and the northern boundaries of Ranchos Lompoc and Mission Vieja de la Purisima, as patented in November, 1873, must be considered the southern boundary of the grant in question. The eastern boundary of Rancho Jesus Maria has also been settled and determined, and a patent was issued for that rancho in September, 1871; and that line must form the western boundary of La Purisima. Todos Santos was first surveyed to its exterior boundary on the south, and that line formed a portion of the north line of La Purisima as surveyed by Terrell in 1860. Todos Santos was confirmed for five leagues. It appears that as it was subsequently surveyed the piece known as the triangle was excluded from the first survey, and its north line extended into the south part of Rancho Punta de la Laguna.

The owner of Todos Santos, to avoid a contest with La Laguna on account of such extension on the north, accepted a patent for 20,772.17 acres (being 1,421.23 acres less than five leagues), still leaving out the piece embraced in the original survey lying in the southwest corner. No special claim seems to be made to this piece of land by the owners of La Purisima, and the disposition of it must be determined by the

same rule that governs the disposition of the large tract lying east of the west line of Santa Rita as granted to Malo.

The remaining and important question in the case is whether any lands should be included in the grant in question lying east of such west line of the Rancho Santa Rita, being the west line as patented, extended north to the south line of Los Alamos.

Prior to 1873 the owners of La Purisima had not made claim to any lands lying east of the west line of Rancho Santa Rita. They had contested the southern and western boundaries of their grant, and were endeavoring to extend the limits in those directions, or repel intrusions upon what they regarded as their territory by the owners of the grants lying on those boundaries; but it was not until after the decision of 1873 that any claim was made to lands lying east of the west line of Santa Rita. The first survey that included lands lying east of that line was the Norway survey, made in November, 1874, and embraced 34,012.56 acres. The largest amount embraced in any survey before that time was that constructed by Beale from field notes in June, 1862, and included lands in contest with Lompoc, Vieja de la Purisima, and Jesus Maria, and embraced 16,455.54 acres. The two large tracts, one lying upon the Pacific Ocean and the other north of Los Alamos, have never been included in any survey of La Purisima. Your predecessor was of the opinion that these two tracts, under the decision of 1873, hereafter mentioned, were included in La Purisima at the time of the sale to Temple, and that the claimants would be entitled to them but for the fact that they were not included in the petition for confirmation. Your predecessor bases this opinion, and also the opinion that the lands lying east of the west line of Santa Rita belong to the grant in question, upon the ground that by the decision of the Secretary of the Interior of July 21, 1873, "the La Purisima was a *sobrante* dependent for its boundaries upon the location of the adjoining ranchos."

I think the effect of that decision upon the question involved in this case will not bear the construction placed upon it by your office. It must be remembered that the extent, the quantity of land granted, and the particular character of La Purisima were not involved in the questions considered in that decision. The particular question under consideration by the Secretary in the "Lompoc contest," when he designated La Purisima as a *sobrante*, was to determine the northern boundary of Lompoc and Mission Vieja, as conflicting with La Purisima; whether the River Ynez constituted such boundary, or the range of hills lying north of the river. He finds that Lompoc was granted in 1837, long before the sale to Temple; that juridical possession was given; and that La Purisima, being a grant made subsequently to Lompoc, was a *sobrante* or grant of what remained, and must necessarily be limited by the boundaries of Lompoc as granted and settled by juridical possession. Such I understand to be the purport of that decision in that respect. Applying the facts and the reasons given in that decision to

the boundary line between La Purisima and Santa Rita, the effect of the decision would be to limit La Purisima to the western boundary of Santa Rita as granted, and as juridical possession was given.

The decision says that many grants had been made "from the lands of the La Purisima, among them the Lompoc, Mission Vieja, Santa Rita, Todos Santos, and Los Alamos. The residue was sold in the manner indicated, and then granted to the purchaser." It cannot be claimed that the Secretary meant by such language to hold that La Purisima could be extended beyond the interior lines or sides looking toward each other of the surrounding grants named by him. Whatever may have been said in that decision in respect to La Purisima being a *sobrante*, not called for in consideration of the questions then to be decided, must be regarded as *obiter dictum*, and not intended by the Secretary to designate the extent of La Purisima, and its character as a *sobrante* in the general acceptance of that term. It may be observed here that the Secretary expresses doubt whether, but for the act of confirmation, La Purisima ever had any valid existence. Referring to the grant to Temple, the decision says :

This was the only title that Temple or any one under him ever had from the Mexican government; if under that government it was of any validity whatever, which is doubtful, it was one of the weakest titles known to the law.

Taking the decision as a whole, and regarding the questions then under consideration, to hold that the Secretary intended to characterize La Purisima as a *sobrante* in the sense claimed, extending beyond the limits of the surrounding ranchos named by him, and embracing large tracts of land, vastly greater than the part lying within the boundaries of such ranchos, and some of them at great distances therefrom, would be doing violence to the language used by the Secretary and the manifest purport and intent of the decision, and yet such is the construction which your predecessor has placed upon it.

La Purisima was not described in terms as a "sobrante" in the sale and conveyance to Temple, or the transfer to Malo, nor in the original or amended petition for confirmation, nor in the decree of confirmation, except in the use of that term by Thompson in his deposition referred to in the decree "for a more particular description." It therefore becomes of some interest and importance to look into the meaning of the term as used by Thompson, and especially so since the claim of La Purisima to all the lands, except about three leagues, depends upon whether the claim is a *sobrante* in the broad interpretation of the term. Thompson, in his deposition, says :

There were some lands then belonging to the mission, and which were sold with the buildings. These lands were called the *sobrante*, or lands then remaining to the mission after deducting the lands which had been granted. These lands (*sobrante*) I understood amounted to about two or three leagues.

When asked for a more particular location he gives Rancho Lompoc as situated on the south of Santa Rita, "belonging to Ramon Malo" on the southeast, and Todos Santos and Los Alamos on the north. Thompson had been acquainted with La Purisima since 1831, and knew the surrounding ranchos. Within the limits of the ranchos he names (supplying Jesus Maria on the west and Mission Vieja on the south) we find about three leagues of land, the largest amount estimated by him as belonging to La Purisima, which he terms a *sobrante*. It is clear that Thompson by the use of that term did not suppose that it applied to any lands lying outside of the interior boundaries of the ranchos named by him, and evidently believed that there were no such lands belonging to La Purisima. It is clear that Thompson used the term in the same sense as did the Secretary in the decision of July 21, 1873. If he had intended to include in his term "sobrante" the large tracts lying outside of the ranchos named, he would not have limited the amount "to about two or three leagues." There is as much force in insisting that La Purisima is a "sobrante" in the sense claimed by its owners, under the Thompson deposition (since it is by the decree made a part of the description), as there is that it is a "sobrante" by the decision of 1873. I am aware that it is claimed that, by the decision of 1873, La Purisima is adjudicated to be a *sobrante*, but, as has already been intimated, there was not that identity of the subject matter under consideration which constitutes the first element of "*res judicata*."

Again, it is evident that, in any view of the case, the owners of La Purisima can take no more land than was petitioned for and confirmed by the Board of Commissioners.

The lands petitioned for are the lands belonging to La Purisima—

Amounting to between two and three square leagues, having for boundaries the lines of former or previous grants, viz: Mission Vieja de la Purisima, Rancho Maria, Lompoc, Los Alamos, and Santa Rita.

It is difficult to understand how the plain language of that petition can be construed to embrace several tracts of land in quantity many times greater than sufficient to answer the call, and lying outside of the interior limits of the ranchos named. Is it not clear that the petition asks for a compact parcel of land lying within the boundaries of the ranchos named, and embracing two or three leagues? It is manifest from the petition what land Malo believed he owned. If he supposed that he took by his grant some 90,000 acres of land, or upwards of twenty leagues, would he have limited the quantity to two or three leagues, or some 13,000 acres? Although permitted to amend his petition some nineteen months after filing the first, he, in both, claims the amount to be between two and three leagues. He also states in the petition that he has been in peaceable possession of the lands asked for since the transfer to him by Temple in 1850, which could not have been true as to the large amount of lands now claimed as a *sobrante*, and could only have been true as to the two or three leagues.

The decree of confirmation is for "the lands of the Mission of La Purisima to the extent of between two and three square leagues," bounded by the Ranchos Lompoc, Santa Rita, Todos Santos, and Los Alamos. It will be observed that in the petition the Rancho Todos Santos is omitted in giving the boundaries, but it is supplied in the decree, while in the decree Rancho Maria is omitted, as well as in the deposition of Thompson; but, taking the petition, the decree, and deposition together, La Purisima is bounded and inclosed completely by the adjoining ranchos.

As before suggested, whatever construction may be put upon the decision of 1873, the grant cannot be extended beyond the decree of confirmation. The amount of land may exceed three square leagues, but the quantity is limited by the lines of the surrounding ranchos as they existed at the time of the decree. In that sense, and in no other, can La Purisima be called a *sobrante*. It was a grant for all the lands inclosed within those limits; and the amount, as ascertained by actual survey, nearly corresponds to the amount named in Malo's petition, the decree of confirmation, and the deposition of Thompson.

The idea that La Purisima was a *sobrante* in any other sense than that mentioned above, seems to have originated in the misconstruction put upon the language used in the decision of 1873; and since then the claims for La Purisima have attained proportions that could hardly have been anticipated by the most sanguine claimants at the time of its confirmation, or before that decision.

As has been already intimated, the boundary of the grant in question must be limited by the western boundary of Santa Rita, as it was originally granted to Malo under that grant. Such line extended north to Los Alamos, and juridical possession of the grant was given to him on the 31st day of October, 1845, and it is recited in the record of the proceedings giving such possession that "he took the true, real, actual, and corporal possession"; that "he entered upon and passed over said lands, pulling up herbage, scattering handfuls of earth, breaking branches of trees, and making other demonstrations of the possession that he took of said lands." The amount of land conveyed to him, and of which he took possession, was three leagues and two hundred varas. The amount confirmed to him by the district court, southern district of California, at the December term, 1856, was "three square leagues, and no more."

Under the approved survey made in March, 1875, the surplus of the juridical measurement was taken out on the north, leaving a parcel of land of considerable extent between Santa Rita, as thus surveyed, and the southern boundary of Los Alamos. This parcel adjoins La Purisima, as surveyed prior to 1873, and is now claimed by the owners of La Purisima, together with the large tract connected therewith lying east and northeast of Santa Rita, under their claim of "*sobrante*."

It will be remembered that in the deed of La Purisima from Pico to Temple, juridical possession of the grant was directed and permitted, but was never given. This was a proceeding corresponding in its nature somewhat with livery of seisin under the common law, and was important, if not absolutely necessary, to complete the title; and failure to give such possession, taken in connection with the otherwise uncertain character of the grant, but for the decree of confirmation, might raise a grave question as to its validity.

In *Van Reynegan v. Bolton* (5 Otto, 33), decided several years after the decision of the Secretary before referred to, Mr. Justice Field, in considering the validity of like grants, says:

There was another proceeding to be taken, which was essential to the complete investiture of the title, and that was a formal delivery of the possession of the property by a magistrate of the vicinage, called, in the language of the country, the delivery of juridical possession. This proceeding involved the establishment of the boundaries of the tract, when there was any uncertainty respecting them. If these were designated in the grant, it required their ascertainment and identification; if they were not thus designated, it required the measurement of the quantity granted, and its segregation from the public domain. The regulations prescribed by law for the guidance of the magistrate in these matters made it his duty to preserve a record of the various steps taken in the proceeding; to have the same attested by the assisting witnesses, and to deliver an authentic copy to the grantee.

It was evidently intended that juridical measurement and possession should follow immediately after the grant. And yet such measurement and possession of the tracts now claimed as a *sobrante* would have been practically impossible, and could have been contemplated only in relation to the two or three leagues inclosed within the limits of the adjacent ranchos. The fact that the two vineyards of Jalama, contained in the sale and conveyance to Temple, were situated several miles distant from the principal tract granted, adds no force to the claim for other outlying tracts as *sobrante*. On the contrary, under the well-known rule of construction that where a particular thing is mentioned all others are excluded, the particular mention of the two vineyards would exclude the supposition that any other outlying tracts were intended to be included in the grant.

I am of the opinion that the west line of Rancho Santa Rita as originally granted, and as fixed by the act of juridical possession (being the west line of Santa Rita as patented, extended to the south line of Los Alamos as patented), must limit the grant of La Purisima in that direction, and such line constitute the eastern boundary thereof.

I am also of the opinion that the triangle lying upon the southwest corner of Rancho Todos Santos, as patented, must be excluded from the grant of La Purisima; and that in other respects, and in other directions, the grant of La Purisima is limited by the surrounding ranchos, as patented.

The modified Norway survey of June, 1875, embracing 14,735.76 acres, is therefore the correct survey, and a patent should issue in accordance therewith. This survey has been duly advertised, as provided by the act of July 1, 1864. (See opinion of Surveyor-General H. G. Rollins, April 5, 1877.)

The decision of your predecessor, directing that the Terrell survey be so amended as to include all the land between the Ranchos Todos Santos y San Antonio, Los Alamos, La Laguna, San Carlos, De Jonata, Santa Rosa, Santa Rita, Lompoc, and Jesus Maria, is hereby overruled.

PRIVATE CLAIM—SECOND PUBLICATION OF SURVEY.

RANCHO ARROYO DEL RODEO.

Where publication of the survey of a private land claim in California has been regularly made and certified to under the act of June 14, 1860, all parties are concluded, and patent should issue for the claim as surveyed. A subsequent publication under the act of July 1, 1864, is invalid.

Secretary Kirkwood to Commissioner McFarland, March 10, 1882.

I have examined the matter of the survey of the Rancho Arroyo del Rodeo, situate in Santa Cruz County, San Francisco district, California, on appeal by the confirmees from your predecessor's decision of April 2, 1881, holding that a patent should issue upon said survey.

The records of your office show that this rancho was granted to one, Francisco Rodriguez, July 28, 1834, by Gov. José Figueroa, as being "bounded by the town of Branciforte and the Rancho Shoquel. On May 12, 1854, said rancho was sold and conveyed by the grantee to Messrs. Juan Hames and Juan Danbenber (or Danbenbin), upon whose petition it was confirmed March 27, 1855, by the Board of Land Commissioners appointed pursuant to the provisions of the act of March 3, 1851 (9 Stat., 631), which confirmation was affirmed by the United States district court for the southern district of California, March 5, 1856.—

To the extent of one league in longitude by one-fourth of a league in latitude, and no more, within the boundaries called for in the grant and map to which the grant refers, to wit: One league in length by one-quarter of a league in width, and bounded on the South by the Sea, on the west by the Arroyo del Rodeo, and on the east by Arroyo Shoquel: Provided, That should there be a less quantity than one square league within the said boundaries, then confirmation is hereby made to such less quantity.

This decree became final upon the vacation by said court, at its December term, 1856, of its order allowing an appeal by the United States to the supreme court of the United States.

In November and December, 1858, a survey of said rancho was made by John Wallace, United States deputy surveyor, the boundaries of which, as shown by the official plat thereof, contained 2,353.32 acres,

but which, as approved by Surveyor-General Mandeville February 5, 1861, contains only an area of 1,473.07 acres. As thus diminished this rancho has for boundaries: On the south the Bay of Monterey; on the east the Arroyo Shoquel; on the west the Arroyo del Rodeo; and on the north, a due east and west line between said Arroyos, distant 210 chains and 68 links from a point on the bay aforesaid, indicated on said plat as "Post of United States Coast Survey," the same being the southernmost point of said rancho. The fact is clearly established by the certificate of Surveyor-General Mandeville, dated May 31, 1861, that notice of said survey, the approval of the plat thereof, and its retention in his office for four weeks subject to inspection, was published for that period pursuant to the requirements of the act of June 14, 1860 (12 Stat., 33); and it is also as clearly established by such certificate that no order for the return of said survey and plat to the United States district court was ever served upon him. Subsequently, however, upon the publication of said survey, under the provisions of the act of July 1, 1864 (13 Stats., 332), and within the period prescribed by the same, the confirtees filed objections thereto, alleging: (1) That it excludes lands that have been in the continuous possession of the said grantee, Francisco Rodriguez, and those claiming under him since the date of the grant of said rancho to him in 1834; (2) that it excludes land within the boundaries of the judicial possession; and (3) that it does not conform to the description of the land as confirmed.

The primal question to be determined is, did the publication of notice by Surveyor-General Mandeville of his approval of the Wallace survey, pursuant to the provisions of the act of June 14, 1860, render such survey final? The act of 1860 requires the publication of the survey to be made by the surveyor-general of California—

Once a week for four weeks in two newspapers, one published in Los Angeles, and one of which the place of publication is nearest the land, if the land is situated in the southern district of California; and until the expiration of such a time the survey and plat shall be retained in his office, subject to inspection.

In this case, as shown by the surveyor-general's certificate aforesaid, the requirements of the act in question were literally complied with by him in every essential particular, and this without intervention by any party in interest.

After the lapse of the period prescribed for retaining the plat and survey in the office of the surveyor-general, without intervention by any party interested (if the other preliminaries have been duly performed), there is no provision for making complaint or for correcting the result; and in such case, it seems to me, if any injury has been done, the only appeal left is to Congress.—(Opinion of Solicitor-General Phillips, March 10, 1873, in the matter of the California private land claim Guadalupe.)

This opinion was adopted by this Department March 26, 1873.

In such a case all parties are concluded; for the statute expressly directs "that the patent for the land as surveyed shall forthwith be is-

sued therefor," and further declares that "the said plat and survey so finally determined by publication shall . . . have the same effect and validity in law as if a patent for the lands so surveyed had been issued by the United States."

It has been invariably held that the date of approval should be regarded as the date of survey. The survey in this case was approved February 5, 1861, as aforesaid. It has been determined by the Department in the case of Corral de Piedra, June 26, 1867, and the opinion of Attorney-General Stanbery, under date of September 30, 1867 (12 Opin., 250), that a survey made after the passage of the act of 1860, and duly advertised and not taken into the district court, is final.

This opinion was adopted by this Department October 5, 1867. It was also held by my predecessor, Mr. Secretary Delano, in the case of San Bernabe, under date of February 10, 1872, "that a survey approved after the passage of the act of 1860 was such a survey as that act contemplated."—(Rancho Tajauta, 1 C. L. L., 548.)

Inasmuch as the certificate of the surveyor-general is in the usual form, and contains a sufficient statement of the facts showing publication of the notice of said survey in all respects conforming to the requirements of the act of June 14, 1860, and as none of the parties in interest intervened within the period and in the manner prescribed by the statute, I concur with you in the opinion that the subsequent publication of the Wallace survey in question was without authority of law, and null, and that a patent should issue upon said survey.

Your decision is accordingly affirmed.

PRIVATE CLAIM—SURVEY—JURISDICTION.

RANCHO LAS CRUCES.

The act of June 19, 1878, gave to the United States district court jurisdiction to hear and determine as to the *title* of the claimant, and to the Land Department the *final location* of the claim.

The survey was therefore properly published by the surveyor-general, and objections thereto filed before him by party in interest as contestant. Motion to dismiss the objections on the ground that the court had power to and did determine the location is untenable and overruled.

Commissioner McFarland to U. S. surveyor-general, San Francisco, California, July 13, 1882.

In the matter of the survey of the Rancho Las Cruces, confirmed to Vicente Cordero and others by decree of the United States district court for the district of California, under the special act of Congress of June 19, 1878 (20 Stats., 172), John Mullan, esq., of counsel for confirmees, on the 31st of January, 1882, filed in this office a statement

referring to the proceedings in said matter, claiming that said proceeding, as far as relates to determining the location of the confirmed tract, became final upon the rendition of the decree of the district court in the case, and that the action of your office therein in the publication of the survey, etc., was without authority of law and void; and thereupon moving that your office be called upon for a report as to its action in the premises, and to transmit copies of the papers in the case to this office for its "consideration and action," and instructed to suspend further proceedings in said matter until otherwise directed.

The motion of Mr. Mullan was granted, of which your office was advised on the 14th of February, 1882, and under date of March 2, 1882, transmitted to this office copies of the papers in the case, showing the proceedings that had been had therein.

These proceedings are now before me for consideration; William Leviston, esq., as attorney for Ramon de la Cuesta, having, under date of May 15 last, filed in this office an answer to the statement aforesaid of Mr. Mullan, and the latter on the 10th of June ultimo filed a reply thereto.

The act of June 19, 1878, under which the proceedings herein originated, by its first section permitted and authorized the claimants of the Rancho Las Cruces to present their claim to the United States district court for examination, and if found valid authorized the court to confirm it; *provided* that the quantity should not exceed 8,888 acres; that no land should be confirmed to which there were valid claims existing under the pre-emption or homestead laws, and that the confirmation should not affect any valid adverse rights, nor give to the confirmees any claim against the United States for compensation on account of any such pre-emption or homestead claims or adverse rights; and *provided further*, that the claimants before filing their claim should execute releases to all persons in possession under the pre-emption or homestead laws, which releases the court was required to see executed before confirmation.

The second section gave to the claimants the right of appeal to the supreme court of the United States.

The third section directs that the United States surveyor-general for California, upon the filing in his office a certified copy of the decree of confirmation, shall cause the claim to be surveyed as other claims of like nature are now surveyed under existing laws; and that upon the approval of the survey by the Commissioner of the General Land Office, a patent shall issue to the claimants in the usual form.

It appears by the papers returned that the claim was presented to the district court by the petition of the claimants, the United States appearing by J. E. Levett, esq., and that upon the hearing thereof the court found that at the date of said act there were no valid claims to said lands existing under the pre-emption or homestead laws, nor persons in possession of any of said land under valid claims under those laws or

other laws of the United States; that the claim was good and valid, and thereupon confirmed it to the petitioners by the following description :

The lands of which confirmation is hereby made are known as the "Las Cruces," situated in Santa Barbara County, and are bounded and described as follows: On the south by that portion of the Nuestra Señora del Refugio which is known as the "La Gavida," on the west by the Rancho San Julian, on the north by the Rancho Santa Rosa, on the east by the Rancho Nojoqui and the Cuchilla or ridge of Nojoqui, and on the southeast by a range of mountains; not to exceed within said limits 8,888 acres, reference being had to a survey of said Rancho Las Cruces, made by W. H. Norway, and delineated upon a plat filed in this case, marked Exhibit C, and hereunto annexed and made part of this decree.

On the 30th day of June, 1881, upon motion of the petitioners, the United States being represented, the court by further order, holding that by the provisions of the act the right of appeal was only given to the claimants, and that the proofs in the case would not justify an appeal by the United States in case the right of appeal existed by general laws, declared its decree of confirmation final, and directed the surveyor-general, upon the filing with him of a certified copy of said decree, to cause the claim to be surveyed with all convenient dispatch "as other claims of like nature are now surveyed under existing laws."

Thereupon it appears a survey was made under the direction of your office by United States Deputy Surveyor W. H. Norway, in August, 1881, and that the same was published, as required by the act of July 1, 1864 (13 Stats., 332), in October and November, 1881.

It further appears that within the time allowed by said act, Ramon de la Cuesta, appearing by Wm. Leviston, esq., his attorney, filed in your office objections to said survey, alleging that by himself and his grantees he had been in possession for the past twenty-two years of 631.11 acres of the land included therein, lying in the northern part of the surveyed tract, which was part of the Rancho Nojoqui, and purchased by the objector and his grantees, in good faith and for a valuable consideration, from the original Mexican grantees; that said survey is erroneous in that it includes the said land of the objector, which is not a part of the Rancho Las Cruces; that the northern boundary of Las Cruces, as shown by the grant, diseño, and decree of confirmation, is south of the land of the objector; with other grounds of objection not necessary to be here set forth.

To these objections the claimants interposed a motion, before your office, asking for their dismissal on the grounds, among others, in substance that they were not sworn to; that the facts of possession, occupancy, etc., alleged, should have been presented to the district court when the claim was pending therein; that the decree of the court was final as to title and boundaries, and the only question that could be raised was whether or not the survey conformed to the decision of the court, and that being undisputed, they asked that the objections be disregarded and the land patented according to the survey.

This motion on the part of the claimants having been overruled, the aforesaid motion of Mr. Mullan in their behalf was filed before this office; the relief sought thereby from the "consideration and action" of this office being, as understood, the dismissal of the contestant's objections and the carrying of the survey into patent under the decree of the court, as being conclusive in regard to the specific location on the ground, of the tract confirmed, as well as to the descriptive designation of the boundaries.

This claim on the part of the grant owners can only be maintained on the assumption that the act of July 19, 1878, empowered the district court to locate and determine *upon the ground* the specific limits of the claim, to the exclusion of the exercise of any control or discretion by the surveyor-general and by this office touching the location, as well as to pass upon and confirm the title.

I do not so understand nor construe the provisions of the act. By it the claimants were permitted to present their claim to the court for examination; and if, upon the hearing, it should appear that the claim was valid under Mexican law, the court was authorized to confirm it to the extent of quantity specified; valid claims under the pre-emption and homestead laws, and valid adverse rights being protected by the act.

The duty of locating the land confirmed by survey is, by the act, imposed upon the surveyor-general; who upon the production of the final decree of confirmation is directed to cause the claim to be surveyed "*as other claims are now surveyed under existing laws,*" and final approval of the survey by this office is required before patent can issue.

This provision contemplates and requires a survey of the claim by the surveyor-general *after the confirmation*; notice thereof by publication, and opportunity for parties interested to appear and contest the same before your office, as in like cases under the laws existing at the date of the passage of the act (see act of March 3, 1851, 9 Stats., 631, sec. 13, and act of July 1, 1864, 13 Stats., sec., 1 and 7).

The language of the act relating to the survey of the claim is so plain and direct that it would seem impossible to come to a conclusion differing from the above. And, besides, the necessity for the provision imposing the duty of making the location upon the surveyor-general and this office in the manner prescribed by the existing laws is as obvious as the conclusion that the act had that intention is unquestionable.

The act in prescribing the machinery for perfecting the claim in the confirmees contains no provision, as regards the proceedings in the district court, for the notification or summoning of parties having interests possibly in conflict with the claim. The contestant could have had no opportunity, and, having regard to the provisions of the act, was warned of no necessity for becoming a party to said proceedings. He was, therefore, guilty of no laches in that regard. The first opportunity he had to be heard in opposition to the location was upon the publication of the survey, of which he availed himself in due time.

The act of July 1, 1864, under which the objections are filed, does not require that they should be sworn to, but only "reduced to writing, showing distinctly the interest of the objector and signed by him or his attorney." They are in due form and entitled to be heard in the usual course of proceeding.

The allegation of the claimants in their motion paper, in allusion to the proceedings before your office, in substance, that it *is not disputed* that the survey conforms to the decree of confirmation is negated by the following objections of the contestant, which puts it directly in issue:

That it (the survey) includes the said land of objector which is not a part of said Rancho Las Cruces, but was a part of the Rancho Nojoqui. That the northern boundary of said Rancho Las Cruces, as shown by the grant, *diseño*, and *decree of confirmation*, is south of said land of objector.

It is not proper to decide or even examine, upon this motion, as to whether the survey conforms to the decree of confirmation or otherwise. In the view here taken that can only properly be determined upon the issue formed between the parties after they shall have had opportunity to present their proofs and be heard thereon in the usual manner.

The motion of the claimants to dismiss the objections of the contestant is denied, of which you are instructed to notify the parties, and, as soon as practicable, to complete the proceedings in the case, and make return of the same, with your report thereon, to this office.

PRIVATE CLAIM—REQUEST FOR INSTRUCTIONS.

VIGIL AND ST. VRAIN.

Commissioner McFarland to Secretary Teller, May 5, 1882.

An application has been made to this office for the delivery of the plat of survey approved August 6, 1878, by the surveyor-general of Colorado, being the evidence of title provided by the third section, act of February 25, 1869, Stats. 15, p. 276, in the case of the claim of Estefana Hicklin, one of the derivative claimants within the limits of the Las Animas grant, Colorado.

The facts in this case, briefly stated, are as follows:

By the first section, act of June 21, 1860, Stats. 12, p. 71, the claim No. 17, in the name of Cornelia Vigil and Ceran St. Vrain, was confirmed, not to exceed 11 square leagues to each of said claimants or 22 square leagues to both, amounting to 97,650.96 acres.

The tract granted embraced within its boundaries a much larger area than that confirmed, to wit, about 4,000,000 acres.

The second section of said act provided that in surveying this claim the location shall be made as follows, viz:

The survey shall first be made of all tracts occupied by actual settlers holding possession under titles or promises to settle which have hereto-

fore been given by said Vigil and St. Vrain, in the tracts claimed by them, and after deducting the area of all such tracts from the area embraced in 22 square leagues, the remainder shall be located in two equal tracts, each of square form, in any part of the tract claimed by the said Vigil and St. Vrain selected by them, and it shall be the duty of the surveyor-general of New Mexico immediately to proceed to make the surveys and locations authorized and required by the terms of this section.

Presumably for the reason that the grantees had disposed of the entire grant, and it was not practicable to comply with the above provisions of law as to survey, further legislation was necessary to determine the validity and extent of the claims of Vigil and St. Vrain, and all of the derivative claimants; therefore Congress passed the act of February 25, 1869, in which it was provided that all claimants (the original grantees and those who had title from them) should "establish their claims to the satisfaction of the register and receiver of the proper district."

Under this act 39 claims of different tracts of land were presented to the register and receiver at Pueblo, Colorado, for adjudication, and on the 23d of February, 1874, they made awards in 13 claims, amounting to 97,614.53 acres, as follows:

	Acres.
Charles Autobeas	686.17
Norton W. Welton	760.00
Joseph B. Doyle's heirs.....	1,924.49
Helen N. McCormick.....	200.00
George F. Streeter	160.00
George W. Schofield.....	3,593.06
Henry W. Jones.....	5,752.40
Estefana Hicklin.....	5,118.72
Wm. W. Bent's heirs	2,085.51
B. B. Field and Wm. Kronig	322.63
John M. Francisco & Henry Daigre.....	1,720.00
Romalda Luna Boggs.....	2,040.00
William Craig.....	73,251.55
	97,614.53

It will thus be observed that these awards, with the exception of 36.43 acres absorbed the 22 square leagues confirmed.

In some cases in which awards were made as well as those that were rejected appeals were taken from the action of the register and receiver to this office. A question, however, was raised as to its jurisdiction to try these cases upon their merits, it having been claimed that the action of the register and receiver was final, and on October 14, 1874, a decision was rendered here in favor of jurisdiction, which was affirmed by the Department October 27, 1874, and upon a motion for reconsideration again decided in the affirmative January 23, 1875.

It appears, however, that this matter was brought to the attention of the President who referred the question to the Attorney General, and that officer, May 15, 1876, rendered an opinion to the effect that an appeal did not lie from the action of the register and receiver which was final under the statute, and on the 2d day of March, 1887 President

Grant issued the following order in the claim of Col. Wm. Craig, one of the derivative claimants, viz :

In accordance with the opinion and recommendation of the Attorney General upon the questions submitted to him the Commissioner of the General Land Office is directed to instruct the surveyor-general of Colorado to deliver to Col. William Craig an approved plat of the land adjudged to him by the register and receiver of the Pueblo land district in that State, dated February 23, 1874.

In accordance with this order plats were prepared, approved, and delivered in the following derivative claims: William Craig, George W. Schofield, John M. Francisco & Henry Daigre, Charles Autobees.

(In the claims of Craig, Schofield, and Francisco & Daigre, patents also were issued under sec. 2447, Rev. Stats. U. S.)

In the claims of the heirs of Wm. W. Bent and Estefana Hicklin approved plats are on file in this office. These plats were prepared, approved, and transmitted here, in pursuance of instructions from this office, but were subsequently suspended on account of the decision of Judge Dillon in United States circuit court, for the district of Colorado, July term, 1878, in the case of Thomas Leitensdorfer v. Wm. L. Campbell, United States surveyor-general, and William Craig, which was communicated to this office August 21, 1878.

In the decision referred to, the court held, in substance, that parties affected thereby had the right to appeal from the awards of the register and receiver, and consequently that the opinion of the Attorney-General, upon which the President's order aforesaid was founded, was erroneous, and if this view of the said act of 1869 should be sustained upon a final decision in this case, and followed by the Executive, it would reopen at least such cases as had not been finally adjudicated under the order of the President.

It is contended in this case that as the plat had been prepared and approved under instructions from this office, and in the manner provided by the said act of February 25, 1869, which makes the plat of survey in this class of cases evidence of title, this Department has no further jurisdiction over the matter, and that the plat should be delivered under the principles announced in the decision of the Supreme Court of the United States in the Thomas McBride case, decided at the October term, 1880.

While this may be true, and the claimant is entitled to the plat referred to, yet as the case is without precedent, and if decided affirmatively by this office would not reach the Department, as the question presented is solely between the United States and claimant, and consequently there would be no appeal, I deem it proper to ask for instructions as to what course should be pursued in the premises.

The papers transmitted are—

1. Order of the President, March 2, 1877, claim of William Craig.
2. Copy of office instructions dated June 24, 1878, in claim of Estefana Hicklin.

3. Plats of claim of Estefana Hicklin.
4. Copy of decision of Judge Dillon, rendered at July term, 1878, of United States circuit court, district of Colorado.

IN SAME CASE.

Review of facts reported and direction that evidence of title of the tract awarded to her be issued to Mrs. Hicklin.

Secretary Teller to Commissioner McFarland, June 12, 1882.

The claim of Estefana Hicklin, one of the derivative claimants within the limits of the Las Animas grant, Colorado, for a delivery of the plat of survey approved August 6, 1878, by the surveyor-general of Colorado, has been considered by me.

The grant in the name of Cornelio Vigil and Ceran St. Vrain, designated as No. 17, was for 922 square leagues, about 4,000,000 acres.

June 21, 1860, Congress confirmed the grant to the extent of 22 square leagues, 97,650.96 acres, to both claimants (12 Stats., 71).

The act (Sec. 2) provided that in surveying and locating the confirmed grant, all tracts occupied by actual settlers, holding possession under titles or promises to settle, theretofore given by Vigil and St. Vrain in the tracts claimed by them, should be first surveyed, and after deducting the area of all such tracts from the area embraced in the 22 square leagues, the remainder should be located in two equal tracts in any part of the tract claimed by Vigil and St. Vrain. And it was made the duty of the surveyor-general of New Mexico immediately to proceed to make the surveys and locations authorized.

A further act was passed, February 25, 1869, (15 Stat., 275), which provided that all claimants should "establish their claims to the satisfaction of the register and receiver of the proper district"; and that upon the adjustment of the claims according to the provisions of the act, the surveyor-general should furnish proper approved plats to claimants, which should be *evidence of title*, the same to be done according to instructions to be given by the Commissioner of the General Land Office.

You inform me that, under the provisions of the act before stated, 39 claims of different tracts of land were presented to the register and receiver for adjustment, and that, February 23, 1874, they made awards in 13 claims, amounting to 97,614.53 acres, thus absorbing the 22 square leagues except 36.43 acres.

That appeals from the decision of the register and receiver in some cases in which awards were made and upon some of the rejected claims were taken to your office.

It was claimed, however, that the determination of the register and receiver was final under the provision in the act before referred to, and that no appeal would lie from their decision.

The Commissioner held otherwise, and upon an appeal being taken to the Secretary the decision was affirmed October 27, 1874.

And again upon a reconsideration of the question in an opinion of great length, given January 23, 1875, the Secretary held that this Department had jurisdiction, and would entertain the appeals.

The matter being brought to the attention of the President, it was referred by him to the Attorney-General, who, May 15, 1876, gave an opinion that an appeal did not lie from the determination of the register and receiver to the Commissioner of the land office (15 Opinions, 94) and recommended that the Commissioner of the General Land Office be instructed to direct the surveyor-general to deliver to Craig an approved plat of the land awarded to him by the register and receiver.

Accordingly, March 2, 1877, the President issued such order, and in compliance therewith such plat was prepared and delivered to Craig, and, probably in view of such opinion and action, plats were also prepared and delivered to George W. Scofield, John M. Francisco and Henry Daigre, and Charles Autobées, whose claims were allowed by the register and receiver, followed by patents to all of such claimants except to Autobees.

The patents seem to have been unnecessary, since the act before referred to made the approved plats "evidence of title."

You inform me that in pursuance of instruction from your office, plats were prepared, approved, and transmitted in cases of the adjusted claims of the heirs of Wm. W. Bent and Estefana Hicklin, and are now on file; that the delivery of these plats was suspended because of the decision of Judge Dillon, Judge Hallett concurring, rendered in the United States circuit court for the district of Colorado, at the June term, 1878, in the case of Thomas Leitensdorfer, complainant, *v.* William L. Campbell, United States surveyor general, and William Craig, defendants. A demurrer to the original bill had been interposed and sustained at the July term, 1877, of said court, by Mr. Justice Miller and Judge Hallett with leave to amend.

Thereupon a supplemental bill was filed, and again demurred to by the defendants severally. The demurrer was sustained as to the surveyor-general, upon the ground that he was an improper party, but overruled as to defendant Craig. Judge Dillon is of the opinion that the complainant had the right to appeal from the decision of the register and receiver, rejecting his claim, and from the decision establishing Craig's claim, and that the opinion of the Attorney-General to the contrary was erroneous; that the court would relieve derivative claimants of the Vigil and St. Vrain grant, under the act referred to, from evidences of title procured by fraud; that while the approved plats remained in force it is not within the power of the Commissioner or of the Secretary to hear and determine the appeals because the delivery of the plats passed the legal title, and with it all control of the executive department over the title (*Moore v. Robbins*, 96 U. S., 530); that

under the acts relating to the Vigil and St. Vrain grants it was contemplated that the validity and extent of the claims of Vigil and St. Vrain and of derivative claimants showed he decided by the executive instead of the judicial department; that the courts could only interfere in the results of executive action when such results had been procured by fraud or the denial of plain legal rights; that if the approved plats were set aside, and the courts could go no further, the executive department would be free to act and hear and decide the appeals, and perhaps could be compelled to do so by mandamus; but that by issuing the plats the executive department had disabled itself from hearing the appeals; and that in many of its aspects the case was wholly without a precedent, and grave doubts existed as to what the court ought to do upon a final determination of the case.

I am advised that in July, 1880, said court, after a hearing upon pleadings and proofs, made a decree setting aside the decision and award in favor of Craig, made by the register and receiver upon the ground that it was procured by fraud, and declaring the patent and plats issued to him void and of no effect. The decision is likely to be reviewed on appeal taken to the supreme court, but the effect of the present decision may be to open the whole question as to the rights, claims, and locations of the derivative claimants, and to this Department the matter of finally determining and settling all the claims and equities of the derivative claimants may yet be referred.

The particular instruction which you ask of me is, whether the approved plat embracing 5,118.72 acres, in the case of Estefana Hicklin, shall be delivered to her.

No question has been raised as to the right or equity of the award made to her. She took an appeal from the decision of the register and receiver, complaining that the amount awarded to her was too small (she claims she had improved and occupied 12,000 acres); but an acceptance of the plat of the amount awarded would of course be a waiver of the appeal, and probably a release of any further claim. It does not appear that complaint as to the award made to her has been made by any one else. The proofs set forth in the award show that she has been in occupation, actually residing on the land, since 1859 or 1860, and she was only awarded the tracts improved, cultivated, and actually built on, and such other tracts as were indispensable to the enjoyment of the portions actually cultivated and built upon.

It does not follow, because the award to Craig was procured by bribery and fraud, that the other awards were necessarily tainted. A presumption of fraud for that reason alone could not be raised. The claims were entirely distinct, and not dependent at all upon the same proofs. Corruption in a judicial officer proved in one instance does not affect his adjudications in other cases.

If any inference as to other claimants can be drawn from the alleged corrupt action of the register and receiver in Craig's claim, it is that

their claims were cut down or thrown out in order to make room for his, which, as claimed, exceeded the whole amount confirmed by Congress.

It may not be of any advantage to Mrs. Hicklin to receive the plat, in view of the questions existing in the courts, but an award has been made to her, under the act of Congress before mentioned, which has not been set aside, and I am not informed that any proceedings are pending for such a purpose. An approved plat has been made under instructions from your office, and is now ready to be delivered. The act of Congress provides that upon the adjustment of the claims "it shall be the duty of the surveyor-general of the district to furnish proper approved plats to said claimants."

I am of the opinion that you should deliver the plat in question to the claimant, Estefana Hicklin.

PRIVATE CLAIM—FRENCH GRANT—CONFIRMATION.

BRADISH JOHNSON.

Grants made by the representatives of France, after the cession of the Province to Spain, were void, unless recognized by Spanish authority subsequent to the cession, and before the transfer by Spain to the United States.

There is no authority of law empowering the General Land Office to adjudicate affirmatively and declare claims under foreign grants, to be held by *complete title*, in effect to confirm the same. Parties relying upon such grants must assert and defend their claims, if assailed, in the courts.

Commissioner McFarland to register and receiver, New Orleans, La., June 2, 1882.

In the matter of the claim of Bradish Johnson it appears that the claimant presented his notice and sworn statement to the former register and receiver at your office, alleging a complete French grant by D'Abbadie, director-general, etc., to François Vignette, *alias* Pantin, of 30 arpents front by 40 arpents in depth on the west side of the Mississippi River, in the parish of Plaquemines, 17 arpents front of which were confirmed by the Board of Commissioners for the eastern district of the Territory of Orleans to Honoré and Michel Duplessis; and claiming the remainder of said 30 arpents, embracing sections 14 and 15 in T. 17 S., R. 26 E., southeastern district of Louisiana, as held by him by complete title under said grant and under the decision of the Department in the Malines case, not requiring confirmation; but that—

Since the government has cast a cloud upon his title, by allowing the property covered by it to be represented on the official plat of survey as unconfirmed and liable to be treated as public land, he deems it proper to ask a formal recognition of the above-described grant to François Vignette, etc.

The former register and receiver reported the claim as if presented under the act of June 22, 1860, as No. 7, of class 1, according to the clas-

sification of claims prescribed by said act, without, however, recommending it for confirmation, but expressing the opinion—

“That there is no further action of the government required than to place the same upon the official plats, as other complete grants requiring no confirmation.”

Appended to the claimant's notice and statement of claim is a copy of the grant to Vignette, with a translation of the same; but no abstract of title nor evidence in support of the same, other than said grant to Vignette.

Regarding the claim as presented under the act of 1860 and the material defects above referred to appearing in the record, the transcript was returned to your office on the 13th of August, 1880, with instructions that the claimant be notified and given opportunity to supply the deficiencies, by presenting an abstract of his title and evidence to support the same. It was also suggested that he might avail himself of the provisions contained in the second section of the act of June 10, 1872 (17 Stats., 378), relating to proof of continuous possession in connection with proof of title if able to do so.

Under date of November 10, 1881, the transcript of the record was returned from your office with the following additions certified thereto:

A letter of Albert C. Janin, attorney for claimant, accompanied by three affidavits, in which the affiants severally depose that Bradish Johnson and his grantor, George W. Johnson, have had continuous possession of the property known as the Woodland Plantation, situated on the right bank of the river Mississippi, in the parish of Plaquemines, State of Louisiana (not otherwise identifying said plantation as composed of, or embracing, the land claimed), one since the year 1838, one since May, 1840, and the other since 1849 and 1850.

Mr. Janin states in his said letter that no confirmation of the title by the United States is needed to protect the claimant in his possession; and that all that he, as counsel for the claimant, asks is that official notice be taken of the fact that he claims the tract by virtue of a grant made before the date of the treaty of cession and that he be not interfered with by any attempted exercise by the government of the right to disposal thereof.

Though the application was reported under the act of 1860, it did not, either originally nor as amended, comply with its requirements; nor is the action asked for and recommended by the former register and receiver contemplated by its provisions. That act required that claimants should file with their notice “the evidence in support of *their claims* . . . together with a brief abstract of the title of *the claimant*.” These material requirements could only be answered by an abstract *showing title in the claimant*, and evidence establishing the same.

The act of June 10, 1872, allows proof of continuous possession by claimants, and those from whom they derive title, from the date of the cession of the territory to the United States (April 30, 1803) in substi-

tution for proof of title; but the affidavits produced only show possession back to 1838, at furthest.

The forms prescribed by the act under which the claim was ostensibly presented not having been observed, and neither the proof of title in the claimant required by that act, nor the substituted proof of possession allowed by the act of June 10, 1872, produced, the claim could not be favorably reported by this office to Congress for its action, if that were desired, even if the original grant could be held to confer complete title on the grantee.

If the action asked for came within the province of this office the defects in the claimant's proof would prevent it being taken. Suppose a complete grant to Vignette; the question presented is, what right has the claimant established under or in connection with it? The answer must be, none whatever. Though the grant may have been complete as to Vignette, and invested him with absolute title, it is not shown that he had, as far as relates to the land herein claimed, succession or representation; it may therefore have reverted to the government having the right of sovereignty; and whether so or not the claimant fails, indeed makes no attempt, to connect himself, by proof, with the Vignette title; and the presumption could hardly be justified that, because the land was granted to Vignette in 1764 without specification or proof of time or manner, it became the property of the claimant.

The cession of Louisiana by France to Spain took place November 19, 1762. Grants made by the representative of France after the transfer have been held by the Supreme Court of the United States to be void unless confirmed by the Spanish authority before the cession by Spain to the United States (*United States v. D'Auterive*, 10 Howard, 609; *United States v. Pelerin et al.*, 13 Howard, 9). The grant to Vignette comes within these decisions, having been made under French authority in 1764, and there being no pretense of proof that it was ever confirmed or recognized by Spain.

The claimant in his statement refers to proceedings before the Board of Commissioners for the eastern district of the Territory of Orleans, as showing confirmation of 17 of the 30 arpents to the Duplesses under the grant to Vignette, on the ground that said grant gave a complete title. The report of the Commissioners is as follows:

It appears that Francis Vignette, from whom the claimants derive title, obtained from the French government, on the 19th day of July, 1764, a complete title to 30 arpents front on the river, of which the present claim is a part. Confirmed.—(Am. State Papers; Gales and Seaton, Vol. II, p. 322.)

The seventh section of the act of June 22, 1860, provides, in case of a claim presented for confirmation under the act, which had before then been presented to any Board of Commissioners under authority of Congress, that "the facts reported as proved by the former Board shall be taken as true *prima facie*."

The section *in terms* only applies to claims presented *for confirmation* under the act which is not the character of the present application; confirmation in the manner provided for by the act not being sought. But without having regard to this distinction it is seen that the only *fact* reported as found by the Board, which has connection with the present claim, is that Vignette obtained from the French government a *complete title*. From the particular reference to the date, etc., it is evident that the proof of title presented to the Board was the Vignette grant; and it is clear that the *prima facie* character given to it as proof by the report of the Board, under the section quoted, is nullified by the subsequent decisions of the supreme court holding corresponding grants void.

I am not aware of any provision of law empowering this office to adjudicate affirmatively, and in effect to *confirm* claims of this character and presented as in this case (however complete the origin of title claimed may be), which is really the action now asked for. It is presumed that parties claiming under foreign grants as conferring complete titles not requiring confirmation, must assert and defend their claims if assailed in the courts having jurisdiction, as in other cases. If brought in question by conflicting claims arising under the land laws of the United States, the Department charged with the execution of those laws must necessarily consider and determine the questions arising, so far as to designate the status of such claims in their relation to claims under foreign alleged complete unconfirmed grants.

For the reasons herein set forth, the claim of Bradish Johnson in question cannot be recognized in the manner requested.

18 ID 64

PRIVATE CLAIM—ACT OF FEBRUARY 5, 1825.

JAMES AND DENNIS QUINNILTY.

The proviso that no claim confirmed by said act should exceed in quantity one square league applies to *all the claims* reported by the register and receiver for confirmation, and embraced in the act; and is not limited by their recommendation that the claim, in class six (in which the claim in question is included), be limited in quantity to one mile square.

The Quinnilty claim having been surveyed for 5,876.74 acres (125.76 acres less than the maximum quantity confirmed), and so represented on the township plat, patent should issue for the quantity surveyed.

Secretary Teller to Commissioner McFarland, April 4, 1883.

I have considered the matter of the private land claim of James and Dennis Quinnilty for a certain tract of land alleged to contain a square league of land, situate on the island Piscadaire, Red River, in T. 11 N., of R. 10 W., late southwestern district, Louisiana, on appeal by one of the parties in interest from your office decision of January 15, 1872,

holding that the claim was confirmed for one section, or 640 acres of land only.

It appears that this claim is designated as No. 323, in class 6, in the report of the register and receiver at Opelousas, La., dated December 30, 1815, to wit:

James and Dennis Quinnilty, heirs of John Quinnilty, claim a tract of land one league square, situated on the island Piscadaire, on Red River, in the county of Natchitoches, bounded on the north by land known by the name of Wallis' Old Place. The evidence of José de la Vega, aged fifty-nine years, taken the 28th December, 1813, states that John Quinnilty settled on the land upwards of twenty years ago, and continued to inhabit and cultivate the same for twelve years, since when it has remained vacant. Deponent knows of no grant for this land which lies within the jurisdiction of Nacogdoches, the commandant of which place usually granted lands from one to two leagues square. This deponent, as collector for the church at Nacogdoches, recollects having receiving (ed) tithes from said Quinnilty, the produce of said land.—(See American State Papers, Public Lands, Vol. 3, p. 176.)

The register and receiver, in recommending said class of claims for confirmation by Congress, state that the same ought to be—

Confirmed, pursuant to the first section of the act of Congress of the 21st April, 1806, for the quantity claimed, or within the acknowledged and ascertained limits of the same, not exceeding one mile square, or 640 acres.

The first six classes of claims, including the one in question, as designated in said report, were confirmed by the act of February, 5, 1825. (4 Stat., 81), which provides as follows:

That all claims to land embraced in the report made by the Commissioners appointed for adjusting the titles and claims to land in the western district of Louisiana, upon the thirtieth day of December, 1815, and recommended by them for confirmation, be, and the same are hereby, confirmed: *Provided*, That no person or persons shall be entitled, by any one claim, to a greater quantity than one league square under this act.

The decision in question holds in this connection as follows:

From the foregoing it is conclusively shown that the confirmation of the class of claims to which the one under consideration belongs was for a quantity not to exceed one mile square, or 640 acres, the proviso in the confirmatory statute being applicable to claims recommended for confirmation by the Commissioners other than those embraced in class six.

And that the approved survey of the premises must therefore be reduced to an area containing one section, or 640 acres.

The said party in interest (*pro se, et al.*) urges, however, that some time, about the year 1832 (or shortly after the passage of the act of March 3, 1831, (4 Stat., 492), creating the office of surveyor-general of Louisiana), the claim was regularly surveyed pursuant to the orders of the surveyor-general of Louisiana, the plat thereof approved, and the claim designated thereon as section 37, T. 11 N., R. 10 W., containing:

5,876.74 acres, or a square league of land; that during the interim of the passage of the confirmatory act and the date of the decision in question—nearly fifty years—the United States has expressly and tacitly recognized the claim as valid, segregated from the public domain, and confirmed to the full amount claimed, or for one league, and so delineated upon said plat in your office, the local office, and the surveyor-general's office. That “as shown by the certificate of the clerk and recorder of Natchitoches Parish, where the land is situated, it has been, during the time named, the subject of transactions of every description incident to private ownership, to the amount of near \$50,000.”

The records of your office show that the claim has been surveyed, and it is represented on the approved township plat as containing 5,876.74 acres, or 125.76 acres less than a square league, which contains 7,056 arpents, or 6,002.50 acres.

It should be observed that the report of the register and receiver was expressly submitted “for the revision of Congress,” as will be seen from the purview thereof, to wit :

“The register of the land office and the receiver of public moneys of the western district of the late Territory of Orleans, now State of Louisiana, have the honor to report their decisions and opinions, *for the revision of Congress*, on the following claims to land within said district.”

Such report consists of a concise recital of facts coupled with a recommendation or expression of opinion touching the action that should be had thereon, subject, however, to Congressional “revision,” *i. e.*, re-examination or correction. Indeed, one of the duties expressly imposed upon the several Boards of Commissioners, as created by the fifth section of the act of March 2, 1805 (2 Stat., 324), was the submission of their decisions or opinions on all claims filed with the register in conformity with the provisions of the fourth section of said act, to wit, “which decisions shall be laid before Congress in the manner herein directed, *and be subject to their determination* thereon.”

While Congress doubtless accepted the facts as recited, it cannot be presumed to have adopted such opinion as of course, because it merely subserved the purpose of a suggestion, which Congress, in its discretion, adopted or corrected as it deemed advisable. Albeit Congress only confirmed the said six classes that were recommended for confirmation by the report in question, it should be observed, nevertheless, that while none of them were so recommended for more than 640 acres, Congress did not adopt such recommendation, but, on the contrary, expressly disregarded the restrictive feature of the same by substituting “one league square” as the maximum area of claims confirmed under this act, in lieu of the “one mile square or 640 acres” suggested by said report.

The patent intent of Congress, as expressed by the proviso in question, is, that all claims recommended for confirmation are confirmed for

the quantity claimed, upon the condition precedent that such quantity shall not exceed "one square league"

In order to sustain the converse of the foregoing proposition, it would be necessary either to interpolate some such words as "are hereby confirmed *as recommended*," or to eliminate the proviso; because otherwise the same would be in direct conflict with the purview of the act, which would render the former nugatory or inoperative.

It is a fundamental rule that invariably obtains in the construction of statutes that the legislative intent is to be ascertained from the statute itself, unless the language be so ambiguous as to render such construction unreasonable or impracticable.

Every day I see the necessity of *not* importing into statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulties. (Per Patterson, J., in *King v. Burrell*, 12 A. & E., 468.)

In the case of *Newhall v. Sanger* (92 U. S., 761), it was strenuously urged by the learned counsel that the word "lawfully" should be imported into section 6 of the act of March 3, 1853 (10 Stat., 246), by which lands claimed under Mexican or Spanish grants were reserved from pre-emption and sale until final decree upon title, but the court in passing upon this question said:

"It is said that this means *lawfully* claimed; but there is no authority to import a word into a statute in order to change its meaning."

This rule of construction is elementary, and indorsed by all text writers. (See *Potter's Dwaris*, 199, *et seq.*)

Passing from these considerations to another, which necessarily brings under review the second point of objection to the holding that "the proviso in the confirmatory statute being applicable to claims recommended for confirmation by the Commissioners *other than* those embraced in class 6," I am constrained to the opinion that there is nothing in the purview of the statute, either in the enacting clause or in the proviso, to justify such presumptive construction.

In *United States v. Dickson* (15 Peters, 165), the court say:

We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exceptions must establish it as being within the words as well as within the reason thereof.

As matter of fact, it will be observed that while the various claims embraced in the six classes recommended for confirmation are for manifold quantities, the Quinnilty claim in question is the only one for the specific quantity of *one league square*. In view of this fact, and of the further fact that the report in question recommended no claim *in any of the classes* for a quantity more than about one-half a league square, and none in class six for more than one mile square—of all wlie reof Congress

was presumably cognizant—it would seem to be imputing a vain intent or an act of supererogation on the part of that body in enacting said proviso if the same were to be a dead letter, negatived by the recommendation in question.

I think, therefore, that the proviso undoubtedly applies *generally* to all claims confirmed by said act, and that it is merely an expression of the sense of Congress that no claim should be confirmed for “a greater quantity than *one league square* under this act.

Inasmuch, therefore, as this claim is for a tract of land containing 5,876.74 acres, or 125.76 acres less than the maximum quantity confirmed by said act, I am of opinion that patent should issue in the name of James and Dennis Quinnilty for the premises as claimed by them.

Your office decision is accordingly reversed.

DONATION—RESIDENCE—SETTLEMENT—PATENT.

JUAN RAFAEL GARCIA.

The object of the donation act (June 22, 1854) was to secure the permanent settlement and occupation of the country as speedily as possible by a substantial residence upon the tracts selected by it.

Residence and settlement were required to be contemporaneous. Settlement upon the tract claimed as donation, as well as residence within the territory, must therefore have commenced within the time limited in the act, *i. e.*, January 1, 1858.

As, in this case, though residence commenced prior to 1853, settlement was not made until July 1, 1871, the claim cannot be approved for patent.

Secretary Teller to Commissioner McFarland, November 23, 1882.

I have considered the donation claim of Juan Rafael Garcia, certificate No. 228, for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 29, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 32, T. 22 N., R. 33 E., N. M. P. M., submitted for my approval under act of Congress of July 22, 1854 (10 Stat., 308).

Section 2 of said act is as follows, viz:

That, to every white male citizen of the United States, or every white male above the age of twenty-one years who has declared his intention to become a citizen, and who was residing in said Territory prior to the first day of January, eighteen hundred and fifty-three, and who may be still residing there, there shall be, and hereby is, donated one quarter-section, or one hundred and sixty acres of land. And to every white male citizen of the United States, or every white male above the age of twenty-one years who has declared his intention to become a citizen, and who shall have removed or shall remove to and settle in said Territory between the first day of January, eighteen hundred and fifty-three, and the first day of January, eighteen hundred and fifty-eight, there shall in like manner be donated one quarter-section, or one hundred and sixty acres, on condition of actual settlement and cultivation

for not less than four years: *Provided, however,* That each of said donations shall include the actual settlement and improvement of the donee, and shall be selected by legal subdivisions, within three months after the survey of the land where the settlement was made before the survey; and where the settlement was made after the survey, then within three months after the settlement has been made; and all persons failing to designate the boundaries of their claims within that time shall forfeit all right to the same.

The proofs submitted show that Garcia resided in New Mexico prior to the 1st day of January, 1853, and has since continued to reside in such Territory, and in all respects possessed the necessary qualifications to become a donee under such act. He entered upon and took possession of the land in question July 1, 1871, and had resided thereon continuously from that time to the time of making his proofs, January 8, 1881, and had made the necessary cultivation and improvement upon the land.

The township plat was filed in the local office October 9, 1880.

The single question presented by the case is, whether the selection should have been made and the actual settlement and cultivation been commenced by the 1st day of January, 1858.

I am informed that most of the claims under this act on file in your office show settlement and cultivation begun and ended within the last eight or nine years.

The question, therefore, has an importance beyond the single case under consideration.

Some light to aid us in the construction of this statute may be found by referring to the condition of New Mexico at the time of the passage of the donation act.

Courts will take judicial notice of the condition of the country and of titles to land at the time of the passage of the act. (*Lamb v. Davenport*, 1 Saw., 609.) And the rule is specially applicable in the administration of the laws in this Department relating to the public lands.

The treaty of Guadalupe Hidalgo was concluded February 2, 1848.

At the time the vast country composing New Mexico was organized into a Territory, in 1850, it contained about 60,000 white inhabitants, most of them peacefully engaged in raising stock and cultivating the soil. For several years before the passage of the donation act the country had been in an unsettled and suffering condition. The Comanche and Apache Indians, the two largest tribes in the Territory, "were as actively hostile to the Americans as they were before the country occupied by them became a part of the Union." They, especially the Apaches, had been robbers from the first knowledge of them, as early as 1694.

For several years the average number of sheep stolen by them had been 100,000 each year, besides large numbers of mules, horses, and horned cattle. In 1852 and 1853 these depredations, accompanied with the killing of the inhabitants, were appalling; and "regions once

inhabited by a peaceful and happy population, and the fertile valleys they tilled, were reverting to the condition of a wilderness."

To protect this country and parts of Texas adjacent to it, full two-thirds of the whole Army was required and was maintained there at great expense. A considerable number of the soldiers, to the neglect of their proper duty as soldiers, went into quarters and engaged in cultivating corn and in other agricultural pursuits, in order to provide food for the Army. (Bartlett's United States Explorations in New Mexico, vol. 2, page 384, *et seq.*)

It was of the greatest importance, therefore, that this vast country so thinly settled, and subject to such depredations, should be speedily and permanently occupied, and its resources, especially those of an agricultural character, developed. And the object of the donation undoubtedly was to induce the persons then in the Territory to remain there, and to induce others, within the time specified in the act, to go there to reside and settle.

If only residence, without selection and settlement of the land within the time specified, was required by the act, then all those persons residing there January 1, 1853, and still there at the time of the passage of the act, and those who became residents by the 1st day of January, 1858, could have left the Territory and returned at any time during the lifetime of such persons and claimed the donation. And residence once having been acquired the selection and cultivation, within the allotted limit of human life, might have, in many instances, been postponed forty or fifty years. It seems incredible that such could have been the intention of the act, and yet these claims under consideration must all be based upon such a construction.

I do not see how by construction the residence can be separated from the selection and settlement. I think it was contemplated that the fact of residence and settlement should be contemporaneous. The act, speaking of the persons not then resident, says, who "shall remove to and *settle* in said Territory.

If the land can be claimed so many years after the required residence, much difficulty must arise in proving the fact that residence was acquired within the time limited, and it would open a door to much mischief and fraud.

The reasons why settlement and cultivation should be commenced within the time specified in the act, are even stronger than that residence should be acquired within that time.

The mere fact of residence, often unsubstantial and indefinite, and especially so in such a country as New Mexico was at that time, would not accomplish the intents of the act.

The plain object of the donation was to secure the permanent settlement and occupation of the country as speedily as possible, and that object could be best attained by a substantial residence upon tracts of

land selected and defined which would be the homes of the settlers and of their families, and to which they would be attached and aroused to defend by the interest of a present property, and which by cultivation would supply the wants of the country.

Residence separated from settlement and cultivation might be *bona fide*, and yet be of short duration; united with settlement a definite period of time was secured.

The act says that there shall be donated to the persons then residing, or removing to the Territory within the time specified, 160 acres, on condition of actual settlement and cultivation for not less than four years. Was this contemplated settlement and cultivation to proceed at once, or could it be made at any period during the life-time of the donee?

If it could be held in these cases that the grant to all persons, under this act, possessing the necessary qualifications, and having complied with the act as to residence, was a grant *in presenti*, and vested the title in such persons in fee simple, subject to be defeated only by a failure to perform the conditions as to settlement and cultivation, then, perhaps, there being a present estate, settlement and cultivation might be postponed, and a way found to the approval of these claims.

Lands under the Oregon donation act of September 27, 1850, have been the subject of numerous decisions in the Federal courts.

In *Adams v. Burke*, 3 Saw., 415; *Wythe v. Haskell*, *ib.*, 574; *Chapman v. School District*, 1 Deady, 108; *Lamb v. Davenport*, 1 Saw., 609, it was held that the Oregon act transferred a present title in fee simple, subject to be defeated by a failure to perform the conditions as to settlement and cultivation. But in all those cases settlement was begun within the time required by the act for acquiring residence.

In the case, however, of *Hall v. Russell* (101 U. S., 503), arising under the Oregon donation act, it was held that the title to the soil did not rest in the settler before the conditions had been fully performed; that although the language of the act was appropriate to express a present grant yet there could be no present grant without a grantee actually in existence, and fully qualified at the time of the passage of the act, to take the grant; and if the "law making the grant indicates a future grantee, and not a present one, the grant will take effect in the future, and not presently."

The paramount question in the construction of these grants is, however, what was the intent of Congress?

In the case of the Missouri, Kansas and Texas Railway Company *v.* Kansas Pacific Railway Company (97 U. S., 491), Justice Field says:

It is always to be borne in mind that in construing a Congressional grant the act by which it is made is *law*, as well as a *conveyance*, and that such effect must be given to it as will carry out the intent of Congress.

I think it was the intent of Congress, in the passage of the New Mexico donation act that all selections should be made under the act, and settlement and cultivation be commenced by the first day of January, 1858, that being the limit of the time within which the necessary residence could be acquired.

These claims do not seem to be represented by counsel, and no reasons are presented why they should be approved.

If these settlers have in good faith settled upon and cultivated these lands under a misapprehension of the meaning of the act, they may be entitled to relief, but it is not in the power of this Department to grant it under the donation act in question. It is quite probable that under the pre-emption and homestead laws meritorious claimants can obtain adequate relief.

I must decline to approve for patent the claim of Garcia submitted to me.

DONATION—HOMESTEAD—RELINQUISHMENT.

JESUS MARIA RAEL.

Claimant having relinquished his right under the donation act and requested permission to make entry of the land under the homestead law, his donation claim is canceled, and instructions will issue as to the manner of application to enter under the homestead or pre-emption laws.

*Commissioner McFarland to register and receiver, Santa Fé, New Mexico,
March 2, 1883.*

I am in receipt of your letter of the 2d ultimo, inclosing duplicate donation certificate No. 317, issued at your office January 19, 1882, to Jesus Maria Rael, upon notification No. 437, for the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, and W. $\frac{1}{2}$ NW. $\frac{1}{4}$ Sec. 9, and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 4, T. 7 N., R. 28 E., N. M. P. M.

Upon said duplicate Mr. Rael has executed a relinquishment of all his right and title to the land under the act of July 22, 1854, and he requests permission to enter the same tracts under the act of May 14, 1880, relating to homesteads, with credit for fees and commissions already paid.

The donation claim above described has therefore this day been canceled upon our files and records, and you will make proper annotations upon your records, advising the claimant of the action taken.

You will receive further instructions as to the manner in which the claimant may apply to enter said land under the pre-emption or homestead laws, etc.

Until further advised, you will permit no person to initiate a claim of any character to the tract embraced in said canceled donation certificate.

DONATION—SETTLEMENT—CERTIFICATE.

SISTO RAMIREZ.

Settlement not having commenced until after January 1, 1858, claimant is not entitled to donation; and having acquired no interest under the donation act, relinquishment is not necessary.

No certificate having been issued the claim cannot be docketed in the General Land Office, and the land appears on the tract books as vacant.

If, therefore, the claimant possesses the proper qualifications, he may protect his improvements by making entry of the tract under the homestead or pre-emption laws.

Commissioner McFarland to register and receiver, Santa Fé, New Mexico, April 4, 1883.

I am in receipt of your letter of the 23d ultimo, inclosing a duly executed relinquishment by Sisto Ramirez, of all "right and title" to the SE. $\frac{1}{4}$ Sec. 12, T. 5 N., R. 23 E., as a donation claim under the act of July 22, 1854.

It appears that you declined to receive the fee tendered in this case, and issued no certificate; but forwarded the papers here on September 22, last, for examination.

The party filed his notification, No. 150, in your office, February 21, 1878. He swears—and his witnesses also—that he resided upon and cultivated the land from February 1, 1876, to August 9, 1882.

In a supplemental affidavit executed September 16, 1878, Mr. Ramirez sets forth that the date of settlement given in his original affidavit, and in his proof was a mistake; that the true date is February 21, 1878; that he did not take possession of the land described prior to that time, etc.

You stated in your letter of September 22, 1882, that said supplemental affidavit was not satisfactory to your office.

The question as to whether settlement was commenced in 1876 or 1878, has now become immaterial. Under the Department decision of November 23 last, in the case of Juan Rafael Garcia, settlement and cultivation must have been commenced on or before January 1, 1858, to render the claim valid in its initiation.

There is no necessity, therefore, for the relinquishment of interest made by the party. His claim is invalid, and is hereby *rejected*; and you will so note upon the papers herewith returned, to be retained upon your files.

As no certificate has been issued in the case, this rejected claim cannot be docketed upon our record of New Mexico donations; and the proper tract-book shows the land described to be vacant and subject to entry, so far as the returns from your office have been received and posted.

If, therefore, Mr. Ramirez possesses the legal qualifications of an entry-man, has not exhausted his rights, and is in actual occupancy of

the land, he can protect his improvements by applying to enter the tract in question, in the usual manner, under either the homestead or pre-emption laws; and you will so notify him.

PRIVATE CLAIM—CORRECTION OF SURVEY.

TOWN OF CHILILI.

A survey made under instructions given upon an erroneous translation of original title papers, etc., ordered to be corrected.

Secretary Kirkwood to Commissioner McFarland, July 21, 1881.

I have considered the matters set forth in your letter of July 22 instant, respecting the survey of the Chilili town grant, in the counties of Bernalillo and Valencia, N. Mex. It appears that on March 8, 1841, certain persons petitioned the civil and military governor for a grant of certain described land, and that on March 20, 1841, said governor directed a named official to place the petitioners in possession of the land asked for, in accordance with the boundaries named by them. On March 29, 1841, this official directed that the petitioners be placed in possession of said land, that the boundaries be established, and that each one be given lands according to his means of cultivation, and that the running springs and heads of streams were to be well cared for as belonging to them. It does not appear from the original record that juridical possession was ever given in compliance with these directions.

On December 17, 1856, this claim was presented to the surveyor-general of New Mexico for examination and report, in accordance with the act of July 22, 1854 (10 Stats., 308). It was favorably reported by him in September, 1857, and was confirmed by the act of Congress of December 22, 1858 (11 Stats., 374), as the claim of "the town of Chilili;" and the survey thereof was made by United States Deputy Surveyor Clements, and approved by Surveyor-General Wilbur November 8, 1860, according to certain lines set forth in your letter. On February 12, 1875, your office held this survey defective, for reasons named, and directed a new survey, which order was affirmed by this Department on September 7 following, with the further direction that, if upon survey it be found that a straight line would run south of and exclude the town of Chilili from the grant, the line be so modified as to include the town, for, as stated, "it cannot be possible that the Pueblo grant would exclude the town." Surveyor-General Proudfit being in doubt as to the manner of executing the survey in regard to the town of Chilili, under said decision, asked instructions from your office, which were given him specifically on December 9, 1875.

In February, 1877, a new survey was made by United States Deputy Surveyors Sawyer and McElroy; and, in April following, the attorney for the grantees advised the surveyor-general that the directions for

said new survey had been given under a misunderstanding arising from a mistake in the translation of the original grant, and asked for a new translation thereof. The surveyor-general, however, approved said survey, and on July 10, 1877, transmitted the same to your office.

No further proceedings appear to have been had in the case until August 30, 1880, when the said attorney transmitted to the surveyor-general a protest adopted at a public meeting of the inhabitants of said town, accompanied by sundry affidavits, all of which were transmitted for the action of your office, on December 21, 1880. The reasons for said protest and the allegations in said affidavits are fully set forth in your letter, and were enforced by an argument filed by W. C. Hill, esq., attorney for said town, in March last, who, in view of said protest and allegations, asked that a new survey be directed, in order to obviate said objections; and on April 2 last your office directed the surveyor-general to cause an examination to be made touching said matters, after notice to the town authorities and all parties in interest, and to take testimony respecting them. This duty was performed by United States Deputy Surveyor Willison, who made due report. In view thereof, and of the testimony submitted, and of the corrected transcript from the records of Bernalillo County, of the Chilili grant, which varies from the copy in possession of the surveyor-general when the claim was adjudicated, in this, that, in the description of the boundaries, where it reads in the original copy "from west to south," in the corrected copy it reads "north to south," thus causing an error in the former survey; and in view, also, of the recommendation of said Deputy Surveyor Willison, approved by the surveyor-general, and of your suggestions, and as no objection is made to a further survey, I direct that the survey of Sawyer and McElroy be set aside, and that the granted tract be located by a new survey, with the following boundaries, viz: At the northeast, the brow of the Cibolo, at the point where it faces the surveyed tract, and where the two lateral lines will unite to form the northeast angle; at the south, the spring of Los Casos; the spring to be included; and on the two sides, from the northeast to the southwest points aforesaid, the sharp edged hills of the cañon; the lines to be run along the dividing ridges on the two sides of the cañon; being substantially as shown on the diagram of Deputy Surveyor Willison, except as to the spring of Los Casos, which should be included in the survey, it appearing that it was the intent of the order for juridical possession to give the petitioners control of the water supply of the cañon, which spring was one of the principal sources thereof. A survey by these boundaries will, as stated by you, exclude on the northwest and southeast considerable tracts included in the first survey; also on the southeast a portion of that included in the Sawyer and McElroy survey, and will include the source of the water supply of the cañon, the old and new towns of Chilili, and the former and present cultivated fields and improvements of the inhabitants.

PRIVATE CLAIMS—DELIVERY OF PATENT.

CAÑON DE SAN DIEGO.

Where the title is in litigation, and opposing parties claim the delivery of the patent, it will be retained until the ownership of the land is judicially settled; but, if essential for purposes of the litigation, it may, on stipulation of the parties, be delivered to a responsible person to be held in trust for, and finally delivered to, the one legally entitled thereto.

Commissioner McFarland to U. S. surveyor-general, Santa Fé, Mexico.
March 20, 1882.

Referring to your letter of January 23 last, relating to the delivery of the patent for the "Canon de San Diego" grant; also to your letter of February 16, ultimo, on the same subject, I have to say: It is shown by the record that the patent was issued to Francisco Garcia and nineteen others named therein, the original grantees, "and those claiming under or through them"; and that on the 27th of October, 1881, the patent was transmitted to you from this office "for delivery to the party or parties legally entitled to the delivery thereof."

It now appears from your letters aforesaid that different parties claim the delivery of the patent, each contesting the right of the other to receive it; but that both fail to connect themselves by evidence with the title of the original grantees, and therefore to establish their right of ownership under or through them. Also, that a suit in partition is pending in the district court, in which the question of title will be judicially determined.

Though the possession of the patent could give but little advantage to one not holding the legal title, the uniform practice should be maintained and delivery only made, as heretofore directed, to the party or parties legally entitled thereto; and if no one applies who can establish that claim, you will retain the patent until the ownership of the land covered by it shall be judicially ascertained and settled.

If, however, *delivery* appears to be essential for purposes of the pending litigation, you are authorized, on stipulation placed in your possession to that effect, by the parties claiming to be interested, to deliver the patent to a responsible person, to be selected by you, to be held in trust for and finally delivered to the party or parties who shall be ascertained to be legally entitled thereto.

PRIVATE CLAIM—CONFIRMATION—GRANT.

ANTON CHICO.

Confirmation not recognized as being to the town of *Anton Chico*.

Justice would be done by following the terms of the grant or judgment rather than by having regard to the mere style of the case, and patent should issue to Manuel Rivera and others, being the thirty-six men, etc. Direction accordingly.

Secretary Teller to Commissioner McFarland, February 19, 1883.

I have considered the matter of the land claim known as *Anton Chico*, Santa Fé district, New Mexico, on appeal alleged to have been

presented in behalf of the claimants under Manuel Rivera from your decision of August 10, 1881, holding that confirmation is to the "town of Anton Chico," and that patent should so run.

The record shows that the claim was presented to the United States surveyor-general of New Mexico in accordance with the provisions of the eighth section of the act of Congress approved July 22, 1854 (10 Stat., 309), and was finally reported by him to Congress, and thereby confirmed as No. 29 by the third section of the act of June 21, 1860 (12 Stat., 71).

I am of opinion that substantial justice would be done to all parties in interest by following the terms of the grant or judgment recorded rather than by having regard to the mere style of the case or description of the papers therein, and that patent should issue accordingly, citing the grant as in terms following: To Manuel Rivera and others, being the thirty-six men to whom the grant was made by Facunda Nulgares, governor, May 2, 1822, their children, heirs, successors, and assigns, as in said grant provided, and which was confirmed as private land claim No. 29 by act of Congress, entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860, subject to all the provisions and conditions mentioned and set forth in the decree granting said tract of land as aforesaid, and the record of juridical possession and other documents accompanying the same, and made part of the report of William Pelham, surveyor-general of New Mexico, on the 15th of July, 1859, and to the rights of all persons claiming under said provisions and conditions.

Your decision is accordingly reversed.

PRIVATE CLAIM—CONFIRMATION—BOUNDARY.

RAMON VIGIL GRANT.

Where "mountains" are made the boundary of a grant, the foot or base (unless otherwise expressed) is intended and must be taken as the limit of the claim.

Commissioner McFarland to U. S. surveyor-general, Santa Fe, New Mexico, April 10, 1883.

I have examined the case in the matter of the survey of the Ramon Vigil grant, being private land claim No. 38, New Mexico, in connection with the protest of Thomas A. Hayes, claiming to be the present owner of the granted tract, against the survey of the same as approved and returned by you.

The grant which is the foundation of the claim originated in a petition by Pedro Sanchez to the governor and captain-general of New Mexico, soliciting the grant of a piece of vacant land, which he described as follows:

The boundaries being on the north the lands enjoyed by right by the Indians of the Pueblo of San Ildefonso; on the south the lands of Capt..

Andres Montoya; on the east the Del Norte River; on the west the Rocky Mountains.

The grant bears date March 20, 1742, and was made in conformity with the petition by Don Gaspar Domingo de Mendoza, lieutenant-colonel, governor, and captain-general, for "the land asked for," without further description, with direction to the senior justice of the jurisdiction to give possession.

On the 28th day of the same month the act of possession, certified by Juan Joseph Lovato, acting judge, set forth that he gave the royal possession of the land granted, in doing which he established the southern limits of the pueblo, erecting there "a holy cross" to serve as the boundary of the said Indians on the south, and of Sanchez, the grantee, on the north; but gives no description of the other boundaries.

After the passage of the act of July 22, 1854, Ramon Vigil, claiming to be the owner of the lands granted to Pedro Sanchez, made application to the surveyor-general of New Mexico for proceedings under the provisions of said act, for confirmation to him of the title to the lands in question; and, though he referred in his petition to the conveyances by which he claimed to have become the owner, he failed to produce and prove the same.

On July 15, 1859, Surveyor-General William Pelham reported the claim for the action of Congress, holding the grant to be genuine and valid, finding that the parties were, and had been from time immemorial, in quiet and peaceable possession of the land, and approving the claim in favor of "the legal representatives of Pedro Sanchez."

By the act of June 21, 1860 (12 Stat., 71), the claim was confirmed "as recommended for confirmation by the surveyor-general."

The survey of the confirmed claim being that under consideration, made by United States Deputy Surveyors Sawyer and McElroy, in April, 1877, and approved by you June 3 in the same year, bounds the surveyed tract on the east by the Rio Grande; on the south by lands of Capt. Andres Montoya; on the west by mountains (Sierra Madre), and on the north by the San Ildefonso grant, and a line extended west from the southwest corner of that grant to the mountains represented as the western boundary. The area presents the figure of an irregular triangle, the north line forming the base, the course of the Rio Grande the boundary on the east, being from said north line southwesterly, the boundary of the lands of Montoya, from the point where the Rio Grande intersects the same, running in a general course northwesterly, and the mountains representing the western boundary, extending from the point of intersection of the Montoya line in nearly the same direction northwesterly, to the point where they are intersected by the north boundary.

The north boundary, governed by the line of Ildefonso, and the east boundary, the Rio Grande, cannot be otherwise than correct. The southern boundary is not questioned; and if the deputy surveyors

have ascertained and rightly located the boundary of Montoya's land, as there is no reason to doubt that they have, must also be correct.

The western boundary is described in the petition of Sanchez (the only description found in the original title papers), and in the petition of Ramon Vigil to the surveyor-general, as the Rocky Mountains. In the report of the deputy surveyors who made the survey, and in the protest of Mr. Hayes, the mountain range made the western boundary of the surveyed tract is called the Sierra Madre. No other mountains are alluded to by either; and from the description of the northern boundary line in the field notes, and of the surveyed tract in the deputy surveyors' report, it appears that this is the first mountain range west of the Rio Grande answering the descriptive call.

The survey makes the foot or base of the range the boundary on the west. The protest and objection of Mr. Hayes is limited to this part of the survey; the ground of complaint being that the line is run at the foot instead of the summit, or ridge, "thereby," as alleged, "attempting to materially reduce the quantity of land in fact granted."

The only question, therefore, remaining to be considered is as to whether the base or the summit of the mountains should constitute the boundary. The protestant contends that "it always was and is yet the custom and understanding in Mexico (and consequently in New Mexico) that a mountain boundary embraced to the summit, unless otherwise specifically expressed."

I do not so understand the rule. Where an object boundary of extent is named, it stands to reason that the side of the object nearest the tract to be bounded, unless some other part be particularly designated, should be taken as the boundary; and upon this principle it has always been held in this Department, in locating Mexican grants in California, that where a mountain has been made the boundary, without more specific designation, the proximate foot or base is to determine the boundary line.

The rule was so held by this office December 17, 1873, in the case of the Rancho Caslamayomi, affirmed by the Department on appeal August 13, 1874. (1 C. L. L., 589.)

The same was held by this office in the case of the Rancho Los Prietos y Najalayegua, decided September 18, 1874, where one of the calls was a mountain represented on a *diseño*. (*Id.*, 591.)

In the matter of the survey of the Rancho Agua Caliente, Vallejo confirmed for part and Leavenworth for another part. The description in the case of Vallejo was "the hills and mountains which intervene and separate the rancho of George Yont; and in the Leavenworth case the mountains dividing Sonoma from Napa." This office decided, February 21, 1878, in the case of Vallejo, that "the boundary must follow along the foot or base of such hills or mountains," and in that of Leavenworth that "the foot of the mountain should constitute the boundary."

In a subsequent review of the latter case, April 24, 1878, this office, in reply to an application of Hon. Henry S. Foote, asking for certain modifications of the decision, and as to the mountain boundary, claiming that there was a well-defined range of hills or mountains between Sonoma and Napa, and that the summit or ridge thereof should be adopted as the boundary, made the following statement of the rule:

The rule is well settled in regard to cases like this, that where hills, mountains, or mountain ranges are named as boundaries, the foot or base is to be taken as the boundary indicated, unless the top ridge or summit is clearly indicated as such.

Appeal was taken to the Department in the cases both of Vallejo and Leavenworth, but withdrawn as to that of Leavenworth; but as both cases were embraced in the same decision, both were before the Department; and by its decision of January 9, 1879, the decision of this office as to the mountain boundary in the case of Vallejo was affirmed, and in that of Leavenworth, expressly approved.

If I entertained doubt as to the proper location of the boundary under consideration, as matter of construction having reference to the descriptive call, which I do not, the decisions cited above abundantly settle the question. In accordance with them the boundary must be held to be properly located, and the survey is hereby approved.

You will give notice of this decision to the protestant, and all parties who are, within your knowledge, or as shown by the records of the case, interested therein, advising this office of the date on which such notice is given.

DONATION—CERTIFICATE—HEIRS.

JACOB SPORES.

A certificate on a donation claim notified upon by a single man, and issued in his name, he being deceased, is erroneous, and should have been in favor of his heirs at law. A new certificate therefore directed to be issued.

Commissioner McFarland to register and receiver, Roseburg, Oregon, July 19, 1881.

It appears by evidence on file here that the east half of Sec. 3, T. 17 S., R. 3 W., Oregon, was notified upon December 1, 1853, by Jacob Spores, as a donation, under the fourth section of the act of September 27, 1850 (Stat. 9, p. 496.)

Proof is furnished showing that the land thus claimed was continuously resided upon and cultivated by said Jacob Spores, as a single man, from the 16th day of August, 1853, to the 10th day of May, 1856, the day of the donee's death.

The 8th section of said act provides—

That upon the death of any settler before the expiration of the four years' continued possession required by this act, all the rights of the

deceased under this act shall descend to the heirs at law of such settler, including the widow, where one is left, in equal parts; and proof of compliance with the conditions of this act up to the time of the death of such settler shall be sufficient to entitle them to the patent.

The certificate No. 2056 issued at your office for the claim in question is in favor of Jacob Spores, and hence is erroneous.

You are therefore hereby instructed to issue another certificate in favor of the heirs at law of Jacob Spores, deceased, for the aforesaid tracts of land and forward it to this office.

DONATION—LIMITED TO ONE CLAIM.

GEARSHUM VANNATER.

The settler, a married man, having notified on a specified tract, under the fifth section, act of September 27, 1850, made proof of residence, etc., commencing November 11, 1854, and received patent to himself and wife March 22, 1866, and also having notified upon another tract, and made proof of residence, etc., commencing November 1, 1854, could only receive the one donation patented as above.

Commissioner McFarland to register and receiver, Roseburg, Oregon, August, 11, 1881.

It appears by the records and files of this office that Gearshum Vannater claimed, as a married man, under the fifth section of the act of September 27, 1850 (Stats., vol. 9, p. 496), and the legislation supplemental thereto, Notification No. 5784, lots 1 and 2, and the N. $\frac{1}{2}$ of N. $\frac{1}{2}$ of Sec. 3, and the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 4, T. 15 S., R. 3 W., Oregon, containing 250.38 acres, and made proof of residence and cultivation thereon from November 11, 1854, to January, 1859. This claim was patented to the donee and his wife March 22, 1866.

It also appears that the said Gearshum Vannater claimed under said act the NW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 8, in same township and range, Notification No. 4724, and made proof of residence and cultivation thereon from November 1, 1854, to the 7th of December, 1858. This latter claim and proof was retained in your office and was not known to exist by this office until long after the issue of said patent to Vannater and wife in 1866.

The first proviso in section 5 of said act of 1850 provides—

“That no person shall ever receive a patent for more than one donation of land in said Territory in his or her own right.”

These two claims under said act being for two separate and distinct donations of land in Oregon, one of which has been patented to the claimant, Vannater, his rights thereunder as a donee are exhausted, and for that reason his claim under said act to the tracts of land in said section 8 is held for cancellation, and you will so notify the interested parties.

In case of an appeal you will be governed by the rules of practice now in force.

DONATION—PARTITION—SURVEY.

ELIJAH ELLIOTT.

The act of September 27, 1850, confers no authority upon any officer connected with the adjudication of the claim to make any division of the land among the donees.

Commissioner McFarland to register and receiver, Roseburg, Oregon, March 17, 1882.

I return herewith donation certificate No. 2083, for the claim of the widow and heirs at law of Elijah Elliott, deceased, that the initial point 15.29 chains W., and 8.90 chains N., of the northeast corner Sec. 35, T. 18 S., R. 2 W., Oregon, and the direction of the third line east 29.96 chains, may be corrected by you to agree with the official survey, which shows the initial point to be 15.29 chains W. and 8.96 chains N. of the northeast corner of said Sec. 35, and the third course to run N. 89 $\frac{3}{4}$ ° E. 29.96 chains. You will strike out all of the printed line *eleven* in said certificate, except the word *cultivation*, and insert the following: "Until the date of the death of said settler, as provided by the eighth section of said act."

It is also noticed that you have divided the donation into two equal parts, and assigned one-half to the widow and the other to the heirs at law of said Elijah Elliott, deceased.

The supreme court, in the case of *Hall v. Russell*, 11 Otto, p. 503, held if a settler died before the expiration of the required four years' continued possession, that the eighth section of the act of September 27, 1850 (Stats. 9, p. 496), made a new grant of the land claimed by him to his heirs at law, including his widow, if he left one, and proof of compliance with the conditions of the act up to the time of his death should be sufficient to entitle them to the patent. According to this construction of said eighth section, the land claimed by Mr. Elliott during his lifetime was, after his death, donated to his heirs at law, including his widow, they having furnished the required proof. Said section confers no authority upon any officer connected with the adjudication of said claim to make any division of the land donated among the donees, and consequently your action in dividing the land donated to the present claimants is disapproved, and you are hereby instructed to cancel upon said certificate the division made by you between said widow and the heirs at law of Elijah Elliott, deceased.

Inasmuch as you have upon the application of the widow, one of the donees in this case, made a division of the land in question, you will, before canceling the aforesaid division, as herein directed, notify the parties in interest of this ruling and allow them the usual time for appeal therefrom to the honorable Secretary of the Interior. In case of an appeal you will correct the certificate as herein indicated, except the cancellation of the division of the land, and return it here with the appeal papers; but if no appeal is taken within the time allowed by you, you will, before returning said certificates, make all the corrections indicated by these instructions.

DONATION—NOTIFICATION—AGREEMENT OF PARTIES.

ATTWELL *v.* OREGON RY. & NAV. Co.

The husband of claimant having, as a married man, filed notification, before and after survey, describing his claim by metes and bounds, the land notified for, as described, is that which constitutes the Attwell claim.

The claim of the company above is made under Chipman, who notified after Attwell on an adjoining tract, and by color of an alleged agreement with Mr. Attwell (denied by her), by which a portion of the Attwell claim was to be included in that of Chipman.

There is no authority of law for patenting any part of the donation of Attwell to Chipman, or his assignees, or *vice versa*.

Commissioner McFarland to register and receiver, Oregon City, Oregon, May 25, 1882.

I have had under consideration the contest of Mrs. Mary J. Attwell, wife of Roger G. Attwell, against the Oregon Railway and Navigation Company, involving the title to a portion of the NE. $\frac{1}{4}$ of Sec. 12, T. 2 N., R. 7 E., Oregon, transmitted here on appeal from your decision of January 16, 1881.

The tract in question, as appears by the donation certificate in the case, is included in the claim of John Chipman and wife, now owned by the Oregon Railway and Navigation Company, but it is contended that said tract is a portion of the donation claim of Roger G. Attwell and wife.

These claims had their inception under the fifth section of the act of September 27, 1850, commonly known as the Oregon donation act (Stats. 9, 496), and supplemental legislation, and upon examination of the proofs furnished, it is clear that each claimant is entitled, as a married man, to a donation of 320 acres.

The sixth section of the said act of September 27, 1850, and the sixth section of the act of February 14, 1853, as amended by the third section of the act of July 17, 1854, require donees to notify upon the lands claimed by them respectively.

The public surveys were extended over the townships in which these claims are located, April 9, 1860.

Attwell filed his notification before and after survey, prior to Chipman.

It has been held in the case of *Ramsey v. Loomis et al.*, Oregon Reports, vol. 6, p. 367, and that of *Fitzpatrick v. Du Bois et al.* (2 Sawyer, p. 434), that land claimed under the "donation act" is segregated when the notification is filed. Applying this rule to the claims under discussion the question arises what lands were segregated by the notices of Attwell and Chipman respectively.

Attwell described his claim as extending from a balm of gilead tree, standing at the mouth of a small creek which empties into the Colum-

bia River, up the river about one mile to a fir tree standing on a large pile of stones, "thence back."

Chipman described his claim as extending down the river from this tree a little more than one mile.

It will thus be observed that the claimants had a common initial point, viz: a balm of gilead tree, and from this tree the lines run in opposite directions.

Two witnesses, Russell and McMillan, civil engineers, produced at the hearing before you, locate this balm of gilead tree 113 feet south of the south boundary of lot 2 in said section 12, and as this location is not disputed would throw said lot 2 and 113 feet off that portion of the north side of lot 3 adjoining said lot 2; also 113 feet off the north side of the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ in said section 12, being the land in controversy within the limits of the Attwell claim.

Notwithstanding the public surveys of these townships Attwell continued to claim his donation by metes and bounds, and hence no official survey of it has yet been made. It would seem, however, that if the line extending west to the river from the line between ranges 7 and 8 east described in his first notification after the public survey of these townships is located in connection therewith it would fall about 217 feet south of said tree, and in the second about 85 feet.

The theory upon which the representatives of the Chipman interest are attempting to include the land in controversy is that Mrs. Attwell had agreed or consented to the establishing of the line dividing these two donations as they appear in said certificates, but Mrs. Attwell denies making this agreement or giving her consent to such dividing line. She admits that she was negotiating with the agent of the Oregon Steam Navigation Company, J. W. Brazee, for the sale of the said strip of land, but the sale was never perfected.

It will thus be observed that this contest is not to settle a disputed line between the two donations, but is a proceeding based upon an alleged agreement to secure by patent as a part of the Chipman donation lands belonging to the Attwell donation, or, in other words, to patent to Chipman lands not claimed or occupied by him.

I find no authority of law for this office to patent any part of the donation of Attwell to Chipman or his assignees, or *vice versa*. Each of these two donations must be adjudicated by the provisions of the donation acts, and as of the date when the claimants perfected title thereto, and issue patents for the title so perfected, giving each claimant the land settled upon and selected by him pursuant to the provisions of said acts, and leave those who claim the whole or any portion of said donations as purchasers to follow the title granted to these donees.

In view of the foregoing I am of the opinion and so decide that lot 2 and a strip 113 feet wide off that portion of the north side of lot 3, contiguous to said lot 2, also a strip 113 feet wide off the north side of

the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ in said section 12, should be included in the Attwell claim.

This disposes of the conflict between the two claims, but it is observed from an examination of the Chipman claim that after excluding therefrom the land in controversy which is awarded to Attwell by this decision, it will still have a continuous river front from the balm of gilead tree according to the meanders of the river of about $1\frac{3}{4}$ miles.

The distance from this tree along the river, according to Mr. Chipman's notification was a little more than 1 mile, and, in my opinion, if the lines were to terminate at the SW. corner of lot 1, in Sec. 13, T. 2 N., R. 7 E., it would cover substantially all that was claimed, giving him a river front of about $1\frac{1}{2}$ miles. This would reduce the area of the claim according to the certificate to about 273 acres.

The certificate, however, is found to exclude the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 12, T. 2 N., R. 7 E., originally claimed by Chipman, and which does not appear to be claimed by Attwell, with the exception of a small strip 113 feet wide across the north side. The remainder of this tract, therefore, may be included in the Chipman claim, and will increase the area to about 310 acres, or approximately what he was entitled to under the law.

You will notify all parties in interest of the purport of this decision, and be governed by the rules of practice in case of an appeal.

DONATION—RESIDENCE—SETTLEMENT.

ELVIRA BREWER.

Where the husband could not have become a resident of Oregon before December 1, 1850, or at any time thereafter, his widow could gain no right by settlement under the act of September 27, 1850, nor acts amendatory thereof.

Secretary Teller to Commissioner McFarland, June 29, 1882.

I have considered the matter of Elvira Brewer's donation claim, involving the NW. $\frac{1}{4}$ of Sec. 11, T. 17 S., R. 5 W., Roseburg district, Oregon, on appeal by her son, Reese A. Brewer, from your office decision of June 18, 1881, rejecting his mother's claim.

The record shows that said claim was preferred by her as the relict of John Brewer, under the provisions of the eighth section of the act of February 14, 1853 (10 Stat., 158); that her husband died in Pike County, Arkansas, on the 9th day of April, 1845; and that she subsequently emigrated to Oregon, where she arrived in October, 1853, and settled upon and commenced to cultivate the tract in question February 10, 1854, which she continued to do until the day of her death, November 15, 1857.

As it thus appears that it was impossible for her husband to bring himself within the purview of the act of September 27, 1850 (9 Stat., 496), by becoming a resident of Oregon on or before December 1, 1850,

or at any time thereafter, it follows, therefore, that she can derive no benefit from the act cited or from any of those amendatory thereof, and her claim must fail for want of the requisite basis.

Your decision is accordingly affirmed.

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DONATION CLAIM—RESIDENCE—CULTIVATION.

WILLIAM T. BINGHAM.

Where a donation claim was initiated in the fall of 1855; a little garden made in the spring of 1856; a small house on the place; no land cultivated but one season, and then only the small garden; the claimant in the fall of 1856 going to the mines and residing there the fall and winter of 1856 and most of the year 1857, dying about 1858, the residence and cultivation were not such as required by the donation act, and the claim should be canceled.

Commissioner McFarland to register and receiver, Roseburg, Oregon, July 25, 1882.

I have considered the matter of the donation claim of William T. Bingham, certificate No. 1142, made under the provisions of the fifth section of the act of September 27, 1850 (Stats. 9, p. 496).

From the papers in the case it appears that Mr. Bingham settled upon a tract of 160 acres of unsurveyed land on the 28th of October, 1855, and on the 8th of November following made preliminary proof of residence and cultivation and his notification, in which he described the particular tract claimed by him as well as was possible in the absence of a survey of the land.

On the 15th of April, 1863, Thomas Johnson appeared before the register and made affidavit that Bingham had resided upon and cultivated his claim from October, 1855, until his death in May, 1858, "except during the Indian troubles."

On the 9th of May, 1863, Edward Burroughs made affidavit that Bingham resided upon and cultivated his claim from November, 1855, to May 10, 1858, the date of his death, and further testified that the land claimed by Bingham—

Was embraced in the following metes and bounds: commencing at a stake marked R. 15 W., T. 31 S., 9 & 10; thence running south one-half mile; thence east one-half mile; thence north one-half mile; thence west to the place of beginning.

On the 31st of December, 1866 the register and receiver issued their certificate for the claim in favor of the heirs-at-law of William T. Bingham, deceased, and located it on the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of sec. 9 and W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of sec. 10, T. 31 S., R. 15 W.

On the 20th of June, 1876, the Hon. L. F. Lane filed in this office the affidavits of W. H. Cooper, Frederick Unicorn, and James S. Langlois, that Bingham had never claimed the tract described in the certificate,

but that his claim was located on what would be the NW. $\frac{1}{4}$ of Sec. 15, if the public surveys were extended over it.

In view of these sworn statements you were instructed on the 23d of November, 1876, to take the necessary steps to determine the correct location of the claim in connection with the public surveys, obtain further proof showing specifically the character of Bingham's residence and cultivation, and if he had been absent from his claim on account of Indian troubles, to ascertain the duration of such absence.

In accordance with these instructions, as appears from your report of the 26th of March, 1877, on the 3d of January, 1877, you published for four weeks a notice to all parties interested in the claim of Bingham to appear at your office on the 26th of February, 1877, for the purpose of furnishing proof as to the correct location of the claim, etc., and in addition to the published notice, you notified, by letter, Isaac Bingham, a brother of the deceased claimant, who, as administrator of his brother's estate, procured the proofs of residence and cultivation on which the certificate was based.

On the day set for the hearing the only parties appearing before you were W. H. Cooper, who had previously applied to enter the tracts covered by the donation certificate as a homestead, and S. H. Crouch. The latter testified that he was acquainted with Bingham in his lifetime and knew that he located a donation claim in the fall of 1855, on the NW. $\frac{1}{4}$ of Sec. 15; that he resided on the place and in the vicinity until about the year 1858, when he died; that there was a small house on the tract and "a little garden put in in the spring of 1856;" that in the fall of 1856 Bingham, in company with deponent, went "prospecting" and found mines, where Bingham resided during the fall and winter of 1856, and that he also resided in the mines most of the year 1857, and also that Bingham did not claim the tracts described in the certificate issued by the register and receiver.

In regard to Bingham's cultivation Crouch further testified that he "did not cultivate any land but one summer, and then only a small garden."

The deposition of S. H. Crouch and a diagram of Secs. 9, 10, and 16, of T. 31 S., R. 15 W., certified by F. W. Colebrook, county surveyor for Curry County, Oreg., filed by W. H. Cooper, is the only evidence produced at the trial.

In certifying to the diagram Mr. Colebrook stated that he had examined the public surveys of the sections covered by the diagram, and found that Bingham's improvements were on the NW. $\frac{1}{4}$ of Sec. 15.

Upon a careful consideration of the record in the case, and particularly the deposition of Crouch, who it appears was the friend and associate of Bingham, and cognizant of his acts and whereabouts during the period referred to, it appears that his residence and cultivation were not of such a character as was contemplated by the provisions of the donation act.

I am, therefore, of the opinion, and so decide, that the claim of William T. Bingham is not a *bona fide* one, and should be canceled.

It appears by the evidence that the original settlement of Bingham was upon the NW. $\frac{1}{4}$ of Sec. 15, Township 31 S., R. 15 W., Oregon, but as my decision disposes of his claim upon the ground that it had no validity under the donation act, the necessity of rendering a decision upon that question is thereby obviated.

PRACTICE—NOTICE BY PUBLICATION.

MILLER ET AL. v. TERRY ET AL.

Service by publication is not authorized without due showing that personal service cannot be made.

Commissioner McFarland to register and receiver, Oregon City, Oregon,
December 30, 1882.

On the 15th of July, 1880, the register forwarded here the affidavits of J. L. Miller, Andrew J. Miller, and James A. Crabtree, and recommended, upon the allegations contained in said affidavits, that a hearing be allowed at his office for the purpose of showing the falsity of the final proof accompanying the papers in the donation case of Hugh Terry, deceased, certificate No. 5216, involving the title to the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 25, T. 10 S., R. 3 W., Oregon.

Pursuant to this recommendation, on the 17th of May last, a hearing was allowed upon the conditions that those desiring to contest said claim should deposit with you a sufficient sum of money to defray the expense incident thereto, and that due notice to all interested parties should be given.

On the 11th instant the register transmitted here in the cause entitled "J. L. Miller, James Williams, and James A. Crabtree v. the heirs-at-law of Hugh Terry *et al.*", an affidavit of publication of notice of hearing to be had at the United States land office at Oregon City, Oreg., on Wednesday, October 18, 1882, at 10 o'clock a. m.; affidavit of the posting of a copy of the notice of said hearing on said claim; affidavit of Daniel Morris amending his former affidavit, and the testimony taken pursuant to said published notice on the day mentioned therein.

This published notice is directed to Lucinda McCool, Polly Ann Morris, Sarah Bilyer, Nancy Miller, Martha F. Miller, Hugh Terry, Orsena Bilyer, and Evelina Powell, heirs-at-law of Hugh Terry, deceased, and to all parties in interest.

The record in this case does not show that any person made affidavit that *personal service* of said notice could not be made upon any of the parties named therein, and consequently the publication of the notice of hearing in this case was unauthorized and gave you no jurisdiction either to proceed with the examination of witnesses or to continue the controversy. (See Rule 12, rules of practice, relating to service of notice.)

It also appears that you have entirely failed to observe rule 50 of said rules of practice. And it further appears that said hearing was conducted on the day mentioned in said published notice by the register alone, without any evidence being produced to show that any of said parties were non-residents, or that their residence was unknown, and without legal notice having been served, personally or by mail, upon any of the parties mentioned in said published notice, and without appearance by any of them in any manner, and consequently I have this day set aside all proceedings had in the matter of said hearing.

You will notify the parties contesting this claim of this ruling, and at the same time give them notice that they can hereafter be heard before you, at the office of the United States register, at Oregon City, Oreg., upon their complying with the rules of practice now in force, and depositing within thirty days from the date of the service of such notice a sufficient sum of money to defray the expense incident thereto.

SCRIP—MISNOMER OF ASSIGNEE.

PIERRE BONTAIN.

Affidavit required showing the true spelling of the name, and proving the identity of the assignee.

Commissioner McFarland to register and receiver, Crookston, Minnesota, July 17, 1882.

Upon an examination of the papers in pre-emption entry at your office for the NE. $\frac{1}{4}$ Sec. 28, T. 152 N., R. 46 W., and paid for with supreme court scrip Nos. B471 and B472, I find that the name of the party who made said entry is Pierre *Bontain*; but the scrip appears to have been assigned to Pierre *Bontine*.

The case is, therefore, held suspended, and you will please call upon the party to furnish an affidavit showing the true orthography of his name, and that the party who made said entry is the identical person to whom said scrip was assigned, and upon the receipt of the same you will transmit it to this office.

SCRIP—MISNOMER OF ASSIGNEE.

PEDER P. LOMEM.

Entry by *Pedre P. Lomem*, on assignment of scrip to *Peter P. Lomem*. Affidavit required showing true name and identity of party.

Commissioner McFarland to register and receiver, Fargo, Dakota, July 19, 1882.

Upon an examination of the papers in pre-emption entry, at your office, for SE. $\frac{1}{4}$ Sec. 30, T. 147, R. 51, and paid for with supreme court scrip Nos. B260 and B261, I find that the name of the party who made

said entry is *Peder P. Lomem*, but the scrip appears to be assigned to *Peter P. Lomem*.

The case is therefore held suspended, and you will please call upon the party to furnish an affidavit showing the true orthography of his name, and that the party who made said entry is the identical person to whom said scrip was assigned, and upon the receipt of the same you will transmit it to this office.

SCRIP—ASSIGNEE—ERASURE.

JOHN HERRING.

Assignee required to show by affidavit how he became possessed of the scrip, and to account for the erasure, etc.

Commissioner McFarland to register and receiver, Crookston, Minnesota, July 19, 1882.

Upon an examination of the assignment of certificate of location No. R709, and applied in payment of pre-emption entry for N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ Sec. 30, T. 140 N., R. 45 W., from Albert C. Janin, attorney-in-fact of Charles Bouligny *et al.*, heirs and legal representatives of Jean Antoine Bernard Dauterive, deceased, it is found that the scrip was originally assigned to some person unknown, and that the name was erased and that John Herring was substituted.

You will require Mr. Herring to show by affidavit how he came in possession of said scrip and to account for the erasure in the body of said assignment, upon the receipt of which you will transmit it to this office.

19 ID 201

SCRIP—ASSIGNMENT IN BLANK.

MICHAEL CALLAGHAN.

Certificate returned and blank assignment required to be perfected.

Commissioner McFarland to register and receiver, Fargo, Dakota, July 25, 1882.

Certificate of location No. M552, issued by this office April 14, 1875, in part satisfaction of the private land claim of the cities of Baltimore and New Orleans, under act of June 22, 1860, and supplemental legislation, applied in payment of pre-emption entry by Michael Callaghan for SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 19, T. 152 N., R. 50 W., is held suspended upon the records of this office for the reason that the said certificate has never been assigned to the party in whose name said entry is made.

It appears by reference to the instruments indorsed upon the back of said certificate that the same has been regularly assigned by the cities of Baltimore and New Orleans to Samuel H. Tayart, and that on the

13th day of May, 1879, Mr. Tayart executed an assignment in blank, and the said certificate is herewith returned in order that the party in interest may have an opportunity to perfect said assignment, after which you will please return it to this office.

SCRIP—ASSIGNMENT—CONFIRMEE.

JACOB S. TAYLOR.

Assignment required from the *legal representative* of the confirnee of the claim for which the scrip was issued.

Commissioner McFarland to register and receiver, Pueblo, Colorado, September 27, 1882.

Certificates of location Nos. 221E, 221F, 221G, and 221H, issued June 29, 1872, by the surveyor-general of Louisiana, in part satisfaction of the private land claim of Jesse Kesspy, entered as No. 82 in the report dated December 24, 1819, of Cosby and Skipwith, located at your office by Jacob S. Taylor on W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ Sec. 5, W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ Sec. 9, and E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ Sec. 32, T. 11 S., R. 65 W., and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 13, T. 11 S., R. 66 W., are held suspended upon the records of this office, for the reason that the said certificates have never been assigned to the party in whose name said locations are made.

It appears by reference to an instrument indorsed upon the backs of said certificates that W. T. Dugan is the legal representative of said confirnee, and as such is entitled to assign the same. You will therefore require Mr. Taylor to furnish a properly executed assignment for each piece of scrip, upon the receipt of which you will please transmit them to this office.

SCRIP—ASSIGNMENT—AUTHORITY.

JAMES L. BRADFORD

Assignment having been made by attorney in fact of legal representatives of confirnee, without accompanying evidence of his authority, the same is required to be furnished.

Commissioner McFarland to U. S. surveyor-general, New Orleans, La., September 27, 1882.

It appears by reference to the instruments indorsed upon the backs of certificates of locations Nos. 56A, 56B, and 56C, issued July 21, 1880, by your office in satisfaction of the private land claim of Philip Green, entered as No. 1274, in the report dated December 30, 1815, of the register and receiver of western district Louisiana, under act of June 2, 1858, that David Taliaferro, as attorney in fact of the legal representatives of said Green, executed assignments of said certificates to James L. Bradford.

As there is nothing on file here to show that Mr. Taliaferro is the attorney in fact of said confirmee you will please request him to furnish a power of attorney authorizing him to assign said certificates upon the receipt of which you will please transmit it to this office.

31 LD 259

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SCRIP—REISSUE—INSTRUCTIONS.

JOHN MARRIS PIERRO.

Two certificates of location for one hundred and sixty acres each authorized to be issued, in lieu of one of three hundred and twenty acres, on application of the holders of the latter certificate.

*Commissioner McFarland to U. S. surveyor-general, New Orleans, La.,
January 5, 1883.*

Messrs. Curtis and Burdett of this city filed here, with their letter of 28th ultimo, one certificate of location numbered 380A, for 320 acres issued by you September 18, 1877, in part satisfaction of the private land claim of John Marris Pierro, entered as No. 259, fifth class, in the report dated December 30, 1815, of the register and receiver, western district of Louisiana, confirmed by act of Congress of February 5, 1825, with the request that the same be canceled and two pieces of one hundred and sixty acres each be issued in lieu thereof.

As there is no reason known to this office why the request should not be complied with, I transmit herewith said certificate in order that the same may be *canceled*, and scrip of the denomination of 160 acres be issued as requested.

Your attention is respectfully invited to office letter to you of April 18, 1879, in the matter of the private land claims of *Joshua Garret* and *George Miller*, wherein instructions for subdividing this class of scrip, will be found.

After preparing the new scrip you will cancel the original in red ink, across its face, over your signature, referring to this letter by its initial and date, and transmit all the certificates to this office for further action.

On the back of each new piece of scrip you should place your usual certificate, showing who is the legal representative of the confirmee in the claim.

19 LD 347
20 " 348
23 " 392
24 " 344
28 " 345

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DONATION—NOTIFICATION—SEGREGATION.

JOHN J. ELLIOTT.

Filing an original notification is an *ipso facto* segregation of the land described from the contiguous lands, and after completing the term of residence required, the donee cannot amend it so as to include other lands.

Secretary Kirkwood to Commissioner McFarland, March 6, 1882.

I have considered the matter of the survey and proper location of John J. Elliott's donation claim to certain lands in Sec. 29, T. 9 N.,

R. 5 W., Willamette meridian, Vancouver district, Washington Territory, on appeal from your decision of April 27, 1881; suspending the issuance of a certificate for said claim.

It appears from the record that Elliott settled upon a certain tract containing 160 acres of unsurveyed land situate in Wahkiakum County, W. T., and specifically described by metes and bounds and courses and distances in his original notification No. 1430, filed in the local office April 10, 1856, whereby he claims title under the donation act of September 27, 1850 (9 Stat., 496), and the act amendatory thereof.

Elliott subsequently filed two more notifications numbered 1430, one dated April 17, 1871, and the other March 22, 1872, which cover substantially the same tract, but embrace only a portion of the land covered by the original notification.

It appears that the official survey was based upon the description of his claim as contained in the second notification, and that such survey locates the same in section 29, as aforesaid.

The filing of the original notification was an *ipso facto* segregation of the tract therein described from the lands contiguous thereto; and as Elliott has resided upon and cultivated the tract so described for more than the full period of four years prescribed by the statute, he cannot be allowed to change or amend such notification so as to embrace land not included in his original selection.

I therefore concur with you in the opinion that the survey in question does not correctly locate Elliott's claim as he described the same in his original notification; that such survey should be set aside; and that the issuance of certificate to Elliott should be held in abeyance until he shall procure an official survey of his claim in accordance with the original description thereof. Your decision is accordingly affirmed.

DONATION—DEATH OF CLAIMANT—DESCENT.

JOSEPH H. CONNER.

By the eighth section of the act of September 27, 1850, on the death of the donation claimant before completing the term of residence and cultivation, the land descended as a donation to his heirs at law, including his widow, if one is left, Certificate should issue accordingly, and its issue in the name of the deceased donation claimant and his widow is erroneous.

Commissioner McFarland to register and receiver, Olympia, Washington Territory, May 5, 1882.

The proofs accompanying certificate No. 689, for lands in T. 18 N., R. 1 W., W. T., claimed by Joseph H. Conner as a donation under the fifth section of the act of September 27, 1850 (9 Stats., 496), and supplemental legislation, show that the claimant, as a married man, settled upon a part of sections 25 and 26, in said township, on the 18th day of

December, 1852, and continued his residence thereon, as required by law, until the 26th day of March, 1856, the day of his death.

The eighth section of said act of September 27, 1850, provides:

That upon the death of any settler before the expiration of the four years' continued possession required by this act, all the rights of the deceased under this act shall descend to the heirs at law of such settler, including the widow, where one is left, in equal parts; and proof of compliance with the conditions of this act up to the time of the death of such settler shall be sufficient to entitle them to the patent.

Mr. Conner having died before completing his title to the land in question by a continuous residence thereon of four years, and proof having been furnished of his compliance with the conditions of said act up to the time of his death, the land upon which he had settled was donated by said eighth section to his heirs at law, including his widow.

The present certificate being in favor of "Joseph H. Conner, now deceased, and Phebe M. Campbell, late widow of the said Joseph Conner," is erroneous.

You are therefore instructed to issue a corrected certificate for the claim in question in favor of Phebe M. Conner, widow, and the heirs at law of Joseph H. Conner, deceased.

The law does not authorize you to make a division between the donees of the land granted by said eighth section, and consequently in the issue of the corrected certificate you will not divide the claim.

DONATION—NOTIFICATION—RAILROAD CLAIM.

BAPTISTE PEONE.

Where the claimant settled as far back as 1853, or farther, and complied with all the requirements of law, except filing notice of his claim within the time fixed by statute, the act of June 25, 1874, exempted him from forfeiture; and having within twelve months after survey made proof showing the *bona fides* of his settlement, etc., as required by the seventh section of the act of September 27, 1853, he established a claim superior to that of the railroad company, accruing by withdrawal and definite location (including the land in question) in the mean time.

Commissioner McFarland to register and receiver, Colfax, Washington Territory, June 6, 1882.

I am in receipt of your letter of the 12th of September last, inclosing, for the views of this office, the proofs in the matter of the donation claim of Baptiste Peone, accompanied by the protest of the Northern Pacific Railroad Company against the allowance of said claim.

The question presented for adjudication involves the title to Sec. 13, T. 26 N., R. 43 E., W. T.

Peone claims said section as a married half-breed Indian, under the fourth section of the act of September 27, 1850 (9 Stats., 496), and supplemental legislation.

The railroad company, by virtue of their compliance with the provisions of the act of July 2, 1864 (13 Stats., 365), and supplemental legislation, claims said section as a portion of the land granted them to aid in the construction of their road, and allege that Peone has forfeited his right to claim this tract of land by reason of his failure to give notice of his claim thereto within the time required by law.

The public surveys of the township embracing the tract in question were approved August 12, 1880, and were filed in the local land office on the 7th of the following October.

The withdrawal for the Northern Pacific Railroad Company on its general route was made February 21, 1872, and the definite location of its line was made October 4, 1880. This section 13 falls within the limits of said withdrawal, and also within the limits of said definite location.

The first notice Peone gave of his claim to this land was on the 16th day of March, 1881, upwards of five months after the public surveys had been extended over it.

The proof furnished by Peone shows that he possessed all the necessary qualifications as a married half-breed American Indian to claim 640 acres of land under the fourth section of said act of September 27, 1850. The donee's settlement upon the land in question is variously stated. One witness makes this settlement date from April, 1853, to December, 1880. Another witness makes it extend back from September 29, 1880, "for more than thirty years." The affidavit of the settler dates this settlement as early as 1848, and the occupancy thereafter to have continued until the day preceding the date of his affidavit, March 14, 1881.

It is not claimed by the donee that he complied or attempted to comply with the requirements of the 6th section of the act of Congress of February 14, 1853 (10 Stats., 158), as amended by the third section of the act of July 17, 1854 (10 Stats., 305), hence from December 1, 1855, to June 25, 1864, Mr. Peone was debarred from receiving any of the benefits conferred by the fourth section of said donation act. Congress at this latter date provided as follows:

That in all cases under the act of Congress approved September 27, 1850, entitled "An act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey, and to make donations to settlers of the said public lands, and the several acts amendatory and supplemental thereto, in which the actual settlement may be shown to be *bona fide* and the claim in all respects to be fully within the requirements of existing laws, except as to the failure of the party to file notice within the time fixed by statute, such failure shall not work forfeiture when no adverse rights intervene before the filing of the required notification by the claimant."

The seventh section of said act of September 27, 1853, gave Mr. Peone a period of twelve months after survey within which to show his *bona fides* by proving the commencement of his residence and cultivation on the land claimed by him as a donation. He has furnished proof within

six months after such survey, and it shows that his residence and cultivation on said tract commenced as early as April, 1853, and was continued thereafter far beyond the time required by law.

This, in my judgment, establishes a claim to the land in question at the date said railroad company, October 4, 1880, definitely and legally fixed the line of their road, which claim had its inception as early as 1853, and consequently it formed no part of the grant to said company, as the act under which said company is claiming only conveys to them upon their compliance with its provisions land to which the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.

DONATION—NOTIFICATION—PUBLIC RESERVATION.

DOMINICK CORCORAN.

The claimant made settlement and notification and occupied the land for over a year, when his further occupation was prevented by Indian hostilities; the land being afterwards taken possession of by government officers and occupied as a military post and for Indian purposes, the return of the claimant to the same, though attempted, was thereby prevented; the claimant having made proof of residence, etc., and received donation certificate as the basis for patent, and the land being still required for public purposes, compensation therefor is recommended.

Commissioner McFarland to Secretary Teller, June 9, 1882.

In compliance with the direction for report contained in your reference on 1st instant, of the papers submitted on the 26th ultimo to the Department by the Acting Commissioner of Indian Affairs relative to the claim of Dominick Corcoran to parts of sections 1 and 2 in township 20, north, of range 5 east, Washington Territory, containing 160 acres of land taken by the government for Indian purposes and known as the "Muckleshoot Prairie" Indian reservation, I have the honor to state that the record in this case shows that Dominick Corcoran filed a notification on the 21st day of April, 1855, numbered 1028, upon unsurveyed land, claiming as a single man 160 acres of land, under fifth section of the act of Congress of September 27, 1850 (9 Stats. 496), and supplemental legislation and made proof, by two disinterested witnesses, that his settlement upon the land claimed by him commenced, on the 1st day of July, 1854, and continued until April, 1855. Subsequently additional proof was furnished showing that the settler occupied and improved his claim until October, 1855, when he was prevented by Indian hostilities from continuing in the occupation of the same. The land was subsequently taken possession of by the officers of the United

States Army as a military post, and since then has been occupied by the government for military and Indian purposes.

It appears that Mr. Corcoran has made repeated demands of those having charge of the reservation to be reinstated in his possessory rights to the land claimed by him as a donation, but as the said land was required by the government for military and Indian purposes his demands have not been complied with.

In 1858 Mr. Corcoran made proof alleging the completion of his residence and cultivation upon the land claimed for the full period of four years as required by law, stating that from October, 1855, he believed it to be unsafe for him to reside upon his claim on account of said Indian hostilities.

The township embracing the claim of Corcoran was officially surveyed in 1872, and in 1873 he procured a survey of his claim as follows: Beginning at a point 6.40 chains south of the northwest corner of section 1 in T. 20 N., R. 5 E., W. T., and running thence west 3.75 chains; thence south 40.00 chains; thence east 40.00 chains; thence north 40.00 chains, and thence west 36.25 chains to the place of beginning.

The register and receiver on the 9th of April, 1873, issued donation certificate No. 588, describing the claim by metes and bounds, as above set forth, as the basis of a patent, but no patent has yet been issued for the reasons before stated.

In my opinion this claim in its inception was in all respects proper and legal, and I have no doubt would have been perfected according to law and patented but for the action of the government in taking possession of it for military and Indian purposes.

It would seem, therefore, that as a matter of common justice Mr. Corcoran should be paid a sufficient sum of money to cover the damages he has suffered by reason of such action, and without fault upon his part, and I fully concur with the Acting Commissioner of Indian Affairs that he be paid the sum of \$320.

SURVEY—DEPOSIT SYSTEM—RAILROADS.

ATLANTIC & PAC. R. R. CO.

Under Revised Statutes 2401, 2402, and 2403, and act of March 3, 1879, corporations cannot be considered as "residing" or being "settlers" in a township, and are not entitled to the benefits conferred by said laws. The railroad applying cannot be allowed to make deposit in payment for surveys along its line.

Commissioner McFarland to Messrs. Britton and Gray, Washington, D. C. November 28, 1882.

I have considered your application for a reconsideration of my decision of August 19, 1881, denying the application of the Atlantic and Pacific Railroad Company to be allowed to make deposit for surveying pub-

lic lands, under the provisions of sections 2401, 2402, 2403, Revised Statutes, and the act of March 3, 1879 (20 Stat., 352), and also the argument of Messrs. Britton and Gray, filed in support of said application.

The privileges granted by said provisions are limited by section 2401 to "settlers in any township" who desire to have the same surveyed. If it be true that any person or corporation that causes a township to be settled is a settler of such township, as is argued, yet, unless such settler is residing or located within the township, he is not a settler in the township.

Section 2403 provides :

When settlers make deposits, in accordance with the provisions of section 2401, the amount so deposited shall go in part payment of *their lands* situated in the townships, the surveying of which is paid for out of such deposits.

When these provisions became law, March 3, 1871, the only settlers that could acquire any interests in public lands required to be paid for were settlers actually resident in the township, and who resided upon and improved the lands, and who possessed certain personal qualifications that pertain to individuals and that cannot be predicated of corporations.

Though I were satisfied that the term settler as used in the public land laws does not always mean a resident, yet it seems to me obvious that the term as used in the statutes under consideration means those residing in the township.

Words should be construed in connection with the context in which they are found, for a word standing alone may have several significations, which, when considered in relation to accompanying words and phrases, is clearly limited to one meaning; and sometimes the text clearly shows that a word has not been used in a sense which might otherwise belong to it. But it is always to be understood in the sense in which it is obviously employed in the statute or instrument to be construed. In this case it has been used in the sense of a resident, which is a proper and the most common meaning of the word, and the sense in which it is more frequently, if not invariably, used in the public land laws, and in the correspondence and decisions of this office.

The act of March 3, 1879, amending section 2403 Rev. Stat., provides as follows :

When settlers make deposits in accordance with provisions of section 2401, the amount so deposited shall go in part payment for their land situated in the townships, the surveying of which is paid for out of such deposits; or the certificates issued for such deposits may be assigned by indorsement and be received in payment for any public lands of the United States entered by settlers under the pre-emption and homestead laws of the United States, and not otherwise.

This amendment does not enlarge the right to make deposits or extend the privilege to any parties not previously authorized to make deposits. The certificates are authorized to be assigned, but they can

only be used in payment of lands entered by settlers under the pre-emption and homestead laws. Lands are entered under these laws by those settlers only who possess certain personal qualifications as to age or citizenship and who have complied with certain requirements as to residence, improvement, etc.

Whether I consider these provisions separately or collectively, it appears to me that the term settler, as used in the statutes in question, means actual persons who are residents of the township, and cannot be applied to corporations that are not actual persons and cannot be considered as residing or as being settlers in a township.

Whether the law is considered as to its terms, its general meaning or the intention of its framers, I am clearly of the opinion that the Atlantic and Pacific Railroad Company is excluded from its provisions, and therefore adhere to my former decision.

SAME, ON APPEAL.

Secretary Teller to Commissioner McFarland, July 8, 1882.

I have considered the appeal of the Atlantic and Pacific Railway Company from your decision of August 19, November 23, and December 6, 1881, declining to authorize the deposit of money for surveys along the line of its road.

1st. As a "settler" under sections 2401, 2402, 2403, Revised Statutes; and—

2d. As advance payment of "cost of surveys" under act of July 31, 1876 (19 Stat., 121), which provides that before any lands granted shall be conveyed "there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same."

The reasons given for your conclusions appear to rest upon sound construction, and your action is accordingly affirmed.

SURVEY—OVERFLOWED LAND.

DENNIS COOK.

Request for survey of a tract lying between and excluded from two private claims, not classed on the township plat as public land, but designated thereon as "overflowed," and on the plat of the county surveys as "sand, salt marsh, and willows," was properly refused by the surveyor-general.

Commissioner McFarland to U. S. surveyor-general, San Francisco, California, November 19, 1881.

I am in receipt of your letter of November 2, 1881, transmitting the notice of appeal of J. W. Harding, esq., attorney for Dennis Cook, esq., from your decision rejecting his application for the survey of a tract of land containing, as per private survey made by Thomas W. Wright,

county surveyor of Santa Cruz County, in which the land is situated, 38.025 acres, together with copies of the correspondence between yourself and the said J. W. Harding, the attorney for the applicant.

From a careful examination of the papers, and particularly the decision of the honorable the Secretary of the Interior, dated December 16, 1880, reviewing the survey of Deputy Surveyor Freeman in the case of the rancho Arroya de la Laguna, to which special attention was invited by Mr. Harding, I am of the opinion that the rejection of the application of Dennis Cook, by Attorney Harding, should be sustained.

The entire question turns upon the matter of survey by Deputy Surveyors Freeman and Craven and the decision of the honorable the Secretary of the Interior, above referred to. The skeleton plat of T. 11 S., R. 3 W., M. D. M., as filed with the letter of Surveyor-General Stratton, under date of July 23, 1874, shows the tract in question to have been excluded from the survey of either the Rancho de la Laguna and Rancho Refugio and from the township named. The decision of the honorable the Secretary of the Interior, while affirming the exclusion of the Cook tract, the survey of which is now applied for from both of the surveys of the ranchos named and from the township, does not class it as public land. The skeleton plat above referred to would make it appear that the locality of the Cook tract is not alone outside of the rancho, but is also omitted from the official survey of T. 11 S., R. 3 W., M. D. M., and is shown as overflowed. The plat of survey as made by County Surveyor Wright designates the tract in question (38.025 acres) to be sand, salt marsh, and willows.

The decision of the honorable the Secretary of the Interior above referred to shows that the Cook tract was excluded from the survey of the Rancho Refugio, by direction of its owner, as being worthless; that subsequently one Butler filed a claim for the tract under the laws of the State of California; and further, that in course of time Cook became possessed of the entire claim, he having been at one time interested only to the extent of one-half.

The claim having been made under the laws of the State of California, the tract in question being shown by the survey of United States deputy surveyor to be overflowed, and designated as sand, salt marsh, and willows by the survey of County Surveyor Wright, and probably subject to overflow; the tract not being included within the patented limits of either of the ranchos bordering on the same, nor specifically classed as public lands of the United States in the decision of the honorable the Secretary of the Interior, your declining to entertain the application for the survey in question is sustained and hereby approved. You will therefore so inform J. W. Harding, esq., the attorney for Dennis Cook, applicant.

At your early convenience you will cause an authenticated copy of the plat and field notes of T. 11 S., R. 3 W., M. D. M., showing the subdivisional surveys of Deputy H. S. Cravens, executed in 1873 and 1874,

to be furnished for the files of this office. Surveyor-General Stratton, under date of July 23, 1874, in transmitting the skeleton plat of the township named, proposed forwarding official plats of survey to the local land office and to this office. No copy has been received here, and it is doubtful whether the same has been furnished to the local land office. You will cause inquiry to be made in this respect, and forward a copy to that office, if found necessary, with proper annotations thereon.

SAME, ON APPEAL.

Secretary Teller to Commissioner McFarland, October 5, 1882.

I have considered the appeal of Dennis Cook from your decision of November 19, 1881, rejecting his application for a survey of a tract of land alleged to be situated in the county of Santa Cruz, California, and to contain thirty-eight and twenty-five one hundredth acres.

The alleged tract is upon a bay or inlet of the ocean, between the Rancho Arroyo de la Laguna and the Rancho Refugio, both of which have been surveyed and from the patented limits of both of which it was excluded. It was also excluded from the official survey of T. 11 S., R. 3 W., M. D. M., within which it is alleged to be located, as not being public land. The plat of survey of said township shows the tract to be overflowed land, and the private survey by County Surveyor Wright, filed by the applicant, shows it to be sand, salt-marsh, and willows, with but a very small portion of cultivable land, if any.

Your decision holds that as the tract has not been heretofore claimed nor classed as public land of the United States, but has been claimed by Cook and those associated with him from the State of California; and also in view of its exclusion from said ranches and township, and of the character of the tract as represented by said surveys, and its subjection to tidal overflow, said application should be rejected.

Your decision is affirmed.

SURVEY—SWAMP LAND.

STATE OF CALIFORNIA.

The act of September 28, 1850, was a grant of the swamp land to the State *in presenti, i. e.*, of the land *then being* swamp.

The R. S. 2488 has relation to lands in California that were swamp at the date of the granting act, September 28, 1850.

A survey made in California in February, 1830, as of *all swamp land*, when part had become dry from natural causes, it appearing that it was all swamp in 1850, was properly so designated by the survey.

Commissioner McFarland to U. S. surveyor general, San Francisco, California, February 14, 1882.

I have duly considered the survey of T. 21 S., R. 19, 20, 21, 22, and 23, E.; T. 22 S., R. 18, 19, 22, and 23 E.; T. 23 S., R. 19, 20, 23, and 24 E., and T. 24 S., R. 20, 21, 22, 23, and 24 E., M. D. M., made by

Thomas Creighton, United States deputy surveyor, in January and February, 1880, under contract dated September 12, 1879, and the questions raised by protest against the same. Said survey represents all of said lands as swamp and is approved by you.

Protest was filed against my approving said survey by the attorneys of the Southern Pacific Railroad Company on the grounds—

1st. That the survey had not been made as required by law.

2d. That the classification of the lands as swamp was clearly wrong, a fraud upon the government and the rights of its citizens; that by far the greater part of the lands were dry and subject to sale by the government; and—

3d. That the facts are admitted to be such that the State of California can have no title under the swamp land grant.

Under said first objection it is urged that Creighton has not shown a stream of water entering into the lake, and has not noted the crossing of streams by the subdivisional surveys and the point of intersection and width of streams; that the streams represented in the survey of 1853 and 1854 disappear in the Creighton survey as soon as they enter its lines, and that certain improvements (affidavits of the existence of which are filed) are not noted by him.

Under the second objection it is insisted that the representation of the land as all swamp is wrong and bears marks of fraud; that Creighton reports no land as *acet*, although all is unfit for cultivation without protection by levees, and insists that if all the land is swamp it should not have been subdivided.

It is urged that liability to overflow in seasons of unusual rainfall does not make the land swamp.

It is further pointed out that Creighton, while returning the land as swamp, rates and reports it as first, second, and third rate.

In support of said protest certain affidavits were filed, the gist of which is as follows:

Stephen Barton swears that in 1868 the amount of water from the Sierra Nevada Mountains was ten times as great as the channels of the streams would carry through the valley; that Tulare Lake was raised 17 feet above ordinary level; 300,000 acres submerged for several months; water commenced to recede during dry weather of 1863, and in 1871 about half the submerged lands was laid dry and required irrigation to secure production of cereals in an ordinarily dry year. His inquiries of the oldest white settlers and old Indians fixed the conviction that only two overflows of equal extent have occurred in a century. Not more than one third the amount of water of 1868 has since been equaled by the highest waters, and that from 100,000 to 200,000 acres embraced in Tulare Lake in 1852, as shown by the plats on file in Visalia land office, have since become dry lands from the result of the natural and gradual receding of the waters of the lake.

The affidavit of P. Y. Baker, a surveyor, sets forth that he has been

a resident of Tulare County since 1875; that said lands have not been subject to periodical overflow since 1875, and are now dry; that numerous canals and ditches have been constructed, diverting most of the waters from the streams that empty into the lake; that large tracts of the land embraced in the Creighton survey have been cultivated successfully, and crops produced for years past; that the lands were not reclaimed by reclamation works, and are so dry that there has been serious talk of boring artesian wells for water to irrigate them; that he is informed, believes, and alleges, that the winter of 1849 was an unusually wet one, and that in the months of August and September, 1850, the waters of said lake were fully up to the meander line of said lake as established in 1853 and 1854, and remained at that height, or near that height, for several succeeding years; that the said lands were not from the fall of 1850 up to 1875, subject to periodical overflows, but sometimes remained dry for several successive years.

Samuel Jennings makes affidavit that he has been a resident of California since the fall of 1849, and of Tulare County since the fall of 1852; is acquainted with the character of Tulare Lake and surrounding lands lying between the meander line established by government survey of 1853 and 1854, and the present margin of the lake; that since about 1876 the lands have been dry and fit for cultivation, and have produced abundant crops of cereals; that said lands have become dry by reason of frequent droughts in the valley and the diversion of the waters, formerly flowing into the lake, for irrigation purposes by persons remote from said lands; that about 1868 the major part of King's River, the largest tributary of the lake, diverted from the lake and formed a new channel, running through Cole Slough and discharging into Fresno Slough, and thence through San Joaquin River into San Francisco Bay; that within the last six or eight years the turf or peat, together with the tules or flags theretofore obstructing outlet of the lake, has burned out, some places burning down 7 or 8 feet below the surface, thereby lowering the outlet of the lake from 2 to 8 feet, so that the waters are afforded an outlet and can never overflow said lands from which the water has permanently receded; that the lands are not swamp or subject to periodical overflow, but are of desert character, and have been of that character since about the year 1876, and at present, in an ordinarily dry season, require irrigation for the successful raising of crops; that the dry condition of said lands is not due to reclamation works, and that from his knowledge of the winter of 1849, the waters of the lake were as high during August and September, 1850, as in the fall of 1853 and 1854; the winter of 1849, in the valley, was unusually wet, and none of the waters were diverted then; and that said lands are not now, nor for the last twenty-eight years have been, subject to regular or periodical overflows.

The affidavit of John T. Burch states that he is a surveyor and was employed in 1880, by Thomas Creighton as one of the sworn assistants

under the contract of September 12, 1876, and acted as compassman; is personally familiar with nearly every line of said survey, and all lands embraced therein and their character; that early in 1880, and before the time of said survey, these lands were dry and capable of cultivation, and large portions of them, about 3,000 acres in T. 21 S., 22 E., 22 S., 23 E., and 23 S., 23 E., had been cultivated in 1879, and as he was informed in 1880, in wheat, barley, sorghum, etc., without artificial means save as stated; that the lines of said survey in many places run for long distances, comparatively, on land on which there was stubble of wheat and barley, and the only reclamation was in T. 23 S., 23 W., where Edwin R. Thomason made a farm in 1876, and, being fearful of a rise in the water, built a levee for protection in such contingency at a cost of about \$10,000; that it was found unnecessary as the waters at date of survey were about 2 miles distant from it, and the crops within the levee were so dry they were in danger of drought, and Thomason dug a ditch from the lake back to the levee to conduct water, and bought a steam-pump to raise water to irrigate the land; affiant believes that in 1850 these lands formed a part of the permanent bed of Tulare Lake, and were for a long time subsequent continually under water, and were not swamp in 1850.

James A. Wheeler swears that in April, 1879, he erected a dwelling house on fractional section 17-22 S., 19 E., and has since continuously resided there with his family, and knows lands within the Creighton survey to be dry and fit for agricultural purposes and not subject to any periodical or other overflow, the lake having receded on account of natural causes and not from works of reclamation. Affiant settled to acquire title under homestead and pre-emption laws of the United States.

The foregoing affidavits are quoted as fairly showing the character of evidence submitted to show that said lands are not swamp.

The attorneys for the State have submitted affidavits, Exhibits A to R, inclusive. I will quote from the following only:

Chas. D. Gibbs swears that he is a surveyor and civil engineer, and in 1852 and 1854, he surveyed and meandered Tulare Lake in T. 21, 22, 23, and 24 S., R. 23 and 24 E., M. D. M. 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, and this was the character of the overflow in said townships.

J. S. Meckley swears he arrived in Tulare County in 1852, and has been there ever since; visited T. 21 and 22 S., 23 E., that year; in 1854 assisted Robert Whiting in the subdivisinal survey, and it was then entirely practicable to have designated these lands as swamp, but it

was not then customary; that he has never seen these lands dry during the spring freshets.

J. M. Lewis saw Tulare Lake in 1854, camped two days on the lake; waters extended to about the meander line surveyed in 1853 and 1854; saw the lake in 1866, and has since been well acquainted with the surrounding lands and those embraced in Creighton's survey in T. 19, 20, 21, 22, 23, and 24 S., R. 19, 20, 21, 22, 23, and 24 E.; in fall of 1866 started from Sec. 27, 24 S., 22 E., and waded about three miles into the lake to Atwell Island, and camped there all night, water not being more than 4 feet deep; saw lands in spring, summer, and fall in 1867, and found waters lower; a great portion of Creighton survey was then covered with water. Saw lake again in 1868, and waters were higher than in 1854, and all the land in Creighton survey was covered with water; saw the lake often during each year, and was working on the lake from 1868 to 1875, and all that time was familiar with the water and surrounding lands embraced in said survey, and in said years the waters rose in the spring and receded during the summer and fall, alternately, covering and uncovering most of the land in the Creighton survey, and in each of said years was covered with tules, swamp and wire grass; that from 1875 to the present time the waters have continued to recede, and it has, in opinion of witness, reached the natural and permanent banks; that in T. 23 S., 20 E., is Skull Island, where the Indians evidently buried their dead; the flood waters had washed out and exposed their skulls, and they were scattered about on the sand, and the waters have now receded so as to leave said place above them. Since 1875 the country has been unusually dry, but is of the opinion, from his knowledge of the country, that the lands in Creighton survey will be subject to frequent overflows unless strong and high levees are raised and canals cut to keep off the waters of the lake and its tributaries.

C. W. Clarke has seen the waters of Tulare Lake cover most of the Creighton survey a portion of the year, and then recede the same year, leaving said lands partially dry at least nine times since 1865.

Frederick Cox moved his cattle in 1864 to the swamp lands around Tulare Lake; the waters receded all of that year, and his cattle lived on wire grass, salt grass, and tules in the Creighton survey, and had it not been for the swamp feed that year his cattle and the cattle of many others would have perished.

A. J. Atwell intimately acquainted with lands in Creighton survey over twenty-one years; for large number of years owned and navigated a steambot on said lake, and prior to 1875 the said lands were covered with a dense growth of tules and swamp grass, and were overflowed during the spring and winter of each year so as to render them unfit for cultivation.

Duncan Beaumont, civil engineer, in 1854 had contract with Jack Hayes, United States surveyor-general, for sectionizing T. 20 S., R. 20, 21, 22, and 23 E.; had special instructions not to extend any section

line into the swamp and overflowed lands, but to establish a meander post on the margin thereof; the meander line then established was the correct margin of the swamp and overflowed land in those townships at that time; at meander post, south boundary of Sec. 36, 20 S., 22 E., looking southwest, west, and northwest as far as eye could reach, the land was covered with tules, etc.

Several other affidavits are filed to the same general intent, but sufficient has been quoted from the evidence submitted, both by said railroad company and the State, to show on what facts each relies.

There is a third source from which evidence has been sought in this case. After the protest by said railroad company, my predecessor appointed J. R. Hardenbergh a special agent of this office to make a personal examination of said lands, and to report upon the Creighton survey.

Omitting the detail of examination, I notice that Mr. Hardenbergh describes Tulare Lake as—

Situated in the lowest depression of the upper portion of the San Joaquin Valley, which may be briefly described as a great basin, very flat, rising from the lake from 1 to 3 feet per mile, and receiving the natural waters of all that country. On the east to the summit of the Sierra Nevada Mountains, distant about 70 miles, and on the south for about the same distance, on the north and west about 18 miles.

Mr. Hardenbergh concludes that the Creighton survey is technically correct, but that his classification of lands is entirely erroneous, and finds no indication that any of said lands are swamp and overflowed within the meaning of the act of September 28, 1850.

Referring to the protest of said railroad company, I find that their first exception, to wit, that the survey had not been made as required by law, is not well taken. Mr. Hardenbergh's experience as a surveyor justifies me in regarding his report touching the execution of the work as correct; and while there may be some improvements which were not noted, it cannot be concluded that the omission invalidates the survey.

In respect to the second exception of said protest, to wit, that the classification of lands as swamp was clearly wrong and a fraud upon the government and the rights of its citizens, by far the greater part of said lands being dry and subject to sale by the government, careful consideration of the testimony submitted is necessary.

I will first refer to the affidavit submitted by said railroad company, hereinbefore recited:

Stephen Barton swears that in 1868 Tulare Lake rose 17 feet above ordinary level; that 300,000 acres were submerged for several months; that the water began to recede in the dry weather of 1868, and in 1871 about half the submerged lands were laid dry, and required irrigation to insure production of cereals in an ordinarily dry year. If Mr. Barton swears truly there was nearly three times the area submerged in 1868 than is embraced in Creighton's survey; and three years later there were about 35,000 acres, more than are embraced in Creighton's

survey, still under water from that overflow. Moreover, this was an overflow, and above the "ordinary level" of the lake, and the date is not given when the waters receded from the lands now involved.

Mr. Barton further swears that from 100,000 to 200,000 acres embraced in the lake in 1852, as shown by plats in the Visalia land office, have since become dry lands, and that not more than one-third the amount of water of 1868 has since been equaled by the highest water, thus impliedly conceding the overflow *since* 1868 of about 100,000 acres.

Mr. P. Y. Baker, another witness in behalf of the protestants, swears, upon information and belief, that the winter of 1849 was unusually wet, and that in August and September, 1850, the waters of the lake were fully up to the meander line as established in 1853 and 1854, and remained at that height for several years. Substantially the evidence of Mr. Baker is confirmed by several others, and indeed it nowhere appears to the contrary. It thus seems to be established by protestant's own witnesses that at date of the swamp grant of September 28, 1850, the lands now in question were overflowed, and that the waters did not recede for several years, the land being manifestly rendered unfit for cultivation, and the evidence establishing this fact precludes the conclusion that these lands were the bed of the lake.

Another witness for protestants, Samuel Jennings, who has been a resident of California since 1849, and of Tulare County since 1852, and who is well acquainted with these lands, swears that since 1876 the lands have been dry and fit for cultivation.

In short, the testimony of all the witnesses of protestants is to the effect that the lands are now dry, and have been so since 1875 or 1876; that their condition is not due to reclamation works, but to natural causes, and that the streams formerly discharging into the lake have within the last few years been diverted in other directions.

Relying solely upon protestant's evidence, I should be compelled to conclude that these lands were overflowed and unfit for cultivation at date of the swamp grant; that four years later the waters had receded only to the meander line within which the lands now claimed as swamp are situated; that while reclamation works in the shape of levees may not have been constructed to any considerable extent, yet the waters of several streams were diverted from their course to the lake and turned in other directions for irrigation purposes, and thus reduced the volume of water emptying into the lake which caused the overflow, and that such diversion of said streams was simply one mode of drainage; and that from 1850 to 1875 the lands in question were probably covered by the overflow named, or in such condition for more than half the time as to be unfit for cultivation. These overflows are obviously not such as protestants refer to as a rise in the water of a stream because of an unusual rainfall. As these mountains surrounding this vast plain, which is almost level with the waters of the lake, were annually covered with snow, and the snow annually melted and flowed to this lake, which

had no outlet, the explanation of said overflows and the cause of their duration is very clear.

The great weight of evidence shows that no cultivation of these lands was attempted until within the last few years, although the lands were utilized in seasons of extreme drought for the pasturage of cattle which fed upon the swamp grass while there was no feed on the dry lands. And it further appears that cultivation was not attempted until after the water in the streams which flowed into the lake was diverted to other directions.

Moreover, there is much testimony from those who navigated the lake or were otherwise familiar with it for many years prior to 1875, to the effect that the annual rise and fall of the lake precluded the possibility of successful cultivation of the land now in question.

The swamp grant of 1850, under which the State claims, was of "the whole of those swamp and overflowed lands made unfit thereby for cultivation." The proceeds of such lands were to "be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid."

It was held by this Department as early as 1850 that said grant was *in presenti*, and this ruling has uniformly obtained and been sustained by the highest courts. Hence lands which were of said specified character at date of the grant passed to the State, and the evidence submitted in this case seems conclusive of the material fact that, in 1850, and for many years subsequent thereto, these lands were swamp or overflowed within the clear meaning and intent of said act. There is no evidence submitted, and probably none available, to show the condition of said lands prior to 1850; but as prior to that date there was no outlet to the lake, no irrigation ditches or other known means of diverting the waters of the streams which discharged into the lake, and no known or probable condition of the physical features of the country different from that existing in 1850 and since, the conclusion is unavoidable that like causes produced like effects before as well as after 1850, and that the land was subject to like overflows.

The question arises whether, as much of said land was dry at date of Creighton's survey, it was not his duty to return it as such, and thus remit the State to a subsequent claim to be determined by evidence to be submitted before the surveyor-general. This view is insisted upon by protestants.

I find that the fourth paragraph of section 2488, United States Revised Statutes, which relates to swamp lands in California, is as follows:

In case State surveys are found not to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the Commission 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 the swamp and overflowed land in such townships, and to report the same to the General Land Office, representing

and describing what land was swamp and overflowed; under the grant, according to the best evidence he can obtain.

It is only after this has been done that the further provision is made for the adjustment of any claim which the State may then present for lands not represented on the map or in the returns of the surveyors as swamp.

Under the law as above quoted it would appear to be the plain duty of the surveyor-general to represent and return what land he finds to be swamp and overflowed "under the grant according to the best evidence he can obtain." This clearly means the land which was swamp in 1850, as that only is swamp under the grant; and I am of the opinion that the action of the surveyor-general was therefore lawful and necessary in the case in returning the land as it was shown to be in 1850, and not as it appeared in 1880.

Several points are raised in this case, both by protestants and the State, other than those herein considered, but as I am convinced that said lands were of the character granted to the State by the swamp act of September 28, 1850, I deem it unnecessary to discuss any propositions not essential to said conclusion.

I decide to approve the said Creighton survey. You will give notice hereof to all parties in interest. Time for appeal from this decision will be allowed under the rules of practice.

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SAME, ON APPEAL.

Secretary Teller to Commissioner McFarland, March 9, 1883.

I have considered the question of survey of T. 21 S., R. 19, 20, 21, 22, and 23 E.; T. 22 S., R. 18, 19, 22, and 3 E.; T. 23 S., R. 19, 22, 23, and 24 E.; and T. 24 S., R. 20, 21, 22, 23, and 24 E., M. D. M., California, made by Thomas Creighton, United States deputy surveyor, in January and February, 1880, and approved by Theodore Wagner, United States surveyor-general.

The question involves a tract of land lying upon the borders of Lake Tulare, containing upward of 100,000 acres.

By your decision of February 14, 1882, you approve of the said Creighton survey, which represents the whole of said tract as swamp lands.

The Southern Pacific Railroad Company brought an appeal in the interest of its land grant, and certain settlers, represented by counsel, but not having a standing in the case, requested the Attorney-General to direct an appeal in behalf of the settlers and of the United States. Such appeal was accordingly taken.

The State of California claims the entire tract, under the swamp-land grant act of September 28, 1850 (9 Stat., 519).

The Creighton survey was made at the request of the governor of California, by letter of July 31, 1879, addressed to the surveyor-general of that State, and was duly authorized by your office.

The first township surveys of land adjoining the lake were made in 1853 and 1854. The tract in controversy lies between the meander line of the lake, as shown by those surveys, and the waters of the lake, or new meander line, as shown by the Creighton survey of 1880. By the first surveys this tract was returned as lake, and was at that time, in fact, covered, or nearly so, by water.

The swamp-land grant is a grant *in presenti*, except as to States admitted into the Union after the passage of the act (French *v.* Fyan, 93 U. S., 169). California was admitted September 9, 1850.

If, then, the tract in question at the time the swamp-land grant passed was covered with water, apparently of a permanent character, up to or near the old meander line, it would not pass to the State under that grant, although subsequently, by a recession of the waters, land of a dry or swampy character should come into existence (Wolf Lake, Illinois, 5 C. L. O., 19; Beaver Lake, Commissioner's decision, June 17, 1871; County of St. Clair *v.* Lovington, 23 Wall., 46).

It becomes, therefore, of the first importance to inquire whether the tract became a reliction after the 28th day of September, 1850, or whether in fact at that time it existed as land and was swamp or overflowed, so as to bring it within the meaning of the act of that date.

The question thus presented is one purely of fact.

There is no common-law proof in the record upon the subject, and keeping out of view for the present the Creighton survey, which is a subject of much controversy, the testimony in the record is made up entirely of affidavits taken *ex parte*. These affidavits are numerous, are taken and put into the case by both sides without objection, and are referred to and quoted from by counsel for the respective parties.

In order to understand the proofs fully, it is necessary to state briefly the conformation of that part of the earth's surface to which they relate.

Lake Tulare is an inland navigable body of water, some 25 miles in extent across its center, from north to south and from east to west. It occupies the lowest depression of a large valley, the watershed being quite extensive, comprising on the east all the country between the lake and the Sierra Nevada range, distant some 70 miles, and, on the south and west, that between the lake and the coast range, distant from 20 to 70 miles. The slope upon the north, east, and south, is very gradual, but on the west is less so; consequently nearly all of the tract in controversy lies upon the eastern and southern shores of the lake.

Tule River, Cross Creek, Deer Creek, King's River, Flat Creek, Elk Bayou, and numerous streams and water-courses, flow into the lake from the direction of the mountains. From the old meander line across the tract in question, these streams have no defined channels.

At the time of the surveys of 1853 and 1854, there was no outlet of the lake, natural or otherwise, except that after attaining at or about the height marked by the old meander line, the waters overflowing through the slough extending northward from the lake toward the San Joaquin River, found an outlet by way of that river.

There is no certainty that the waters will remain at or near the level represented by the new meander line unless an artificial outlet is provided; and there is some question whether an adequate outlet could be thus constructed, although some efforts to that end have been made.

Such are the topographical features of the country and its general situation as affecting the tract in question.

The proofs found in the affidavits introduced by both parties show that the water in the lake was as high at the time of the surveys of 1853 and 1854 as it has ever been; that it was about the same height in 1868; that from the first surveys to the year 1876 the lake was subject to great fluctuations, inundating from 100,000 to 300,000 acres of land which were exposed at its lowest level; that the tract in question was often submerged; that since the year 1876 seasons have been generally dry, and the tract in question has suffered but little from inundation; that the beds of all or nearly all the streams running into the lake are dry at certain seasons of the year, and others are swollen by rains and melting snows, and after passing the old meander line, spread out and overflow considerable portions of the tract in question; that in order to protect the lands channel excavations must be made, whereby to conduct the waters of the streams from points in the old meander line through the tract to the lake, and extensive levees built along the lake and the streams.

There is but little conflict in the affidavits as to what was the condition of the tract as to its being subject to overflow prior to 1875 and 1876, the main conflict being as to its condition since that time, and the liability of its being inundated in the future.

There is some proof that some of the streams formerly emptying into the lake have in whole or part been diverted for purposes of irrigation. I think, however, that it is clear there is no adequate protection of the tract, either by outlet or otherwise, against a wet season or such rises of water as occurred frequently prior to 1876, and are quite likely to occur again. The affidavits prove that large portions of the tract were dry at the time of the Creighton survey. Other portions were covered by a luxuriant growth of tule, salt-grass, and other vegetation, the products of a wet soil, and affording pasture for stock in seasons of drought.

It must be borne in mind, however, that our inquiry must be kept to the condition of the tract in 1850, and that evidence of its subsequent condition is material only in aiding us to ascertain its real condition at the time the swamp grant act was passed. There is proof, in the affidavits of deputy surveyors and others, that at the time of the surveys of

1853 and 1854, there was a belt of swamp land on the lake side of the meander line then established, and that at that time there existed instructions "issued by the United States surveyor-general, not to extend any section lines into swamp and overflowed lands, but to establish a meander post on the margin of the same."

The deputy surveyor who made the survey and established the old meander line, says that the water then seemed at its highest; that from the meander line the water was very shallow for a long distance into the lake, and so muddy that he had to go nearly half a mile into the lake daily for drinking water; and that such was the general character of the overflow in the townships in which this tract is located.

In 1849 there was a great rise of water in the lake, which seems to have remained up to and after the time of the surveys of 1853 and 1854.

Such is substantially the case as made by the proofs and the record, aside from the Creighton survey.

In relation to this survey and the recitations found in it there is much controversy.

The survey is important, since if it cannot be sustained the lands cannot be certified to the State in the present proceeding, even if it should clearly appear that they were swamp and overflowed lands in 1850. They were not, as we have seen, represented as such lands upon the surveys and plats of 1853 and 1854. Therefore it became necessary, under the act of July 23, 1866, to quiet land titles in California (14 Stat., 218), that the governor should make application to the surveyor-general, and that by your direction segregation surveys should be made "of all the swamp and overflowed lands 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 could obtain." If the State made claim, under the act of 1850, to lands as swamp and overflowed which were not represented as such by the returns of any surveys, the claim was to be determined by testimony to be taken before the surveyor-general.

The Creighton survey was duly authorized, and was made in the field in January and February, 1880. The field notes were returned to the surveyor-general, and approved by him. By such survey the tract in question was returned and classified as swamp and overflowed land.

A protest, with various allegations, was made against the survey by said railroad company, which resulted in the appointment of a special agent by your office to make personal examination of the lands and report upon the Creighton survey. This agent, after an extended examination, reported that the survey was technically correct, but was erroneous in the classification of the lands as swamp and overflowed within the meaning of the act of 1850.

Undoubtedly at the time of the Creighton survey the actual condition of lands was generally dry, and that they were in that condition also at the time of the examination by the special agent in 1881.

Upon an examination of the lengthy report of the special agent, I think it will clearly appear that he had in mind the condition of the lands as he found them in 1881, and as they had been for some years prior to that time, but that he did not consider nor report upon their condition in 1850, nor seek, to any considerable extent, for evidence to establish their actual condition at that time, nor do I think his instructions require him to do so. And when he reports Creighton's classification of the lands to be erroneous, he evidently refers mainly to the condition he then found them in, and the condition they actually were in at the time of the Creighton survey. In proof of this I quote briefly from his report. He says:

I have no hesitation in reporting that the land returned by the Creighton survey as swamp and overflowed land is not correct, and that the land returned as swamp and overflowed is not of that character; that no water stands upon the land except that which I have mentioned, and no reclamation is required to raise a crop on the same.

After referring to the fact that formerly the lake had no outlet, he says:

But its condition has changed materially; it has lost its chief water supply by canals and ditches, and it never can, while those canals and ditches keep up their flow, receive any great amount of water.

And the purport of the great share of his report is to the same effect.

On the other hand, the general description of the physical formation of the region about the lake, as given by the agent, affords very strong proof that the lands were subject to overflow, and unfit for cultivation, in 1850. He describes the lake as having no outlet at the time of the great floods of 1861-'62, 1867-'68, and that it then took the waters a long time to recede by evaporation and percolation; that the lake was situated in the lowest depression of the San Joaquin Valley, a great basin and receiving the natural waters of all that country, being "a vast area of over 7,000 square miles."

It became Creighton's duty under the act aforesaid, being section 2488, United States Revised Statutes, to represent and describe what land was swamp and overflowed under the act of 1850, "according to the best evidence he could obtain." I think an examination of his survey and report leads inevitably to the conclusion that his classification of the lands as swamp and overflowed referred to their condition in 1850. As I read the reports of Creighton and of the special agent, the supposed conflict does not exist.

The Creighton survey is severely assailed by the protest on the part of the railroad company as fraudulent and illegal. The principal ground of the charge is as follows:

The surveyor-general, before his appointment as such, acted as attorney for the State in reference to the lands now in question, although not in relation to the present controversy. After the survey in the field, the books of survey were transmitted to him by Creighton, and were

returned by the surveyor-general, accompanied by the letter of May 8, 1880, for correction, which letter indicated that the notes of survey should show more definitely the condition of the lands September 28, 1850, if he (Creighton) should be of that opinion. Creighton then added to his notes, after nearly every subdivision, as follows: "Subject to overflow and unfit for cultivation within the meaning of the act of September 28, 1850," giving in many instances the name of the stream from which the overflow was liable to come. After these additions were made the survey was approved.

It is undoubtedly within the duty of the surveyor-general to supervise and direct corrections to be made of the field notes of subordinate surveyors, and it is a duty often exercised. But for the fact of the surveyor-general's former relation to these lands as attorney, the question of his interference with the notes and surveys would not probably be raised. Such relation ought, it would seem, to disqualify a surveyor-general from action; but probably it does not—at least, not by positive law.

I think, however, that such additions do not vitiate the surveys, nor for that reason require that they should be rejected and canceled. Such additions are in effect but the statement of a conclusion of law, and may very properly be disregarded. I think the addition was uncalled for and unnecessary. It occurs, the same in substance, more than four hundred times. The surveyor (Creighton) has already, without any suggestion, incorporated into his notes, at the end of the surveys of the townships, a complete and much more satisfactory statement as to all the lands within the townships embraced in the surveys. As an instance, I cite the statement at the end of the survey of township 24, range 20 E., which is as follows, viz:

The quality of land in Fr. T. 24 S., R. 20 E., is generally good. The land is swamp and overflowed in nature, being made so by the waters of Kern River, [which] coming down through the Buena Vista, and having no definite channel, overflow the whole country at time of high water. It is also liable to overflow from the rising of Tulare Lake, having been under water for these causes since 1860, the water gradually receding for the last six or eight years, being seasons of drought in this country. The land is liable to be again inundated from these causes (unless thoroughly protected by levees) at any season of anything more than an average rainfall.

I shall refer to but one other criticism of the Creighton survey. It is claimed that, under section 2395 of the Revised Statutes, all water-courses must be noted in the field book, and that in fact no water-courses are noted upon the plats in question, but all the numerous streams disappear upon reaching the old meander line, so that no streams appear as passing across the tract in question to the water of the lake. This is explained by evidence which shows that in fact there are no channels across the tract, but that, the ground being nearly level, the waters spread out over the tract after reaching the old meander line.

A large map of Tulare county, which I find in the record, approved by the supervisors as the official map of the county, and apparently having no connection with the case, has clearly marked upon it the tract in question, and shows all streams as ending at the old meander line. The examination and report made by special agent Hardenbergh, conceded to be a very competent surveyor, states that the Creighton survey is technically correct.

Leaving out of view the additions before referred to, I think the Creighton survey is full and intelligent, and all its recitations bear the evidence of being fair and truthful. I find no ground for impeaching it.

The evidence shows that there are but few settlers upon the tract except those who are there under a claim of right from the State. It is doubtful whether there are any other actual or *bona-fide* settlers. Of the eighteen persons who signed the request (Exhibit No. 6) for appeal to this Department, it is proven that not any of them reside upon lands within the Creighton survey, but are residents of adjoining towns. Undoubtedly some of these persons have made claim to some of the lands within the Creighton survey, and have made some improvements thereon. In a very few instances quite a large amount of money has been expended in the construction of levees, but I understand from the evidence that such expenditure has been made by persons claiming under the State.

The Creighton survey and notes (disregarding the additions before named) afford much satisfactory evidence as to the condition and situation of the lands and their liability to overflow, and the hazards of cultivation without a large expenditure for protection. This evidence, taken in connection with the physical conformation of the country, and the fact that there is no adequate outlet for the waters liable at any unusual rise to be precipitated into the lake, show that these lands are at present in a condition unfit for safe and continued cultivation. Most of the tract is so nearly on a level with the water in the lake at its present stage, that a small rise therein, without protection, would inundate the entire tract.

When these well-established facts are considered, with the proof furnished by the surveys of 1853 and 1854, and the evidence connected therewith that the tract was that mainly covered with water, and had been since 1849, and that at different times, for long periods down to 1876, it had been so covered and overflowed, the conclusion is manifest that the tract in question, at the time of the passage of the act of September 28, 1850, was "swamp and overflowed lands, made unfit thereby for cultivation."

After a somewhat extended examination of the several matters involved, I am satisfied that the lands properly belong to the State, and have therefore concluded to affirm your decision approving the Creighton survey, and to direct the necessary steps to be taken to give the State the legal title to the lands covered thereby.

PRICE OF LAND—ACT OF JUNE 22, 1874.

CHARLES MCEWEN.

A tract of land within the limits of the grant to the Hastings and Dakota Railroad, to which the railroad has the superior right, which it relinquishes under the act of June 22, 1874, held to be subject to entry at the minimum price, it not being "land remaining to the United States."

Commissioner McFarland to register and receiver, Benson, Minnesota, October 31, 1881.

I am in receipt of a letter from Messrs. Curtis, Earle and Burdette, attorneys, dated 26th August, 1881, relative to cash entry 4571 of Charles McEwen for lots 1, 2, 7, and 8 of Sec. 31, 116, 31, Benson district, Minnesota, in which case you were instructed by my letter of April 16, 1880, to call upon McEwen for an additional payment of \$1.25 per acre (\$1.25 per acre being paid at date of entry), because the land was within the ten-mile "granted" limits of the Hastings and Dakota Railroad Company, which relinquished said land in favor of McEwen under act of June 22, 1874. Said attorneys claim in behalf of McEwen that the land was not—being in an odd-numbered section—reserved to the United States; that there is no law authorizing the increase of price to be applied to the odd-numbered sections; that the land is not land the title to which "remained in the United States;" also that said decision or requirement of April 16, 1880, is contrary to the ruling of the Department in similar cases, in proof of which they refer to the case of Jane Soule, who made cash entry (pre) 3998 for the SW. $\frac{1}{4}$ of Sec. 5, 117, 40, in your district.

The act of July 4, 1866, under the provisions of which the Hastings and Dakota Railroad was constructed, provides—

That the sections and parts of sections of land which by such grant shall remain to the United States within 10 miles on each side of said road shall not be sold for less than double the minimum price of public lands when sold. . . . *Provided*, That actual *bona fide* settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement and occupation, as now provided by law, purchase the same at the increased minimum price.

It has been held by this office in cases arising under similar grants, notably that of Hartley *v.* Saint Joseph and Denver City Railroad Company, decided October 20, 1876, that where lands in odd sections within the granted limits, were in the possession of actual *bona fide* settlers under the pre-emption laws, at the time the right of a road attached, and where such lands subsequently *reverted* to the United States by abandonment or otherwise, they could not be sold to pre-emptors at less than \$2.50 per acre. A tract, therefore, excepted from a grant by reason of the existence of a valid claim, which subsequently ceased, would "remain to the United States," and become subject to the pro-

vision of law under consideration. In the present case the land was granted to the road, and the superior right of the road admitted and affirmed by letters from this office, of July 16, 1873, and October 19, 1874. The fact that the road or company subsequently relinquished the land did not bring the land into the condition described by the act as "land remaining to the United States," because the United States in such cases is, if I may so term it, merely a trustee for a transfer of the land from the company to the settler.

The act of June 22, 1874, specifically states that the lands relinquished under its terms must be lands *granted* to the road, and when such lands are relinquished by the company, they are relinquished in order that "the entries or filings may be perfected into complete title as if such lands had not been granted." I am therefore constrained to decide that the decision of my predecessor in this case was erroneous, and that the entry of McEwen should have been approved without requiring further payment. I have therefore this day approved said entry. There was no formal decision in the Soule case referred to by the attorneys named, the entry evidently having been approved without raising any question as to the price of the land involved.

RAILROAD GRANT—FORFEITURE—AUTHORITY OF DEPARTMENT.

McGRATH v. ATLANTIC & PAC. R. R. CO.

Although the company has failed to comply with the terms of its grant it is not competent for the Department to enforce a forfeiture or restore the lands granted by the act of 1866.

Secretary Kirkwood to Commissioner McFarland, November 21, 1881.

I have considered the case of Edward McGrath *v.* The Atlantic and Pacific Railroad Company, involving the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 9, T. 31 S., R. 15 E., M. D. M., San Francisco district, California, on appeal by McGrath from your decision of January 27, 1881, rejecting his application to purchase said tract.

It appears from the record that the tract is within the 20 miles (granted) limits of the grant by act of July 27, 1866 (14 Stat., 292), to the said company, and was withdrawn therefor on December 9, 1874, upon definite location.

The township plat was approved by the surveyor-general July 26, 1880.

On August 27, 1880, McGrath applied at the local office to purchase the land in question under the act of June 3, 1878 (20 Stat., 89), but the register and receiver rejected his application, for the reason that the land was reserved for the said company. From this action McGrath appealed, urging as a ground therefor that the eighth section of the act

of 1866, aforesaid, required said company to "construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-eight," and that by reason of failure to comply with such requirement the company has forfeited its rights to all the lands granted thereto.

The ninth section of the act in question provides that in the event of any breach of the conditions cited the United States may, at any time after the expiration of one year from the making of such breach, do any and all acts which may be requisite to insure a speedy completion of the said road. This section does not create a forfeiture, but is merely in the nature of a condition subsequent.

In the case of *Schulenberg v. Harriman* (21 Wallace, 44) it was held by the United States supreme court that the provision in the act of June 3, 1856, to the effect that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is a condition subsequent, being in effect a provision that the grant, to the extent of the lands unsold, shall be void if the work designated be not done within that period; that no one can take advantage of the non-performance of such a condition annexed to an estate in fee but the grantor or his heirs or successors, 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 same doctrine obtains where the grant upon such condition proceeds from the government (as in the case under consideration); "no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed." This construction is based upon Sheppard's Touchstone, p. 125, wherein it is said:

If the words in the close or conclusion of a condition be thus, that the land shall return to the enfeoffor, or that he shall take it again and turn it to his own profit, or that the land shall revert, or that the feoffor shall *recipere* the land; these are, either of them, good words in a condition to give a re-entry—as good as the word "re-enter"—and by these words the estate will be made conditional.

Although, as you state, the Atlantic and Pacific Railroad Company has failed to comply with the terms of its grant, it is not competent for this Department to enforce a forfeiture or restore the lands granted by the act of 1866, as no action to that end has been taken either by legislative or judicial proceedings.

Therefore the title remains in the company as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections.

The foregoing construction of the act of 1866 is in harmony with that of the Attorney-General of the United States, as expressed in his opinion under date of October 26, 1880, which opinion has been adopted by this Department as the law of the case.

Your decision is accordingly affirmed.

RAILROAD GRANT—INDEMNITY SELECTION.

CALIFORNIA & OREGON R. R. CO.

Instructions will not issue to receive this company's selections of lands subsequent to the expiration of its grant (July 1, 1880), as the granting act provides that if the said company shall fail to complete its road within that time the act shall be null and void, and all the lands not conveyed by patent to said company at the date of such failure shall revert to the United States.

Commissioner McFarland to Henry Beard, Washington, D. C., December 15, 1881.

I am in receipt of your letter of the 10th of October last, stating that in June, 1880, the Central Pacific Railroad Company, successor to the California and Oregon Railroad Company, applied to select sundry tracts of land at Marysville, Cal., as per list No. 11; that among the lands thus applied for was a very considerable quantity, the surveys of which were not then completed, and the selections were refused by the register and receiver for that reason; and you now request that this office direct the said officers to accept the fees and certify the said list for the following tracts in T. 16 N., R. 1 E. (the survey of which township has been completed and returned), with a view of patenting the same to the said company, so far as not in conflict with pre-emption, homestead, or other lawful claims, to wit: S. $\frac{1}{2}$ of Sec. 11, T. 16 N., R. 1 E.; all of Sec. 13, T. 16 N., R. 1 E.; E. $\frac{1}{2}$ of Sec. 15, T. 16 N., R. 1 E.; all of Sec. 23, T. 16 N., R. 1 E.; N. $\frac{1}{2}$ and SW. $\frac{1}{4}$ of Sec. 25, T. 16 N., R. 1 E.; E. $\frac{1}{2}$ of Sec. 27, T. 16 N., R. 1 E.

In answer, I have to advise you that the lands in question are within the 20-mile limits of the grant of July 25, 1866, to the California and Oregon Railroad Company. This company was required, under section 6, of the said act, to complete the whole of its road on or before July 1, 1875. This section was amended by act of June 25, 1868 (15 Stats., 80), which extended the time for the completion of said road to July 1, 1880.

The line of said road has been completed north toward the Oregon State line, to a point in Sec. 35, T. 32 N., R. 5 W., M. D. M.

The eighth section of the granting act of July 25, 1866 (14 Stats., 241), provides:

That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section 6 of this act, or by not completing the same as provided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company, or companies, as the case may be, at the date of any such failure shall revert to the United States.

In view of this provision of the law, which is plain and not to be misunderstood, I must decline to instruct the local officers at Marysville,

Cal., to accept the fees and certify the list of lands referred to, as they cannot now be patented to the Central Pacific Railroad Company, successor to the California and Oregon Railroad Company, by reason of its failure to complete its road within the time specified in the granting act.

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RAILROAD GRANT—WITHDRAWAL—SETTLEMENT.

ST. PAUL M. & M. RY. CO. *v.* GJUVE.

A grant is to be taken most strongly against the grantee, and, therefore, in a case where a pre-emptor settled on the same day that the railroad right attached, the land, in the absence of proof as to the actual facts, should be awarded to the settler.

Secretary Teller to Commissioner McFarland, July 24, 1882.

I have considered the case of the Saint Paul, Minneapolis and Manitoba Railway Company *v.* Bjorn Christopherson Gjuve, involving the cash entry of the latter, made February 10, 1877, upon lot 4 of Sec. 33, T. 136, R. 44, Fergus Falls, Minn., on appeal by the company from your decision of August 11, 1880, holding Gjuve's entry for approval for patent.

The tract is within the 10-mile limits of the grant to Saint Vincent Extension, Saint Paul and Pacific Railroad Company, the right of which attached September 20, 1871. Gjuve made his settlement on the same day; and upon the day of his entry submitted proof showing continuous residence and cultivation of the tract, with valuable improvements thereon.

There is no proof showing or tending to show which of the parties became first entitled to the tract; whether Gjuve by his settlement, or the company by the definite location of its road, on the same day. The argument of the company that, as there are no fractions of a day recognized in law, it must be conceded that the right of the company commenced with the beginning of that day and hence has priority, applies with no greater force to it than to Gjuve, who, under the same rule, might be held to have commenced his settlement with the beginning of the day. In the absence of proof as to the actual facts, I find no other rule for the determination of the question than the equities of the case and the general proposition that a grant is to be taken most strongly against the grantee.

Your decision is affirmed.

RAILROAD GRANT—OVERLAPPING LIMITS.

MISSOURI, KANSAS & TEXAS RY. CO.

A tract of land is within the 10-mile (granted) limits of the Leavenworth, Lawrence and Galveston Railroad, and the 20-mile (indemnity) limits of the Missouri, Kansas and Texas Railway. *Held*: 1st. That as at the date of the withdrawal for the latter company the tract in question was reserved for the Leavenworth, Lawrence and Galveston Railroad, it was excepted from the grant to the Missouri, Kansas and Texas Railway; and 2d. As the tract in question could not be withdrawn for the Missouri, Kansas and Texas Railway before the act of July 24, 1876, declaring the lands of the Leavenworth, Lawrence and Galveston Railroad forfeited to the United States, and as it has not since been selected by, nor withdrawn for, the Missouri, Kansas and Texas Railway, it is subject to entry under the homestead law by the first legal applicant.

Acting Commissioner Harrison to register and receiver, Independence, Kansas, September 2, 1882.

I am in receipt of the register's letter, dated the 4th instant, asking why the location of warrant No. 80463, act of 1847, by John Wiggins, for the NE. $\frac{1}{4}$ Sec. 13, T. 23 S., R. 18 E., was canceled, and what disposition is to be made of the land.

In reply, I have to state that the records of this office show that Wiggins was actually residing on the NE. $\frac{1}{4}$ Sec. 13, T. 23 S., R. 17 E., and did not therefore have a pre-emption right for the first described tract, and the location was canceled.

The tract is situate within the 10-mile limits of the grant to the Leavenworth, Lawrence and Galveston Railroad Company and the 20-mile limits of the grant to the Missouri, Kansas and Texas Railway Company. The grant to the former company was created by the act of Congress approved March 3, 1863, and the lands were withdrawn for its benefit May 5, 1863.

The grant to the latter was created by the act approved July 26, 1866, the withdrawal for which became effective April 3, 1867.

Section 4 of the act of March 3, 1863, provided that if any part of the roads and branches was not completed within ten years from the passage of that act, no further sale should be made and the lands unsold should revert to the United States. A portion of the Leavenworth, Lawrence and Galveston Railroad was not completed, and the act of July 24, 1876, provided that all lands granted to the company which had not been patented to it under said act, or earned by the completion of its road, or to which it was not lawfully entitled, were thereby declared forfeited to the United States, and should thereafter be subject to entry only under the provisions of the homestead laws. I therefore hold that the company's right to select the tract in question ceased from that date, and the land became a part of the public domain.

The Missouri, Kansas and Texas Railway Company claims lands under the act of March 3, 1863, by virtue of an assignment by the Atchison, Topeka and Santa Fé Railroad Company of its rights for the branch from Emporia to where the Leavenworth, Lawrence and Gal-

veston Railroad enters the valley of the Neosho, but it cannot be claimed that under that act it would be entitled to indemnity within the 10-mile limits of the grant to the Leavenworth, Lawrence and Galveston Railroad Company.

Therefore it must assert its claim to the tract, if at all, under the act of July 26, 1866, and at the date of this act, as well as at the time of the withdrawal for its benefit, the land had clearly been reserved to the State of Kansas for the benefit of the Leavenworth, Lawrence and Galveston Railroad Company, and consequently was excepted from the operation of the grant to the Missouri, Kansas and Texas Railway Company.

The former theory of this Department that railroad rights attached to lands within indemnity limits was abrogated by the decision of the supreme court of the United States, in the case of Michael Ryan *v.* the Central Pacific Railroad Company (100 U. S., 382), wherein it was held that the grant of indemnity lands was only a float which attached to no particular tracts until a selection was actually made.

The Missouri, Kansas and Texas Railway Company has not selected the tract in question. It has not been withdrawn for its benefit since the act of July 24, 1876, declaring the Leavenworth, Lawrence and Galveston lands forfeited to the United States, and it could not be withdrawn before on account of the then existing grant to the Leavenworth, Lawrence and Galveston Railroad Company.

It is my opinion that the tract is subject to entry under the provisions of the homestead law, and you will allow the first legal applicant to so enter it, and note upon the papers a reference to this letter by its initial and date.

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RAILROAD GRANT—ACT OF APRIL 21, 1876.

WENZEL *v.* ST. PAUL, M. & M. RY. CO.

- A settlement and filing constitute an entry within the meaning of the act of April 21, 1876, as well as under the general practice of the Land Department.
- A filing duly made with the local officer, whose action was approved by the General Land Office, is an entry "made by permission of the Land Department," within the meaning of the act of 1876.
- In using the language "at a time subsequent to the expiration of such grant" Congress has reference to the dates named in the various granting acts to railroads, as the dates at which the roads should be completed, and not to a time when by legislative or judicial action a forfeiture might be declared.
- A settlement and filing made under the pre-emption laws on lands within the limits of a railroad land grant, at a time subsequent to the expiration of such grant, is an entry which is confirmed by the third section of the act of April 21, 1876.

Secretary Teller to Commissioner McFarland, October 20, 1880.

I have examined the application of W. K. Mendenhall, esq., of counsel, for a reconsideration of my decision of the 13th of July last in the case of John P. Pillard and others (including Charles Wenzel) *v.* The

Saint Paul, Minneapolis and Manitoba Railway (formerly the Saint Vincent Extension, Saint Paul and Pacific Railroad) Company, so far as said decision relates to Charles Wenzel. The claims involved in that decision were adjudicated under the provisions of the act of April 21, 1876, entitled "An act to confirm pre-emption and homestead entries of public lands within the limit of railroad grants in cases where such entries have been made under the regulations of the Land Department." (19 Stat., 35.)

Wenzel made settlement June 2, 1874, and filed declaratory statement September 2, 1874, as a pre-emptor on the NW. $\frac{1}{4}$ of Sec. 1, T. 154, R. 48, Crookston, Minn. This tract is within the 10 mile limit of the grant to the railroad, and Wenzel's filing was by you held for cancellation as not confirmed by the act of April 21, 1876, for the reasons that he did not make settlement until after the withdrawal of the land for the benefit of the road. This action, based upon section 1 of the act, was affirmed by the Department July 13, as above stated.

In the application for review it is contended that Wenzel's claim comes within the provisions of section 3 of the act cited. That section provides:

That all such pre-emption and homestead entries which may have been made by permission of the Land Department, or in pursuance of the rules and instructions thereof, within the limits of any land grant at a time subsequent to the expiration of such grant, shall be deemed valid, and a compliance with the laws and the making of the proof required shall entitle the holder of such claim to a patent therefor.

Applying the law just quoted to the facts as they appear in Wenzel's case, the following inquiry is suggested: Did he make a pre-emption entry by permission of the Land Department, or under the rules and instructions thereof, at a time subsequent to the expiration of the grant to the railroad?

That his settlement and filing constituted an entry within the meaning of the act of 1876, as well as under the general practice of the Land Department, seems to me obvious. I am equally well convinced that the entry was made by permission and under authority of the Land Department. The filing was duly made with the local officer, whose action, in addition to being *prima facie* authoritative, was explicitly approved and ratified by your office in letter bearing date September 23, 1874, directing that "settlers upon the land of the Saint Vincent Extension who were actual settlers at the date of the act of June 22, 1874, and applied to file within the legal period, are protected by the statute, and their filings may be received," etc. Wenzel's settlement was on June 2, 1874. It is true the act of June 22, 1874, was subsequently declared by one of my predecessors inoperative. *Vide* case of *Kemper v. Saint Paul and Pacific Railroad Company* (3 C. L. O., 170). Until that was done, however, all rules and regulations of your office relating to said act of 1874 were properly in force, and all acts of settle-

ment in good faith in accordance therewith are entitled to recognition. The policy of the general law is to protect such settlers in their rights. Especially must such a policy prevail when a remedial statute is invoked, as in this case.

There remains to be considered, then, only the third point in the inquiry, viz, was the entry made at a time subsequent to the expiration of the grant to the railroad? After a careful consideration of the act of 1876 in all its bearings, and especially of section 3 as applicable to this case, I am of the opinion that in using the language "at a time subsequent to the expiration of such grant" Congress had reference to the dates named in the various granting acts to railroads as the dates at which the road should be completed, and not to a time when by legislative or judicial action a forfeiture might be declared.

If such was not the intention of Congress, then the section is meaningless, for after declaration of forfeiture by legislative action or judicial decision the lands would be open to entry under the general pre-emption and homestead laws, and without the intervention of a remedial statute.

The original grant, under which the construction of the Saint Paul and Pacific Railroad was authorized, was by act of Congress approved March 3, 1857.

By act of March 3, 1865, the grant was increased to 10 sections per mile, the indemnity limits to 20 miles from the line of the roads or branches, and the time for the completion of said roads was extended eight years from the passage of said act.

By act of March 3, 1873, the time for the completion of the roads from Saint Anthony to Brainerd and from Saint Cloud to Saint Vincent was extended nine months from the time limited by prior acts. The limitations named in these several acts as to time of completion had all expired prior to the date of Wenzel's settlement.

It therefore seems conclusive that the remedy offered by section 3 of the act of April 21, 1876, was intended to, and does, include entries of the character of that made by Mr. Wenzel, and it is not even necessary to apply the well-established principle of law that "remedial statutes must be construed liberally, and where the meaning is doubtful they must be construed to extend the remedy."

My decision of July 13 is accordingly modified so as to allow the entry of Wenzel, he having made settlement and filing in accordance with the pre-emption laws. It is no part of my duty to here discuss the constitutionality of the act of 1876, nor the questions which may arise as to conflict of title by reason of its having a place on the statute books.

Those are questions for the courts. My plain duty is to execute the laws under which I am called to act, in accordance with their letter and spirit as I find them.

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RAILROAD GRANT—CONFLICTING CLAIMS.

PERKINS v. CENTRAL PAC. R. R. CO.

These grants to railroads are present grants; when they take effect they operate *eo instante* upon the lands within the granted limits. The grant is not held in abeyance to await the default of settlers, but the title vests or does not vest at once; and so far as regards the land in which the title does not vest at once, the claim of the company is at an end. If the grant is a present one, and the title does not vest when the grant takes effect, it cannot vest afterward.

It was the intention of Congress that only such unoccupied lands as were not held under any claim recognized by the government, should pass under the grant.

The lands, therefore, in those sections to which pre-emption and homestead claims had attached at the time the line of the road was fixed, were not granted at all. It was not a grant of the entire odd sections, subject to pre-emption and homestead claims thereon; but the grant did not touch the lands to which these claims had attached.

Secretary Teller to Commissioner McFarland, December 12, 1882.

I have considered the case of James F. Perkins v. the Central Pacific Railroad Company, involving the SE. $\frac{1}{4}$ of Sec. 21, T. 14 N., R. 9 E., M. D. M., Sacramento, Cal., on appeal from your decision affirming the decision of the local office and permitting Perkins to make pre-emption filing for said tract.

The land in question is within the granted limits of the grant of July 1, 1862, to the Central Pacific Railroad Company, the right of which attached September 14, 1866.

Lands in the odd-numbered sections were withdrawn October 3, 1864, and the township plat filed in the local office April 16, 1866.

February 2, 1878, Perkins applied to make pre-emption filing for the tract, and at his request citation issued to the said company to appear March 14, 1878, at the local office, there to produce evidence to contest Perkin's claim.

At the time and place named, both parties appeared, and testimony was taken.

By the testimony so taken, and the evidence, the following facts are fairly established, viz :

That one Murphy settled upon the land in 1854, and lived there until 1857 or 1858, and then sold his possessory right and claim to Lorenzo D. Brown and one Dow.

Brown went into possession, and lived there until 1871. He continued to make improvements, so that in 1871 he had a good fence of cedar rails around the whole tract; a good house, barn, and orchard thereon, and all of the value of \$1,800. Brown sold the improvements and possessory claim for \$600 to one George Geisendorfer, who sold the same to said James F. Perkins for \$500. Perkins took possession in 1877, and has since then lived on the land, cultivating and improving it.

It is insisted that it is not proven that Brown was a qualified pre-emptor.

Brown filed declaratory statement No. 3481 for said tract July 13, 1886, alleging settlement June 1, 1858. The testimony taken upon such hearing, considered in connection with the record evidence, establishes *prima facie* that said Brown was a qualified pre-emptor, and there was no adverse testimony.

It is also claimed that the testimony proved that Dow was an equal owner with Brown, and that "a joint purchase does not give one of the parties a right to acquire the title under the pre-emption law." It is not shown what became of Dow's interest. It does not appear that he was ever in possession, or joined at all in the settlement with Brown.

Brown was in possession many years; Geisendorfer, his vendee, was also in possession, and Perkins has now been in sole possession several years, living upon, cultivating, and improving the land.

Dow's right, however, was only a possessory right, and not having been asserted for so many years may well be regarded as extinguished.

At the time, therefore, that the grant of the company attached to the land within its grant, there was a valid pre-emption claim to the tract in question, capable of being perfected.

Upon this state of facts the legal question in the case arises, viz: did the pre-emption claim existing at the time the grant to the company took effect absolutely exclude the land from the grant?

If such was the effect of the pre-emption claim, then "it is immaterial whether the lands subsequently became a part of the public lands of the country." (2 Otto, 733.)

That would be a question which would not concern the company; and upon abandonment or failure of the pre-emption claim for any reason, the tract would become public land, and questions relating to it would be solely between the government and the claimants other than the company.

I agree with the counsel for the company that this case does not come within the ruling of *Trepp v. Northern Pacific Railroad Company* (8 C. L. O., 181). In that case the tract had not been abandoned; and it was held that where the pre-emption claimant asserted his right, the failure to file in time (the land being unoffered) did not defeat the claim, except where another settler on the same tract had filed and complied with the law.

In considering the case at bar it will be assumed that the sale by Brown of his improvements and possessory right was in legal effect an abandonment, and that Perkins acquired no right of inchoate title until he applied for leave to file his declaratory statement of February 2, 1878.

The case of *Gates v. California and Oregon Railroad Company*, cited and relied upon by counsel for the defendant in this case, was decided by this Department December 18, 1878 (5 C. L. O., 150).

This case held that where a pre-emption claim, capable of being perfected, existed at the time the grant to the company took effect, but was afterwards abandoned, the fact of such claim having so existed did not exempt the tract from the grant.

The granting words of the act granting lands to that company are different from those in the act granting lands to the Central Pacific; but if the legal effect is the same (a question which will be considered hereafter), then the case under consideration is ruled by the Gates decision, and if that decision is to be followed the tract in question, upon the abandonment by Brown, inured to the company, and the plaintiff's request to file must be denied.

Before the decision in the Gates case a different rule, as to the operation of railroad grants generally, had prevailed for many years in this Department and in your office. That decision was made solely upon the authority of *Sherman v. Buick* (3 Otto, 209) and *Water & Mining Company v. Bugbey* (6 *Ib.*, 165).

Some two years after the decision in the Gates case the case of *Mining Company v. Consolidated Mining Company* (102 U. S., 167) was decided. This latter case involved substantially the same questions examined in the two former cases, and in the last case the two former ones were considered and explained.

Upon a careful examination of these cases, especially as considered and explained by the later case, it will be found that they will not bear the construction put upon them in the Gates case.

These cases all arose under the act granting to the State of California sections 16 and 36 for school purposes. Section 7 of the act provided:

That when any settlement, by the erection of a dwelling, or the cultivation of any portion of the land, shall be made upon the 16th and 36th sections before the same shall be surveyed, . . . other land shall be selected by the proper authorities of the State in lieu thereof.

In *Sherman v. Buick*, in commenting upon the effect of the erection of a dwelling house, or of cultivation, found on those sections, Mr. Justice Miller, who delivered the opinion, says:

These things being found to exist when the survey ascertained their location on a school section, the claim of the State was at an end; and, being shown in the proper mode to the proper officer of the United States, the right of the State to that land was gone, and in lieu of it she had acquired the right to select other lands.

This is very clear and explicit, and it would seem that the settlement, being found to exist at the time the grant to the State took effect, was such an appropriation of the land as prevented its passing, then or afterward, whatever its condition, to the State under said act.

Some expressions, however, found in the later case of *Water & Mining Company v. Bugbey*, and quoted in the Gates case, are supposed to convey a different meaning. But upon examination of the facts it will be found that such is not the case. Bugbey had settled upon one of such school sections, and undoubtedly had the necessary buildings and

cultivation to have excluded the land from the grant to the State; but he did not assert his claim, and took a patent from the State. The mining company did not in any manner connect itself with Bugbey's title, but by means of it sought to defeat that of the State. The language quoted in the Gates case, and supposed to be decisive of the question now under consideration, is as follows:

As against all the world, except the pre-emption settler, the title of the United States passed to the State upon completion of the surveys, and if the settler failed to assert his claim, or to make it good, the right of the State became absolute.

But in the same connection, and immediately after, the court quotes with approval, from the case of *Sherman v. Buick*, the language already cited, to the effect that when the settlement and improvement were found, the title of the State was at an end. This seeming contradiction is reconcilable by a reference to the fact that Bugbey did not claim adversely to the State, but took title from the State; and the court said truly that he "was under no obligation to assert his claim."

In the case of *Mining Company v. Consolidated Mining Company* (*supra*), where, as before stated, the two former cases were commented upon and explained, this question is put to rest. It was there decided that—

Whenever, at the time these sections (16 and 36) are ascertained by the government survey, there is either a dwelling-house, or the cultivation of any portion of the land on which some one is residing, and is asserting claim, it (the title of the State) does not vest, but the alternative right to other land as indemnity does.

The principle settled in the case—that the erection of a dwelling-house, or the cultivation of any portion of the land, found at the time the grant took effect, and connected with assertion of claim, excluded the land from the grant—is valuable in considering the effect of an existing pre-emption claim held adversely to the company at the time a grant to a railroad company takes effect.

We may now proceed to examine more closely the question under consideration.

In *Wilcox v. Jackson* (13 Peters, 498) it was held 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.

This case was cited and approved in *Leavenworth, Lawrence & Galveston Railroad Company v. United States* (92 U. S., 733). And in the latter case it was held that a grant, in general terms, to a State of odd sections to aid in the construction of a railroad, could not be construed to embrace Indian lands, to which the right of the Indians to occupy was assured by treaty; that such lands would not pass, neither absolutely

nor subject to the incumbrance of the Indian right of occupancy. In that case the grant was in the words of a present absolute donation, and there was no exception of the Indian right; and it was held that "a special exception was not necessary, but that these grants (to railroads) have always been recognized as attaching only to so much of the public domain as was subject to sale or other disposal"; and that such grants were "applicable only to public land owned absolutely by the United States."

In *Newhall v. Sanger* (92 U. S., 761), decided subsequently, but at the same term, the principle established in the above case was carried to the extent of holding that lands claimed under an alleged Mexican grant, and which were *sub judice* at the time the grant to the railroad took effect, did not pass under the grant to the company, although it subsequently appeared that the pretended Mexican grant was forged and fraudulent. In *Ryan v. Railroad Company* (99 U. S., 382), this case (*Newhall v. Sanger*) was cited and distinguished, and the doctrine that the land was not public land at the time the grant took effect, and therefore a patent to the company therefor was void, was reaffirmed. It was, however, further held that when the Mexican claim was adjudged to be false the land was restored to the public domain, and being within the indemnity limits the company had the right to make selection of lands within the boundaries of the former Mexican grant.

The court says:

At the time of the selection the premises were public land. The Mexican claim had been rejected by this court more than a year and a half before, and the land was not within any exception expressed or implied in the act.

That "with respect to the 'lieu lands,' as they are called, the right was only a float, and *attached to no specific land until the selection was actually made.*" That in effect as to those lands which had been *sub judice*, the company was put upon the same footing as were pre-emption and homestead claimants, and having made a selection and received a patent long before the homestead claimant made entry for the same land, the title of the company was sustained. At the time the line of the road was fixed Brown was in the lawful possession of the land under the settlement laws; such possession was the legal appropriation of the tract, and by virtue of such appropriation for the time being it was severed from the mass of public lands. See *Wilcox v. Jackson*, 13 Peters, 498; *Leavenworth et al. v. Railroad Company*, 92 U. S., 745.

It may have been within the power of Congress to have disregarded such inchoate right, and to have granted to the company the land so occupied by Brown. It did not do that, but, on the contrary, declared that Brown's rights should be respected, and that all lands so held should not pass by the grant to the railroad company. The United States had undertaken to convey to Brown a fee-simple title when he should fully

comply with its terms, and to enable the government to do this it retained its full and complete title to the land. But it is now said that if Brown did not choose to avail himself of the privilege given him by the United States, and abandoned the land, the United States lost its title, and the railroad company took what the United States lost. I do not think this view of the case can be maintained, either on principle or precedent. The title was in the United States, the possession in Brown, and when he abandoned his possession the title and possession were both in the United States, and not the railroad company. How can it be said that Brown's action could create a title in the railroad company when the provisions of the act expressly exclude from the grant lands so held, without reference to the subsequent conduct of the lawful occupant thereof?

These grants were not in consideration of any debt or obligation on the part of the United States to the grantee. They were bounties bestowed on the railroad company by the United States to encourage the building of the road, and in consideration thereof the company undertook to build. In this case the company accepted whatever it could find within its limit "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of the said road is definitely fixed." If the United States had not sold, reserved, or otherwise disposed of any of said lands, and no pre-emption or homestead claims had attached, the company got its full complement of land. But if any embarrassment of the kind before stated existed, then the company took the measure of its grant less the land embarrassed by such claim, or that had been reserved, sold, or otherwise disposed of. The company now claim to take more than was under the absolute control of the United States at the time the line of the road was definitely fixed.

These grants to railroads are present grants; when they take effect they operate *eo instante* upon the lands within the granted limits. The grant is not held in abeyance to await the default of the settlers, but the title vests or does not vest at once; and so far as regards the land in which the title does not vest at once, the claim of the company is at an end. The same rule must be applied as was applied in *Mining Company v. Consolidated Mining Company* (*supra*), where it was held, as before stated, that, where there is "either a dwelling-house or the cultivation of any portion of the land on which some one is residing and asserting claim, the title does not vest." If the grant is a present one, and the title does not vest when the grant takes effect, it cannot vest afterwards.

It was, I think, the intention of Congress that only such unoccupied lands as were not held under any claim recognized by the government should pass under the grant. Grants to railroad companies must be strictly construed against the grantee (92 U. S., 733).

The language of the grant to the Central Pacific Company, which is more particularly in question, is as follows, viz:

That there be, and is hereby, granted to said company every alternate section of public land designated by odd numbers 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. (12 Stat., 489.) See section 3, p. 492.

The lands, therefore, in those sections to which the pre-emption and homestead claim had attached at the time the line of the road was fixed were not granted at all. The act did not undertake to grant them. It is not a grant with an exception, but a grant of those sections or parts of sections to which such claims had not attached. It was not a grant of the entire odd sections, subject to pre-emption and homestead claims thereon; but the grant did not touch the lands to which these claims had attached.

The grant under consideration, in *Gates v. California and Oregon Railroad* (14 Stat., 239), granted alternate sections, and then provided that, "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" shall be selected in lieu thereof.

In the one case (the Central Pacific) the pre-emption and homestead claims are not granted at all; in the other, the sections are granted in terms, and then the sections and parts of sections "occupied by homestead settlers, pre-empted, or otherwise disposed of," are designated and reserved. I am of the opinion, however, upon authority, and for the reasons before stated at length, that the legal effect in both cases is substantially the same, and that lands to which pre-emption and homestead claims, existing and capable of being perfected, had attached at the time the grant took effect, did not pass to said California and Oregon Railroad Company.

The decision in the case of *Gates v. California and Oregon Railroad Company*, wherein it holds that a pre-emption claim capable of being perfected, existing at the time the grant to the company took effect, passed to the company upon abandonment, is therefore overruled.

Perkins should be permitted to make pre-emption filing for the land in question in accordance with his application.

Cases already adjudicated, under views different from those herein announced, are not to be reopened—the rule established hereby is for future guidance only.

Your decision in that it permits Perkins to make pre-emption filing is affirmed.

RAILROAD GRANT—FORFEITURE—STATE.

ALABAMA & CHATTANOOGA R. R. CO.

It was the intention of Congress to extend the grant of 1856 to the roads named, as the *cestuis que trust* under the title vested in the State, limited by the requirement of the second proviso, to the effect "that the lands hereby granted for and on account of said road, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever."

Secretary Teller to Commissioner McFarland, December 21, 1882.

I have considered the application of the Alabama and Chattanooga Railroad Company, in connection with your reports of 21st of February and 24th of April last, respecting the listing of lands to the State of Alabama along the completed line of said road and within the common limits of that road and the intersecting but incompletd Coosa and Tennessee Railroad.

The grant was by act of June 3, 1856 (11 Stat., 17), revived as to the Alabama and Chattanooga by act of April 10, 1869 (16 Stat., 45), the present management being formed by consolidation of the lines named in the granting acts from Gadsden to the Mobile and Ohio and from Gadsden to the Georgia and Tennessee line of railroads.

The road was constructed within the time limited by the latter statute.

It was the former practice of this Department to certify lands to the State upon construction of any portions or sections of road for the benefit of the particular road; and in the case of overlapping limits, caused either by intersecting or closely parallel lines, to certify by moieties for the respective benefit of each.

Latterly, following the decision of the Secretary in the case of the Alabama and Chattanooga *v.* the South and North Railroad, the practice has been in some cases modified, and certification has been made to the State, without specification of the particular road for whose benefit each portion was certified, leaving the matter to the exclusive jurisdiction of the State authorities. This rule was adopted in the particular case to avoid the necessity of an award, there being no question of the construction of both roads, but a conflict of opinion on the construction of the law touching their respective rights under the reviving act.

And it may be noticed in this connection that the opinion of the Attorney-General (14 Op., 617) was to the effect that the grant being in fee to the State, no certification was necessary; that the act of 1869 gave a priority of right to all the lands, being a new declaration of grant after a liability to forfeiture, and an accrued right of re-entry; that a later reviving act in favor of the other road gave nothing to that road within the conflicting limits on account of the vested right of the Alabama and Chattanooga road to the whole under the reviving statute; and that in view of former settled practice, if a certification was made

by the Department, it should properly specify the particular road in whose favor the same was intended to run.

By some evident misapprehension in the mind of the then head of this Department, the direction given to your office, on the 28th of August, 1874, while stating in terms that it was made "in accordance with the opinion of the Hon. Attorney-General, and out of deference to the same," was expressly opposed to the doctrine laid down by that official, and required your office, as before stated, "to certify the lands in controversy to the State of Alabama, without any expression of opinion as to what company is entitled to them or any part thereof," and they were certified accordingly.

The question afterward arose in the matter of the indemnity lands in the common limits of the Alabama and Chattanooga and the Coosa and Chattooga River Railroads, the latter road never having been constructed; and my predecessor held, on the 20th of July, 1881, that, as to such limits, proper selections made by a duly authorized agent of the State might be approved for the benefit of any road entitled thereto under her laws, without the intervention of this Department upon the question of partition between the respective companies.

This decision, Mr. Brainard, as attorney for the Alabama and Chattanooga Company, now seeks to have modified or ignored as to the lands granted in place within the intersecting limits of his road and the Coosa and Tennessee; and that all such lands may, in default of construction of the latter road, be certified for the Alabama and Chattanooga.

Notwithstanding the able arguments, printed and oral, which have been presented in support of the application, and with due respect to the opinion of the Attorney-General already cited, I am constrained to hold that it was the intention of Congress to extend the grant of 1856 to all the specific roads named, as the *cestuis que trust* under the title vested in the State, governed and limited by the requirement of the second proviso, to the effect "that the lands hereby granted for and on account of said road, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever."

I agree with counsel that this is no limitation upon the whole fee; but I regard it as a marking out by Congress of the particular definite portions applicable to each, "severally," as declared, and a prohibition of any recognition of the right of one to take what was by intentment appropriated to another.

By intersection or close parallel, the routes might include common limits; and this must have been in the mind of Congress, for the direction of the routes and the connections required to be made show that the system provided for just such results. How, then, could Congress more clearly regulate the grants to each, and by a several provision applicable to each, the enforcement of which would be impossible if the

whole fee might be given to one road, and another having equal right in the scheme be denied its equal share?

Now if this limitation operated at once upon definite location of the roads named, its operation continues with the life of the grant, which is until Congress resumes it for breach of condition subsequent, and declares a forfeiture.

This has not been done. In the case of the Alabama and Chattanooga, the grant of so much as was granted to assist it by the original act was revived by the act of April 10, 1869. But no more than that was done, and no declaration of forfeiture as to other grants was made. There has been a default and breach but no re-entry or "office found." Consequently there has been no release of appropriation for the purpose of including the lands in the revivor to another grantee.

This disposes of the question. It is not material to inquire what may ultimately be done with the moiety necessarily withheld from certification for the benefit of the incompleteroad. Of course it would be impolitic to certify it while there exists a moral if not an absolute certainty that the road will never be completed. And it is equally impolitic to certify an undivided moiety for the benefit of the completed road, as that would create for an indefinite period a species of common tenancy in the government and its grantee, which might embarrass its reversionary right or interest. If the State will make proper partition of the lands, indicating by legal description the moiety belonging under her laws to the railroad company, I see no objection to passing the selections by the usual certification.

You will so advise the parties in interest.

24th Dec 1899

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RAILROAD GRANT—SETTLEMENT RIGHTS.

COOPER ET AL. v. SIOUX CITY & PAC. R. R. CO.

The Sioux City and Pacific Railroad Company completed its road in 1869, and in 1875 sold to the Missouri Valley Land Company certain lands granted to it by the acts of July 1, 1862, and July 2, 1864, which lands have been settled upon and claimed by certain settlers under the last clause of the third section of the former act, which provides that all lands not disposed of within three years after the entire road shall have been completed shall be subject to settlement and pre-emption as other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to the company.

This proviso was a condition subsequent, the failure to perform which does not derogate from the grant, nor can it operate to defeat the same, or cause its lands to revert to the United States.

The aforesaid sale must be regarded as an hypothecation of the fee for the benefit of the stockholders, or such disposal of the lands as the statute contemplated.

Even if intended to be disposed of as public lands, no machinery is provided by the statute for such disposal by the executive department of the government, in view of the provision for payment to be made to the company.

Secretary Teller to Commissioner McFarland, February 7, 1883.

I have considered the case of *S. M. Cooper et al. v. Sioux City and Pacific Railroad Company*, involving the right of certain settlers to

pre-empt certain described tracts of land situate in the Norfolk district, Nebraska, on appeal by the company from your adverse decision of February 9, 1882.

The tracts in question are parts of odd-numbered sections within the limits of the grant made by act of July 1, 1862 (12 Stat., 489), and of July 2, 1864 (13 *Id.*, 356), amendatory thereof, under and by virtue whereof the company claims the premises, while the seven settlers claim the same by virtue of the last clause of the third section of the former act. This clause provides as follows, to wit:

And all such lands so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

The company's right attached November 9, 1866, and as at such date no valid adverse claim for any of said tracts existed, the same inured to its grant.

It appears that the company completed its entire road in March, 1869; that in January and February, 1881, the said settlers offered to file declaratory statements for the tracts settled upon by them, respectively, and tendered the purchase-money therefor to the receiver of the local office; that the lands being within the limits of the railroad grant their filings were disallowed, and a hearing was ordered (pursuant to your office circulars of August 10, 1878, and of May 23, 1879, modifying the former), whereto the company was duly cited, in order to determine whether or not the lands thus applied for had been sold or disposed of thereby, as contemplated by the third section in question.

While the evidence in support of the main facts is in many instances questionable, yet as the same stands uncontroverted, they must be regarded as admitted.

The facts as they thus appear are, that the company completed its road as aforesaid; that at a meeting of the board of directors of the company, held December 30, 1874, certain resolutions were adopted, from which it appears that it was necessary to raise the sum of \$200,000 for the purpose of liquidating the interest due and maturing upon the company's floating bonded debt, taxes, etc.; that after discussing the question as to the most feasible method of accomplishing such object, the Board concluded to sell for the sum of \$200,000 cash, the residue of the company's assets, consisting of lands, town lots, bills receivable for lands sold, etc., to a corporation thereafter to be formed, the capital stock thereof to be offered to the stockholders of the railroad company of record at the close of business January 6, 1875, *pro rata*, to the amount of their stock, both preferred and common; that to this end, such a stock company was organized in April ensuing, under the style of the Missouri Valley Land Company, and a *parol* agreement, based upon said resolutions, was entered into between said companies during the

spring of that year, pursuant to which the land company paid the railroad company the sum of \$200,000, "which payment was made in cash, and the coupons of the first mortgage bonds of the Sioux City and Pacific Railroad Company," in May, June, and July, 1875, in consideration of the latter company's assignment to the former, of said bills receivable, the face value of which at the date of such transfer was \$81,146; and in the further consideration of the conveyance of title to certain of said lands, aggregating, as it is alleged, 56,000 acres, to which the railroad company had complete title, it being understood that it would convey the remaining lands when it should receive patents therefor, without further consideration. This method was adopted as an alternative to the hypothecation of said assets as security to a second mortgage loan.

It further appears that none of the tracts in question have been patented to the railroad company, nor even selected thereby, nor deeded by the same to the land company; that the records of the county wherein the tracts are situate fail to discover any such conveyance, nor do they evidence any transaction whatever between the companies, touching said tracts.

Upon the foregoing state of facts the register and receiver found that the company *had* disposed of and *could further* so dispose of its lands, but that as the laws of Nebraska require that "deeds and other instruments relating to real estate . . . shall be recorded in the county in which such real estate or any part thereof is situated," and that they shall obtain "from and after the time of delivering the same to the clerk for record, and not before, as to all creditors, and subsequent purchasers in good faith without notice," and shall be adjudged void as to such creditors and purchasers without notice, whose deeds shall be first recorded; and that as the applications in question were made in good faith, the applicants fall within the category of "subsequent purchasers in good faith without notice," and that therefore the agreement between the companies was void as to them, and they are entitled to file their declaratory statements. From this action the company appealed upon the following grounds, to wit: That the tracts applied for were granted to it by the said acts of Congress; that the lands thus granted do not fall under the third section of the senior act, requiring the company to sell or dispose of such lands within three years from the date of the completion of the road; that even if they did so fall the United States would be estopped from setting up a failure on the part of the company to sell said lands within such period, and this by reason of its having failed and refused to convey the same to the company; and that the same has sold the land to the land company.

In this connection, you hold:

If the applicants are entitled to have their declaratory statements received, it is not because they are *purchasers in good faith without notice*. They are not only not purchasers as yet, and have no instru-

ment of conveyance recorded in the county records, but from the very nature of the case and the requirements of the office instructions in such cases are compelled to take notice of the *status* of the land before they can become such.

The State statute cannot be employed to furnish a condition under which said clause of said act of Congress became operative. The inconsistency and impropriety of a different view must at once appear. If the applications aforesaid should be received, it is because the railroad company has not *sold* or *disposed of* the land at all, or because it did not sell or dispose thereof within the prescribed limit of *three years* from the completion of its entire road. There is no question *but* that the grant to said company was made subject to the provision in said clause. That the Department so considered it may be seen by the circular of August 10, 1878, aforesaid, in which said company is specifically designated as one whose grant is clearly subject to the terms of said clause. No further authority for this view would seem to be required than the provisions in section 14 of the granting act, authorizing the company to construct a railroad, etc., *on the same terms and conditions* as provided *in this act* for the construction of the Union Pacific Railroad Company; and it will not be denied that the clause in section 3 furnished one of the terms and conditions of the grant to said Union Pacific Railroad Company. The third ground for appeal, whereby the company claims that it should be relieved from the strict construction of said clause, is not supported by facts.

The government could not in any way refuse to patent specific lands until the list of selections had been made and transmitted to this office for consideration; and it appears that these lands have not been selected by said company. Besides, it is well known that granted lands are often and *can be transferred, sold or disposed of prior* to the issuance of patent therefor. None of the objections raised by the company are tenable, unless it be held that it has sold or disposed of the land to said Missouri Valley Land Company, and that subsequent to the date of such sale or disposal the land was not subject to settlement and pre-emption as provided in the clause under consideration.

But it is unnecessary to consider whether there was such a sale or disposal, if the clause referred to must be so construed that to have defeated the right of pre-emption authorized thereby, the company must have sold or disposed of the lands within the stated period of three years after the entire road was completed, and not *after* the expiration of that time, though prior to any application to pre-empt the land.

Upon the foregoing statement of facts the primal question to be determined is: Is it competent for the Land Department to permit such settlers to acquire title to the tracts in question under the general land laws of the United States?

It is strenuously urged by the settler's attorneys that the railroad grant is coupled with a condition, which is unquestionably a reservation of sale in the government, by virtue whereof, *proprio vigore*, upon the company's failure to sell or dispose of all the lands granted by the section in question within the prescribed three years, all such lands, *eo instanti*, "became subject to settlement and pre-emption like other lands."

The senior act in question was a grant, *in presenti*, to the Union Pacific Railroad Company and its branches, of public lands within cer-

tain specified lateral limits, which were not, however, identified with precision until the map of definite location was filed, when the grant attached by relation as of the date thereof. (Missouri, Kansas and Texas Railway Company *v.* Kansas Pacific Railway Company, 97 U. S., 491.)

The express requirement prescribed by the third section of the act in question, that the company should sell or dispose of all its lands within three years from the date of the completion of its entire road, and that otherwise they should be subject to settlement and pre-emption like other lands, if intended as a reservation of power in the government to resume and sell the lands, is manifestly a *condition subsequently* annexed to the freehold, a failure to perform which does not derogate from such grant or in any manner impair the company's title thereunder, unless the grantor, the United States, deem it advisable to take advantage of such failure by enforcing the condition. Hence, in the absence of such procedure, it is neither competent for the land department nor for third parties to so construe the said section as to assume that such formal procedure is not necessary. Such condition predicated upon such failure, cannot, therefore, operate to defeat the company's grant, or cause its lands to revert to the United States *ex vi termini*.

But, in another view, in the year 1881, when Cooper and the other settlers applied to file their declaratory statements for the tracts in question, respectively, the title conveyed by the grant reposed in the railroad company, wanting only the issue of patent to render it complete; so that, the United States having no right to refuse such patent when demanded, according to the terms of the granting act, it is not competent for the Land Department to create an adverse title by patent or otherwise in these applicants. The statute expressly prescribes that the minimum price (\$1.25) per acre of all such lands, so settled upon and pre-empted, shall be paid to the company. No authority is delegated to the register and receiver to receive such purchase-money, or to issue certificates therefor; no machinery is provided by the statute. If such delegation were attempted by this department, it would be manifestly without sanction of law. The lands having been granted as aforesaid to the company, belong to the same; and hence, all tenders of purchase-money should be made directly to it; and, would-be pre-emptors of such lands must look to the company and not to the government for title. And, if this be so, it may be assumed that, in case the lands be not otherwise disposed of, a party having settled and improved the land in such manner as would support a pre-emption right to lands of the United States, may tender his purchase-money to the company and demand his deed; and if the same be refused, that he may maintain an action in equity to compel its execution. But in all this there is no room for further intervention by the Land Department.

I am aware that in the case of *Nelson Dudymott v. Kansas Pacific Railway Company* (5 Copp, 69), my immediate predecessor, Mr. Secre-

tary Schurz, construed the section in question differently, and that he therein prescribed a method for the sale of such lands and directed your office to instruct the local officers to keep a separate account of all moneys received from such sales, in order that the same might be credited to the company. But such decision was modified, and the instructions aforesaid of August 10, 1878, issued pursuant thereto, were recalled, under date of May 7, 1879 (6 *Id.*, 60), upon application of the company's attorney, based upon the decision of the United States supreme court, in the case of *Platt v. Union Pacific Railroad Company* (99 U. S., 48). The question considered by the court was whether a mortgage executed by the company within the period designated by the section in question was such a sale or disposal of the company's lands as the statute contemplated, and it was held that the provisions both of the original and of the amendatory act should be so construed as to effect their primary object, which was to aid in the construction of the road; that that could not be subordinated to the secondary purpose of opening to settlement and pre-emption such of the lands as had not been sold or disposed of within the designated period; that the words "or disposed of" are not redundant, nor are they synonymous with "sold;" that a mortgage of said lands is such a disposal—an hypothecation of the fee, and not merely of an estate determinable at the expiration of three years from the completion of the road; that the debt which it was given to secure not having matured, the lands are not subject to pre-emption; *sed quære*, whether the remnants that may be unsold when the mortgage debt shall be paid will not then be subject to pre-emption, and that in construing a statute aid may be derived from a consideration of the condition of affairs as they existed and appeared to the legislative mind when the statute was enacted.

As the construction is to be made upon the entire instrument, whole will, or complete statute, and not upon disjointed parts of it, consequently all its parts are to be compared, considered, and construed with reference to each other. . . . It is an established rule in the exposition of statutes, that the intention of the law-giver is to be deduced from a view of the whole and every part of a statute, taken and compared together. When the words of the statute are not explicit, the intention is to be collected from the context—from the occasion and necessity of the law from the mischief felt—and the object and remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion. This was the rule laid down by Plowden, pp. 10, 57, 205, 363, and by which Chancellor Kent says: The sages of the laws have ever been guided in seeking for the intention of the legislature; and which he approves, as maxims of sound interpretations, which have been accumulated by the experience and ratified by the approbation of sages.—1 Kent. Com., 462. (Potter's Dwaris, 194, note 13.)

With respect to the alleged sale or disposal of the tracts in question, independently of the foregoing considerations, and upon the facts as found and recited, I am of the opinion that the transfer of the lands by

the railroad company must be regarded as an hypothecation of the fee for the benefit of the stockholders, or such a disposal of its lands as the statute contemplated. Such view brings the case within the ruling in the Platt case (*supra*), which must, therefore, be regarded as a precedent for the determination of the question involved in the premises.

In this connection, I deem it advisable to state that under date of September 3, 1878, my said predecessor denied at length the application of the railroad company for a suspension and reconsideration of his decision of July 23 preceding, in the aforesaid case of Dudymott. In so far as his opinion expressed in such denial, touching mortgages and deeds of trust, asserts a different doctrine from that enunciated by the supreme court in the Platt case, the same is hereby overruled.

Your decision is accordingly reversed.

RAILROAD GRANT—ACT OF JULY 4, 1866—PATENT.

KUFNER v. THE SOUTHERN MINNESOTA RY. EXT. CO.*

The title to the lands granted to the State of Minnesota, for the benefit of the Southern Minnesota Railway Extension Company, by the act of July 4, 1866, must under the terms of the act be conveyed by patent.

Hence the title to a tract of land which was erroneously certified to the State for said company is still in the United States, and the land is under the control of the Department.

Commissioner McFarland to register and receiver, Worthington, Minnesota, March 31, 1883.

I am in receipt, by reference from the Secretary of the Interior, of a letter addressed to him by F. B. Robbins, of Wells, Minn., under date of February 20, 1883, and asking for action in the case of Augustine Kufner, who claims the NW. $\frac{1}{4}$ of Sec. 17, 104, 24. The land described is within the 10 mile or primary limits of the grant by act of July 4, 1866, for the Southern Minnesota Railway extension. Said grant was accepted by the legislature of Minnesota February 25, 1867, on which date it became effective. On May 24, 1864, J. A. Hovey made homestead entry 1773 of the land in question, and said entry remained intact until March 27, 1872, when it was canceled. On March 6, 1876, the land was *certified* to the State of Minnesota for the road above named. Said certification was, however, erroneous, as the entry of Hovey excepted the land from the operation of the grant.

The title to land granted by the act of July 4, 1866, must, under the terms of the act, be conveyed by *patent*.

The NW. $\frac{1}{4}$ of Sec. 17, 104, 24, is therefore still under the control of this Department. It appears from testimony on file in this case, that

* See 2 L. D., 492.

Kufner settled upon said tract in October, 1867; that he has resided upon and cultivated the land ever since; that his improvements thereon are valued at \$700; that in the month of June, 1872, he applied "at the local office at Jackson, Minn.," to enter the land as a homestead, paying at the same time \$18 as fee and commissions, and that the local officers told him that as soon as Hovey's entry was canceled they would send him his receipt. Subsequently said officers informed Kufner that the land had been awarded to the railroad company by this office. Kufner has shown entire good faith in the matter, and is clearly entitled to enter the land. You will therefore permit him to make a homestead entry for the same, and as he has completed the term of residence required by law, he may be allowed to make final proof as provided by the acts of March 3, 1879, and May 14, 1880. The Southern Minnesota Railway Extension Company will be allowed the usual right of appeal from the foregoing decision.

RAILROAD GRANT—WITHDRAWAL—HOMESTEAD.

BAUGHMAN *v.* OREGON CENTRAL WAGON ROAD CO.

A homestead entry of record within the "granted" limits of the railroad and the "indemnity" limits of the wagon road at the date of the withdrawals, excepts the tract covered thereby from the operation of either of the grants.

Secretary Kirkwood to Commissioner McFarland, November 12, 1881.

I have considered the appeal of the Oregon Central Wagon Road Company from your decision of June 1, 1880, permitting to stand intact homestead entry No. 3180, made by Peter J. Baughman, February 24, 1879, of the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 27, T. 19 S., R. 2 W., Roseburg district, Oregon.

It appears from the record that the tract is within the 20 miles *granted* limits of the grant by act of July 25, 1866 (14 Stat., 239), to the California and Oregon Railroad Company, the right of which attached March 26, 1870; and it is also within the 6 miles *indemnity* limits of the grant to said wagon-road company by act of December 26, 1866 (14 Stat., 374), the withdrawal for the benefit of which became effective May 19, 1871.

On January 31, 1870, one A. J. Wimer made homestead entry No. 1193 of said tract, and the same was canceled on May 10, 1873, for voluntary relinquishment.

Thus it appears that at the date of the withdrawals aforesaid the tract in question was covered by a valid, subsisting homestead claim, which excepted the same from the operation of either of the said grants, and it was subject to Baughman's entry. Your decision is therefore affirmed.

RAILROAD GRANT—RESTORATION OF LAND TO MARKET.

JENNESS *v.* CEDAR RAPIDS & M. R. R. Co.

A homestead entry for a tract of land within the limits of the railroad withdrawal, which tract was covered, at the date of the order for the restoration to market of the vacant lands within such limits, by a former homestead entry, and was not therefore included in the list of lands actually restored, held to be confirmed by the act of April 21, 1876, the land being treated by the Department as in fact restored and properly subject to homestead entry.

Secretary Teller to Commissioner McFarland, May 19, 1882.

I have considered the case of the Cedar Rapids and Missouri River Railroad Company *v.* M. J. P. Jenness, involving the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 6, T. 85 N., R. 43 W., Des Moines, Iowa, on appeal from your decision of July 9, 1880, in part adverse to the company. The lands in question were withdrawn from market June 16, 1864, but were restored to homestead and pre-emption entry August 25, 1864.

Homestead entry was made May 31, 1865, by one Anthony McCainey, for NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, of the section above named, which entry stood unimpeached until July 3, 1868, when it was canceled for abandonment. The lands were again withdrawn from location or entry June 7, 1865, and were again restored November 1, 1867, but the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ was not included in the restoration. The entry of Jenness was made February 4, 1873, and on the state of facts above recited, your office declined to hold for confirmation, under the act of April 21, 1876, so much of said entry as refers to the 40 acres last described. The effect of this would be to annul his entry as to the one or the other of the 40-acre tracts included in the entry, for want of contiguity, thus leaving for confirmation only 40 acres out of the original entry of 120 acres.

In this conclusion I do not concur. The entry of McCainey (which covered the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, now included in the entry of Jenness), was made at a time when the lands in question were open to entry by order of your office restoring them to market. This entry having been canceled in 1868 for abandonment, homestead entry, including the same NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, was, on August 1, 1870, made by Edward W. Mackey, which was canceled January 23, 1873, for relinquishment. The fact that neither of these entries was canceled on account of any right of the railroad company to the lands, and the additional fact that the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ was not included in the restoration of November 1, 1867, show that the entry of McCainey was treated by the Department as upon land in fact restored and properly open to his entry at the date thereof.

The entry of Jenness, therefore, comes within the reason of my decision of the 9th instant in the case of Azrow W. Copeland *v.* The Cedar

Rapids and Missouri River Railroad Company, and clearly falls within the spirit if not the very letter of the statute.

It appears from the proof that Jenness fully complied with the homestead law, showing good faith throughout, and I am of opinion that his entry should be held intact in its entirety.

Your decision is modified accordingly.

RAILROAD GRANT—RESTORATION OF LANDS.

LEGGETT v. CEDAR RAPIDS & M. R. R. CO.

Land situate within the limits of a railroad withdrawal is subject to homestead entry in the *interim* of its restoration to market and the suspension of the same. A subsequent entry of such tract is confirmed by the act of April 21, 1876.

Secretary Teller to Commissioner McFarland, May 31, 1882.

I have considered the case of Heman C. Leggett *v.* Cedar Rapids and Missouri River Railroad Company, involving the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 22, T. 86, R. 44, Des Moines (formerly Sioux City) district, Iowa, on appeal by Leggett from your predecessor's decision of April 19, 1880, permitting his entry to stand subject to the final adjustment of the railroad grant.

The record shows said tract to be within the 15 miles (indemnity) limits of the original line of the Iowa Central Air Line (now Cedar Rapids and Missouri River) Railroad, as located under the act of May 15, 1856 (11 Stat., 9).

The tract in question was withdrawn for the benefit of the company, pursuant to your office letter of June 16, 1864, but such withdrawal was so modified, August 25, 1864, as to allow pre-emption and homestead entries. Such modification was rescinded June 7, 1865, and the register and receiver were directed to allow neither entries nor locations of any kind within the limits of the withdrawal. On July 5, 1866, when the railroad grant was supposed to have been adjusted, all the vacant or unsettled lands within said limits were restored to market. A copy of such order with descriptive lists of the lands to be restored in the Sioux City district was transmitted to that office, and the tract in question, as shown by said lists, appeared to be clear and unincumbered. This order of restoration was subsequently suspended for one year from its date, but on August 5, 1867, such suspension was rescinded and the lands then vacant were actually restored to private entry September 23 ensuing.

It further appears that one Philander M. East made homestead entry No. 360 (Sioux City series) of the tract, August 30, 1866, which was canceled March 20, 1869, for abandonment. Under date of August 1 ensuing, Leggett made homestead entry No. 2346, of the tract in question, and on January 5, 1875, he submitted proof, upon which final cer-

tificate No. 1664 was issued, but the entry was suspended by reason of conflict with the railroad grant; the Department having held subsequently to the restoration of 1867, aforesaid, that the same was erroneous. The tract was included in a list of selections made by the company April 18, 1876, but such list was disapproved by the register and receiver for conflict with Leggett's entry.

Upon the foregoing statement of facts your office held his entry to be illegal, and as not confirmed by the act of April 21, 1876 (19 Stats., 35), for the reason that at the date of the final restoration East's entry was extant upon the records and defeated such restoration as to the tract covered thereby. In this view of the case I do not concur. East's entry was made in the *interim* of the restoration of July 5, 1866, and the suspension thereof, during which interval the tract was subject to such entry. It was for this reason that his entry was allowed to stand upon the record until March 20, 1869, when it was canceled for abandonment, and not for conflict with the railroad grant.

As regards Leggett's entry, I am of the opinion that the fact that the tract was not included in the final restoration shows that his entry was treated by the Department as upon land already restored to market so far as respects homestead and pre-emption entry, and properly subject to the same at the date thereof.

The first section of the said act provides that where *bona fide* entries have been made in compliance with any law of the United States by actual settlers on the public lands within the limits of any land grant "after their restoration to market by order of the General Land Office," and proper proofs of compliance with legal requirements have been made, such entries shall be confirmed and patents for the tracts covered thereby shall be issued to the parties entitled thereto.

As it appears that Leggett has made final proof showing *bona fide* compliance with the requirements of the homestead law, I am of the opinion that his entry falls clearly within the intendment of the statute and is confirmed thereby.

Your decision is modified accordingly.

HOMESTEAD—PRE-EMPTION—SETTLEMENT.

CENTRAL PAC. R. R. CO. v. BAKER.

Any person who has made a settlement on the public lands under the pre-emption laws and has subsequently changed his filing, in pursuance of law, to a homestead entry upon the same tract of land, shall be entitled to have the time required to perfect his title under the homestead laws computed from the date of his original settlement.

Secretary Teller to Commissioner McFarland, June 20, 1882.

I have considered the case of the Central Pacific Railroad Company v. Amenzo W. Baker, involving the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 5, T. 11 N., R. 1 W., Salt Lake City district, Utah Territory, on appeal by the com-

pany from your predecessor's decision of September 25, 1880, allowing Baker's entry to remain intact subject to final proof.

The tract is within the limits of the grant by act of July 2, 1864 (13 Stat., 356), to the company, the right of which attached July 18, 1868, and the withdrawal for which became effective May 24, 1869.

The township plat was filed in the local office January 18, 1869.

It appears from the record that Baker filed his declaratory statement, No. 882, for the SW. $\frac{1}{4}$ of the said section, June 1, 1869, alleging settlement April 10, 1867. Under date of April 19, 1878, he transmuted his filing to homestead entry No. 3631, of the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ aforesaid. His entry appears to be regular, and the accompanying proof shows that Baker is a citizen of the United States; that he erected a house upon the land in the year 1867, since which date he has continuously resided upon, cultivated, and improved the same. It is, however, urged by the company's attorney that the act of July 14, 1870 (16 Stat., 279), as amended by the joint resolution of March 3, 1871 (*Ibid.*, 601), operated as a statute of limitation, whereby Baker was required to make proof and payment on or before July 14, 1872, and having failed to comply with such requirements he was guilty of laches by reason of which his pre-emption right expired by limitation, and the land department is therefore precluded from recognizing a right which he might otherwise have exercised by virtue of his filing. Such position would doubtless be tenable if the act of May 27, 1878 (20 Stat., 63), had not come to his relief. This act provides "that any person who has made a settlement on the public lands under the pre-emption laws, and has subsequent [ly] to such settlement changed his filing, in pursuance of law, to that for a homestead entry upon the same tract of land, shall be entitled to have the time required to perfect his title under the homestead laws computed from the date of his original settlement heretofore made, or hereafter to be made, under the pre-emption laws, subject to all the provisions of the law relating to homesteads."

Again, section 2281, Revised Statutes, provides that—

All settlers on public lands which have been or may be withdrawn from market in consequence of proposed railroads, and *and who had settled thereon prior to such withdrawal*, shall be entitled to pre-emption at the ordinary minimum to the lands settled on and cultivated by them; but they shall file the proper notices of their claims, and make proof and payment as in other cases.

This section was derived from the act of March 27, 1854 (10 Stat., 269), as amended by the second section of the act of July 14, 1870, aforesaid. That these acts obtained at the date of the railroad grant and of the withdrawal thereunder, there can be no doubt. Baker is undoubtedly entitled to the benefit of their provisions, and to those of section 2281 as well. That section only requires of the settler that he shall file and make proof and payment as in other cases. Hence, if a failure to so comply within the prescribed period work no forfeiture of a claim in the

absence of another settler on the same tract in other cases, there can be no such forfeiture within the purview of the statutes cited, which were unquestionably enacted for the protection, and not for the destruction, of settlers' claims.

Furthermore, this case comes clearly within the reason of the rule laid down by the Department in the case of *Trepp v. Northern Pacific Railroad Company* (8 C. L. O., 180), wherein my immediate predecessor held that a pre-emption claim ("not since abandoned") attaching to a tract in an odd-numbered section within the granted limits of a railroad at the date of the definite location of the road, excepts such tract from the operation of the grant, and the claimant's failure to file within the prescribed statutory period, if he afterward assert his claim, does not defeat the same unless another settler on the same tract has filed and otherwise complied with legal requirements.

As it is proved that Baker was the sole settler upon the tract in question at the date of the definite location of the railroad, and that he has not abandoned his claim, but has in good faith made satisfactory compliance with legal requirements in point of inhabitancy, cultivation, and improvement, his entry should be allowed to remain intact subject to final proof, which he should be required to make forthwith.

Your decision is accordingly affirmed.

RAILROAD GRANT—ACT OF APRIL 21, 1876.

LUNDE v. ST. PAUL M. & M. RY. CO.

A homestead entry, allowed under instructions from the General Land Office, although based upon a former homestead entry, which is now held to be illegal, is confirmed by the act of April 21, 1876.

Secretary Teller to Commissioner McFarland, June 28, 1882.

I have considered the case of *Asle N. Lunde v. The Saint Paul, Minneapolis and Manitoba Railway Company* (successor to the Saint Paul and Pacific Railroad Company, Saint Vincent Extension), involving the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, and lot No. 1, Sec. 11, T. 132, R. 43, Fergus Falls (formerly Litchfield) district, Minnesota, on appeal by the company from your decision of June 29, 1880, holding Lunde's homestead entry No. 2588 of the said tract for approval.

It appears from the records that the tract is within the 10 miles (granted) limits of the grant by act of March 3, 1871 (16 Stat., 588), to the said Saint Vincent Extension, the right of which attached in September, 1871.

It appears, from the records of your office, that the first notice of withdrawal was received at the Litchfield local office February 15, 1872,

which order was revoked on June 25 ensuing, and the lands restored to market; and that the lands were again withdrawn by letter of your office received at the local office September 3, 1872.

At the date on which the right of the railroad attached the tract was covered by homestead entry No. 5322, made by Robert Cavanaugh, July 21, 1868, which entry was canceled December 14, 1871, for abandonment. This entry was made under the provisions of the act of March 21, 1864 (section 2293, Rev. Stat.), amendatory of the original act of May 20, 1862 (section 2290, Rev. Stat.). It appears that at the date of the entry in question, Cavanaugh was a single man engaged in the United States service, and not the head of a family. This entry was made by one F. A. Conwell, as the agent of Cavanaugh, who never settled upon or cultivated the land.

It further appears that Lunde settled upon the land and contested Cavanaugh's entry of the same. On December 14, 1871, he procured its cancellation as aforesaid, and on the same day offered to file declaratory statement for the tract, but the register and receiver refused to accept the same because the tract was within the limits of the railroad grant. From this action Lunde appealed, and your office, under date of April 29, 1872, advised the local office that as the tract was covered by a valid homestead entry at the date when the railroad right attached, it reverted to the United States upon the cancellation of such entry, and became public land subject to the first legal applicant.

Under these instructions Lunde was permitted to file his declaratory statement, No. 477, for the tract May 10, 1872, alleging settlement April 10, preceding. On August 23 ensuing he transmuted his filing to homestead entry No. 2323, and made proof of his compliance with the pre-emption laws. This proof shows that Lunde settled upon and cultivated the land from April 12, 1871, to date of his entry. On November 23, 1878, he submitted final proof, showing settlement and residence upon the land from August 6, 1872, to date of submitting such proof.

I am of the opinion that as Lunde filed his declaratory statement pursuant to the instructions of your office, and as he has made proper proof showing *bona fide* compliance with the requirements of the pre-emption and homestead laws, his entry should be deemed valid within the meaning of the act of April 21, 1876 (19 Stat., 35), and is thereby confirmed, (*Streeter v. Missouri, Kansas and Texas Railroad Company*, 4 C. L. O. 180.)

Your decision is therefore affirmed.

RAILROAD GRANT—INDEMNITY—ACT OF JUNE 22, 1874.

MARTIN *v.* ATLANTIC, GULF AND WEST INDIA TRANSIT CO.*

A settler having initiated an entry under the homestead law prior to the railroad withdrawal of March 26, 1881, his cash entry for the same land under act of June 15, 1880, made after that date, was properly allowed, and the railroad is not entitled to indemnity under the act of June 22, 1874, although it has relinquished in his favor, the effect of the decision of the Secretary of the Interior of April 29, 1876, having been to throw open to homestead settlement and entry all of the public lands within the six and fifteen mile limits of the Tampa Bay portion of the road.

Commissioner McFarland to register and receiver, Gainesville, Florida, July 12, 1882.

I have this day examined cash entry No. 2267, of the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 29, 10 S., 23 E., made by Charles Martin, December 30, 1881, under act of June 15, 1880, being the land embraced in his homestead No. 6671, entered by him June 12, 1878, and the same is held for approval subject to appeal by the Atlantic, Gulf and West India Transit Company.

The said tract lies with the 6-mile limits of the Atlantic, Gulf and West India Transit Company Railroad between Waldo and Tampa Bay.

On December 14, 1860, the engineer of said company filed a map of the route of said road between Waldo and Tampa Bay. This map was, however, not accepted, as it was not certified to by the governor of Florida, and was returned for the governor's certificate. Afterwards it was lost, mislaid, or destroyed.

On December 13, 1875, the president of the company filed an alleged duplicate thereof, which was officially approved by M. L. Stearns, governor of the State at the date of its presentation.

On April 29, 1876, the Hon. Secretary of the Interior (Hon. Z. Chandler) decided that said duplicate map could not be accepted as a map of the definite location of the Tampa Bay portion of the road. He held that no map showing the definite location of the road to Tampa Bay had ever been filed in this Department. That "the completion and operation of the road from Fernandina to Cedar Key as a single line, coupled with the failure for fifteen years thereafter to designate the line or perform any other act indicating an intention to build the road to Tampa Bay, would naturally be accepted as such an abandonment of the latter portion of the line as would render a formal forfeiture unnecessary." That the "important act of definitely locating the road can only be performed by or under the authority of the State, and it should be done within a reasonable time after the date of the grant, and in *all cases before* the *expiration* of the time fixed for completing the road. Failure to discharge this duty should be taken as

*See 2 L. D., 535.

conclusive evidence of abandonment of the grant." That he did not conceive it to be his duty "to aid in reviving a grant which had so long remained dormant," and therefore declined to receive or approve the map above mentioned, and directed "that it be returned to Mr. Yulee, with the information that this Department cannot permit the company, after so great a delay, to file a map designating the route of its road."

Afterwards the company applied for a review of the above decision upon the ground of newly-discovered matter not within the reach of the company at the date of the original application, and upon the ground that material facts which go to show the authority of the company to locate the line and file the map were not before the honorable Secretary.

This application for review and accompanying papers were submitted to the honorable Secretary (C. Schurz) by this office November 10, 1879, and on January 28, 1881, the honorable Secretary, having examined the various documents presented, upon due consideration was of the opinion that sufficient ground for review was established, and held that "the exact correspondence with the map of 1860 of the duplicate plat now filed appears to have been sufficiently shown, and there remains no doubt that the line exhibited was surveyed and marked as the definite location of the road; that it was recognized as such by the officers of the company and the State authorities, and that the map was filed in the same manner as the surveys of previous portions of the line had been filed in the office of the secretary of state of Florida." That the map before him was "officially approved by M. L. Stearns, governor of the State at the date of its presentation," and that the only question relating to its acceptance that can "be considered is, whether or not the lands can be legally certified to the State in view of the limitation of time contained in the provision of the granting act, that if the road is not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States. Upon this point the authorities are clear and express to the effect that the proviso in question is a condition subsequent, of which no one but the grantor can take advantage; and that until some proceeding in the nature of 'office found' be instituted, the grantee may enjoy the estate upon the original fee, and no reversion can take place by mere operation of law."

He returned the map and accompanying papers for the *files* of this office, and directed "the necessary withdrawal of lands to protect the rights of the company, and secure the proper adjustment of the grant upon the line designated."

In connection with this decision the attention of this office was "also particularly invited to the formal waiver of the company in favor of actual settlers prior to December 13, 1875," and was "instructed to make respectful request for a like waiver covering the time since that date, and up to the time when formal notice of the withdrawal can be communicated to the district land office."

In pursuance of these instructions, on March 16, 1881, the necessary withdrawal was ordered to be made, and Mr. Yulee, the vice-president

and acting president of the company, was requested that the company "waive its right in favor of actual settlers prior to the time when the formal notice of withdrawal is received at the district office." The order for the said withdrawal was received at the local office March 26, following, when the same accordingly became effective.

On June 25, 1881, the company filed a formal waiver in favor of actual settlers, as follows, to wit:

It rests in the volition of the company, as is recognized in the general instructions from your office, whether or not it will assert its title to lands occupied under homestead and other entries after the survey of the line, which in this case was in 1858-'59. . . . 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 sixteenth day of March, 1881, upon which day 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 such 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.

The effect of Secretary Chandler's decision was to throw open all of the public lands within the six and fifteen mile limits of the Tampa Bay portion of the road to settlement and entry under the homestead laws. This became a privilege and a *right* of which many persons availed themselves, and established homes thereon, and in many cases many have invested their all in improvements on the land.

Mr. Martin's entry having been initiated under the provisions of the homestead laws prior to March 26, 1881, his said cash entry under act of June 15, 1880, made after that time, was properly allowed, and the company will not be entitled to indemnity under the act of June 22, 1874.

You will notify Mr. Martin and the proper officer of said railroad company of this decision. Allow the company sixty days in which to appeal therefrom and make prompt report.

RAILROAD GRANT—SELECTION—RES JUDICATA.

GONZALES *v.* ATLANTIC & PAC. R. R. Co.

The land in question is within the indemnity limits of the grant, but has not been selected by the company, and was not subject to selection on account of the prior claim of Gonzales.

Gonzales having made final proof, after due notice by publication as required by law, the question of the validity of his claim is *res judicata* so far as the railroad company is concerned.

Commissioner McFarland to register and receiver, January 15, 1883.

I have considered the case of Bivian Gonzales, who made homestead entry No. 1018, on March 6, 1882, of the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ Sec. 10, and NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ Sec. 11, and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 3, 20 N., 28 E., Santa Fé, N.

Mex., alleging settlement February, 1871. His final proof, which was made September 30, 1882, shows that he is a citizen of the United States; that he settled on the land in February, 1871, and has resided thereon with his family continuously since that date.

The land in question is within the indemnity limits of the grant to the Atlantic and Pacific Railway Company, but has not been selected by said company, and was not subject to such selection owing to the prior claim of Gonzales. (See *Perkins v. Central Pacific Railroad Company*. The Reporter, vol. 2, p. 161, December number, 1882.) Gonzales having made final proof, after due notice by publication as required by law, the question of the validity of his claim is *res judicata* so far as the railroad company is concerned. (See *Atlantic and Pacific Railroad Company v. Forrester*. The Reporter. *Supra*, p. 163.)

His proof being satisfactory, you will, upon payment of the legal fees, issue final certificate, noting thereon a reference to this letter.

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RAILROAD GRANT—ENTRY OF RECORD.

GRAHAM *v.* HASTINGS AND DAKOTA RY. CO.

Under Section 2308 Rev. Stats., a soldier's services in the United States army are equivalent to residence under a homestead entry.

A homestead entry, which on its face is valid, subsisting at the date a present grant to a railroad company took effect, excepts the land embraced thereby from such railroad grant.

An entry of record, which on its face is valid, reserves the land covered thereby from the operation of any subsequent law, grant, or sale, until a forfeiture is declared and the land is restored to the public domain in the manner prescribed by law.

Secretary Teller to Commissioner McFarland, February 12, 1883.

I have considered the case of Julia D. Graham *v.* The Hastings and Dakota Railroad Company, involving the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 35, T. 116, R. 32, Benson district, Minnesota, on appeal by the company from your decision of November 4, 1881 (reversing your predecessor's decision of November 29, 1880, in favor of the company, and) permitting Graham's entry to remain intact.

The tract is within the 10 miles granted limits of the grant by act of July 4, 1866 (14 Stat., 87), to the State of Minnesota, for the purpose of aiding in the construction of said railroad (*inter alia*), the right of which attached March 7, 1867, the date of the act of the State legislature conferring the grant upon the company.

It appears that the tract was formerly covered by soldier's homestead entry No. 1842 (Minneapolis series), made May 3, 1865, in the name of Bentley S. Turner, and canceled September 30, 1872. The entry was made through F. A. Conwell, as Turner's attorney in fact, pursuant to the provisions of the act of March 21, 1864 (13 Stat., 35), as embodied in

section 2293 of the Rev. Stat., which act is amendatory of the original act of May 20, 1862 (12 *id.*, 392) as embodied in section 2290 of the Rev. Stat.

Turner alleged in his affidavit (which was made before his commanding officer while engaged in the military service of the United States in the State of Virginia) that he was the head of a family, a citizen of the United States, and a resident of Franklin County, New York.

Under date of May 7, 1877, Graham made homestead entry, No. 7560, of the tract in question. Inasmuch as the record failed to discover whether Turner's family, or any member thereof, had ever resided upon the land, your office, under date of September 1, 1880, directed the register and receiver to order a hearing for the purpose of ascertaining that fact. In their letter of October 30 ensuing, said officers reported that pursuant to your instructions they had duly advised the parties in interest, September 11, 1880, that such hearing would be had October 29 ensuing, but that neither the company nor the claimant appeared. Whereupon, November 29, 1880, your predecessor, Commissioner Williamson, held Graham's entry for cancellation, subject to the usual appeal, for conflict with the railroad grant

Under date of February 18, 1881, the register and receiver transmitted a letter from Miss Graham, wherein she stated that she was unable to appear at the local office by reason of sickness and the state of the roads at the date of the hearing, and she therefore asked for a new trial. This petition was treated as an appeal, which, being considered defective, your office instructed the register and receiver, April 13, 1881, to allow her fifteen days to amend by filing a specification of errors.

Under date of June 20 ensuing, they reported to your office that Miss Graham had been duly advised of such extension, but had failed to respond.

Under date of November 4 ensuing, you finally decided upon examining Graham's letter that she asked for a new trial, and probably did not intend to make a technical appeal; that her application for a new trial was as informal as her presumed appeal was held to have been; that a consideration of the case shows you that no new trial is necessary, and that the decision of your predecessor "of November 29, 1880, was inadvertently made, through some misapprehension of the law or the facts."

From such decision the railroad company appeals, alleging, *inter alia*, error on your part in reversing your predecessor's decision; in ruling that you had jurisdiction to vacate such decision; and in holding that the homestead entry of Turner was in any sense such a valid subsisting claim as to defeat the company's grant.

It will be observed that your predecessor virtually reopened the case himself, and, as you found it in that condition, it was competent for you to consider and decide the same. Furthermore, the irregularity of procedure in the premises is such as to bring this case within the category

of exceptions to the general rule laid down by this Department in the case of *Owen v. Russell* (9 C. L. O., p. 111).

Upon the foregoing state of facts the question arises: Did Turner's entry except the land from the operation of the railroad grant?

In the case of *Kniskern v. Hastings and Dakota Railroad Company* (6 C. L. O., 50), it was held by my predecessor, Secretary Schurz, that an entry under the statutes hereinbefore cited, made by a single man not the head of a family, in the military or naval service of the United States, who had not made a *bona fide* settlement upon and improvement of the land as required by the statute, is void *ab initio*, and cannot except the land covered thereby from the operation of a railroad grant.

On the other hand, it has always been the invariable custom of the Department to regard land appropriated under the homestead law as removed from pre-emption settlement and homestead entry, and not again subject to either until the homestead entry is canceled, whereupon the land reverts to the government, and as a part of the public domain becomes subject to either.

Until after the expiration of the period in which the settlement and improvement can be proven, the government presumes that the homestead claimant is acting in good faith, unless the contrary be shown in the manner prescribed by the statute; but until such showing a forfeiture cannot be declared.

When an entry thereof is made under those laws (whether pre-emption, homestead, or other), the particular land entered thus becomes segregated from the mass of public lands, and takes the character of private property. "In no just sense," observe the supreme court in *Witherspoon v. Duncan* (4 Wall., 218), "can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before entry, after it they are private property." (Opinion of the Attorney-General, 8 C. L. O., 72.)

In the light of the judicial interpretation of the term "entry," as it is used in the public land laws, I am constrained to the opinion that an entry of record, which on its face is valid, is such an appropriation of the land covered thereby as to reserve the same from the operation of any subsequent law, grant, or sale, until a forfeiture is declared and the land is restored to the public domain in the manner prescribed by law.

Section 2271 (chap. 4, Pre-emptions) Rev. Stat. provides as follows:

The provisions of this chapter shall be so construed as not to confer on any one a right of pre-emption, by reason of a settlement made on a tract theretofore disposed of, when such disposal has not been confirmed by the General Land Office, on account of any alleged defect therein.

It will be observed in this connection that railroad grants invariably provide in express terms that all lands to which the right of pre-emption or homestead has attached, or that are found at the date the grant became effective to have been theretofore reserved, or in any wise disposed of by the United States, shall be excepted from the operation of

the grant. In other words, railroad grants are made subject to pre-emption and homestead rights.

if, therefore, the right of pre-emption to a tract of land theretofore disposed of is barred, although such disposal has not been confirmed by your office *a fortiori*, is a railroad company precluded from acquiring title to a tract of land that is expressly excepted from the operation of its grant?

The manifest intent of Congress in these provisions was to protect actual *bona fide* settlers in their rights at the date of the definite location of the road, and to give the company other lands in lieu of the lands *thus* or in *any wise* appropriated at such date. By the express terms of the granting act, lands to which the right of pre-emption or homestead settlement had attached when the line or route of said road was definitely located were excepted from the operation of the grant. It provides in the first section thereof as follows:

That there be, and is hereby, granted to the State of Minnesota, for the purpose of aiding in the construction of a railroad from Houston, and also for a railroad from Hastings to such point on the western boundary of the State as the legislature of the State may determine, every alternate section of land designated by odd numbers, to the amount of five alternate sections per mile on each side of said road; but in case it shall appear that the United States have, when the lines or route of said roads are *definitely located*, sold any section or part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever. (14 Stat., 87.)

These grants to railroads are present grants; when they take effect they operate *eo instanti* upon the lands within the granted limits. The grant is not held in abeyance to await the default of the settlers, but the title vests or does not vest at once; and so far as regards the land in which title does not vest at once, the claim of the company is at an end. If the grant is a present one, and the title does not vest when the grant takes effect, it cannot vest afterwards.

It was, I think, the intention of Congress that only such unoccupied lands as were not held under any claim recognized by the government should pass under the grant. Grants to railroad companies must be strictly construed against the grantee (92 U. S., 733). See case of James F. Perkins *v.* The Central Pacific Railroad Company, decided by the Department under date of 12th of December, 1882. (The Reporter, vol. 2, p. 161.)

Thus it will be seen that the company's title to the lands embraced in the grant attached to the road from the date of its *definite location*, March 7, 1867; but, as before stated, Turner's entry was at such date intact upon the record, and remained so until September 30, 1872, when it was canceled for failure to make final proof; and the tract being thus released from reservation, reverted *eo instanti* to the public domain, and became subject to entry by the first settler.

The rule laid down by the Department in the case of Chalkley Thomas *v.* The Saint Joseph and Denver City Railroad Company (3 C. L. O., 197), and which still invariably obtains, is that in cases where a forfeit-

ure has been declared for abandonment, and the land has been disposed of under the ruling of your office, it is not competent for a claimant to show that the canceled entry was void, as such cases are treated as *res judicata*.

Now, this is exactly the *status* of the case at bar, as will be seen from the recital in the premises, Turner's entry having been canceled for constructive or virtual abandonment, and Graham's entry having been allowed pursuant to the rules and regulations of your office, which obtained until the rendition of the Kniskern decision, and the promulgation of instructions thereunder. Such regulations will be found in their entirety in 2d Lester, p, 253, *et sequentia*, under the style and date respectively of No. "243 B," April 18, 1864 (explanatory of the act of March 21, 1864), and "No. 244 B," March 1, 1865 (supplemental to the former).

Thus it appears in the light of the foregoing rules and regulations that Turner's entry was regular in all respects, and hence *prima facie* valid. And as it was extant upon the record, both at the date of the grant and when the company's right thereunder attached, I am clearly of the opinion that the land in question was excepted from the operation of the grant, or, rather, that the same was not granted thereby.

Hence any laches on Graham's part was a matter to be considered solely between her and the government, of which it was not competent for the company to take advantage; because any defect that may have existed in Turner's *status* could be questioned only by the government, and subsequently it was cured by the remedial act of June 8, 1872 (17 Stat., 333), as embodied in section 2308 Rev. Stat., which declares that the soldier's services in the Army of the United States "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." This section ratified the original entry, and rendered it complete.

Your decision is accordingly affirmed.

RAILROAD GRANT—CERTIFICATION—PATENT.

JOHNSON *v.* ST. PAUL & SIOUX CITY R. R. CO.*

A certification to the State of Minnesota for the benefit of the Saint Paul and Sioux City Railroad Company does not convey title to land, as, under the act of March 3, 1865, title can only be conveyed by patent.

The party in interest having received no notice of the decision canceling his entry, and, therefore, having no opportunity for appeal, the decision cannot be treated as final.

Commissioner McFarland to register and receiver, Worthington, Minnesota, March 23, 1883.

I am in receipt of a letter from C. F. Kellogg, esq., of Sterling Centre, Minn., asking that patent may issue on homestead entry 1238 (F. C.,

437) of George W. Johnson for NE. $\frac{1}{4}$ of Sec. 5, 105, 27. The records of this office show that said entry was made December 8, 1863; that on March 22, 1866, it was canceled upon the records of this office, because at date of entry the land was withdrawn and reserved for the benefit of the Saint Paul and Sioux City Railroad, which was definitely located opposite said tract in June, 1857. Johnson enlisted in the Army after making the entry. His family, consisting of a wife and three children, remained upon the land. Johnson died in March, 1865, in the Army. In March, 1869, his widow was allowed by the local officers to make final proof on the entry, there being no record on the local office tract-books of the cancellation of the entry by this office, March 22, 1866, although the register and receiver (successors of the officers who allowed final proof) report, May 2, 1870, that the letter of this office dated March 22, 1866, is on file in the local office and bears this indorsement: "Johnson notified at Mapleton, May 12." The land is within the 15-mile indemnity limits by act of March 3, 1857, of the Saint Paul and Sioux City Railroad, and was *certified* to the State for the benefit of said road on March 7, 1872, having been previously selected August 1, 1871. The certification of the land to the State *did not convey title* to the land, as under the act of March 3, 1865, title can only be conveyed by *patent*. (See Secretary's decision of September 29, 1874, and December 2, 1875, in case of Saint Paul and Pacific Railroad, C. L. O., vol. 2, p. 134.) The certificate states that the land is listed in accordance with the requirements of the acts of May 12, 1864, and July 13, 1866, no reference being made to the act of March 3, 1865. The Saint Paul and Sioux City Railroad was definitely located opposite the land on June 18, 1857. On July 6, 1857, Solon B. Rumvill filed Pre. D. S. 7759 for the land in question, alleging settlement June 1, 1857. The land was withdrawn from entry March 14, 1857, but by letter of April 9, 1857, the register and receiver were directed to permit pre-emption settlements up to date of definite location.

Rumvill's settlement, therefore, annulled the withdrawal of the land, and it was subject to entry at the date of Johnson's application. The attempted cancellation of the entry not having been consummated by noting the same on the records of the local office, and the party in interest (Mrs. Johnson) evidently not having received notice of the action of this office, and, therefore, having no opportunity for appeal, the decision of March 22, 1866, cannot be treated as final. Said irregularities are sufficient to bring the case within the exceptions to the general rule relative to reopening decided cases. (See *Graham v. Hastings and Dakota Railroad Company*, Reporter, vol. 2, p. 178.)

The entry of Johnson will, therefore, be reinstated (for the purpose of issuing patent on same), subject to appeal by the Saint Paul and Sioux City Railroad Company, the resident attorney of which will be notified hereof by this office.

19 FD 522 38-371
RAILROAD GRANT—INDIAN RESERVATION.

PHELPS *v.* NORTHERN PAC. R. R. CO.

The grant (July 2, 1864) was a present one, and conveyed lands within the granted limits to which the United States had "full title, not reserved or otherwise appropriated, at the time the line of road is definitely fixed."

The act does not pass the lands "reserved" or "otherwise appropriated." At the time the grant to the company was made these lands were occupied by the Flatheads. They would not, therefore, pass by the grant.

Every tract set apart for special uses is reserved to the government, to enable it to enforce them. And that was the character of the reserve of the Bitter Root Valley. The stipulation to extinguish the Indian title did not apply to those lands.

Secretary Teller to Commissioner McFarland, January 22, 1883.

I have considered the case of James Phelps *v.* Northern Pacific Railroad Company, involving homestead entry No. 918, for the E $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 32, and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 33, T. 9 N., R. 19 W., Helena, Mont., on appeal from the decision of your office holding said entry for cancellation as to the odd section and for approval as to the even. The case is a test one, and a large number of others await the decision in this.

The first error assigned by counsel for Phelps (who appears also for the settlers generally in the Bitter Root Valley) is that your office erred in holding that said odd-numbered Section 33, 9, 19, constituted any portion of the land granted to the said railroad company. All the other assignments of error are involved in the first, and it will be necessary to consider only the first.

Said sections are a part of the land situate in the Bitter Root Valley, mentioned in the treaty made with the Flathead nation of Indians July 16, 1855, ratified by the Senate March 8, 1859 (12 Stat., 975).

Article XI of the treaty provided that the Bitter Root Valley above the Lo-Lo Fork should be carefully surveyed and examined, and if it should prove, in the judgment of the President, to be better adapted to the wants of the Flathead tribe than the general reservation provided for in such treaty, then such portions of it as might be necessary should be set apart as a separate reservation for said tribe.

November 14, 1871, the President issued an order which recited that the Bitter Root Valley above Lo-Lo Fork had "been carefully surveyed and examined in accordance with the eleventh article of the treaty" above mentioned, and in the judgment of the President had proved "not to be better adapted to the wants of the Flathead tribe than the general reservation provided for in said treaty," and he "therefore ordered and directed that all Indians residing in said Bitter Root Valley be removed, as soon as practicable, to the reservation provided for in the second article of said treaty."

June 5, 1872, Congress passed an act (17 Stat., 226) providing for the removal of said Indians from the Bitter Root Valley to the Jocko reser-

vation mentioned in said treaty. Section 2 of the act declared that the lands in the Bitter Root Valley lying above the Lo-Lo Fork should be surveyed as soon as practicable, "as other public lands of the United States are surveyed;" and that "said lands shall be open to settlement and shall be sold in legal subdivisions to actual settlers only in quantities not exceeding 160 acres to each settler, at the price of \$1.25 per acre." It provided for the reservation of the sixteenth and thirty-sixth sections for school purposes, and of lands for town sites. None of the lands were to be opened to settlement under the homestead and pre-emption laws. Out of the first moneys arising from the sales \$50,000 was to be set apart for the use of the Flatheads. No more than fifteen townships of the lands so to be surveyed were subject to the provisions of the act.

Section 3 provided that any of said Indians, being the head of a family or twenty-one years of age, residing upon and cultivating any portion of said lands, should be permitted to remain in said valley and pre-empt without cost the land so occupied, not exceeding 160 acres to each Indian, for which patent should issue, without power of alienation, upon condition that the Indian should give notice of his intention to abandon his tribal relations and remain in the valley.

The act of February 11, 1874 (18 Stat., 15), extended the benefit of the homestead act to settlers in the Bitter Root Valley.

In 1872 the Hon. James A. Garfield, at the request of the Secretary of the Interior, went to the Bitter Root Valley for the purpose of making arrangements to remove the Flathead Indians to the Jocko reservation. He made an agreement in writing, August 27, 1872, containing numerous provisions as to such removal. The agreement was executed by himself as special commissioner, and by the second and third chiefs on the part of the Indians; but Charlot, the first chief, declined to sign the agreement.

In reply to a special inquiry recently made by this Department to the Commissioner of Indian Affairs, as to the removal of said Indians from the Bitter Root Valley, it appears that the Garfield agreement has been only partially performed, either on the part of the government or of the Indians, and the latest information in possession of the Indian Office, contained in a report made by Inspector Pollock, October 12, 1880, was to the effect that between 300 and 400 Flathead Indians were then residing in the Bitter Root Valley, under Chief Charlot, and that 104, under Chief Arlee, had removed, under the Garfield agreement, to the Jocko reservation, joining other Flathead Indians already there under the treaty.

Quite a large number of patents have been issued to individual Indians for lands in the Bitter Root Valley, but have not been delivered, because the Indians declined to receive them, alleging as a reason that acceptance would dissolve their tribal relations.

February 21, 1872, the Northern Pacific Railroad Company filed in your office a map of general route in Montana, and lands were withdrawn for the benefit of the grant. (A map of general route had also been filed August 13, 1870.)

The grant (July 2, 1864, 13 Stat., 365) was a present one, and conveyed land within the granted limits to which the United States had "full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights at the time the line of said road is definitely fixed."

It is claimed by counsel for the company that if the lands became public lands prior to February 21, 1872, they passed by the grant. It is not necessary to controvert such claim.

It is only necessary to refer to the citations already made to show that the lands in the Bitter Root Valley were not public lands free from "other claims or rights" at the time of filing such map, but had been otherwise appropriated.

The Flatheads might have continued to occupy the valley for all time if after a careful survey and examination thereof above the Lo-Lo Fork it proved, in the judgment of the President, to be better adapted to their wants than the general reservation provided for in the treaty. If that should be the judgment of the President, then such portions of the valley as should be found necessary were to be "set apart as a separate reservation for the said tribe." And no portion of said valley above said fork was to be open to settlement until after such examination had and "the decision of the President made known." The act does not pass the lands "reserved" or "otherwise appropriated." At the time the grant to the company was made these lands were occupied by the Flatheads. All or portions of them were quite likely to become a permanent Indian reservation. By the treaty they were expressly reserved for that purpose, or until the question should be determined; and settlement upon them was prohibited. They would not, therefore, pass by the grant. (*Leavenworth, L. & G. Railroad Company v. United States*, 92 U. S., 733.)

The executive order, made before the filing of the map of route, found the lands in the reserved condition before stated, occupied by the Indians, and ordered their removal as soon as practicable. It directed an appraisal of substantial improvements made by Indians, such as fields inclosed and cultivated, and houses erected. It further ordered that after such removal the Bitter Root Valley aforesaid should be opened to settlement; and that any Indians residing in the valley who desired to become citizens and to reside on the lands then occupied by them, not exceeding in quantity the amount allowed under the homestead and pre-emption laws, should be permitted to do so, provided such intention was declared by the 1st day of January, 1873.

The effect of the order was not to extinguish the Indian title. It reserved to the Indians a preference right to the lands, upon conditions,

not to be determined until after the time the company filed its map of route. The condition of the Bitter Root Valley was substantially unchanged when Congress at a time subsequent to the filing of the map of route, obviously regarding all the lands in that valley and the rights of the Indian thereto as a proper subject of legislation, as a subject pending and not settled, proceeded to make ample provision for the rights of the Indians therein, and for the removal therefrom of such as were not disposed to remain, and for a disposition of all of the lands without recognition or reservation of odd sections or of the grant to the Northern Pacific Company in any manner whatever.

The only further question necessary to be considered is as to the effect of the stipulation in the granting act relating to the extinguishment of Indian titles.

The acts of Congress of June 5, 1872, and of February 11, 1874, before cited, were passed after the filing of map of general route in Montana. These acts, as before stated, provide for a disposition of all the lands in the valley, and for the raising of a trust fund therefrom for the benefit of said Indians. The right of the company to the lands or any part thereof is nowhere expressly recognized.

I do not mean to be understood as asserting that it is always necessary to make express mention of lands in order to prevent them from passing by a granting act which apparently covers them. The question of reservation is, however, one of intention. The price of the lands to be sold is fixed at the single minimum; and other provisions are inconsistent with an intention on the part of Congress to extinguish the Indian title for the benefit of the railroad grant.

Your office has given this construction to the acts. In a letter addressed, April 30, 1874, to L. B. Lyman, esq., the Acting Commissioner says:

Under the act of June 5, 1872, the lands are not subject to the withdrawal for the Northern Pacific Railroad Company, and can only be disposed of in the manner prescribed in that act to actual settlers at \$1.25 per acre.

In a letter addressed to the register and receiver at Helena, Mont., July 18, 1874, the Commissioner says:

All sections, odd and even, opened for settlement by act approved June 5, 1872, are subject to pre-emption and homestead entry. Settlers may file on odd in the same manner as on even sections.

Your office seems to have acted upon such construction for several years, and until the decision of the late Commissioner Williamson in the case of Martin, decided July 24, 1880, and in a few months afterwards in the case of Phelps, now under consideration.

The decision in Martin's case (which was followed by the Commissioner in the present case) was made upon the authority of *Hogland v.*

the Northern Pacific Railroad Company (5 C L. O., 107). The situation of the lands under consideration in that case as to the Indian claim or right is clearly distinguished from that of the lands now under consideration; nor had such lands been the subject of legislative enactments by the aid of which we are the better enabled to arrive at the legislative intention. The right of the Indians to the lands under consideration in Hogland's case was that of occupancy under the aboriginal title, and it was held that the extinguishment of that right was but giving effect to the stipulation in the last clause of section second of the granting act, to the effect that the United States should, as rapidly as was consistent with public policy and the welfare of the Indians, extinguish the Indian titles to the lands donated. This stipulation cannot be held to apply to permanent Indian reservations, nor to lands which had been reserved before the grant was made, as we have seen these lands were. It applied only to the lands clearly granted.

In construing a public grant, as we have seen, the intention of the grantor, gathered from the whole and every part of it, must prevail. If on examination there are doubts about that intention, or the *extent of the grant*, the government is to receive the benefit of them.—*Leavenworth Railroad Company v. United States (supra)*, 746.

In the case last cited the Indian title to the lands there in question was extinguished between the time of the passage of the act making a present grant and the filing of the map of definite location, and it was held that the lands did not pass by the grant. In that case, however, the provision for the extinguishment of the Indian title was in an act other than the one making the grant, and the acts had no necessary connection, although passed on the same day. I think, however, that the principle is applicable to the case under consideration. After referring to the stipulation on the part of the government to extinguish the Indian title in the case of the grant to the Union Pacific and roads therewith connected, the court said: "This was necessary, although their roads ran through territory occupied by wild tribes; but this (the Leavenworth) passed through a reservation secured by treaty and occupied by Indians (the Osages) at least partially civilized."

If the lands in the Bitter Root Valley had passed by the grant, the government could not have fulfilled its agreement with the Flatheads in case the President found that those lands were better adapted to their uses than the Jocko reservation.

Referring again to the case last cited, the court uses this language: "Every tract set apart for special uses is reserved to the government, to enable it to enforce them." And that was the character of the reserve of the Bitter Root Valley. The stipulation to extinguish the Indian title did not apply to those lands.

I am of the opinion that the lands in question did not pass to the Northern Pacific Railroad Company under its grant, nor subsequently

upon extinguishment of the Indian title, and therefore reverse the decision of your office wherein it holds that the land in the odd-numbered section is not subject to entry.

The facts recited show that some obstacles present themselves in the way of awarding lands to settlers in the Bitter Root Valley. Fifty-one patents to Indians are now outstanding, but not delivered, for the reason before stated. A large number of the Flatheads are still residing in the valley, and may have initiated claims by giving notice required by section 3 of the act cited and by residing upon and cultivating lands for which patents have not yet been issued to them.

Great care should be exercised that there may be no interference in respect to the patents already issued, and that all rights which the Indians may have to lands actually occupied by them may be properly regarded.

In the case of James Phelps, under consideration, there seems to be no adverse claim except that of the railroad company herein considered; his entry should therefore be allowed.

RAILROAD GRANT—LANDS EARNED BY CONSTRUCTION.

WISCONSIN CENTRAL R. R. CO.

There is no question that the road was entitled to alternate sections so soon as progressive sections of the road are completed. The company is entitled to the lands earned by the construction of its road prior to the expiration of its grant.

Secretary Teller to Commissioner McFarland, October 2, 1882.

I herewith inclose letters from W. K. Mendenhall, esq., dated respectively February 20, and September 18, 1882, on behalf of the Wisconsin Central Railroad Company, in which a request is made for the patenting of lands earned by the construction of that railroad prior to the expiration of the grant.

By your letter of the 30th of March ultimo, it appears that the road has received 575,844.56 acres; and that the lists ready for submission for approval contain 23,578.08 acres; and that these two amounts will fall short of the number of acres earned by the construction of 231 miles of road completed prior to December 31, 1876.

In the matter of the grant to the Wisconsin Central Railroad, there is no question that the road was entitled to alternate sections so soon as progressive sections of the road should be completed. That being the case, I see no reason why the list mentioned in your letter should not be submitted to me for approval, and you are directed accordingly.

RAILROAD GRANT—OVERLAPPING LIMITS.

ALABAMA & CHATTANOOGA R. R. CO. ET AL.

The lands within the overlapping or conflicting 15 miles or indemnity limits of the two lines of road authorized by the same act, one of which has never been constructed, should be approved and certified to the governor of the State of Alabama for disposal by the legislature of the State in accordance with the conditions of the trust as expressed in the granting act.

It is for the State to determine what lands or proceeds of lands the Alabama and Chattanooga Railroad Company shall receive under the grant.

The Department has not the authority to direct the State in this matter; for all the directions and conditions that Congress saw fit to give to and impose upon the State are expressed in the act.

Secretary Kirkwood to Commissioner McFarland, July 20, 1881.

I have examined your report of the 16th instant, accompanying a list of lands selected by F. Y. Anderson, as agent of the State of Alabama, within the indemnity limits of the Alabama and Chattanooga railroad, and claimed as inuring to the Alabama and Chattanooga Railroad Company under the acts of Congress approved respectively June 3, 1856 (11 Stats., 17), and April 10, 1869 (16 Stats., 45).

The list was rejected by the register of the United States Land Office at Huntsville, Ala., March 8, 1881, without stating any reasons therefor; whereupon the said Anderson, as agent of the State and Company appealed to your office.

You report as follows:

1st. That the lands were withdrawn from disposal by telegrams of June 19 and letters of June 20, 1856, addressed to registers and receivers in said State.

2d. That a map of definite location of the Coosa and Chattooga River railroad, from Gadsden, Ala., to the Georgia State line, through the Chattooga Valley, a distance of about 40 miles, was filed in your office September 20, 1858.

3d. That no portion of the projected road thus located was ever constructed; that no existing corporation having any relation to this line is known to your office; and that there has been no declaration of forfeiture of the grant of 1856 or 1869 to aid in the construction of this projected or contemplated road.

4th. That a map of definite location of the northeast and southwest Alabama and Wills Valley railroads, in connection (now by consolidation under State law the Alabama and Chattanooga Railroad) from the Mississippi State line to the Georgia State line, through the Wills and Lookout Valleys, was filed in your office November 29, 1858.

5th. That the last-named road has been completed, and that no forfeiture of the grant to aid in its construction has ever, in any manner, been declared.

6th. That a portion of the lands selected as aforesaid, lie within the overlapping or conflicting 15 miles or indemnity limits of the two lines of roads located as above set forth.

Under this state of facts you submit, for my opinion, the question whether the indemnity selections should be certified to the Alabama and Chattanooga Railroad Company.

The act of April 10, 1869, revived and renewed the grant of 1856 to the State of Alabama to aid in the construction of the two roads definitely located as aforesaid. The first section of the act of 1856 provided that the lands thereby granted should be exclusively applied in the construction of that road for and on account of which the same were granted, and that they should be disposed of only as the road progressed.

The third section provided that the lands granted by the act to the State should be subject to the disposal of the legislature thereof, for the purposes aforesaid, and for no other.

The fourth section provided the manner in which the State should dispose of the lands; that is to say:

That a quantity of land, not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold, and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, may be sold, and so on, from time to time, until said roads are completed.

Thus it is seen that the grant is to the State to aid in the construction of said roads; that the State is, therefore, simply the trustee to dispose of the lands, for the benefit of the several roads, in the manner prescribed by Congress.

It is also clear, from your report, that the precedent conditions to the right or authority of the State to dispose of the lands granted in aid of the Alabama and Chattanooga Railroad have been performed.

The first section of the act of 1856 further provided that it should be lawful for any agent or agents to be appointed by the governor of the State to select the indemnity lands, subject to the approval of the Secretary of the Interior, and that the lands so selected should be held by the State of Alabama for the use and purpose of the grant as aforesaid.

It follows, therefore, that any proper selections of indemnity should be approved and certified to the governor of the State of Alabama for disposal by the legislature of the State, in accordance with the conditions of the trust as expressed in the granting act.

It seems to me that it is for the State to determine what lands or proceeds of lands the Alabama and Chattanooga Railroad Company shall receive under the grant, and that this Department has not the authority

to direct the State in this matter, for all the directions and conditions that Congress saw fit to give to and impose upon the State are expressed in the act.

I therefore hold that indemnity selections made by lawful authority of lands inuring to the State under the grant of 1856, as revived and renewed by the act of 1869, should be properly listed and forwarded to this Department for approval and certification to the governor of the State of Alabama.

RAILROAD GRANT—PARTITION BY THE STATE.

ALABAMA & CHATTANOOGA R. R. Co.

Where several roads intersect at a common point, their entire respective interests must enter into consideration in making partition.

This partition is the duty of the State, and the General Land Office is not called upon to act in the absence of a proper request for certification, nor to lay down rules for such partition, further than to say that any adjustment by the State authorities which shall give to each only what is legally due will be recognized and carried into certification when presented.

Secretary Teller to Commissioner McFarland, December 29, 1882.

I inclose for your information, and such consideration as may be required, a letter of 27th instant from M. D. Brainard, esq., submitting various questions and asking definite instructions in the matter of the right of the Alabama and Chattanooga Railroad Company under the ruling made 21st instant touching the overlapping or common limits of certain roads in Alabama.

Deeming the decision referred to sufficiently explicit, and in the absence of any suggestion of doubt from you as to its practical execution, I forbear to add at this time any instructions further than to remark that the term moiety was intended in its true sense to indicate equal division as between any two roads having equal right and common limits. Where several roads intersect at a common point, their entire respective interests must enter into consideration in making partition. This partition is, however, the duty of the State, and you are not called upon to act in the absence of a proper request for certification, nor to lay down rules for such partition, further than to say that any adjustment by the State authorities which shall give to each only what is legally due will be recognized and carried into certification when presented.

RAILROAD GRANT—PRIVATE CLAIM—CONFLICT.

SOUTHERN PAC. R. R. CO.

The lands in question were at the date of the grant within a survey of the Tajauta Rancho, and were patented to the railroad company in 1876 under the rulings then in force.

As the company has sold the land, neither justice nor good policy require the intervention of the government to disturb the title conveyed, although under subsequent decisions the lands are held to be excluded from the grant.

Secretary Teller to Commissioner McFarland, December 8, 1882.

I have considered your communication of 7th August last recommending the institution of suits to vacate patent issued in favor of the Southern Pacific Railroad Company, March 29, 1876, to the following described lands, in Los Angeles district, California: Lots 1 and 2 of Sec. 33, 2 S., 13 W.; SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 5, 3 S., 13 W.; Lots 1, 2, 3, and 4 Sec. 9, 3 S., 13 W.; NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and lot 3, Sec. 17, 3 S., 13 W., San Bernardino meridian.

These tracts were in 1871 within a survey made in 1868 of the claimed Tajauta Rancho, and it is claimed that they are therefore excluded from the railroad grant under the Newhall-Sanger decision (2 Otto, 761).

It was held, however, by Mr. Secretary Delano, February 21, 1872 (1 C. L. L., 548), that the survey was unauthorized, and he had no jurisdiction to approve it, on account of a previous survey of 1858, which had become final by proper publication without objection under the act of June 14, 1860 (12 Stat., 33). This final survey did not embrace these lands, and the same were regarded as public lands properly inuring to the grant at the date of patent. The issue of such patent was not, therefore, inadvertent, although my predecessor, Mr. Secretary Schurz, in the subsequent case of Henry J. Dull (2 C. L. L., 944), held that the pendency in this Department of proceedings on the latter survey operated to exclude the lands within its limits from the railroad grant.

It is shown that the patents were issued advisedly under rulings in force, and it is further shown that the company has sold the lands. Under these conditions, even were it reasonably certain that the decision made subsequently to such issue was grounded upon a better construction of law (a point not necessary to decide), I am of the opinion that neither justice nor good policy requires the intervention of the government to disturb the title conveyed.

RAILROAD GRANT—CONSTRUCTION OF ROAD.

ST. PAUL M. & M. RY. CO.

Although the greater portion of the lands in question lie opposite portions of the road which were not completed within the time required by the granting act, the Department is estopped by the decision of the United States supreme court in the case of *Schulenberg v. Harriman* from refusing to permit the list of lands to go to patent merely on account of the failure of the company to complete the sections of road within the time prescribed.

Secretary Teller to Commissioner McFarland, April 3, 1883.

On December 30, 1882, the Department referred to you a letter of Messrs. Curtis & Burdett in relation to a certain list of selections of land on account of the grant to the Saint Paul and Pacific, Saint Vincent extension, now the Saint Paul, Minneapolis and Manitoba Railway Company, which had received the approval of my predecessor, Mr. Kirkwood, with directions that you submit to the Department the proposed amended list for approval, with all other papers on file in your office pertaining to the case, as requested by the letter of the attorneys of the road.

On the 15th of January last, in accordance with this direction, you inclosed the said list of 6,273.68 acres and papers, stating that you "had not been officially advised of Secretary Kirkwood's decision of any of the questions raised before him as to the issuance of patent in this case," and that "the major portion of the lands described in said list desired to be patented lie opposite to portions of said railroad which were not completed within the term required by the granting act."

I have been informed that Secretary Kirkwood, after informally ordering suspension of action on the list approved by him, disposed of all the objections raised by Mr. G. B. Edmonds's letter of September 9, 1881 (concerning the lands which he states were about to be patented to the Saint Paul, Minneapolis and Manitoba Railway Company), excepting the one relating to indemnity selected for lands lost within the granted limits of the railroad through the operation of the swamp-land grant to the State of Minnesota, and upon which he did not reach a conclusion.

As to the information which you deem proper to give with regard to the major portion of the lands described in said list, that "they lie opposite portions of said railroad which were not completed within the term required by the granting act," I have to say that I am estopped by the decision of the United States supreme court in the case of *Schulenberg v. Harriman* (21 Wall., 44) from refusing to permit such list to go to patent merely on account of the failure of the company to complete the sections of road affected within the time prescribed. Besides, I question whether I am empowered, under the well-settled practice of this Department, to set aside, by my own volition, without sufficient and controlling reasons, a list of selections formally approved by a former Secretary.

Under date of the 28th ultimo, Messrs. Curtis & Burdett request that the list of 6,273.68 acres be returned to them, and that the list of selections for indemnity approved by Secretary Kirkwood be patented, omitting the tracts selected in lieu of lands lost to the road by reason of the swamp grant. They also state that they do not by this intend to surrender any rights the company may have acquired by reason of the approval of the list by Secretary Kirkwood of the lands withdrawn from consideration at the present time by the Department.

You are directed to patent the lands certified by Secretary Kirkwood, omitting from the list, however, the 6,273.68 acres which were selected in lieu of lands lost by reason of the swamp grant.

RAILROAD GRANT—CONFLICTING PRE-EMPTION CLAIM.

HAZEL v. ST. PAUL & SIOUX CITY R. R. CO. ET AL.

Although it is held that the burden of proof is upon him who alleges that a tract within the granted limits is excepted from a railroad grant, yet, as a pre-emption filing is *prima facie* evidence of a valid right, it follows that a pre-emption filing makes a *prima facie* case in favor of the pre-emption claimant, and shifts the burden of proof from him, and in the absence of evidence to rebut the presumption raised by his pre-emption filing the validity of his pre-emption claim must be deemed to be established and his entry must be approved.

Commissioner McFarland to register and receiver, Worthington, Minnesota, October 10, 1881.

Referring to final homestead entry No. 4942, dated January 16, 1878 (original 8602, January 3, 1873), in the name of Hugh C. Hazel, covering the NE. $\frac{1}{4}$ Sec. 21, T. 105, R. 27, I have to state that the tract is unoffered land and is within the 20 mile indemnity limits of the additional grant by the act of May 12, 1864, for the Saint Paul and Sioux City Railroad Company, the withdrawal for which became effective July 20, 1864. It is also within the 10-mile limits of the grant by the act of July 4, 1866, for the Southern Minnesota Railroad Company, the right of which attached November 29, 1866.

Hugh C. Hazel filed D. S. No. 12091 for the tract May 9, alleging settlement March 1, 1862. January 3, 1873, he made homestead No. 8602, and on January 3, 1878, he submitted final homestead proof, showing settlement on the land at the date of his entry, and continuous residence and cultivation from that time to the date of his proof. There is no pre-emption proof in the case, and as the land was withdrawn for railroad purposes at the date of his entry, he is not entitled to the same, unless he has a prior claim based on his pre-emption filing.

Prior to the act of July 14, 1870 (16 Stat., 279), pre-emptors on unoffered land were not required to make proof and payment until the lands were offered. Said act required such pre-emptors to make their proof within eighteen months after the date prescribed for filing their

declaratory notices had expired, and where said date had elapsed before the passage of the act, they were to have one year after the passage thereof to make such proof. The resolution of March 3, 1871 (16 Stat., 601), allowed said parties twelve months' additional time to make their proof and payment. The act of May 9, 1872 (17 Stat., 88), allowed persons who had pre-emptions on the public lands in Minnesota one year in addition to the time then prescribed by law within which to make their proof and payment. The party, therefore, appears not to have been in default as to proof and payment at the time he made his entry, and he, therefore, had the right to transmute his filing to a homestead entry, if he had complied up to that time with the pre-emption law.

If Mr. Hazel had a valid pre-emption claim to the land from the time of filing his declaratory statement down to the time of making his homestead entry, the land was clearly excepted out of the grant.

It is held that the burden of proof is upon him who alleges that a tract within the granted limits is excepted from a railroad grant. It was also decided by Secretary Schurz, in *Vincent v. Saint Joseph and Denver City Railroad Company* (4 C. L. O., 44), that a pre-emption filing is *prima facie* evidence of a valid right. It consequently follows that the pre-emption filing of Mr. Hazel made a *prima facie* case in his favor and shifted the burden of proof from him, and in the absence of evidence to rebut the presumption raised by his pre-emption filing the validity of his pre-emption claim must be deemed to be established, and his final entry must be, and hereby is, held for approval for patent. You will so advise him and the proper representative of the Saint Paul and Sioux City Railroad Company. The Southern Minnesota Railroad Company will be advised from this office.

RAILROAD GRANT—WITHDRAWAL—PRE-EMPTION CLAIM.

TREPP *v.* NORTHERN PAC. R. R. CO.

A pre-emption claim (not since abandoned), attaching to a tract in an odd-numbered section in the "granted" limits at the date of the withdrawal made upon the filing of a map showing the general route of the road, excludes said tract from the withdrawal and from the grant.

The failure of a pre-emption claimant to file "in time" on such a tract, but who afterwards asserts his claim, it being for "unoffered" land, does not defeat his claim, except where *another settler* on the same tract has filed and complied with the law.

Tracts to which valid pre-emption *claims* attached when lands were withdrawn for the road, or at its definite location, cannot pass under the grant if the pre-emption claimant asserts his right.

The Department decision in *Serrano v. Southern Pacific Railroad Company* was erroneous.

Secretary Kirkwood to Commissioner McFarland, December 17, 1881.

On the 25th ultimo I instructed you verbally to suspend the execution of my decision of the 3d of October, 1881, in the case of Martin

Trepp *v.* The Northern Pacific Railroad Company, in order that I might give the case further examination upon the questions of law involved therein.

The decision of October 3, 1881, was simply an affirmance of the decision of your office following the precedent of the Department in the case of *Serrano v. Southern Pacific Railroad Company*, decided July 2, 1879 (6 C. L. O., v. 93), and under the circumstances the main questions of law involved did not receive the critical examination and careful consideration that they otherwise would; for to reverse the decision of your office involved the reversal of a rule adopted by my predecessor. Upon a careful re-examination of the case, however, I am convinced that the rule in the *Serrano* case was erroneous, and hence that it was an error to hold that the failure of Trepp to file his declaratory statement for the land in contest within the statutory period, and the intervention of the withdrawal for said Northern Pacific Railroad Company after the expiration of said period and before Trepp filed, worked a forfeiture of the latter's claim.

The material facts are that plat of township embracing tract in question was filed in local office at Helena, Mont., September 18, 1869; that Trepp settled as pre-emptor September 15, 1871; that he was a qualified settler; that he filed declaratory statement for said tract July 3, 1878, more than three months after settlement (Sec. 2265 Rev. Stat.); that he proved up his claim and entered the land August 10, 1878; that it is found, and, as I understand, it is not questioned, that Trepp performed all the requirements of the pre-emption law except as to filing in time, and that with this exception his claim is valid in all respects; that the tract is within the limits of a withdrawal made under authority of said act of 1864 (13 Stats., 365) for the benefit of said company, by letter of the Commissioner of the General Land Office, by direction of the Secretary, under date of April 22, 1872, received at local office May 6, 1872, upon map of general route filed with the Secretary and approved by him February 21, 1872; that this letter withdrew the odd sections within the forty-mile limits on each side of the line of general route; that the tract is within the forty-mile or granted limits as shown by said map of general route on file in the General Land Office, upon which the withdrawal was made, and that the road opposite the land has not been definitely located.

Of course it will be admitted that the title to land within this withdrawal has not absolutely vested in the company beyond revocation by Congress wherever the line of the road has not been definitely located and constructed (see sections 3, 6, and 20, act of July 2, 1864, 13 Stats., 365), and it is not certain that the road will ever be definitely located or built over the line of the general route; but it is a fact that no change of route has been made, and that the withdrawal of 1872 remains intact and in full force; hence it must be assumed that the company claims all rights to which it is entitled by virtue of the filing of the map of

general route and the withdrawal in accordance therewith. The case should, therefore, be treated as if the company had a valid claim to such odd sections within the granted limits as are not excepted from the grant; in other words, that all rights intended by the act of 1864 to be secured to the company upon the filing of a map of general route, remain unimpaired.

The sixth section of the granting act of 1864 (13 Stats., 369) provides as follows:

That the President of the United States shall cause the land 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 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, 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.*

I have underscored words above which seem to me to have significant bearing upon *the* question in the case.

The first observation upon this section is, that while it does not in terms direct the Secretary of the Interior to withdraw lands for the benefit of the company, the duty and authority to do so are clearly implied. The map of general route being filed, the lateral limits of the grant thereby appear. The odd sections *granted by the act* are not thereafter liable to sale, entry, or pre-emption. There is no way, therefore, to prevent disposal or entries of the granted land except by giving notice of the limits of the grant and directing the local officers to make no disposition of the granted lands within those limits. It has been held by the Department that upon acceptance of map of general route by the Secretary, a withdrawal of the odd sections took place *eo instanti*, by force of the sixth section of the statute itself (1 C. L. L., 377); nevertheless, orders of withdrawal were deemed necessary to avoid confusion and to protect both settlers and the company, and there can be no question of the authority to make such withdrawal.

If, however, any question that executive authority existed to make the withdrawal of April 22, 1872, arises in the mind of any one, reference to section 2281 Rev. Stat., and to the decision of the supreme court in *Wolcott v. Des Moines Co.*, 5 Wall., 681, will settle it affirmatively. This certainly puts the case on its firmest grounds in favor of the company, and in my opinion on the correct basis.

Now let us see whether the company has any just claim of right to Trepp's land, or whether Trepp's entry ought to be canceled by reason of anything in said act of 1864, or the recited proceedings thereunder.

In the first place the legislative withdrawal which occurred upon the acceptance of the map of general route February 21, 1872, or the executive withdrawal of April 22, 1872, embraced and attached only to the

odd sections "granted" by act of 1864. The withdrawal was limited to such by the express language of the sixth section: "And the odd sections of land *hereby granted* shall not be liable to sale," etc., and the provisions of the pre-emption law "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,*" is the language of the act.

There was no legislative withdrawal and no authority for executive withdrawal, therefore, of other lands than those granted by the act. It follows that the right of pre-emption could not be denied to any "other lands on the line of said road, when surveyed." Now it is obvious that the withdrawal was to protect the company, and to preserve to it all lands to which its right might attach and vest upon definite location (1 C. L. L. No. 400, page 377). What those lands are, the third section of the act specifies. They are "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 whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, *and free from pre-emption or other claims or rights* at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office."

Clearly, the object of Congress, as expressed in the act, was to withdraw the lands intended to be granted upon the filing of the map of general route, so that they should maintain their existing status from the time of withdrawal to the time of filing map of definite location. Hence the condition of the land at date of withdrawal will determine whether it was granted or intended to be granted or not, and the withdrawal would attach to such lands only as maintaining the same status to time of definite location would pass to the company under the grant. Now, if there was a pre-emption claim (not since abandoned) attaching to the land in question at the date of the withdrawal, it excluded the land from the withdrawal and from the grant as effectually as if the map of definite location had been filed and accepted at the same time as and instead of the map of general route.

Trepp's was such a claim, unless his failure to file in time defeated it. That such failure on unoffered land does not defeat nor forfeit a pre-emption claim, except in case wherein another settler on the same tract has filed and otherwise complied with the conditions of the law, seems to me to be firmly settled by the supreme court and this Department, as it is possible to settle anything, as will presently be shown. But if it were an original proposition such would necessarily be the conclusion. Section 2265 Rev. Stat. provides that every claimant under the pre-emption law for unoffered land shall make known his claim in writing to the register of the proper land office within three months from settlement, etc., "otherwise his claim shall be forfeited and the tract

awarded to the next settler, in the order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law." Section 2282 Rev. Stat. provides that nothing contained in the chapter relative to pre-emptions shall delay the sale of any of the public lands beyond the time appointed by the proclamation of the President.

Now, when it is considered that unoffered land cannot be entered at private entry or sale, and that settlement without filing within the time mentioned in section 2265 will not debar another settler from appropriating the land, nor the government from selling it at public sale, there can be no possible reason for forfeiting a pre-emption claim because of failure to file in time, nor for giving to section 2265 any other construction or meaning than its language clearly imports—that is, that the claim of a pre-emptor who "fails to file the notice of his claim in time shall be forfeited, and the tract awarded to the next settler," etc. By limitation of the language itself the forfeiture and award is to the "next settler."

It is a well-known principle that the law does not favor forfeitures. To give any other construction to section 2265 than its language imports, would be in open violation of this wise rule and principle of law.

It might be urged that this limitation would restrict the forfeiture and award to a pre-emption settler; but such does not appear to be the law. For, in the first place, the section does not so express it; and, in the next place, section 2289 Rev. Stat., relative to homesteads, makes all lands that are subject to pre-emption subject to homestead entry. But whether the law limits the forfeiture to pre-emption settlers or not is of no consequence in determining this case. If the law is, that in case of failure to file declaratory statement in time the claim is forfeitable, and the tract subject to award only to a pre-emptor, let it be so administered. The executive duty is to execute the law. The responsibility for the law is with the law-making power.

Again section 2281 Rev. Stat. provides that—

All settlers on public lands which have been or may be withdrawn from market in consequence of proposed railroads, and *who had settled thereon prior to such withdrawal*, shall be entitled to pre-emption at the ordinary minimum to the lands settled on and cultivated by them; but they shall file the proper notices of their claims, and make proof and payment as in *other cases*.

This section was taken from the act of 27th March, 1854 (10 Stats., 269), as amended by the second section of the act of July 14, 1870 (16 Stats., 279). All I desire to remark upon the acts of 1854 and 1870 is that they were in force at the time of the grant to the company and when the land was withdrawn; that Trepp is undoubtedly entitled to their provisions as well as to the provisions of section 2281 Rev. Stat., and that all that that section requires is that the settler shall file and make proof and payment as in other cases.

It follows, therefore, that if a failure to file or make proof and payment in time works no forfeiture of a claim in the absence of another subsequent settler on the same tract in other cases, it cannot under the act of 1854, as amended, and section 2281, which were unquestionably enacted for the protection of settler's claims, and not for their destruction. But this question was clearly and positively settled by the supreme court in the case of *Johnson v. Towsley* (13 Wall., 72). That case has been so often referred to, quoted from, and applied in decisions of this Department, that it would seem supererogation to do more than refer to it; but I feel constrained to call attention to certain facts therein.

Towsley settled June 15, 1858, and filed declaratory statement February 4, 1859. Johnson filed declaratory statement October 5, 1860, for same land. On September 20, 1862, the local officers allowed Towsley's entry, and issued patent certificat . Finally, upon appeal to the Secretary of the Interior, a decision was rendered July 11, 1863, in favor of Johnson. Afterwards Johnson entered the land and received a patent therefor. Upon these facts the court upheld Towsley's title, and decreed that Johnson, who was held to be the trustee of Towsley, should convey the title, which passed by patent to Towsley. I need not refer specially to the opinion of the court upon the question of the failure of Towsley to file in time. They held that it did not defeat his claim, because no other person, settler on the same tract, had given the notice, etc., before Towsley filed. But I desire to draw attention specially to the fact that the court held that Towsley's claim was a valid pre-emption claim, notwithstanding his failure to file in time, which point was fully considered; and being a valid claim, which means that Towsley had made compliance with the law as the court construed it, the court decreed the title in him.

Now, let me ask, what is it that is excepted from the grant of the Northern Pacific Railroad Company? What is carved out of the grant by express language? What condition is land in which cannot pass under the grant? What, by every intendment of the act, should not pass by the grant?

The answer comes from the very language of the third section of the act itself. Land, odd sections, to which a *pre-emption* claim attaches when the same is withdrawn for the benefit of the road, or at definite location, as above shown, cannot pass under the grant if the claim is not abandoned. The land, in other words, must be "free from pre-emption or other claims or rights." According to *Johnson v. Towsley*, Trepp had a pre-emption claim at the time of withdrawal.

It is not a question whether or not the company is an adverse claimant, and whether the intervention of its claim works a defeat or forfeiture of Trepp's pre-emption, as in the case of the subsequent settler who has given notice, etc. The real question is whether the claim of Trepp does not bring the tract within the exception to the grant; and

under the doctrine of *Johnson v. Towsley* it clearly does ; and the same doctrine was maintained in *Lansdale v. Daniels* (10 Otto, 117).

Another view is that, as between the United States and the company, the grant is construed more favorably to the government and strictly as to the company. (*Leavenworth Railroad Company v. The United States*, 2 Otto, 733.) Hence, instead of attempting by strained interpretation of the opinions in *Johnson v. Towsley* and *Lansdale v. Daniels* to avoid applying the rule that failure to file for more than three months will not of itself render a claim invalid, the doctrine of those cases should be applied in the sense in which it plainly appears in said opinions. Yet even in this view of the case the only hardship upon the company will be the selection of other land in lieu of that claimed by Trepp ; the grant is not necessarily diminished.

The Department at an early day adopted the doctrine of *Johnson v. Towsley*, and applied it in cases similar to the one under consideration. There is an unbroken line until we reach the case of *Serrano v. The Southern Pacific Railroad Company*. (6 C. L. O., 93.) In that case it will be observed that the Secretary found, leaving out of view the question of laches in filing, that Mrs. Serrano had no pre-emption claim when the right of the company attached. That was sufficient to defeat her case, and to award the land to the company. The reasoning, after rejecting the claim upon the facts, does not seem to me, after careful consideration thereof, to overcome that of the court in the cases cited, nor the evident intent of sections 2265, 2281, and 2282 of the Revised Statutes, nor to my mind does it afford sufficient ground for setting aside a rule that had prevailed in the Department since January 10, 1872, at least. (*Walker and Walker*, 1 C. L. L., 293.)

The Department, prior to the *Serrano* case, had not only held that a failure to file in the absence of an adverse settler's claim did not defeat a pre-emption claim, but it had also held, by analogy of reasoning, that a failure to prove up within the time required would not defeat a claim.

I here refer to some of the decisions in which the Department has applied the *Johnson-Towsley* doctrine, either directly or analogously ; and an examination of them will show how firmly that doctrine was adopted as a rule of law for the guidance of the Land Department.

Walker and Walker, above cited ; *Erastus Kimball* (1 C. L. L., 295) ; *Schwerin v. Western Pacific Railroad Company* (1 C. L. L., 409)—this case was decided February 9, 1872 ; *Fitzgerald v. Western Pacific Railroad* (2 C. L. O., 51, exactly in point) ; *Duffy v. Northern Pacific Railroad Company* (2 C. L. O., 51, exactly in point) ; *Whitaker v. Southern Pacific Railroad Company* (id., 119, exactly in point) ; *Watson v. Missouri River, Fort Scott and Gulf Railroad Company* (3 id., 7) ; *Barnes v. Saint Joseph and Denver City Railroad Company* (id., 132) ; *Southern Pacific Railroad Company v. Wiggins et al.* (4 id., 123) ; *Cox v. Southern Pacific Railroad Company* (6 id., 35).

Now, Trepp's claim being valid at date of withdrawal, there is no inhibition in the act of 1864 against allowing his entry after the withdrawal; because (1) it is not one of the tracts withdrawn, and (2) the sixth section of the act of 1864 specifically provides that the provisions of the pre-emption law shall extend to all lands along the line of road except those granted to the company, and (3) section 2281 also provides for the allowance of the entry.

The decision of this Department of October, 3, 1881, is hereby recalled and set aside, and that of your office of January 22, 1881, reversed, and the entry of Trepp held for patent, and not for cancellation.

RAILROAD GRANT—PRE-EMPTION—ACT OF APRIL 21, 1876.

WARD *v.* SOUTHERN MINN. RY. EXT. CO.

A pre-emption entry which was canceled for conflict with the railroad grant held as confirmed by, and for re-instatement under, the act of April 21, 1876, notwithstanding the fact that the pre-emptor had, upon the cancellation of his entry, applied for the return of the purchase-money, it not appearing from the office records that the money had been refunded.

Secretary Teller to Commissioner McFarland, June 5, 1882.

I have considered the case of the Southern Minnesota Railway Extension Company *v.* Albert L. Ward, involving the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 9, T. 102, R. 30, Worthington (formerly Jackson) district, Minnesota, on appeal by the company from your predecessor's decision of May 4, 1881, holding Ward's entry, No. 7756, made July 17, 1872, for re-instatement.

The tract is within the 10 miles (granted) limits of the grant by the act of July 4, 1866 (14 Stat., 87), to the company, the right of which attached November 29, 1866, and was formerly embraced in Thomas G. Eggleston's homestead entry, No. 1136, dated November 12, 1863, which was canceled January 15, 1867, for abandonment. Ward filed declaratory statement, No. 15695, for the tract December 1, alleging settlement September 11, 1871, and made entry as above stated.

By letter of September 15, 1873, the register and receiver transmitted to your office an application of Ward for repayment of the purchase-money upon his entry. On December 11 ensuing the entry was accordingly canceled. This action was based upon the testimony adduced at a hearing had at the Jackson office (pursuant to your office instruction of January 23, preceding) to ascertain the *status* of the land November 29, 1866, the date of the definite location of the road. As such testimony showed that Eggleston had abandoned the land long prior to said date, your office held that such entry did not except the tract from the operation of the grant, and allowed the company to select the same upon its paying the requisite fees. The company accordingly selected the

tract March 4, 1880. This action of your office was in accordance with the rulings that then obtained, but which have since been changed.

My predecessor, Mr. Secretary Chandler, in the case of Chalkley Thomas *v.* Saint Joseph and Denver City Railroad Company (3 U. L. O., 197), held that land situate within the limits of a railroad grant covered by homestead entries at the date of such granting act, which entries were subsequently canceled, are excepted from the operation of the grant. In this view of the case the entry was improperly canceled. Stress is laid upon Ward's assertion that he never applied for the repayment of his purchase-money, notwithstanding the fact that the records of your office contain presumptive proof that such application was filed.

While your records undoubtedly show such fact, they also show that the application has lain in your office for several years, but they fail to discover that the money has been refunded.

In view of such record showing, and as Ward's proof stands unimpeached by the company, I deem it competent for the Department, under the ruling cited, to entertain his application for the re-instatement of his cash entry and for the issuance of patent thereon.

Inasmuch as it appears that at the date of the definite location aforesaid Eggleston's homestead entry was intact upon the records, and as Ward has made final proof showing *bona fide* compliance with the requirements of the pre-emption law, I am of the opinion that his entry falls clearly within the intentment of the second section of the act of April 21, 1876 (19 Stat., 35), and that the same is thereby confirmed.

Your predecessor's decision is modified accordingly.

RAILROAD GRANT—WITHDRAWAL—PRE-EMPTION CLAIM.

MCCAIN *v.* TEXAS & PACIFIC RY. CO.

McCain's pre-emption claim is allowed, as the land was claimed as a pre-emption by a qualified party at date of withdrawal for the railroad.

Acting Commissioner Harrison to register and receiver, Los Angeles, California, January 5, 1883.

I have considered the case of Lawrence McCain *v.* The Texas and Pacific Railway Company, involving the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Sec. 9, and the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 4, 18 S., 5 E., S. B. M., California.

The land is within the limits of the grant of March 3, 1871, to the said railroad company. The line of road is not yet definitely located. The lands in the odd-numbered sections were withdrawn upon a preliminary line October 15, 1871.

The records of this office show that one Silas Yarrell made pre-emption filing No. 137 for the tract in the odd-numbered section April 11, 1870, alleging that he made settlement thereon October 18, 1868.

On the 29th of May, 1882, the present claimant, Lawrence McCain, made application at the local office to make pre-emption filing for the land, alleging that he made settlement thereon November 15, 1881. His application was rejected by the register and receiver, on the ground that the tract in the odd-numbered section was within the limits of the withdrawal for the Texas and Pacific Railway Company. Mr. McCain appealed to this office, alleging that the land embraced in the said application was covered by a valid pre-emption claim at the date of the withdrawal for the Texas and Pacific Railway Company, and as such was excepted from the said withdrawal.

McCain filed with his application the *ex parte* affidavits of one John H. Gray and L. H. Gaskill, showing that one Silas Yarrell, a citizen of the United States, and a qualified pre-emptor, was residing on the land, with his family, in 1869, and claiming it as a pre-emption right; that he continued to reside on the land until 1873; that he had improvements thereon, consisting of a dwelling-house, milk-house, and corral, and about five acres fenced and under cultivation—the whole valued at about five hundred dollars.

The grant to the company was of every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line through the territories of the United States, and ten alternate sections per mile on each side of said railroad in California, where the same should not have been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim should not have attached at the time the line of said road should be definitely fixed.

The line of road has not been definitely fixed, and the right of the company has not attached to any of the lands within its grant. A withdrawal of lands for its benefit was made October 15, 1871, upon the filing of the map of general route in this office. At that date the records show that Silas Yarrell had a pre-emption filing upon the tract in question. You will, accordingly, permit McCain to make pre-emption filing for the land; and after the usual notice by publication, will permit him to make proof and entry for the same.

WAGON-ROAD GRANT—PRE-EMPTION FILING.

OVERHOLT *v.* DALLES MILITARY WAGON-ROAD CO.

An application to file a pre-emption declaratory statement for a tract within the indemnity limits of the grant should be allowed subject to the company's right to select the tract.

Secretary Teller to Commissioner McFarland, July 11, 1882.

I have considered the appeal of D. G. Overholt from your decision of April 12, 1881, rejecting his application to file a pre-emption declaratory statement upon the SE. $\frac{1}{4}$ of Sec. 33, T. 13 S., R. 33 E., Lc Grand, Oregon.

The tract is within the ten-mile or indemnity limits of the withdrawal for the benefit of the Dalles Military Wagon-Road Company, under the act of February 25, 1867 (14 Stat., 409), which grants (Sec. 1) "alternate sections of public lands, designated by odd numbers to the extent of three sections in width on each side of said road."

The fourth section authorizes the location and use in the construction of the road, of an additional amount of public lands, not exceeding 10 miles in distance from it, equal to the amount reserved from the operation of the first section of the act (*i. e.*, of lands reserved or otherwise appropriated).

In the case of *Ryan v. Railroad Company* (9 Otto, 382), the court, in construing an act containing substantially similar provisions, said :

With respect to the "lieu lands," as they are called, the right was only a float and attached to no specific tracts until the selection was actually made in the manner prescribed. . . . It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected.

Following this decision, it was held by the Department, in the case of *Blodgett v. California and Oregon Railroad Company* (6 C. L. O., 37, 1879), that a pre-emption claim for a tract of land falling within the indemnity limits of a railroad grant, although made subsequent to the date of withdrawal, is capable of being perfected should the company fail to select said tract as lieu land upon the adjustment of its grant, but is incapable of perfection so long as the grant remains unadjusted. (See also *Stroud v. Grand Rapids and Indiana Railroad Company*, 6 C. L. O., 112.)

The present case is within the same rule, and, it not appearing that the company has selected the tract in question, the application of Overholt should be allowed, subject to the right of the Wagon-Road Company, under said fourth section. Your decision is reversed.

RAILROAD GRANT—WITHDRAWAL—PRE-EMPTION.

EMERSON *v.* SOUTHERN PAC. R. R. CO.

A pre-emption filing shown to be fraudulent does not except the land covered thereby from the grant to the railroad company, it being held that the cancellation of such a filing took effect by relation as of the date of settlement, so that it may be said that the filing never existed.

Secretary Teller to Commissioner McFarland, February 16, 1883.

I have considered the case of *Leonard H. Emerson v. The Southern Pacific Railroad Company, Branch Line*, involving the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 15, T. 1 N., R. 11 W., S. B. M., Los Angeles district, California, on appeal by Emerson from your decision of May 19, 1882, in favor of the company.

The tract is within the 20 miles (granted) limits of the grant to the company by act of March 3, 1871 (16 Stat., 579), the right of which attached April 3, 1871, and the withdrawal for which was made May 10 ensuing.

It appears that one Fabricio de la Ossa filed declaratory statement No. 581, for the tract, October 27, 1873, alleging settlement thereon November 30, 1869, and under date of February 16, 1874, he made pre-emption proof and payment for the land, whereupon cash entry No. 209 issued therefor. May 11 ensuing, however, the company filed affidavits in your office alleging that Ossa had neither resided upon nor cultivated the tract in question, and that he had sold his claim prior to his entry thereof, upon the date whereof he executed a deed conveying the same.

Whereupon a hearing was ordered pursuant to departmental direction of September 27, 1879, whereat Ossa failed to appear, although duly cited. The testimony adduced thereat fully sustained the company's allegations, establishing the fact that Ossa was not a *bona fide* pre-emptor, but that he had done nothing upon the land save to procure wood therefrom for market. Your office thereupon decided that his claim was invalid, and accordingly canceled his entry September 4, 1880.

April 13, 1882, Emerson applied at the local office to file for the said tract, alleging settlement thereon November 28, 1881, but the register and receiver rejected such application on the ground that the land was within the aforesaid withdrawal limits. He appealed from this action, alleging that the land had not been patented to the company, and that it was subject to his filing by reason of Ossa's claim. By your decision in question, however, you approved such action, and held that, in the light of said showing touching Ossa's claim, the tract was not thereby excepted from the operation of the railroad grant.

Inasmuch as it has been established that Ossa never settled as alleged in his declaratory statement, and that he neither resided upon nor improved the land as alleged in his final proof—viz, between 1869 and 1874, nor at any other time, I am of the opinion that at no time had he acquired any right to the tract; and it was therefore competent for the company to prove that he had perpetrated a fraud against the government and its own rights in entering and attempting to convey the land as alleged. Upon the establishment of the fact that the entry was fraudulent your office very properly canceled it, pursuant to the provisions of section 2262 of the Revised Statutes.

As his bad faith has been established, I am of opinion that his claim was invalid—being vitiated by fraud—and did not except the land from the operation of the company's grant; for upon this hypothesis the cancellation took effect by relation as of the date of his settlement, so that it may be said his filing never existed. The land having thus enured to the railroad grant prior to Emerson's filing therefor, the company's right ante-dated, and must therefore be regarded as paramount to his.

Your decision is accordingly affirmed.

1876

RAILROAD GRANT—CONFLICTING PRIVATE CLAIM.

ATLANTIC AND PAC. R. R. CO. *v.* FISHER.

Land within the limits of a Spanish or Mexican grant cannot be selected by a railroad company as a part of their grant, although the Spanish or Mexican grant had not been confirmed by the United States.

Lands within the boundaries of any grant awaiting a judicial decision or adjustment cannot be considered as public lands.

Secretary Teller to Commissioner McFarland, June 8, 1882.

I have considered the case of the Atlantic and Pacific Railroad Company *v.* William Fisher, involving the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 11, lot 1 of Sec. 14, lot 1 of Sec. 15, and lot 4 of Sec. 20, T. 4 N., R. 26 W., S. B. M., Los Angeles district, California, on appeal by the company from your decision of July 22, 1881, holding Fisher's entry for approval for patent.

The said tracts are within the 20 miles (granted) limits of the grant by the act of July 27, 1866 (14 Stats., 292), to the company, which became effective August 15, 1872, the withdrawal for which was made December 10, 1874.

The township plat was filed in the local office May 21, 1875.

The odd-numbered sections of land were also within the claimed limits of the Rancho Los Prietos y Najalayegua, which was confirmed by the private act of June 12, 1866 (14 Stats., 589), and patented February 19, 1875.

The records of your office show that in the year 1867 a survey of said rancho was made by United States Deputy Surveyor Thompson, at the instance of the grant claimants, but the surveyor-general of California forwarded the same without his approval, stating in his letter of transmittal that such survey was not "in accordance with the original title papers on file in his office," as prescribed by the confirmatory grant. Your office rejected this survey April 23, 1870, under which date it directed the surveyor-general to make such new survey of the rancho as he could approve, in accordance with the requirements of the act of July 1, 1864 (13 Stats., 332). These instructions were not carried out, however, and your office, under date of July 21, 1873, further instructed the surveyor-general to make a segregation survey of the rancho by extending the lines of the public surveys thereover, pursuant to the requirements of the eighth section of the act of July 23, 1866 (14 Stat., 218). Such survey was accordingly made by United States Deputy Surveyor Norway, which was approved by the surveyor-general June 24, 1874, and forwarded to your office. This survey did not include the tracts in question. Under date of September 18 ensuing your office rejected the same, holding the true boundaries of the rancho, as shown by the title papers aforesaid, to be upon certain specified lines according to which a new survey was directed to be made. The surveyor-

general made such survey, which excluded said tracts and was substantially in accordance with the Norway survey.

In January, 1875, pending appeal from the said decision of your office, the case was finally compromised by all the parties in interest, and the appeal withdrawn pursuant to a stipulation filed. The case having been thus settled, patent issued February 19, 1875, for the rancho as embraced within the boundaries designated by said decision.

The records of your office further show that Fisher filed declaratory statement No. 915, for the tracts in question, June 18, 1875, alleging settlement thereon February 14, 1874, and that he made final proof August 1, 1877, whereon final certificate No. 616 was issued under same date. Upon the foregoing statement of facts the question arises, were these tracts subject to pre-emption entry when Fisher filed his declaratory statement therefor, or had they passed to the railroad company by virtue of its grant? There can be no doubt that, by the withdrawal, the grant took effect upon such odd-numbered sections of public lands within the specified limits as were not excluded from its operation; and the question arises, whether lands within the boundaries of an alleged Mexican or Spanish grant which was then *sub judice* are public within the meaning of the act of Congress by virtue of which the railroad company asserts title in the premises. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. That they were so employed in this instance is evident from the fact that to them alone could the order withdrawing lands from pre-emption, private entry, and sale apply" (*Newhall v. Sanger*, 92 U. S., 761). By the third section of the act of July 27, 1866, aforesaid, Congress granted "every alternate section of public lands, not mineral, designated by odd numbers 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."

The confirmatory act antedated the one just cited, and pending the exercise of the jurisdiction expressly conferred by the former, Congress cannot be presumed to have granted the land to the company. A tract of land legally appropriated to any purpose becomes *eo instanti* severed from the mass of *public* lands, and no subsequent law, proclamation, or sale will be construed to embrace or operate upon it, although no reservation were made of it. This doctrine was enunciated by the United States supreme court in the case of *Wilcox v. Jackson* (13 Peters, 498), and reiterated in the case of *L. L. & G. R. R. Co. v. United States* (93 U. S., 733). Thus it appears that from the date of the confirmatory act down to January, 1875, the tracts in question were within the claimed limits of the rancho grant, so that they were in a state of reservation during the whole period covering the date of the railroad grant, the date when the same became effective, and the date of the withdrawal.

But it is strenuously urged by the company's attorneys that the doctrine enunciated in the case first hereinbefore cited is not applicable to this case (1), because the facts therein are dissimilar, and (2), because the confirmation of the grant claim was by boundaries which were subsequently so located as to exclude the land in contest, which land was not, therefore, within the limits of the claim at the date of the definite location of the road. A mere variance in unimportant or collateral facts is immaterial. The substantial fact in the case cited was that at the date when the railroad right became effective the land was claimed, in the proper tribunal, to be part of a Mexican grant, and that that claim was *sub judice* pending the adjustment of the same. Now if this be so, in such a case where the claim was found to be a forgery and absolutely rejected by reason of having no grant as a basis therefor, then, *a fortiori*, does the doctrine therein enunciated obtain in this case, where the grant is unquestionably valid, the same having been confirmed by Congress by express reference to certain original title papers of record in the office of the surveyor-general of California, upon whom the duty of surveying the rancho in accordance with such papers was imposed, the issuance of patent for the lands thus surveyed being conditioned upon the approval of such survey by the Commissioner of the General Land Office.

By the confirmatory act all questions of title were finally determined and the sole duty imposed upon the Land Department was the ascertainment of the extent and *locus* of the grant as shown by the original title papers aforesaid. But until the extent and exact *locus* of the grant were ascertained and approved in the manner expressly described by the statute, the rancho remained an unknown quantity, so that no one could say to what lands the confirmees were certainly entitled. I am, therefore, of the opinion that the tracts in question were reserved from the operation of the railroad grant, and that the same were public lands subject to pre-emption when Fisher filed his declaratory statement therefor, and as his proof shows him to be a qualified pre-emptor, and that he has complied in good faith with legal requirements in point of inhabitancy and improvement, he is clearly entitled to a patent for the land.

Your decision is therefore affirmed.

RAILROAD GRANT—SELECTION—TERMINAL LIMITS.

FLINT & PERE MARQUETTE R. R. CO.

The railroad is not entitled to select (in either its granted or indemnity limits) lands lying west of its western terminus, it being the settled practice to allow no selections beyond the terminal limits of a railroad defined by a line drawn at right angles with the general route of the road at such terminus.

Secretary Kirkwood to Commissioner McFarland, September 1, 1881.

I have considered the appeal of the land agent of the Flint and Pere Marquette Railroad Company from your decision of January 26, 1881,

rejecting his application to select certain lands enumerated in the two lists filed by him. These lands in question are situate in the W. $\frac{1}{2}$ of townships S. 19 and 20 N., range 18 W., Reed City (formerly Ionia) district, Michigan, and are claimed by the State under and by virtue of the act of June 3, 1856 (11 Stat., 21).

By this act there were granted to the State to aid in the construction of certain railroads therein named, of which the road aforesaid is one—

Every alternate section of land designated by odd numbers, for six sections in width on each side of each of said roads; but in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any section or any part thereof as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States *nearest to the tiers of sections above specified,*" etc.

It appears from the record that the withdrawal for the railroad aforesaid became effective August 16, 1858, but that the lands in question were not embraced within the limits thereof, the same lying west of Ludington, which is the western terminus of said road and situate in Sec. 15, T. 18 N., R. 18 W.

Your predecessor held, in the decision aforesaid, that it is the settled practice of your office not to allow selections beyond the terminal limits of a railroad defined by a line drawn at right angles with the general route of the road at such terminus.

The act aforesaid is a grant in place, and it is conceded by said agent that the granted or six miles limit must be coterminous, but he urges that the same rule should not obtain in regard to the indemnity or fifteen miles limit. The first proviso to the second section of the act of March 3, 1871 (16 Stat., 582), amendatory of the act aforesaid, provides "that said lands authorized to be sold as aforesaid *shall include only lands situated opposite to and coterminous with the completed sections.*"

It appears that this and kindred questions relative to the determination of the termini of railroad grants were raised before this Department in the matter of the Iowa railroad grants, and it was decided by my predecessor, Mr. Secretary Thompson, February 23, 1858, that the limits should terminate within lines perpendicular to the general course of the road at its terminal points (1 Lester, 527). The supreme court in *United States v. Burlington and Missouri River Railroad Company*, appears to sanction this construction when it declares that "the land was taken along such line in the sense of the statute, when taken along the general direction or course of the road *within lines perpendicular to it at each end.*" (8 Otto, 334.)

Your decision is accordingly affirmed.

RAILROAD GRANT—RIGHT OF WAY—PRIORITY.

UTAH & WYOMING R. R. CO. v. OREGON SHORT LINE RY. CO.

The question of priority between two roads claiming right of way under act of March 3, 1875, is a question of fact to be determined by the courts. The Department cannot take official cognizance of such question.

Secretary Kirkwood to Commissioner McFarland, April 10, 1882.

I return for your files two maps of the Oregon Short Line Railway Company submitted for my approval by your letter of 6th instant, and showing the line of location under act of March 3, 1875, of two sections of 20 miles each, viz:

From a point on Ham's Fork 40 miles west of Grandeur, in the Territory of Wyoming, to a point on Twin Creek, in Sec. 3, 21 N., 119 W., and—

From the point last named to a point in Sec. 29, 24 N., 119 W.

You report that the line represented on the first map, and also about 4 miles of that represented on the second, passes through the same quarter sections of land as the located line of the Utah and Wyoming Railroad Company, heretofore approved.

In this connection I have to state that upon protest and petition of the last-named company, filed in this Department on the 21 of January last, based upon allegations of former company of the previously located line of the latter, I have allowed the parties to file affidavits and to present before me full argument upon the subject of my right to approve the maps now presented.

The affidavits present entirely conflicting statements of fact respecting such appropriation.

Not deeming it proper, upon the showing made, for me to take official cognizance of the issues of fact presented, and being of the opinion that the judicial tribunals alone can authoritatively determine the respective rights of the parties, I have decided to approve the location, subject to the rights of the Union Pacific Railway Company, across whose lands I understand the line passes, and also subject to the rights of the Utah and Wyoming Railroad Company, upon whose previously located and approved right of way it is alleged the right of way of the Oregon Short Line Company now submitted for approval is located, or any other private right, and subject to any legal objection by reason of the date of the organization of said Oregon Short Line Railway Company and of the filing of the due proofs of the same and the approval thereof by this Department—and have indorsed my approval accordingly.

RIGHT OF WAY—SURVEY.

UTAH & WYOMING R. R. CO.

The act of March 3, 1875, provides specifically for approval of maps upon surveyed lands, but requires no filing or approval of such maps prior to survey.

Secretary Teller to Commissioner McFarland, February 12, 1883.

I approve and return herewith the two maps of the Utah & Wyoming Railroad, submitted by your report of 9th instant, the first covering a distance of 4,628.4 feet from a point on the boundary between Utah and Wyoming, in Sec. 9, 21 N., 120 W., to a point in Sec. 10, same township; and the second, a distance of 41.12 miles from the west line of Sec. 7, 21 N., 118 W., to the south line of Sec. 32, 21 N., 112 W.

The act of March 3, 1875 (18 Stat., 482), provides specifically for approval of maps upon surveyed lands, but requires no filing or approval of such maps prior to survey.

Any regulation of this Department requiring or providing for the filing of maps over the unsurveyed lands must be held to operate for purposes of information merely, and such filing and approval cannot take the place of nor supersede the approval required by the express language of the law.

RAILROAD GRANT—WITHDRAWAL—SETTLEMENT.

PRESSEY *v.* NORTHERN PAC. R. R. CO.*

In 1873 a withdrawal was made for the railroad company's branch line in Wyoming Territory on a map of general route; in 1879 a second withdrawal was made upon a map showing the amended line of said branch.

The railroad has no right or title to the lands within the limits of both withdrawals, as against a person who settled subsequent to the withdrawal of 1873, but prior to that of 1879. In other words, the company's right to the lands included in both withdrawals does not relate back beyond the withdrawal of 1879.

Commissioner McFarland to register and receiver, Yakima, W. T., June 13 1882.

Register's letter of February 7, last, transmitting appeal of George W. Pressey from your decision rejecting his application to make homestead entry of the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 14, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 13, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 24, T. 16 N., R. 16 E., was duly received.

An early consideration of the case was requested for the reason that a number of settlers who are desirous of filing similar applications were anxiously awaiting the decision. The limited force of this office, together with the great press of business, has prevented earlier action in the case.

Pressey's application was received by you January 31, 1882. You rejected the application for the reason that the tract in Section 13 "falls

*Reversed, 2 L. D., 551.

within the limits of the withdrawal for the Northern Pacific Railroad Company, made August 15, 1873."

The corroborated affidavit of Pressey, filed in support of his appeal, shows that he settled upon the land May 21, 1878; has resided upon, cultivated, and improved the same from that date; that his improvements are worth \$500; that he was the first settler in the township, and that he deposited the money and secured the survey of said land. It also appears that if he is not permitted to acquire title to the tract in Section 13, his entry will not form a compact body, and that there is now no vacant land contiguous to the remaining tracts embraced in his entry.

The question for this office to decide, however, irrespective of any equities in the case, is the legal status of the land as respects the rights of said company.

The tract in said Section 13 has been continuously withdrawn since August 15, 1873. At this date it was withdrawn for the benefit of the Northern Pacific Railroad Company. Subsequently the company abandoned this line and changed the route of its road to a distance of from 25 to 50 miles south of its original line. This was, in fact, a new location. The withdrawal for this "amended line" took effect July 18, 1879, and embraced the tract in question. The lands embraced in the former withdrawal and not embraced in the new withdrawal were restored September 1, 1879. This tract, of course, was not restored; but Pressey's settlement was made prior to this last withdrawal, and he still resides upon the land.

It now becomes necessary, in order to determine the status of this tract, to give a history of this change of route.

The map of general route of the original branch line filed in 1873, was accepted by the Department as authorized under the sixth section of the act of July 2, 1864 (13 Stats., 365), as amended by resolution of May 13, 1870 (16 Stat., 378).

On November 18, 1876, the company applied to amend said branch line, and filed in the Secretary's office a map greatly shortening the original line.

November 24, 1876, the Secretary (Chandler) approved this map and directed this office to withdraw the lands along the new line and restore those along the old.

Pending the preparation of the maps of withdrawal, Hon. Orange Jacobs filed in the Department a motion to reconsider the action of the Secretary, which was referred to Commissioner Williamson for report. Report was made January 17, 1877.

October 15 following, Secretary Schurz reviewed the whole subject and declined to disturb the action of his predecessor, Secretary Chandler, and directed the Commissioner to execute the original instructions. Before the instructions received the signature of the Commissioner (Williamson) he was directed by the United States Assistant Attorney-

General to suspend action in the premises until further ordered. The matter was held in abeyance.

In 1879 the company filed a new map, and renewed its request of 1876. This map showed a very different route from that represented upon the map filed in 1876, and was, as stated by Commissioner Williamson in his letter to Secretary Schurz of May 21, 1879, "with the exception of a few miles, a new location." The Commissioner, however, recommended the approval of the map, as the amount of lands that would inure to the grant under the new location would be much less than under the old; but calls the Secretary's attention to the question as to whether or not the grant had lapsed.

Under date of June 11, 1879, the Secretary (Schurz) reviewed the whole question, declaring the grant to be in full force and effect, and returned the map approved, and directed the withdrawal of the lands along the new line of road and the restoration of those withdrawn. August 15, 1873, he added as follows:

The rights of settlers upon the lands included within the limits of the withdrawal to be made under the amended route must be protected, if settlements and entries be made before the receipt of notice of withdrawal at the local office.

Prior to the approval of this map of new location, George Gray, esq., attorney for said company, under date of June 9, 1879, by letter to Secretary Schurz, relinquished, on behalf of said company, "all claim and interest" of said company "to any and all lands heretofore withdrawn for its branch line in the Territories of Idaho and Washington, except so far as the same may be within the limits prescribed by the charter and amendments applicable to the amended line of general route of the branch in Washington Territory, according to the map thereof presented on the 13th ultimo."

The question to be determined is as to whether said company has any right or legal claim to any of the lands withdrawn August 15, 1873, whether included in the new withdrawal or not, by virtue of said withdrawal of August 15, 1873. In other words, does the company's right to the lands included in both withdrawals relate back beyond July 18, 1879? I think not.

Conceding that both of said locations of the general route of the company's road, and the withdrawals made in pursuance thereof, were authorized by law, still, as the route of 1873 was entirely abandoned, the company is entitled to no rights thereunder. The fact that the company in relinquishing its claim to the lands embraced in the first withdrawal reserved its right to such lands embraced therein as should fall within the limits of the second withdrawal, is of no importance, as a question of right is one of law and not of election. It was not the intention of the act granting lands to this company that such a large amount of the public domain, comprising nearly one-fourth of the Territory of Washington, should be withheld from disposal for six years to allow the company to designate the general route of its road.

It is not necessary to refer to any part of the act of July 2, 1864, in support of this conclusion. There is nothing in the act authorizing or contemplating any such construction. Nor can the company claim that Pressey's settlement, being upon withdrawn lands, was unauthorized, for the reason that it can gain nothing thereby, this question being one entirely between the government and the settler; and if the government should extend to Pressey any equities to which he may be entitled in the manner provided by law, the company can interpose no objections. Pressey was a resident on the land at the date of the withdrawal of July 18, 1879, and his claim excepted the land from the operation of the grant to said company, under the third section of said act of July 2, 1864.

It may be further stated that the Secretary's order to withdraw the lands along the new line and to restore those withdrawn August 15, 1873, was dated January 11, 1879. There was nothing said about not including in the restoration the lands to be withdrawn on the new line. But as a matter of fact the restoration did not take effect until September 1, 1879, as thirty days' notice was required before the restoration could be made.

It is a question whether this office would not have acted within the scope of its authority had it restored all the land withdrawn August 15, 1873, and *afterwards* withdrawn the lands along the new line.

To allow the company the superior right to this land would be to give it the benefit of two withdrawals on two distinct lines of route.

Sixty days from receipt of notice hereof are allowed the company in which to appeal herefrom should it so desire. At the end of that time you will promptly advise this office what action, if any, has been taken in the premises. The company will be advised hereof by this office.

Should this decision become final, Pressey's homestead application will be transmitted to you to be perfected, and thereafter you will allow applications to file for or enter lands of this class, to which claims have been initiated prior to July 18, 1879.

R.AILROAD GRANT—WITHDRAWAL—SETTLEMENT.

SOUTHERN PAC. R. R. CO. *v.* ROSENBERG.

At date of indemnity withdrawal for this company, the land was occupied by a pre-emption settler who asserted his claim within three months after filing of plat in the local office. He did not make his pre-emption proof within the legal period, but subsequently transmuted his filing to a homestead entry.

The right of the pre-emptor under his settlement antedated that of the company, which was simply the right to select lieu lands in the indemnity limits, and any *laches* on the part of the pre-emptor was a matter solely between himself and the government.

Acting Secretary Joslyn to Commissioner McFarland, August 18, 1882.

I have considered the case of the Southern Pacific Railroad Company, branch line, *v.* Jeremiah W. Rosenberg, involving lot 6 of Sec. 6, lots 3, 4, and 5, and the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 7, T. 3 N., R. 20 W., S. B.

M., Los Angeles district, California, on appeal by the company from your decision of July 9, 1881, holding Rosenberg's homestead entry of the tract for approval for patent.

The tract is within the thirty miles or indemnity limits of the grant by act of March 3, 1871 (16 Stat., 579), to the company, the withdrawal for which was made May 10, 1871.

The township plat was filed in the local office December 18, 1874.

It appears that Rosenberg filed declaratory statement No. 771, for the tract, March 9, 1875, alleging settlement September 10, 1870; that he transmuted his filing to homestead entry, No. 445, February 18, 1879, when he also made final proof pursuant to the provisions of the acts of March 3, 1877 (19 Stat. 404), and May 27, 1878 (20 *id.* 63), whereupon final certificate No. 136 was issued.

His proof shows him to be a native-born citizen of the United States, and a qualified pre-emption and homestead claimant; that he settled on the land September 10, 1870, where he has resided continuously with his family ever since, cultivating and improving the same; and that he has a house, fencing, and about 40 acres under cultivation, his improvements aggregating about \$800 in value.

It is urged by the company's attorney that Rosenberg's homestead entry cannot be regarded as a transmutation of his pre-emption, the same having expired by limitation of law by reason of his failure to make final proof within the statutory period prescribed therefor.

Inasmuch as his pre-emption claim was valid and subsisting at the date upon which the company's right attached, I am of the opinion that his right antedated and was paramount to the company's, which was simply the right to select lieu lands within the indemnity limits whenever, prior to the time said road was designated by a plat thereof filed in your office, and of the designated sections within the granted limits were found to "have been granted, sold, reserved, . . . pre-empted, or otherwise disposed of," and that any laches on Rosenberg's part was a matter to be considered solely between himself and the government, of which it was not competent for the company to take advantage.

Your decision is accordingly affirmed, for the reason stated in the case of the Central Pacific Railroad Company *v.* Amenzo Baker. (The Reporter, vol. 2, p. 113.)

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PRE-EMPTION—HUSBAND AND WIFE.

LARSEN *v.* PECHIERER ET AL.

Abandonment of a claim by a husband during coverture is abandonment by the wife. A divorced wife cannot claim the benefit of acts performed by her husband during coverture. She can only procure title under the pre-emption law by virtue of specific acts performed by herself when a *feme sole* and the head of a family.

Secretary Kirkwood to Commissioner McFarland, February 21, 1882.

I have considered the case of Mary Larsen *v.* Henry Pechierer and Elias Davis, involving the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 36, T. 2 S., R. 14 W., S.

B. M., Los Angeles district, California, on appeal from your decision of May 27, 1881, adverse to the defendants.

It appears from the records of your office that the subdivisional survey was completed February 7, 1868, approved March 31, and that the township plat embracing said tract was filed in the local office April 22 ensuing. Peter Larsen filed declaratory statement No. 402 (in the San Francisco office) January 5, 1872, for the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 36, alleging settlement March 5, 1868. These tracts being part of a school section, a contest therefor seems to have arisen between Larsen and the State of California, wherein they were awarded to the former by decision of your office rendered under date of May 24, 1877. The State did not appeal from this action, having already selected, per lists Nos. 9 and 14, 640 acres of lieu lands in full satisfaction of her claim to the entire thirty-sixth section, under the grant by virtue of the act of March 3, 1853 (10 Stat., 244), for lands lost in place, and the selections thus made were approved July 14, 1869, and July 1, 1870, respectively.

Your office having been advised that Larsen had abandoned the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of his claim, canceled that portion September 24, 1877, and upon satisfactory proof that he had deserted his wife (Mary Larsen) she was permitted to file declaratory statement No. 1583 September 27, 1878, for the tract in question, alleging settlement March 5, 1868.

Elias Davis (or Davies) filed declaratory statement No. 1603, June 23, 1878, for the same tract, alleging settlement March 25, 1878.

Henry Pechierer filed declaratory statement No. 1647 September 27, 1878, for the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 36, alleging settlement September 19, 1878.

Although it does not appear by whom the contest in this case was initiated, the record shows that a hearing was had at the local office December 9, 1878, at which all the parties in interest appeared in person and by attorney except Peter Larsen, who failed to answer the citation.

The testimony shows that the tract in question was occupied for several years by Peter Larsen and Mary, his wife; that he erected a dwelling-house, barn, wind-mill, etc., thereon, and cultivated a small portion of the same; that about six years from the date of settlement he abandoned the land and deserted his wife. She testifies that he never contributed to her support, so that she was compelled to leave the premises daily in quest of work in order to support herself and children; and that she obtained a divorce from her husband some time in the year 1876.

It further appears that Elias Davis occupied the land for about sixteen months, from August 13, 1874, by a virtue of a lease of the same from Peter Larsen; and that during Mrs. Larsen's absence from the land, and at the expiration of the lease term, Davis preferred a pre-emption claim to the land by filing as aforesaid.

As regards Mrs. Larsen's claim to the tract in question, it should be observed that in her declaratory statement she alleges settlement as of March 5, 1868, the date of her husband's alleged settlement; thereby basing her claim upon an act alleged to have been performed by herself during coverture. Whereas she could only acquire title to the land under the pre-emption law, by virtue of certain specific acts performed by herself when a *feme sole* and the head of a family, in compliance with the statutory requirements, because during the period of coverture her being was merged, in contemplation of law, into that of her husband, none of whose acts could inure to the benefit of her claim, preferred, as it was, subsequently to the date of her divorce. Hence it follows that his abandonment of the land was her abandonment, so that she could only acquire title, in any event, *de novo*, as stated.

Mrs. Larsen having failed to show such compliance, has therefore no rights or standing in the premises that the Department can recognize. It is true she interposes a plea of duress (*per minas*) by reason of which she claims to have been prevented from performing any act evidencing her *bona fide* intention to comply with the legal requirements; but as such plea is not corroborated, and as Davis denies having threatened her with personal violence should she attempt to settle upon the land, said plea can avail nothing and her filing must be canceled.

But aside from the foregoing state of facts and conclusions therefrom, it will be observed that Peter Larsen having failed to perfect his claim in the premises, the title to the land embraced in his declaratory statement vested in the State, by relation, as of the date of the completion of the survey as aforesaid, by virtue of the seventh section of the said act of 1853; because, as shown above, he failed to bring himself within the conditions precedent by virtue whereof he might have interposed a plea in bar to such vesting; for only an actual settler before survey who perfects his claim to a patent can preclude such vesting (*Natoma Water and Mining Company v. Bugbey*, 6 Otto, 165; *Sherman v. Buick*, 3 *Ibid.*, 209).

Now, as to the claims of Davis and Pechierer, neither of them can stand; because neither of these claimants were, nor could they be, privies in estate with Peter Larsen, even if he had not abandoned his claim, for his estate cannot be regarded as a particular estate upon which either of these claimants could base theirs.

Under the second section of the act of March 1, 1877 (19 Stats., 267), relating to indemnity school selections in the State of California, the title is not confirmed, if such selections shall fail, because the sixteenth or thirty-sixth section, named as a basis for indemnity, was not actually included within the final survey of a Mexican grant, or are otherwise defective or invalid, but was found already surveyed in place, and subject to appropriation by the State under the school grant.

Thus the certifications to the State being found defective and invalid, and not confirmed by the statute, the same must be revoked, and the

statutory provisions for complete disposal of the land in question carried into effect, pursuant to the method prescribed in the case of *Watson v. State of California* (6 C. L. O., vol. 193).

Your decision is therefore reversed.

PRIORITY—CONDITIONAL PRE-EMPTION—ABANDONMENT.

TITUS *v.* BULL ET AL.

“The first in time in the commencement of proceedings for the acquisition of title is deemed to be the first in right,” when the proceedings are *regularly followed up*. A conditional pre-emption claim is unknown to the law. An abandonment of the land (with a preservation of rights) until the determination of a controversy cannot be recognized.

Secretary Teller to Commissioner McFarland, July 13, 1882.

I have considered the case of *Clark A. Titus v. Carpenter Bull, Alexander Gillmore, and William Stewart*, involving the NW. $\frac{1}{4}$ Sec. 10, T 4 N., R. 68 W., Denver, Col., on appeal by Stewart from your decision of August 12, 1881, holding his homestead entry subject to Titus showing his good faith when he applies to make final proof and payment.

The record shows that Titus filed declaratory statement May 6, alleging settlement May 5, 1879, and that Stewart made homestead entry September 24, 1879.

Bull and Gillmore having failed to appear at the hearing, default was entered against them, and it is not, therefore, necessary to consider their claims.

The testimony shows that Titus laid the foundation of a house (the character of which foundation does not appear) on May 5, 1879. He then returned to his rented ranch—12 miles distance—from which he did not return to the land in dispute until the 18th, from which date until the 21st he was engaged in excavating ground. He was again absent until June 5, when he brought a load of lumber and erected the frame for a house over the excavated ground, remaining three days. He again returned to the land on July 10, with more lumber—remaining two days—when he partially roofed and inclosed the frame; but it was never completed, having neither door, window, floor, nor chimney, nor did it ever have a stove, furniture, or cooking utensils. He states that, in his travels to and from his ranch, he carried his bed with him, sleeping usually wherever night overtook him, and never slept in the house more than six or seven times—the last of which was on June 7, 1879—but that he had cooked and eaten there. From July 10 he was absent with a sick brother, out of the State, and did not return to the land until October 3, when he found Stewart living on the land, with his family, in a house he (Stewart) had erected. He did not remain, for the alleged reason that he did not wish to expend more labor and money on the

land until their respective rights had been determined by a contest, which he commenced on January 8, 1880. He made no further effort to prosecute his claim, or to do any act of settlement, although he was not prevented nor forbidden by Stewart from so doing. He values his improvements at from \$50 to \$75.

Stewart commenced the erection of a house September 26, and moved into it, as above stated, and has since continuously resided there. He has a stable, corral, granary, and has dug 120 post-holes for a fence one mile long. His improvements are valued at \$600.

On these facts the local officers recommended cancellation of Titus's filing. You found otherwise, and sustained it.

In *Shepley v. Cowan* (1 Otto, 330) the court, in discussing pre-emption rights, said :

“In all such cases, the first in time in the commencement of proceedings for the acquisition of title, *when the same are regularly followed up*, is deemed to be the first in right.”

Titus made the first claim to the tract ; but it is not necessary to consider whether or not his acts established a valid settlement, because however excusable his absence may have been from July 10 to October 3—a period of nearly three months—his failure to reside on the land or to cultivate or improve it from the latter date has no legal justification. Indeed, from July 10, 1879, to the date of hearing, February 11, 1880—a period of seven months—he wholly and voluntarily abandoned it, except when temporarily on it October 3, when he performed no act of settlement. An abandonment of land until determination of a contest which may be prolonged a year or more, with a preservation of rights during the interim, cannot be recognized. This would be a conditional claim only, which is unknown to the law, and not the present and absolute one which a party must maintain. A pre-emptor who relinquishes his rights by failure of constant assertion thereof on the land (unless prevented by violence or threats or other excusable reasons) cannot resume them at his pleasure in the presence of an adverse claim. He must, on the contrary, as the court says, regularly follow them up. As Titus neglected to do this, his claim must yield to that of Stewart, which appears in all respects regular.

Your decision is reversed.

PRE-EMPTION—ADJOINING VACANT TRACT.

OSBORNE *v.* HAVENS AND HAWS.

A pre-emptor who first claimed less than one hundred and sixty acres may file for that quantity by embracing an additional vacant tract or tracts adjoining the land first claimed, and his right will commence from date of filing.

Secretary Kirkwood to Commissioner McFarland, January 16, 1882.

I have considered the case of *John D. Osborne v. Cyrus D. Havens and F. M. Haws*, involving the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 32, T. 1 N.,

R. 3 W., S. B. M., Los Angeles, Cal., on appeal by Havens from your decision of April 9, 1881, holding his filing on said tract for cancellation.

The record shows that Havens filed declaratory statement for the NE. $\frac{1}{4}$ of said section November 1, 1878, alleging settlement June 6, 1875; that Haws filed declaratory statement for W. $\frac{1}{2}$ of said quarter section September 17, 1878, alleging settlement November 20, 1873, and that on December 11, 1878, application to locate the additional homestead claim of Osborne upon said W. $\frac{1}{2}$ was rejected by the local officers by reason of the pre-emption filings. The township plat was filed September 2, 1878.

It appears that Haws removed from land of his own to settle on this land, and his filing is admitted to be invalid under section 2260 Rev. Stat. It also appears that the application to locate the additional homestead claim, in the name of Osborne, was made in the interest of Haws for the purpose thereby of securing his right to the tract, otherwise defective. Haws erected a house on the tract in dispute in 1873, and certain fences. His improvements are valued at from \$300 to \$400. His actual residence appears to have been on his other land, elsewhere, until about three months preceding the hearing in February, 1879. He states that prior to October 30, 1878, he resided on the land in dispute, "according to circumstances—when business required me." Another witness testifies that prior to that date he did not reside on the tract, but used it only for raising grain. It is, therefore, doubtful whether he ever had an actual residence on the tract prior to October 30, 1878.

Your decision, however, rests upon another ground, viz: that Havens had never settled upon nor made any claim to the *west half* of said quarter section prior to the date of his filing, but had confined his occupation and improvements to the east half of the quarter section, and had recognized and respected the boundary between these two tracts, as established by a fence erected by Haws two years prior to his (Havens's) entry on said east half, and hence that he could acquire no right to the whole quarter-section by his filing. I think that this was erroneous. It was held by this Department as early as 1859, in the case of *Bryan v. Whittles* (1 Lester, 391), that a pre-emption claimant who first claimed less than 160 acres might file for that quantity and embrace it in his claim if no adverse right had attached to the additional tract, and that his right would commence from the date of such notice. It is clear, under the testimony, that prior to the date of his filing Havens had not settled upon nor made any claim to the west half of said quarter section. But his filing thereon was public notice to all that he *then* claimed it. Haws's claim was, at that date, invalid and of no legal force. The tract was, therefore, vacant public land, subject to the claims of Havens or whoever else might appropriate it. His filing embraced the whole northeast quarter of the section, and a residence upon a part was a residence upon the whole; and as he had a pre-emption right to one hundred and sixty acres, I see no reason why he might t

not legally attach his claim at the date of his filing to the unoccupied eighty acres, and thus embrace the quantity the law allowed him. He was not required to consider Haws's claim, the same being illegal. The tract was to him as if Haws had never claimed it, and there was no other claim. His right to the east half of the quarter section is unquestioned, and his claim to the west half can be defeated only by a prior and better right; and none appears. His filing is within the time required by law, and was admissible under section 2259 Rev. Stat.

The application to locate the Osborne additional homestead claim was made nearly four weeks after Havens's filing, and after he (Havens) had performed or attempted to perform acts of settlement on said west half, in which he was threatened and forbidden by Haws. This claim can, therefore, only be allowed subject to the filing of Havens.

Your decision is reversed, and the filing of Havens is permitted to stand.

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PRE-EMPTION—ALIENATION—CONTRACT.

STATE OF CALIFORNIA *v.* ALARI.*

A quitclaim deed executed by an occupant of public land will not operate to estop the grantor from asserting his own subsequently acquired title.

The converse of this proposition is true in respect of a warranty deed.

While the existence of a contract by which the title the pre-emptor might acquire from the government would inure to the benefit of another is a bar to entry; it does not defeat entirely the pre-emption right.

Commissioner McFarland to register and receiver, Los Angeles, California, October 13, 1881.

I have examined on appeal the case of the State of California *v.* Juan de Jesus Alari, involving the E., SE. $\frac{1}{4}$, and lots 1, 2, and 3 Sec. 34, T. 1 S., R. 9 W., S. B. M.

The records of this office show that Alari filed D. S. 1546 for said tracts December 17, 1877, alleging settlement December 16, 1857; and that the State of California filed indemnity selection therefor, and for SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ said section R. and R. 645, November 8, 1877.

Plat of township filed September 28, 1877.

Your decision was adverse to defendant upon the ground that he had made conveyances by which the title he might acquire from the United States would inure in part to the benefit of persons other than himself.

The appeal is taken upon the grounds that the conveyances referred to were made prior to the initiation of his pre-emption claim and could not affect his good faith or the validity of his claim; that the deed from Alari to Vejar (Ex. A.) was merely a quitclaim and could not operate to convey a subsequently acquired title, and that if the deeds could be held to be contracts to convey his after acquired title they could not

* See Secretary's decision, 1 L. D., 453.

be held to be valid or effective in view of the fact that such contract under the pre-emption law would be unlawful.

The deeds referred to are filed as evidence in the case.

The deed from Alari to Vejar (Ex. A.), dated September 14, 1865, bargains, sells, and quitclaims all of his right, title, and interest in and to a certain tract, containing about one acre, located by the evidence in lots 1 and 2. There are no covenants of warranty. This instrument cannot be considered as being more than a quitclaim deed. It could not operate to estop Alari from setting up any title he might subsequently acquire against those claiming under it.

But the deed from Alari to Santiago Lobo, dated November, 1869 (Ex. B), is in all respects a warranty deed, conveying or attempting to convey in fee simple a certain lot or parcel of land containing 3.72 acres. The tract described therein is shown by the uncontradicted testimony of Wilson Beach to be situate in lot 3, sec. 34.

It is such a deed as would in accordance with all legal principles estop Alari and those in privity with him from disputing the title of his grantee or those in privity with him, and under which any title he might subsequently acquire to the tract conveyed would inure to the benefit of his grantor, his heirs or assigns.

The pre-emption law does not prohibit the making of such a deed, but requires that the pre-emptor, before being allowed to make entry, shall swear that he has not made any contract by which the title he might acquire from the United States would inure to the benefit of any other person, and imposes a penalty for false swearing in that respect. It does not say that such a contract *shall not* be made, but that the settler who attempts in such manner to transfer the public lands shall forfeit his right of entry.

It does not in any way affect the legal operation of a warranty deed to convey subsequently acquired title and permit the grantor to secure the advantage of his own wrong, although title acquired by false swearing would be vitiated by fraud no matter in what hands it might be found.

To adopt the reasoning of the appellant in this regard would be to hold that as no *valid* contract could be made by which the title that the pre-emptor might acquire would inure to the benefit of any other person, such attempted contract could not defeat the right of entry, and hence the law-making power had done a vain and useless thing in providing for a forfeiture of that right under the conditions stated.

It is clear to my mind that the outstanding deed from Alari to Lobo is such a contract or agreement by which the title he might acquire from the United States would inure in part to the benefit of another than himself, and hence that upon application to make entry he could not lawfully make the affidavit required by Sec. 2262 Rev. Stats.

As this conveyance, however, is only a bar to *entry*, and does not vitiate his pre-emption right, he may when he applies to prove up do

so if he can *then* show in proper manner a reconveyance or release of claim by his grantee, or those holding under him, of the premises described in said conveyance, or by eliminating from his application to enter the lot embracing same.

Inasmuch as the time within which Alari would, but for the pendency of this contest, have been required to make proof and payment has expired, he can only be allowed a reasonable time after notice of final decision in his case within which to tender proof and payment.

The State selection is held subject to the ability of Alari to make entry.

Advise the parties of this decision and of their right of appeal.

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PRE-EMPTION—ALIENATION—MORTGAGE.

48-583

LARSON v. WEISBECKER.

A mortgage given by a pre-emptor as security for money loaned him with which to pay the government price for the land filed upon is not an alienation of the land, nor is it such an agreement as is prohibited by 2262 Rev. Stat.

Secretary Teller to Commissioner McFarland, April 24, 1882.

Section 2262 Revised Statutes provides that—

Before any person claiming the benefit of this (pre-emption) chapter is allowed to enter lands, he shall make oath that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person 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.

I am aware that the former rulings of your office and of this Department—following the precedent of an early decision—have held that an outstanding mortgage given by a pre-emptor upon the lands embraced in his filing defeats his right of entry upon the ground that such mortgage is a contract or agreement by which title to the lands *might* inure to some other person than himself. A careful consideration of this section leads me to a different conclusion, and to the opinion that unless it shall appear under the rules of law applicable to the construction of contracts or otherwise that the title *shall* inure to another person, it does not debar the right of entry; and that *the mere possibility* that the title *may* so result—as in the case of an ordinary mortgage—is not sufficient to forfeit the claim.

The term *contract* comprises in its full and more liberal signification any description of agreement, obligation, or legal tie whereby a party binds himself or becomes bound, expressly or impliedly, to another to pay a sum of money, or to do or omit to do a certain act; but in its more familiar sense it is frequently applied to agreements not under seal. The term *agreement*, on the contrary, is rarely used amongst us, except in relation to contracts not under seal, and this is evidently its proper

use (1 Chitty on Contracts, 2). "Contract is an agreement, upon sufficient consideration, to do or not to do a particular thing; from which definition there arise three points to be considered: First, the agreement; second, the consideration; and third, the thing to be done or omitted."—(2 Black.Com., 441.)

As defined by American authorities, a contract is an agreement between two or more parties to do or not to do a particular thing (Taney, Ch. J., 11 Pet., 420, 572); an agreement in which a party undertakes to do or not to do a particular thing (Marshall, Ch. J., 4 Wheat., 197); an agreement between two or more parties for the doing or not doing of some specified thing (1 Parsons on Cont., 5); an agreement of two or more persons, upon sufficient consideration, to do or not to do a particular thing (2 Kent., 450). Under these definitions there seems no essential difference between a contract and an agreement, and the use of either word alone would in my opinion have expressed the intention of Congress in the enactment of this statute as fully as do the two.

It is also a familiar rule in the construction and interpretation of contracts that *the intention of the parties*, if consistent with the rules of law, must prevail; and where this is sufficiently apparent, effect must be given thereto even though some violence be thereby done to the words of the contract (1 Chitty, 105, and authorities cited). The object of the maxims which govern the exposition of contracts is "to discover and give effect to the intention of the parties, so that performance of the contract may be enforced according to the sense in which they mutually understood it at the time it was made" (Bell v. Buen, 1 Howard, 169; Lawrence v. McCalmont, 2 Howard, 426; 1 Pick., 278).

The case shows that Weisbecker executed a mortgage upon the land covered by his filing as security for money loaned him with which to pay the government price for it. That he did not intend thereby that the title *should* inure to some one other than himself appears from the facts that he made a *conditional alienation* of the land only, when, had his purpose been different, he might have made an absolute conveyance; that he used the money in payment of the land, title to which, necessarily under the law, vested in himself and *not* in the mortgagee; that he subsequently repaid the loan and the mortgage was discharged, thus leaving no right whatever in the mortgagee; and that there is no evidence tending even to show that he executed the mortgage for any other purpose than as security for the money loaned. Besides, it was a contract which could not be enforced against Weisbecker to the loss of his title, because by payment of the loan he could defeat such loss, and thus no title could inure to the mortgagee. "A mortgage is the conveyance of an estate by way of pledge for the security of debt, and to become void on payment of it" (4 Kent, 135).

The statute under consideration requires from a pre-emptor, in my opinion, in order to the defeat of his right of entry, a contract *by force of which* title to the land must vest in some other person than himself; and it must appear that *such was his intention* at the time of making it.

If, on the contrary, the mortgage was a mere security for money loaned, and the contract does not *necessarily* divert the title from him, it was not a contract or agreement within the meaning of section 2262. In construing this section the U. S. supreme court says (*Myers v. Croft*, 13 Wall., 291):

It had been the well-defined policy of Congress, in passing these (pre-emption) laws, not to allow their benefit to inure to the profit of land speculators, but this wise policy was often defeated. Experience had proved that designing persons, being unable to purchase valuable lands on account of their withdrawal from sale, would procure middle-men to occupy them temporarily, with indifferent improvements, under an agreement to convey them as soon as they were entered by virtue of their pre-emption rights; when this was done and the speculation accomplished, the lands were abandoned. This was felt to be a serious evil, and Congress undertook in the law under consideration to remedy *it* by requiring of the applicant for pre-emption, before he was allowed to enter the land on which he had settled, to swear that he *had not contracted it away*, nor settled upon it to sell it on speculation, but in good faith to appropriate it to his own use.

It is clear, I think, under the facts, that Weisbecker did not make such a contract or agreement as is contemplated by the statute, and hence that he did not lose his right of entry. This law was intended to prevent speculative entries; but if a pioneer settler, struggling for a home for himself and family, is compelled by his necessities temporarily to mortgage his land, that he may pay for it and secure it to himself, and his good faith is manifest, and, in the absence of all fraudulent or illegal purposes, I discover no reason why the government can reasonably object thereto, or that it is within any prohibition of the law. Weisbecker appears to be one of that numerous class of poor but worthy citizens for whom Congress legislated in the pre-emption laws. He mortgaged his land for no speculative nor improper purpose, but that *by means thereof* the title might vest *in himself* and *not* in another. I am, therefore, of the opinion that his entry should not be forfeited by reason thereof. . . . Your decision canceling his entry is reversed, but cases adjudicated under a different view of section 2262 will not be reopened. The principle here announced in respect to said section will be applied to future cases only.

BOARD OF EQUITABLE ADJUDICATION—AUTHORITY.

CONLIN *v.* YARWOOD.

The Board of Equitable Adjudication has exclusive jurisdiction within the sphere of the powers conferred upon it by the statute.

No appeal lies from its decisions, nor are they subject to review by any other tribunal. The Board may, upon allegations of fraud in an entry, revoke its confirmation thereof.

Secretary Teller to Commissioner McFarland, December 8, 1882.

I have considered the papers transmitted with your letter of March 3, 1882, in the matter of the cash entry of Martin Conlin for the E. $\frac{1}{2}$ of

the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 10, T. 28, R. 18, Menasha, Wis.

It appears that Conlin filed pre-emption declaratory statement for the tracts June 18, alleging settlement June 5, 1875, and made cash entry therefor July 20, 1875, and that Hugh Yarwood made homestead entry for the same tracts March 14, 1876.

On September 6, 1876, your office held Conlin's entry for cancellation for failure to reside on the land for a period of six months prior to his entry, and also held Yarwood's entry for cancellation because made upon a tract already appropriated.

Yarwood did not appeal from your decision, and hence it became final as to him. On Conlin's appeal this Department held, February 28, 1879, that he had shown good faith and compliance with the law, but, in view of the facts, directed submission of the case to the Board of Equitable Adjudication.

Your records show that on March 6, 1879, your predecessor presented to the Secretary of the Interior and the Attorney-General for their consideration and action his confirmation of Conlin's entry; that they approved the same April 7; that it was approved for patent by your office April 14; and that, on December 4 following, an abstract of said case, with others which had been confirmed, was transmitted to this Department for transmission to Congress.

On March 29, 1879, Yarwood applied for reconsideration of my predecessor's decision of February 18, which was refused April 2 following, for want of error therein, unless he should present testimony showing that Conlin's entry was fraudulent. This action, it will be noted, was during the pendency of said entry before the Board, and prior to confirmation thereof. After the confirmation, and while the entry awaited patent, affidavits were filed alleging fraud therein, and your office ordered an investigation thereof. On review of the testimony you sustained the allegations and recommended that proper steps be taken to vacate the confirmation of the Board and for cancellation of the entry. Your decision therefore presents the question of the finality of adjudications of the Board.

The Board of Equitable Adjudication is established and its powers defined by sections 2450 to 2457, Revised Statutes, amended by the act of February 27, 1877, to consist of the Secretary of the Interior, the Attorney-General, and the Commissioner of the General Land Office, and is authorized "to decide upon principles of equity and justice" "all cases of suspended entries of public lands and of suspended pre-emption land claims, and to adjudge in what cases patents shall issue upon the same." "Every such adjudication . . . shall operate only to divest the United States of the title of the lands embraced thereby, without prejudice to the rights of conflicting claimants" (*i. e.*, it shall divest the title of the United States and vest it in the one whose entry the Board confirms, in the absence of a conflicting adverse claim). The Commissioner

is directed to report to Congress at the first session after any such adjudications had been made, a list of the same, under the classes prescribed by law, with a statement of the principles upon which each class was determined, arranging his decisions into two classes: the first to embrace all such cases of equity as may be finally confirmed by the Board, and the second such cases as the Board rejects and decides to be invalid.

“For all lands covered by claims which are placed in the first class, *patents shall issue to the claimants*; and all lands embraced by claims placed in the second class shall *ipso facto* revert to, and become part of, the public domain.” Section 2457 provides that the preceding sections, from 2450 inclusive, shall be applicable to all cases of suspended entries and locations which have arisen in the General Land Office since June 26, 1856, as well as to all cases which may thereafter occur, embracing as well locations under bounty-land warrants as ordinary entries and sales, including homestead entries and pre-emption locations or cases; when the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake, which is satisfactorily explained, and where the rights of no other claimant or pre-emptor are prejudiced, or where there is no adverse claim.

There is no adverse claimant in this case; the question is one solely between Conlin and the government, and the successive steps in the progress of the case to, and through the Board, seem all to have been in pursuance of the law.

Whether or not my predecessor should have sustained Conlin's entry, upon his finding that Conlin had acted in good faith, and in compliance with the law (as I think he should have done), or whether he properly referred the case to the Board notwithstanding such finding, are not questions material to the present issue, but whether only he did so refer it—as he had the undoubted right—whether the Board acted thereon, and the effect of its adjudication. This Board is a tribunal of special and limited jurisdiction. Its powers are conferred and defined by statute. Outside of these it has no authority, but within the sphere thereof they are exclusive, and no other person, officer, or tribunal may control its doings. Your office, this Department, and the Board derive their powers from a common source—the statute—and neither can travel beyond the line of its peculiar jurisdiction, nor take what is not conferred. Hence no appeal lies from the decisions of this Board, nor are they subject to review in any other tribunal, because the statute is silent in respect to these matters. When, therefore, a case is referred to the Board, and it becomes invested with its statutory rights, it acquires exclusive jurisdiction thereof, and your office and this Department lose all control over it.

The case of Conlin having been rightfully referred to this Board, its confirmation of his entry was within its powers and judgment, and its adjudication must be held final and conclusive; and patent would ordi-

narily issue as prescribed by sections 2453 and 2454 Revised Statutes. (*Foley v. Harrison et al.*, 15 How., 433.)

Although the Board may be authorized, upon allegations of fraud in the entry, to revoke its confirmation thereof and further hear the case, I do not find from an examination of the testimony such evidence of fraud as to require me to recommend such action.

The entry will therefore stand for patent.

1817335

PRE-EMPTION—UNSURVEYED LANDS—SETTLEMENT.

When prior settler has distinctly marked his boundaries, his claim by those boundaries will be regarded, though subsequent settler has made improvements within them.

But where prior settler does not mark his boundaries, priority of settlement does not control.

Commissioner McFarland to register and receiver, Grand Forks, Dakota, February 3, 1883.

I am in receipt of register's letter of 18th ultimo, requesting, in view of the numerous settlements that are being made upon the unsurveyed lands in your district, and the differences of opinion existing among attorneys and others as to the rights of conflicting settlers upon such lands, a statement of the views and rulings of this office upon the subject for your own instruction, and which you also propose to publish for the benefit of those now settled, and who may hereafter settle, upon unsurveyed lands.

Prefacing with the remark that the determination of every case must largely depend upon its individual features, and that no general propositions or rules can therefore be laid down that will meet and control all cases, I will endeavor to set forth, as requested, the leading principles that will govern the adjudication of conflicting claims which had their inception prior to survey, as heretofore understood and enforced in the practice of this office.

Section 2274 of the Revised Statutes, providing for joint entries in cases where the extension of the lines of survey finds two or more settlers with improvements upon the same smallest legal subdivision, was remedial in its nature, and designed to meet a class of cases which, prior to the date of the act (March 3, 1873) from which it is taken, had been found extremely difficult to equitably adjust. Owing to ignorance of where the lines of survey would fall, settlers would be found in possession of, and with improvements upon, the same smallest legal subdivision; and although there was no conflict between them as to their actual possession, there would necessarily be a conflict in their claims as placed upon record. In such cases the provisions of section 2273, that the right of pre-emption should be in him who made the first set-

tlement, was extremely inequitable and unjust, and this injustice was met and overcome by the act of March 3, 1873 (Sec. 2274).

This section, it is obvious, is designed to meet only cases where the conflict arises from ignorance upon the part of the settlers as to the extent of the other's claim; hence, in the case stated by you, the prior settler A, having distinctly marked the boundaries of his claim, so that no one could mistake its extent, was entitled to the whole thereof, and the subsequent settler B could acquire no right by asserting a claim in conflict with that location, or by making improvements within the boundaries of A.

If, however, A's location, instead of being in exact conformity with the lines of survey, had excluded a portion of any legal subdivision, and B had settled and made improvements upon that portion of the subdivision outside of A's line, he is, under the provisions of section 2274, entitled to a joint entry of such tract for an adjustment of coterminous boundaries.

The case stated is controlled by the fact that the prior settler had distinctly marked his boundaries, and it can make no difference that he had not and that the subsequent settler had made improvements upon any particular subdivision *within* those boundaries.

In the case of *Caulfield v. Bosworth*, decided by the honorable acting Secretary of the Interior, August 10, 1882, it was held that when a claim is located upon the ground before survey, either with Valentine scrip or under the pre-emption laws, and other claims are afterwards made and located with reference thereto, the party first locating and making known the extent of his claim will not be permitted to enlarge the same to the injury of subsequent locators whose claims have been made to conform to such first location. It would seem to follow that the first locator, being bound by his established lines, subsequent locators are also bound by, and cannot acquire rights within, them. The right of joint entry can only accrue, therefore, where the boundary of the prior location excludes a portion of a legal subdivision.

In a case, however, where the prior settler does not mark the boundaries of his claim, priority of settlement does not control. In such a case the subsequent settler who has, prior to survey, made improvements upon a subdivision upon which the prior settler also has improvements, is entitled to the benefits of section 2274, Rev. Stats., and if he has improvements upon a subdivision embraced in the claim of a prior settler who, however, has no improvements thereon, and who has had possession of no portion thereof, he is entitled to the *whole* tract.

It would seem from the following language contained in your letter, viz: A goes upon unsurveyed land with the intention of taking 160 acres under the pre-emption or *homestead* law, that you consider homestead settlers upon unsurveyed land as in exactly the same position as pre-emption settlers. This view, of course, is based upon the provisions of the third section, act of May 14, 1830.

I do not, however, think that such is the effect of that section. It protects homestead settlements upon surveyed or unsurveyed lands by providing that the settler may make his entry within the same time after settlement, or after the filing of the township plat, as is allowed pre-emptors to place their claims of record, and that his right shall relate back to the date of his settlement. In other words, it makes the provisions of sections 2265 and 2266, Rev. Stats., as regards the time allowed for perfecting entry in the district land office, applicable to settlements under the homestead law, as well as to those under the pre-emption law. It makes no provision for that class of cases where the survey finds two or more settlers with improvements upon the same subdivision, one or all of whom claim under the homestead law, and such settlers are in the same position as were pre-emption settlers prior to the act of March 3, 1873 (section 2274). The provisions of this section cannot be applied to cases of settlement under the homestead law, for the reason that in addition to the fact that there is nothing in said act of May 14, 1880, that would justify it, the mode of procedure provided by it is one that cannot be applied in homestead cases. This is true in cases of conflict between pre-emption and homestead settlements particularly, owing to the great difference in the nature of the two claims. The pre-emptor must pay for the land, the homesteader pays nothing; the pre-emptor must make his proof and payment within thirty-three months from the filing of the plat, the homesteader, after five years' residence. There are no features in the character of the respective entries by which they can be united.

It follows, therefore, that in cases of homestead settlement prior to survey the adjudication of conflicts will depend upon the facts in each case. If the homestead settler, prior to survey, can ascertain the lines of his claim, and so mark his boundaries that they will conform to the lines of public survey when extended, then his entire claim could be protected by compliance with the law. In cases where no boundaries are marked, or if marked do not conform to the surveys, the rights of conflicting claimants to any particular subdivision must be determined by their priorities, possessions, improvements, etc.; that is, by apparent equities.

PRE-EMPTION—INHABITANCY; PRACTICE—REVIEW.

MCBRIDE v. LEBCHER.

The rule of construction in force at any stage of a case is the one that must be applied, and therefore a case will not be reopened upon a motion for review in order that later rulings may be applied to the same state of facts.

*Commissioner McFarland to register and receiver, Miles City, Montana,
June 30, 1882.*

I have considered the motion of C. B. Lebcher for a review of my decision of December 3, 1881, closing the case of John McBride *v.* said Lebcher, filed in your office April 2, 1882.

Your findings of fact and opinion were adverse to Lebcher, but he did not appeal therefrom. Your findings, therefore, became final, and my said letter simply held that your conclusions based thereon, were correct, and, in accordance with the rules of practice, closed the case.

The motion is not based upon newly discovered evidence, but upon the ground that subsequent to the decisions the course of rulings by this office upon similiar facts has changed, and that under them Lebcher would be entitled to an award. There are several reasons why this motion cannot be granted.

It was not filed within thirty days from the decision, as required by rule 77, which is specific upon this point. Again, if it were true that under latter rulings the decision in this case upon the same state of fact would be different, the case could not be reopened in order to apply such rulings. See Secretary's decision of July 17, 1873, in the case of the Missouri, Kansas and Texas Railroad Company *v.* Buck, where it was held that the rule of construction in force at any stage of a case is the one which must be applied.

Finally, although your decision did not state specifically that Lebcher was acting in bad faith, your findings of fact supported that conclusion, which was in itself the vital principle of the decision.

The cases referred to by Lebcher, wherein a failure to actually inhabit the land after settlement were cases wherein such diligence was shown as circumstances permitted, and wherein the settler's good faith was clearly shown; hence these are not applicable to the case. You will advise the parties of the denial of this motion.

McBride submitted final proof of compliance with law, after due publication of notice, April 22, 1882, and at the same time submitted his application to purchase, which you declined to allow during the pendency of this motion. The motion being finally disposed of, you will allow said application as of its date, if no objection other than that stated appears.

PRE-EMPTION—ACT OF JULY 23, 1866.

WARD *v.* WILLIAMS ET AL.

Section 7 of this act was not repealed by the Revised Statutes, as it is local and temporary in character. If repealed, previously acquired rights could not be affected thereby.

Secretary Teller to Commissioner McFarland, June 8, 1882.

I have considered the case of Sarah Ward, applicant to purchase the lands involved, situate in sections 10, 11, 12, 14, and 24, in T. 4 N., R. 9 W., M. D. M., San Francisco, Cal., under the seventh section of the act of July 23, 1866 (14 Stat., 218), *v.* Frank Williams *et al.*, pre-emption and homestead claimants, on appeal from your decision of March 24, 1881, holding, among other things, that said seventh section is not re-

pealed by the Revised Statutes (as is otherwise claimed by Williams *et al.*), but is still in force.

The act of March 3, 1851 (9 Stat., 631), entitled "An act to ascertain and settle private land claims in the State of California," confirmed only *valid* claims derived from the Spanish or Mexican governments; and invalid ones, upon rejection of the grant, were held a part of the public domain. To relieve persons who had purchased lands under such grants, title to which they supposed good, but which proved otherwise, Congress passed the remedial act of 1866, the seventh 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 been subsequently rejected, or where the lands 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, etc.

This act continued in unquestioned force to the date of the adoption of the Revised Statutes in 1874. It has never been repealed in terms, and is still in force, unless its repeal results from sections 5595 and 5596, R. S.

Section 5595 provides that "the foregoing seventy-three titles embrace the statutes of the United States, *general and permanent in their nature*, in force on the 1st day of December, 1873," and section 5596, that "all acts of Congress passed prior to said 1st day of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision having been repealed or superseded by subsequent acts, *or, not being general or permanent in their nature*, provided that the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, *shall not repeal, or in any way affect, any appropriation, or any provision of a private, local, or temporary character, contained in any of said acts, but the same shall remain in force*; and all acts of Congress passed prior to said last-named day, no part of which are embraced in said revision, shall not be affected or changed by its enactment."

The act of 1866 is partly of a general and permanent, and partly of a private, local, or temporary character. The first, second, and third sections, relating to and confirming selections of public lands by the State of California, in part satisfaction of its grants, and the fourth and fifth sections, relating to its swamp lands, being of a general character, are included in the revision. The other four sections relating to *private grants* from the Spanish or Mexican governments, prior to the treaty of Guadalupe Hidalgo, in 1848, and enacted for the benefit of claimants

thereunder, being of a private, local, or temporary character, are omitted therefrom.

These sections are not wholly free from ambiguity, but their provisions lead me to the opinion that the revision was intended as a substitute for all general and permanent acts in force prior to December 1, 1873, and that acts and parts of acts containing provisions of a private, local, or temporary character, were also left in force. I discover no change in the Congressional policy respecting said private grants at the date of the adoption of the revision, nor any reason therefor. They embraced large and important interests. Many of them had not then been submitted for adjudication, and many others were in process of adjudication. Had they been considered of a general and permanent character, the acts affecting them would have found place in the revision; but not being of such character they are subject to the proviso of section 5596, and are not repealed.

Statutes are repealed by express provisions of a subsequent law, or by necessary implication, and in the latter case there must be such a positive repugnancy between the provisions of the old and new law that they cannot stand together, or be consistently reconciled. Repeals by implication are not favored in law, and are never allowed but in cases where inconsistency and repugnancy are plain and unavoidable; and it is a question of construction whether or not an act professing to repeal or interfere with the provisions of a former law operates as a total or partial or temporary repeal; and if there are two acts seemingly repugnant, if there be no clause of repeal in the latter, they shall, if possible, have such construction, that the latter may not be a repeal of the former by implication (Potter's Dwaris, 154, and citations).

In view of the fact that section 7 of the act of 1866 has not been directly repealed, nor impliedly so, under my construction of sections 5595-6, Revised Statutes, and that many cases have been adjudicated under its provisions since the adoption of the Revised Statutes, thereby holding it in force, I am unwilling to give it a different construction until it has been otherwise judicially interpreted. I therefore affirm your decision in this respect.

But whether or not said section is repealed cannot affect the present case, because section 5597, Revised Statutes, provides that—

The repeal of the several acts embraced in said revision shall not affect any act done, or any right accruing or accrued . . . before the said repeal, but all rights and liabilities under said acts shall continue and may be enforced in the same manner as if said repeal had not been made.

As Mrs. Ward acquired her rights, if any, under purchase of a portion of a Mexican grant of the SoulaJule rancho by her deceased husband, in 1861, after whose decease the lands in question were set off to her as part of his estate, by the proper courts, her rights will be determined as his would have been under that provision of section 7, which

provides that persons who *have* purchased lands of Mexican grantees or assigns, and otherwise complied with the requirements of the section, may purchase the same.

What rights had he?

It appears that in March, 1844, the Mexican government granted to one Mesa the tract of land known as Soulajule. This tract was never presented to the United States authorities for confirmation as an entirety, and hence its location has never been determined by established boundaries. Mesa, however, transferred portions of it to different persons, one of which he conveyed to Pedro J. Vasques by deed dated March 28, 1850, and the same was confirmed to him by final decree of the United States district court for the district of California, in August, 1857. The surveys of the different claims were duly approved, except that my predecessor, Hon. C. Schurz, April 15, 1878, directed certain changes in that of Vasques, which were made, and the plat thereof was approved by your office January 18, 1879, and patent issued to Vasques on the same day in accordance therewith.

The tracts applied for by Mrs. Ward appear not to have been within the deed from Mesa to Vasques, nor within the latter's confirmation, nor patent, but little thereto remained in Mesa. Hence any conveyance by Vasques of land outside of his confirmed and patented limits, to which he had no title, would be ineffectual in law to convey any interest to his grantee, and hence, also, as he was not assignee of a Mexican grantee of lands excluded from the approved survey, he had no right to purchase the lands now in dispute under said section 7.

It appears, however, that on June 4, 1852, Vasques made a conveyance of land, of which that now applied for by Mrs. Ward is a part, to one Buckley, who, on June 21, 1861, conveyed the same to one Brown, now deceased, the former husband of Mrs. Ward. As neither Brown nor Buckley had other right than that derived from Vasques, who had no right under said seventh section, I affirm your decision that Mrs. Ward is not entitled to purchase the tracts under said section.

Mesa failed to present for confirmation within the time limited by the act of 1851 that portion of the land granted him, which was excluded from his conveyance to Vasques and his other grantees. It therefore fell within the body of the public lands and became subject to pre-emption and homestead settlement.

* * * * *

You rejected Williams's filing because his improvements embrace those of Mrs. Ward on land claimed by her under color of title, and that his case is, therefore, within the purview of the decision of the case of *Atherton v. Fowler* (6 Otto, 513).

As Williams's filing is also in conflict with the homestead entry of McLaney, and with the filing of Bucklin, upon which proofs have not yet been offered, I modify your decision in respect to him, and direct that his filing remain intact to await future consideration in connection with

said homestead entry and said filing, and I affirm your decision holding the several other filings and entries intact, subject to proofs of compliance with the law and to priority of right.

PRE-EMPTION—QUALIFICATIONS OF SETTLER.

CRITCHFIELD *v.* LEWIS.

While full faith and credit must be given to the decree of the court granting a divorce, it is competent for the Department and the General Land Office to consider collateral facts respecting the relations of the parties for the purpose of deciding whether or not the wife was the head of a family and a *bona fide* settler.

Acting Secretary Joslyn to Commissioner McFarland, November 9, 1882.

I have considered the case of Caroline E. Critchfield *v.* Walter M. Lewis, involving the N.E. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 2, T. 8, R. 6 W., Concordia, Kansas, on appeal by Critchfield from your decision of November 21, 1881, holding her claim for cancellation, and awarding the land to Lewis.

The record shows that one Pierson made timber-culture entry of the tracts June 30, 1877, and that the same was canceled November 7, 1879; that Lewis filed declaratory statement for the tracts November 10, alleging settlement November 7, 1879, and on the day of his filing made homestead entry for the same tracts, and that Critchfield filed declaratory statement November 13, alleging settlement November 7, 1879. It appears that Alvin Critchfield, husband of said Caroline, commenced a contest against the entry of Pierson October 29, 1878, and that pending the same, in November, 1878, Pierson, anticipating an adverse decision, sold his possessory right and his improvements to Lewis for a valuable consideration, who forthwith entered on the land and has since continuously resided on and cultivated more than forty acres thereof.

It appears, also, that on October 31, 1876, Alvin Critchfield filed a declaratory statement upon another tract of land in the same district, whereby his pre-emption right was exhausted, and as Pierson's entry was canceled because the land contained a large amount of timber and would not be subject to another like entry, the only resource left to Critchfield was, if he desired to enter it, to apply for it under the homestead law—if that was admissible—which he did when initiating his contest. His application was rejected by the Department, on appeal, October 24, 1879, for the reason that no preferred right to enter can be allowed a contestant of a timber-culture entry, except where failure to comply with the law is alleged and proven, and that this contest did not involve that question, but the character of the land only.

Upon initiation of his contest Critchfield, with his wife and children, entered upon the land, where she continuously, with their children (and he for a greater portion if not the whole of the time), has since resided.

Both parties to the present contest were therefore resident on the land at the date of cancellation of Pierson's entry, but it does not ap-

pear upon which subdivision their respective residences and improvements were located ; but it does appear that Lewis' house was torn down by Alvin Critchfield, and that he was arrested and convicted thereof, and that one or more of Lewis' houses, subsequently erected, were burned or otherwise destroyed, but by whom is not satisfactorily shown.

It also appears from an exemplification of the records of the district court of Mitchell County, Kansas, that a decree of divorce was entered at its August term, 1879, in favor of said Caroline E. Critchfield against said Alvin Critchfield, for the adultery of the latter, and that the marriage relation theretofore existing between them was wholly annulled. It must be presumed that this court had jurisdiction of the parties and the subject matter of said proceeding, and full faith and credit must be given its decree and judgment. Nor will this Department, nor should your office, attempt to review or overrule its doings. So far, therefore, as marriage is concerned, Caroline E. Critchfield was a qualified pre-emptor at the date of her filing. But it is quite competent for this Department and your office to consider collateral facts respecting the relation of the parties, for the purpose of deciding whether or not she was at that date the head of a family, and made her filing in good faith, in order to appropriate the land to her own exclusive use, and was a *bona fide* settler.

It is claimed that the divorce proceedings were instituted solely to enable the parties to secure, through her filing, the land which he could not file upon nor enter, for the reasons above stated ; that they were nominal only, and not intended to affect their real relations, and that the decree was obtained through their fraud and collusion.

The testimony shows that these proceedings were commenced in July, 1879, and that the decree was entered in August following ; that the summons in the case was served by leaving a copy thereof with the plaintiff, at the residence of the husband, they then occupying the same house, which contained but one room ; that he did not appear in nor defend the case ; that security for the costs of the proceeding was filed by a third person, upon their joint request, and upon Alvin Critchfield's securing that person by a transfer to him of his own wagon ; that they both attended the hearing in this case, going to and returning from the land office in the same vehicle ; that he assisted her in the conduct of the case, and that since the decree of divorce the parties have continued to occupy the same house, without apparent disturbance of their marital relations.

In view of all the facts, I cannot doubt that the proceedings in divorce were collusively and fraudulently begun and conducted, in order to qualify her as a pre-emptor and enable her to make a valid pre-emption filing ; that he, and not she, continues to be the head of their family ; that her filing was not made in order to appropriate the land to her exclusive use, and that she is not a *bona fide* settler on the tract, competent to make a legal filing.

I affirm your decision.

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PRE-EMPTION—TRESPASS—IMPROVEMENTS.MARKS *v.* BRAY.

A trespass upon the public lands will not be sustained under the decision in *Ather-ton v. Fowler*; nor will the claim of any person who is qualified and has complied with law be subject to defeat in favor of an unlawful occupant. The possibility of one party taking the improvements of another under the settle-ment laws, recognized as within the contemplation of the statute.

Acting Secretary Bell to Commissioner McFarland, November 9, 1882.

I have considered the case of Miles C. Marks *v.* Ferdinand T. Bray, involving the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, of section 34, T. 27 N., R. 9 E., San Francisco, Cal., on appeal by Bray from your decision of January 26, 1881, adverse to him.

The record shows that Bray filed declaratory statement September 2, 1870, alleging settlement August 20, 1879, and that Marks made homestead entry October 18, 1879.

It also appears that the State of California selected said tracts as lieu lands, at different times, both of which selections were canceled by your letter of September 1, 1877. Marks purchased the State's claim after said selections and some years prior to said cancellation, and had occupied the land, both prior and subsequently to the date of Bray's settlement; but, at the time, was living on other land, in section 28, owned by himself, and occupying the land in dispute for business purposes, as a dairyman. He has on the land a house, and twelve or fifteen acres under cultivation, and uses the remainder for grazing purposes. His improvements are valued at from \$1,500 to \$2,000, and his whole tract is inclosed by fence, with occasional gaps therein.

Bray entered on the land, peaceably, on August 20, 1879, through a gulch across which there was no fence, and forthwith commenced the erection of a house upon the same subdivision on which Marks's house was situated, and has since continuously resided there with his family. He has about five acres under cultivation, and his improvements are valued at about \$250. Prior to this settlement he ascertained from the local office that the tracts were vacant government land, as shown by the records of that office. He knew of Marks's occupation and im-provements at the date of his own settlement, but has authorized him to remove his buildings and movable property at his pleasure.

On these facts you held the filing of Bray for cancellation, and allowed the entry of Marks to remain intact, subject to his future compliance with the law, referring to the cases of *Ather-ton v. Fowler* (6 Otto, 513), and *Clow v. Patterson* (5 C. L. O., 147).

I think your decision was erroneous.

From the date of cancellation of the State's selection to the date of Bray's settlement—a period of nearly two years—the tract had remained vacant and unappropriated public land, subject to disposal under the laws for the disposition of such land. No one made claim to it. Although, as the testimony shows, Marks knew of such cancella-

tion prior to Bray's settlement, he made no endeavor to fortify his possession and secure a right to the tract under either of said laws until two months after Bray's settlement. His laches thus enabled Bray to exercise a right the law gave him to settle and to file his declaratory statement upon this as upon any other unappropriated public land. At that date Marks's possession was not authorized by any law of Congress. He was on the land in violation of law and without any legal right; and in such a case occupation is mere trespass, and the party will not be protected therein against one who has made a valid adverse claim. That Marks himself regarded his own possession as invalid is apparent from his subsequent homestead entry, whereby he endeavored to secure rights to which he was not previously entitled.

The case of *Atherton v. Fowler*, as now interpreted by this Department, will not sustain a possession manifestly in violation of law, nor defeat a claim to land by one who has complied with the requirements of the law in favor of one who has not so complied. It also recognizes the possibility of one party taking the improvements of another under the settlement laws as within the contemplation of the statute. Further consideration of the case of *Atherton v. Fowler* has led to a modification of the ruling in *Clow v. Patterson*, in the latter cases of *Molyneux v. Young* (7 C. L. O., 107), and *Powers v. Forbes* (Hill's Leading Cases, Jan., 1881). Whatever, therefore, may be the equities of the case, I am of the opinion that as Marks's occupation of the tract was unauthorized and illegal, and he was not a claimant therefor under any act of Congress, and had no legal right thereto at the date of Bray's settlement and filing, and as the latter appears to have complied with the requirements of the pre-emption law, and did not make forcible entry on the land, his declaratory statement should be held intact, subject to full compliance with said law, and that the entry of Marks should be held subject to his (Bray's) right to make payment and proof within the prescribed period.

Your decision is reversed accordingly.

PRE-EMPTION—SETTLEMENT—FORCIBLE ENTRY.

BROWN *v.* QUINLAN ET AL.

Where lands are in the actual possession of one who has settled upon, improved, and fenced the same, no right thereto can be acquired under the pre-emption laws by another who breaks the close and takes forcible possession.

Where the lands are not inclosed by a fence, and the first settler is disqualified, or has taken no lawful steps to acquire title, a subsequent settler, who enters without force or intrusion upon the actual possession of the former, is not a trespasser *qu. cl.*, and may acquire title to the lands under the pre-emption law.

Secretary Teller to Commissioner McFarland, February 15, 1883.

I have examined the case of John McAllen Brown *v.* John Quinlan *et al.*, involving certain lands in T. 4 N., R. 8, W., M. D. M., San Fran-

San Francisco, Cal., on appeal from your decision of January 12, 1882, awarding said lands to various claimants.

* * * * *

The township plat was first filed August 10, 1878, but was withdrawn because the surveys of the confirmed portions of the Soulajule grant had not been finally approved, and was refiled February 5, 1879.

Most of the lands in controversy were situated within the exterior boundaries of the Soulajule grant made to Ramon Mesa in 1844, and described as containing about three square leagues.

At different times in 1849, 1850, and 1851, Mesa conveyed parcels of said grant to seven different parties; and among them a half league to one Trado, February 26, 1851, who on the same day conveyed it to Charles A. Lauff, William C. Andrews, and James McKeever. In this parcel are situated the lands in controversy.

Of this Trado tract Brown went into possession August, 1854, under an agreement with the parties holding the title, and with the intention of purchasing it.

He built his house and made improvements upon lands which he supposed to be within the boundaries of the Soulajule grant, but learned soon afterward that they in fact were upon the Laguna de San Antonio grant, adjoining; and to secure such improvements he purchased an interest in the San Antonio grant.

In 1857, he and his brother Samuel obtained, for a valuable consideration, a deed of the tract from said McKeever, and subsequently he purchased his brother's interest therein.

In 1858 he acquired the title of said Andrews through an execution sale. He has never had a conveyance of Lauff's interest, but it does not appear that any claim to the lands has ever been made by Lauff, or any one representing him.

The title to the Trado part of Soulajule grant was not presented for confirmation under the act of March 3, 1851 (9 Stat. 631).

Notwithstanding parts of Mexican grants have been conveyed, it was the practice to present for confirmation to the Board of Commissioners provided for in said act the grant as an entirety, and of course the confirmation would inure to the benefit of grantees of parts. In the present case that practice was not pursued, but the claims for the parts were presented and confirmed, on appeal to the district court, in severalty—except the Trado part, not presented, and one part conveyed to Fuller, dismissed in the district court for want of prosecution. The time for presenting claims expired by the act, March 3, 1853.

At the time Brown went into possession he was informed that the Soulajule grant had been confirmed as an entirety, and he seems to have been under that belief at the time he made the purchases of the Trado tract aforesaid.

In 1859, Deputy Surveyor Matthewson was instructed to survey the grant. He surveyed and located the exterior boundaries of the entire

Soulajule grant. This survey, which embraced the land in controversy, was approved March 3, 1860, by the surveyor-general. Separate surveys were afterwards made of the five confirmed tracts within the boundaries of the Mathewson survey. There were controversies about the surveys, but that of Mathewson, representing the exterior boundaries of the Soulajule grant, was held to be correct by both your office and by this Department.

Brown seems to have labored under the belief that the grant as an entirety had been confirmed, until Matthewson came upon the ground, in 1859, to make the survey. Upon taking possession, in 1854, he commenced and continued extensive improvements upon the Trado tract, with the view of making it an extensive dairy farm.

For this purpose he built a dwelling and dairy house, with other buildings, sunk wells for water for his cattle, and maintained a dairy of 200 cows. At the time of the survey, in 1859, he had the tract inclosed with a substantial fence, built mainly by him, but in part by occupants of adjoining lands.

In 1871, Brown made an effort to purchase the land comprising the Trado tract from the University of California, as unsurveyed land, and to have the same selected for him under the provisions of the Agricultural College grant. He deposited money for surveying the land. For some reasons not explained, the Board of Regents, in 1875, made an order directing that the applications to select be abandoned (Exhibit 20). Brown does not seem to have learned of this action until 1878. He then renewed his application, and was required to deposit one dollar per acre, whereupon he deposited upwards of \$2,500. Upon the completion of the United States surveys, the selections were, after some controversy, rejected by your office, for the reason that the State and University had already selected more lands than they were entitled to. He then applied to purchase the lands under the seventh section of the act of July 23, 1866 (14 Stat. 218), which provides for permitting persons to purchase of the United States lands which they have in good faith and for a valuable consideration purchased of Mexican grantees, and which have not been included in the final survey of such grants. He, however, was advised that on account of the Lauff outstanding interest, as shown by the record of the title, under the rulings of this Department, such claim to purchase could not be maintained. He then, May 15, 1879, procured the additional homestead entries now in contest, and seeks to obtain title through these entries.

These conveyances to Brown, and the various steps taken by him to acquire title, are recited as bearing upon the question of good faith on his part, and as showing the color of title under which he had been in possession. At the time of the additional homestead entries, he had been in continuous possession of the tract, personally and by his tenants, about twenty-five years.

In the summer of 1878, the pre-emptors generally made forcible and violent entry through Brown's inclosure, and in that manner effected their alleged settlements, and with actual force and arms maintained their possession. Brown remonstrated, and made ineffectual efforts to eject them by force, and also resorted to the State courts for protection. He obtained an injunction to restrain the pre-emptors from plowing the land and interfering with his stock; and, upon the hearing of a motion to dissolve the injunction, it was made perpetual. He also brought suits of ejectment against the pre-emption claimants, in which decisions were rendered in his favor in the trial courts, and on appeal to the supreme court of the State the decisions below were affirmed (8 Pacific Coast Law Journal, 708, 717).

In these cases in the State courts the acts of the respective parties in respect to lawful entry and possession, and the rights of each under the possession acquired in the manner before stated, seem to have been fully considered both upon the law and the facts, and it was determined that the possession of Brown was lawful, and that the pre-emptors were trespassers and intruders.

The surveys of the confirmed grants within the exterior boundaries of the Soulajule were finally approved January 18, 1879. Until that time the surplus land then for the first time definitely found within the exterior boundaries of that grant was not opened to settlement under the pre-emption laws. (*Hosmer v. Wallace*, 97, U. S., 575). And certainly these pre-emption claimants could take nothing by reason of acts done before that time.

I think it will be found upon examination that the present case, both as to the law and the facts, is ruled by the cases of *Atherton v. Fowler* (96 U. S. 513), and *Hosmer v. Wallace* (*supra*).

In the former case (which was replevin for hay cut upon land claimed under a pre-emption settlement), the land had been within the limits of an alleged Mexican grant, but the claim for confirmation was decided adversely in March, 1862; and it was held that upon such decision the land became public land under the act of March 3, 1851 (*supra*). The land, however, after the final decision, continued to be held in possession by tenants and purchasers under the supposed Mexican grant, and while so held it was forcibly invaded by persons who previously had no interest in it, and who dispossessed the occupants "under pretense of establishing a right of pre-emption to the several parts which they so seized."

The court below charged the jury as follows:

If you believe from the evidence that the defendants entered in good faith, with intention to pre-empt the land on which the hay was cut, and had actual possession of it at the time the hay was cut, your verdict should be for the defendants.

The plaintiff requested the court to charge the jury:

That if he was in actual possession of the land, having cultivated it for several years previously, and the defendants broke through his in-

closure against his consent, the entry was unlawful, though the land might be public land.

This request the court refused.

It was held that the charge as given, and the refusal to charge as requested, was error, upon the ground that it was "obvious that the case was made by the court to turn on the assumption that the land was, in its then condition, liable to be pre-empted by defendants, against the wishes of the plaintiff."

The court, in further considering the case, said :

The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land—to make improvement on unimproved lands. To erect a dwelling house did not mean to seize other man's dwelling. It 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 homicides and other crimes of less moral turpitude.

In the case of *Hosmer v. Wallace* the doctrine in *Atherton v. Fowler* was reaffirmed, and it was held that—

The right of pre-emption only inures in favor of a claimant when he has performed the condition of actual settlement, inhabitation, and improvement. As he cannot perform them when the land is occupied by another, his right of pre-emption does not extend to it.

In that case, as in the one at bar, the land in controversy was part of a Mexican grant, but had been excluded by the approved survey of the tract confirmed, but continued in the possession of the grantee under the original grant, and the plaintiff claimed "a right of pre-emption to land excluded by the survey from the tract confirmed, although it was at the time in the occupation of the defendant."

The principle in these cases was again reaffirmed in the case of *Trenouth v. San Francisco* (100 U. S. 251), wherein it was held that "the right of pre-emption under the laws of the United States cannot be acquired by intrusion and trespass upon lands in the actual possession of others." In that case the lands were claimed as against the pre-emptor "under a foreign title—that of the pueblo from Mexico."

Nearly all the questions now under consideration were examined by the supreme court of California in the ejection cases before referred to, and were pertinent to the inquiry. The decision is evidently a careful and well-considered one, and the court expressed the opinion that the questions involved had been substantially determined by the case of *Atherton v. Fowler* (*supra*).

It is insisted, by counsel for the pre-emption claimants, that Brown was a trespasser from his first possession, in 1854. I do not think this

position can be maintained. I think his possession within the exterior bounds of the Soulejule grant was lawful (*Hosmer v. Duggan*, 56 Cal., 257; *Van Reynegan v. Bolton*, 95 U. S., 33; *Newhall v. Sanger*, 92 U. S., 761, and cases before cited). Until final adjustment of the grant within the exterior limits, the lands were by law in a condition of reservation, and were so reserved by your office (letter D, November 26, 1878). There can be no doubt that Ramon Mesa's possession would have been rightful; and if so, the possession transferred to his grantee (*Trado*), and to Brown (*Trado's grantee*), was necessarily of the same lawful character.

The views thus expressed are conclusive of the principal questions in controversy.

Settlements were made in some instances outside of Brown's inclosure, but upon lands adjacent thereto, the sectional subdivisions of which extended within the inclosure. It was said in *Hosmer v. Wallace* that—

Settlement, inhabitation, and improvement of one piece of land can confer no rights to another adjacent to it which at the commencement of the settlement is in the possession and use of others, though upon a subsequent survey by the government it proves to be part of the same sectional subdivision.

Brown, however, is seeking to obtain title through additional homestead entries made subsequently to the pre-emption filings; and I concur in your opinion that where the inclosure divides the smallest subdivision into parts, and the pre-emptor's settlement and improvements were made upon the part lying outside of the inclosure, since no division can be made of such tracts, they should be awarded to the pre-emption claimants in preference to the additional homestead claimant.

* * * * *

Wm. T. Farley claims the NE. $\frac{1}{4}$ of Sec. 25, in conflict with the claim of Aaron F. Bradley, under homestead entry No. 3584, embracing the SE. $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 24, and E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 25, and in conflict with claim of Mack, above adjusted, and said Farley's claim, as to tract in conflict with Mack, is held subject to Mack's claim.

As to the remaining tracts, Farley's record claim is prior to Bradley's. Bradley, however, claims that Farley's settlement was effected by force within his inclosure, and upon land in his actual possession.

At the time that Farley made a settlement upon the land, the evidence shows that it was in Bradley's possession, occupied by his tenant. Bradley was living upon an adjoining tract owned by him. These tracts in contention between Bradley and Farley had been inclosed, or nearly so, by Bradley, and had been in his possession many years. He built a house and commenced to reside upon the tract in dispute in 1870, and resided there until 1876, when he removed to the adjoining tract, but returned to the land in question in 1879, it being occupied in the mean time by his tenant; and since then he has continued to reside thereon.

He has used the land for grazing purposes, keeping thereon some forty milch cows. At one time he made an ineffectual effort to obtain title by means of selections under the grant of college lands.

Farley's settlement was effected by a forcible entry. It was not accompanied by the acts of violence which characterized the possession taken of the Brown tracts, but it was with force. He put the lumber for his building from the public road over Bradley's fence, and afterwards effected an entrance for his team and other property by taking away the fence. He built a small house, and inclosed by a fence within Bradley's inclosure somewhat less than an acre of ground, which he has cultivated. Such is the extent of his possession, except that he has at times turned some of his stock out to graze upon other parts of the tract. The highest estimate made by himself upon the value of his improvements is \$150.

I am unable to agree with you that his pre-emption claim is valid and lawful. The manner of his entry, and the nature of his inhabitancy, is of such a character as prevented him, in my judgment, from obtaining a valid pre-emption under the principles laid down in the decisions already cited.

I am aware that a modified interpretation has been given by this Department to the case of *Atherton v. Fowler*, since some of the earlier rulings made after that case was decided (see *Marks v. Bray*, 8 C. L. O., 139), but I do not think that any of them go to the length of holding a pre-emption valid, attempted to be acquired under the circumstances of this case.

In *Clow v. Patterson*, subsequently modified, the entry of both parties was peaceful, and the actual possession of a part by one did not interfere with the actual possession of the other; and it seems to have been held that under the *Atherton v. Fowler* case the one could not be awarded the part possessed and improved by the other, though the latter had no legal claim to it under the statutes relating to the public lands. If such was the intended effect of the decision, it would manifestly be wrong, and would not be justified by anything found in the case of *Atherton v. Fowler*. The opinion in that case carefully states:

Undoubtedly there have been cases, and may be cases again, where two persons making settlement on different parts of the same quarter-section of land may present conflicting claims to the right of pre-emption of the whole quarter-section, and neither of them be a trespasser upon the possession of the other, for the reason that the quarter-section is open, uninclosed, and neither party interferes with the actual possession of the other. In such cases the settlement of the latter of the two may be *bona fide* for many reasons. The first party may not have the qualifications necessary to a pre-emptor; or he may have pre-empted other land; or he may have permitted the time for filing his declaration to elapse, in which case the statute expressly declares that another person may become pre-emptor; or it may not be known that the settlements are on the same quarter.

The question of a forcible entry was not in the latter case of Powers *v.* Forbes (7 C. L. O., 149), referred to by you, and although a part of the tract had been improved and was occupied by another party, it was awarded to Forbes upon the ground that the other party had failed to comply with the law in making proof and payment, and his holding was, for that reason, in violation of law.

The case of Marks *v.* Bray (*supra*), decided in 1881, is a leading case. Marks had been in possession by right of purchase from the State of California under selections made by the State, but which were canceled in 1877. Bray made settlement and filed pre-emption [D. S.] some two years afterward, and soon after his settlement Marks made homestead entry. At the time of Bray's settlement Marks lived upon other land, but subsequently moved to his improvements on a part of the land in dispute, and both continued to occupy. The tract was awarded to Bray upon the ground that it was public land (the selections having been canceled) at the time Bray settled, and Marks had taken no steps under the law to acquire title. It was expressly found, and is so stated in the decision, that Bray's entry was not a forcible one.

In Atherton *v.* Fowler the single question decided (and the only one before the court) was that the right of pre-emption could not be initiated by forcible intrusion "upon the possession of one who had already settled upon, improved, and inclosed that tract. And that such an intrusion, though made under the pretense of pre-empting the land, was but a naked trespass." That principle has been maintained and reaffirmed in repeated decisions in the courts, and has not been departed from in the decisions of this Department (Molyneux *v.* Young, 7 C. L. O., 107; Belk *v.* Meagher, 104, U. S. 279).

In this respect I therefore reverse your decision, and direct that Farley's pre-emption filing be held for cancellation.

LOCATION—SETTLEMENT—ESTOPPEL.

CAULFIELD *v.* BOSWORTH.

When a claim is located upon the ground before survey, either with Valentine scrip, or under the pre-emption laws, and other claims are afterwards made and located with reference thereto, the party first locating and making known the extent of his claim, will not be permitted to enlarge the same to the injury of subsequent locators whose claims have been made to conform to such first location.

Acting Secretary Joslyn to Commissioner McFarland, August 10, 1882.

I have considered the case of B. G. Caulfield *v.* George T. Bosworth, involving the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 9, T. 5 N., R. 5 E., Deadwood, Dak., on appeal by Bosworth from your decision of March 6, 1882, adverse to him.

Caulfield filed Valentine scrip for the tract October 25, 1878, and Bosworth filed pre-emption declaratory statement for the NE. $\frac{1}{4}$ of the section February 20, 1880, alleging settlement February 3, 1877.

It appears that the tract in question is occupied as part of the town site of Sturgis City, which was not organized as such under any statute of the United States, but was located by an association of individuals, who filed Valentine scrip therefor in the name of Caulfield, and afterwards divided it into lots among the proprietors, which were sold by them individually.

This was a private speculation, and no question arises under the town-site laws, but only whether, as between Caulfield and Bosworth, the tract on which the scrip was located was subject to the claim of Bosworth.

The town site was surveyed in August, 1878, and the subdivisional survey of the township was made in November and December following, and the plat thereof was filed in the local office February 18, 1880.

The testimony is voluminous, and relates largely to the statements and admissions of Bosworth as to the location of his northern line. The southern line of the town site conforms nearly with the government survey but leaves between it and Bosworth's northern line a small, wedge-shaped tract embracing from five to ten acres. Bosworth was present at the town-site survey, and, at the request of the parties in interest, pointed out to them the northern boundary of his claim, no portion of which touched the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the section, and the town site was located and surveyed accordingly.

When a claim is located upon the ground before survey, either with Valentine scrip, or under the pre-emption laws, and other claims are afterwards made and located with reference thereto, the party first locating and making known the extent of his claim, will not be permitted to enlarge the same to the injury of subsequent locators, whose claims have been made to conform to such first location.

The preponderance of testimony clearly shows that the scrip was located in accordance with Bosworth's claim as then made, and he must be held thereto.

Your decision holding for cancellation Bosworth's declaratory statement so far as it conflicts with the scrip location is affirmed.

PRE-EMPTION—FILING—SETTLEMENT.

GENZEL *v.* GSCHWEND.

A filing before settlement is premature, unauthorized, and a nullity.

Acting Secretary Bell to Commissioner Williamson, August 31, 1880.

I have considered the case of Johann G. Genzel *v.* John Gschwend, jr., involving the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$; NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 32, and the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, of Sec. 33, T. 15 N., R. 15 W., San Francisco District, California, on appeal by the plaintiff from your decision of February 28, 1880.

The township plat was filed in the local office September 8, 1868. The land in contest is unoffered. Both parties claim under the provision of the pre-emption law.

Genzel filed for said tracts April 28, alleging settlement thereon April 25, 1876.

Gschwend filed for same tracts October 10, alleging settlement thereon September 16, 1876.

At the two trials of this contest, held respectively April 4, 1877, and June 19, 1879, Genzel failed to prove any act of settlement prior to the filing of his declaratory statement.

So far as the testimony shows, the first work done upon the land, by or for him, was done in the month of May, 1876. By law, he was required to make known his claim in writing to the register "within three months from the time of settlement." (Sec. 2265, Revised Statutes.) He was not authorized to file before settlement. Indeed, before settlement, he had no claim to make known. His filing was premature, unauthorized, and a nullity (*Lansdale v. Daniels*, 10 Otto 113).

But if Genzel's filing had been valid, the testimony shows that he has not inhabited and improved the land within the intent of the law.

Gschwend shows qualifications as a pre-emptor, and compliance with the requirements of the pre-emption law as to settlement, filing, erection of a dwelling-house, and inhabitancy and improvement of the land; and he should be allowed to enter the tracts in contest, upon making the further proof required by law.

Your decision holding Genzel's filing for cancellation is, therefore, affirmed.

PRE-EMPTION—SECOND FILING.

RANSOM YOUNG.

Second filing allowed when first was made of land worthless for agricultural purposes at a time when its character could not be ascertained, and relinquished with due diligence after discovery of its character.

Acting Commissioner Holcomb to register and receiver, Grand Forks, Dak., July 1, 1881.

Ransom Young filed D. S. 5,860 for the NW. $\frac{1}{4}$ 26, 152, 52, January 15, alleging settlement January 13, 1880. Young alleges that his selection of this tract was made through the representation of his attorney, and at a time, also, when the ground was frozen hard, and its actual character could not be accurately determined.

In the spring he discovered that the principal part of it was covered with water, and the tract worthless for agricultural purposes in consequence. Young relinquished his claim March 11, 1880, and now applies to make a second filing, for NE. $\frac{1}{4}$ 12, 153, 55.

It appears from the foregoing, that at the date of this filing, the actual character of the land claimed could not be easily ascertained. At the earliest practicable time, viz, in the following spring, its worthless nature for farming purposes was discovered, and the filing immediately relinquished. Under these circumstances, Young's pre-emption privilege cannot be regarded as exhausted, and you are therefore instructed to allow him to file for the land desired, on payment of the legal fees, subject to any prior valid claim.

HOMESTEAD—PRE-EMPTION—RESIDENCE.

BOWERS v. WILSON.

The act of June 4, 1880, does not change the relation or the rights of parties, but allows only, under certain circumstances, an extension of time for making proof and payment.

If a party has filed his notice of absence and is absent from the land, in fraud of the act, he acquires none of the granted benefits, and this may be matter for investigation at the proper time.

Secretary Kirkwood to Commissioner McFarland, July 30, 1881.

I have considered the appeal of W. P. Bowers from your decision of March 17, 1881, rejecting his application to make homestead entry on the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 12, T. 5, R. 16 W., Kirwin, Kans.

It appears that Joseph Wilson filed declaratory statement for said tracts September 1, alleging settlement August 31, 1879. On November 24, 1880, he filed an application at the local office, alleging that he had broken 16 acres of the tract, and asking that, on account of the extreme dry weather, he be allowed an absence therefrom under the act of June 4, 1880 (Pamphlet Laws, chap. 122, p. 19). This act provides that it shall be lawful for homestead and pre-emption settlers on the public lands, where there has been a loss or failure of crops, from unavoidable cause, in the years 1879 or 1880, to leave and be absent from said lands until the 1st day of October, 1881, under such rules and regulations as to proof and notice as your office may prescribe; and during such absence no adverse rights shall attach to said lands, such settlers being allowed to resume and perfect their settlement as though no such absence had occurred.

Bowers applied on February 1, 1881, to enter the tract under the homestead laws, which the local officers rejected because of Wilson's notice of absence, and you affirmed their decision.

I think this was erroneous. Bowers' entry, if allowed, could not affect Wilson's pre-emption claim. That would still rest upon its own merits, and the homestead entry would be subject thereto, as in ordinary cases. The act of June 4, 1880, does not change the relation or the rights of the parties, but allows only, under certain circumstances, an extension

of time for making proof and payment. Nor do your instructions of June 4, that "no contest involving the right of a party who has filed notice of his intended absence, under this act, can be instituted prior to the legal term of absence to which he is entitled," affect the present question. That is a distinct matter. If the party has filed his notice, and is absent from the land, in fraud of the act, he acquires none of the granted benefits; and this may be proper matter for investigation at the proper time, and under proper proceedings. But as the tract would have been subject to Bowers' entry in the absence of this act, and the act does not affect the rights of the parties, I think his entry should be allowed, subject to Wilson's pre-emption claim, under the usual practice.

Your decision is accordingly reversed.

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SUBSEQUENT FILING—ABSENCE AND RETURN—GOOD FAITH.

MILAM v. FAVROW.

A pre-emption filing is no bar to a subsequent filing or other entry by another person of the same tract.

In the absence of an adverse claim of record, a pre-emption settler upon unoffered land may, after an absence, return to the land, and if good faith is shown, make entry thereof.

A stranger to the record cannot contest an unexpired pre-emption filing.

Commissioner McFarland to register and receiver, Sioux Falls, Dakota, August 12, 1881.

I have examined the case of Bery A. Milam v. Frank L. Favrow, involving the latter's D. S. No. 11430, for the SW. $\frac{1}{4}$ Sec. 20, T. 108, R. 47, filed October 10, 1878.

Trial was had at your office, after continuance from September 10, November 11, 1879, upon complaint of Milam, who alleged that the pre-emptor had abandoned his claim for more than six months.

Defendant made default, but you held that the contest should be dismissed for the reason that defendant was incarcerated in jail. There is no *evidence* in the case that such was the fact, but if there was, it would not, in the absence of testimony as to other circumstances, be sufficient to sustain your decision.

The Rules of Practice, approved October 9, 1878, in force at the time this contest was brought, authorized you to order hearings upon application of one or more of the respective parties to make due proof of his or their compliance with the pre-emption law, or to clear the record of an abandoned or defective *homestead* or *timber-culture entry*, so as to leave undisturbed and undisputed the rights of the party so proceeding.

Milam was not a party in interest; he had no claim of record that he desired to consummate, and hence there was no authority for allowing the contest by him. Neither the law nor the rules make provision, as

in homestead and timber-culture cases, for the contesting of alleged abandoned pre-emption filings by persons not having a claim of record in conflict therewith, for the reason that the same necessity does not exist. Where a tract is embraced in a homestead or timber-culture entry, it is necessary that the record should be cleared thereof before any subsequent claim can be initiated, or prior pre-emption rights completed by entry; but in the case of a filing this is not so. Any claim may be entered of record over it, subject to the pre-emptor's prior rights. If his claim is illegal, or if he has failed to comply with the law, the subsequent claimant may, when he applies to prove up his claim, bring a contest to clear the record of the prior filing. Moreover, the law allows the settler on unoffered lands thirty-three months within which to make proof and payment for his claim, and after the expiration of that period he may at any time make entry if no valid *adverse right* had in the mean time attached. It may happen, and often has happened, that the pre-emptor leaves his claim for a period, but subsequently returns and complies with the requirements of law. In such cases, where good reason is shown for such absence, and the claimant's good faith is established by his subsequent acts, he is allowed to perfect his claim; and no reason exists why he should not, if adverse rights are not thereby prejudiced. Hence, I can see no good reason for permitting a stranger to the record to contest a filing which is *prima facie* valid, and has not expired by limitation of law. If such a person desires to initiate a claim to the land, the filing is no bar, and can, when the necessity arises, be contested by the subsequent claimant who, as a party in interest, has acquired the right to contest.

For these reasons your action is sustained and the case dismissed.

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PRE-EMPTION—SECOND FILING.

WILLIAM L. PHELPS.*

In the absence of adverse rights, a party may file a second declaratory statement for the same tract.

Secretary Kirkwood to Commissioner McFarland, November 17, 1881.

I have considered the appeal of William L. Phelps from your decision of April 6, 1881, rejecting his application to enter certain lands in the Kirwin land district, Kansas.

It appears that Phelps filed declaratory statement November 16, 1871, upon certain tracts in Sections 8 and 9, T. 7 S., R. 14 W., which he afterwards relinquished under advice that his pre-emption right would not thereby be lost, and that thereafter, on December 20, 1879, he made another filing upon certain tracts in said Section 8, which embraced the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ thereof, which was included in his former filing.

* Overruled, 2 L. D., 854.

You reject this second filing upon all the tracts for the reason that the same is prohibited by section 2261, Rev. Stat., which provides that—

No person shall be entitled to more than one pre-emption right by virtue of the provisions of section 2259: nor, where a party has filed his declaration of intention to claim the benefits of such provision for one tract of land, shall he file at any future time a second declaration for another tract.

The right of a person to make a second pre-emption filing upon the *same* tract was considered by the supreme court of California, in the case of *Cumens v. Cyphers* (56 Cal., 383), in which it was said:

We do not understand this section (2261) as prohibiting the filing of a second declaratory statement for the *same* land, when, by reason of defects, or any other reason, the first declaratory statement has become unavailing, and there has intervened no right of any third party. The section in question contains two prohibitions. The first is that "no person shall be entitled to more than one pre-emptive right by virtue of the provisions of section 2259." It is contended on behalf of the respondent that by this is meant that where a person has once filed a declaratory statement for one tract of land he shall never afterwards file another statement for the same or any other tract. If this be the meaning of the first prohibition contained in the section, it is plain there was no occasion for the *second* found in it; for the first, under this construction, would effectually accomplish the same end. But Congress could not have meant this when it said that "No person shall be entitled to more than one pre-emptive right by virtue of the provisions of section 2259," for in the same section it proceeded to make provision for such a case in the words, "Nor where a party has filed his declaration of intention to claim the benefit of such provisions for one tract of land, shall he file at any future time a second declaration for another tract."

In our opinion the meaning of the section is very plain. By its first clause Congress intended to declare, and did in effect declare, that no person shall be entitled to enter with the register, and thus acquire from the government, under the pre-emption laws, more than one tract of land. This is what we understand is meant by the declaration that no person shall be entitled to more than pre-emptive right by virtue of the provisions of section 2259. But it had been found by experience that this prohibition alone was not sufficient to protect the government from imposition, so Congress added another: "Nor where a party has filed his declaration of intention to claim the benefits of such provisions for one tract of land, shall he file at any future time a second declaration for another tract."

The abuses intended to be remedied by this last provision, the substance of which was also embodied in the act of 1843, were pointed out by the supreme court of the United States in the case *Johnson v. Towsley*, 13 Wall., 89. It cannot be said that the reasons that existed for prohibiting a party who had once filed a declaratory statement for one tract from afterward filing a second statement for *another* tract existed in a case where the party for any reason should desire to file a second statement for the *same* tract in the absence of the interposition of any rights on the part of any third person. At all events, we find no prohibition in the statute in the last-mentioned case.

I have quoted at length from this decision because the views therein expressed seem to me a correct interpretation of section 2261, and should be the rule of your office. I therefore modify your decision, and permit

Phelps to enter NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 8, if he shows a compliance with the pre-emption law, and if there is no adverse claim, and affirm it in respect to other tracts named in his filing.

20 LD 4/2

ENTRY OF LAND IN TWO DISTRICTS.

EDWARD WESTGATE.

Where filing is intended for land situated in two districts, proof must be made for the entire claim in both offices, separate pre-emption affidavits and two certificates, and separate payments to the receivers of the two districts.

Commissioner McFarland to register and receiver, Boise City, Idaho, February 8, 1882.

The attention of this office has been directed to the claim of Edward Westgate to a tract of land, one hundred and twenty acres of which lies in your district and 40 acres in the Lakeview (Oregon) district. The land in Idaho is W. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 26, T. 3 S., R. 6 W., and that part of Mr. Westgate's claim and upon which he resides, in Oregon, is unsurveyed.

In view of the statement that you have informed Mr. Westgate that he must remove to the tract in Idaho, in order to obtain title thereto, under the pre-emption or homestead laws, you are advised as follows: Upon the application of Mr. Westgate to file a declaratory statement you will allow him to file for the tracts in your district, with a statement in writing to the effect that he intends to file for the tract in Oregon, upon the survey of the same and the filing of the proper township plat in the local office at Lakeview. When said claimant applies to enter, proof must be made for the entire claim in both offices, but the purchase money for the tracts in your district must be paid to the receiver of your office, and for that portion in Oregon to the receiver at Lakeview, and receipts issued accordingly.

Two certificates, one in each office, will be required, and a separate pre-emption affidavit for the land in each district. The fact that the entry is made in two offices, with a description of the *entire tract*, should be *indorsed* on the certificate from each office.

Forward a copy of this letter to the local officers at Lakeview, and advise said officers of any action taken by you in this case.

PRE-EMPTION—FILING—FINAL PROOF.

HERBERT v. REED.

As between two pre-emption claimants, both of whom were in default as respects the filing of a declaratory statement within the statutory period, the one who first gives notice of his claim is entitled to make the entry.

Secretary Kirkwood to Commissioner McFarland, March 5, 1882.

I have considered the case of Frederick Herbert v. C. C. Reed, involving the right to enter, under the pre-emption laws, the SE. $\frac{1}{4}$ of SE.

$\frac{1}{2}$ of Sec. 3, T. 6 N., R. 13 E., Sacramento, Cal., on appeal by Reed from your decision of February 8, 1881, awarding the same to Herbert.

It appears that Herbert filed declaratory statement March 30, 1877, alleging settlement August 11, 1876, and that Reed filed declaratory statement August 16, 1877, alleging settlement August 15, 1872.

At the date of Herbert's filing there was no claim of record to the tract, and neither party filed his declaratory statement within three months from the date of his settlement, as required by section 2265, Rev. Stats. (the tract not having been proclaimed for sale).

Your decision held that as between two pre-emption claimants, both of whom were in default as respects the filing of a declaratory statement within the statutory period, the one who first gives notice of his claim is entitled to make the entry; and that consequently Herbert is so entitled, upon making the required proofs.

Your decision is affirmed.

SETTLEMENT—RESIDENCE—FRAUD.

ARNOLD *v.* LANGLEY.

A pre-emption filing is void unless preceded by settlement, and hence is no bar to a second filing.

A *bona fide* pre-emption claim should not be rejected because the claimant's house was by mistake beyond the lines of survey bounding his land.

An entry allowed is *prima facie* valid, and should be disturbed only on the clearest proof of fraud, unless shown to be absolutely void.

Commissioner McFarland to register and receiver, Oxford, Idaho, June 27, 1882.

I have considered the testimony relating to William Langley's cash entry No. 15, embracing E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 28, T. 10 S., R. 25 E., elicited by the investigation ordered by my predecessor's letter of April 10, 1880.

Langley filed D. S. 1147, Boise City series, April 5, 1875, alleging settlement November 9, 1874, and again filed, for same land, D. S. 1805, July 29, alleging settlement January 1, 1878. His said entry was made January 12, 1880, after due publication of notice.

Thomas L. Arnold filed D. S. 64, July 24, alleging settlement July 18, 1879, and after Langley's entry had been made filed the affidavits alleging fraud, upon which my predecessor's action was based.

Before considering the question to which the investigation was more particularly directed, I desire to correct the erroneous conclusions arrived at by you in regard to Langley's declaratory statements.

His first filing was absolutely void, not having been preceded by a valid settlement, *Genzel v. Gschwend* (8 C. L. O., 159), and hence was no

bar to a second and legal filing. *French v. Tatro* (*Ib.*, p. 150). Even were his first filing not absolutely void, his second filing for the same tract is not within the prohibition of the statute. Case of William L. Phelps (*Ib.*, p. 139).

There can be no doubt that Langley's second filing was based upon an antecedent settlement, and his entry relates to and depends upon that filing, without reference to the prior and void one. The substantial allegation of Arnold's affidavit is in effect that prior to his entry Langley had sold to him (Arnold) his improvements upon, and the right to, the land claimed by him, upon the faith of which he had made his settlement, and furthermore that Langley had not erected a dwelling-house or resided upon said land prior to entry. In regard to the alleged sale to Arnold parol evidence is introduced to show that Langley, in consideration of \$1,000, transferred in writing to Arnold all his interest in the improvements upon, and his right to, the tract claimed by him as a pre-emptor, and his interest in certain personal property owned by him jointly with C. D. Lane and William Bennett, valued at \$6,000, for which he accepted Arnold's notes—one for \$300, due in October, 1879, and the other for \$700, due in May, 1880. The said writing, or bill of sale, which is in itself the best evidence of its contents, was not produced, or, in order to admit of the acceptance of secondary evidence of its contents, its absence accounted for. Hence the testimony as to the terms of said sale is entirely inadmissible. If it were admissible, however, it is shown by the same testimony that possession of the property intended to be conveyed was never given; that no payment was made on either of the notes; and that the notes themselves were returned to Arnold prior to the time that Langley made his entry; and it does not appear that any attempt was made by Arnold to enforce specific performance of the alleged agreement. I am, therefore, of the opinion that there is no proper proof of any agreement existing at date of entry by Langley contrary to the statute, and hence that in this respect his entry was not illegal or fraudulent.

The only remaining question is in the matter of Langley's residence upon the land. It is clearly shown by the evidence that he did not erect a dwelling-house or reside upon the land prior to entry, but in none of the testimony elicited by Arnold does anything appear indicative of bad faith or fraud on the part of Langley. On the other hand, it is the opinion of one of the witnesses (Wood) that his failure to comply with the law was the result of ignorance. (See Record, p. 67.)

It is shown that in 1874 Langley purchased the Marsh Lake Ranch, including the land in controversy; that there was a house upon this farm, the exact location of which with reference to the lines of survey was not known. Langley cultivated this ranch in connection with Lane and Bennett, each of whom claimed 160 acres as a pre-emptor. He was frequently seen, up to a short time before he made entry, personally

engaged in the cultivation of his pre-emption claim, 45 or 50 acres of which were broken, and upon which he raised crops each year from and including 1875.

In 1875, 1876, and 1877, his crops were destroyed by grasshoppers, much to his financial embarrassment. He also had post-holes dug, and hauled poles himself upon the premises for fencing purposes.

His expenditures of time and money upon this place, during a period of three or four years prior to entry, sufficiently indicates, in my opinion, his good faith.

It is true he did not inhabit the land, yet his purchase included a dwelling which it appears he had no means of knowing was not upon the land. It certainly does not appear affirmatively that he knew the house was not on his claim.

On the other hand, it appears from the testimony of Lane that he supposed it was there, at least until some time in 1879. In the absence of any evidence of a fraudulent intent, and in view of the facts shown as to his personal improvement and cultivation of the tract, it seems to me that the case of Langley is within the spirit of the opinion of Mr. Attorney-General Butler (3d Opin., 312), cited in 1st Lester, p. 385, to the effect that when a pre-emptor had personally cultivated public land, and no doubt could exist as to his intent to make a settlement on the particular quarter section claimed, his claim should be allowed, although his house, by mistake, was over the line. In such a case he did not consider actual inhabitancy essential. See also letter of Mr. Secretary Schurz, dated February 12, 1881, in the matter of Philoman Higgins's homestead entry. In this case the party by mistake erected his house over the line and resided there for a year before discovering and correcting the mistake. It was held, upon reference to the opinion above cited, that the entry did not require confirmation, the party being constructively resident upon the land.

An entry having once been allowed upon proof satisfactory to the local officers is *prima facie* valid, and should, as has been repeatedly held by this office and the Department proper, only be disturbed upon the most clear and convincing proof of fraud, unless it is shown to be absolutely void. In this case the evidence seems rather to sustain Langley's good faith than to prove a fraudulent intent; and as, under the rulings above referred to, his entry is not absolutely void, I cannot concur in your conclusion that it should be canceled, but will approve the same for patent should this decision become final. . . . Arnold, by reason of his filing for the land prior to Langley's entry, being a party in interest, is entitled to appeal.

PRE-EMPTION—SECOND FILING.

STATE OF CALIFORNIA *v.* PIERCE.*

Where a pre-emptor makes a legal filing prior to June 22, 1874, for unoffered land, and relinquished the same, he may make a second filing after that date on another tract.

Secretary Teller to Commissioner McFarland, August 1, 1882.

I have considered the case of the State of California *v.* John Pierce, involving the NW. $\frac{1}{4}$ of Sec. 12, T. 4 N., R. 1 E. H. M., Humboldt district, California, on appeal by Pierce from your decision of September 1, 1881, holding his filing for cancellation.

It appears that Pierce filed declaratory statement No. 3446, for the tract, August 22, alleging settlement August 21, 1876.

One John J. Huse filed declaratory statement No. 3440 for said tract August 18, 1876, alleging settlement the same day, and the State of California selected the same June 15, 1878, in lieu of deficiency in Sec. 36, T. 8 N., R. 5 E., R. and R. No. 36.

The township plat was filed July 23, 1868. A hearing was had March 26, 1877, and under date of October 18, 1879, your office decided, upon the testimony adduced at the hearing, that Pierce should be allowed to enter upon showing that his settlement was not made upon the 40-acre tract in Huse's possession; that he is a qualified pre-emptor and had complied with legal requirements. Said decision also found that Pierce had settled subsequently to his filing, but that entry was permissible under the ruling then in force, in the absence of a valid adverse claim. Huse's claim having been found to be invalid and held for cancellation, and the State's claim held subject to Pierce's, as not being a settler's claim within the meaning of section 2265, Rev. Stats.

Neither Huse nor the State appealed from said decision.

Pierce having applied to make proof and payment according to the provisions of the pre-emption law and of the act of March 3, 1879 (20 Stat., 472), the register of the Humboldt office, under date of January 7, 1880, published notice of his intention to submit proof within thirty days thereafter. On the 4th of March ensuing the register and receiver decided, upon the proof submitted by Pierce pursuant to said notice, to reject his application, from which action he appealed.

In your decision of September 1, 1881, you held that since the former decision of your office the ruling had been so modified that Huse's invalid filing could not defeat Pierce's right to the entire quarter section; but held his filing for cancellation because it was shown by the record and admitted by him that he filed declaratory statement No. 778, for another tract, October 2, alleging settlement July 24, 1869, and relinquished the same August 21, 1871, in favor of certain parties (William and Charles A. Fitch), each of whom had filed for half of the same March 7 preceding. Your decision was based upon the ground that as Pierce's

* See 4 L. D., 187.

filing was legal in its inception, it operated as a complete bar to the filing of a declaratory statement under section 2261, Rev. Stat. You further held that as his settlement under the latter filing was proved to have been made subsequently to the date of filing, the same was void for that reason, and should be held for cancellation.

By your predecessor's decision, Huse's rights were concluded, and those of the State were subordinated to Pierce's. That decision has become final by reason of their failure to appeal therefrom, and they must be regarded as having waived whatever rights they may have had in the premises.

In regard to the objection that Pierce's former filing precluded him from making another subsequently to the adoption of the Revised Statutes, I am of the opinion that such filing does not come within the purview of section 2261 thereof, which prescribes as follows, to wit:

No person shall be entitled to more than one pre-emptive right by virtue of the provisions of section twenty-two hundred and fifty-nine; nor, where a party has filed his declaration of intention to claim the benefits of such provisions for one tract of land shall he file at any future time a second declaration of another tract.

The Revised Statutes were approved June 22, 1874, and the provisions of section 2259 did not, therefore, obtain until that date.

Although Pierce filed as stated, it was upon *unoffered* land, and such filing was no bar to a second filing under the act of March 3, 1843 (5 Stat., 620), from the fourth section of which, and the tenth section of the act of September 4, 1841 (*id.*, 455), section 2261, Rev. Stat., was derived. He relinquished his filing, and was thereafter correctly advised by the register that he could file a second declaratory statement for another tract. Hence when the Revised Statutes were enacted Pierce was a qualified pre-emptor and as competent to file a declaratory statement under the provisions of section 2259 as though he had never attempted to exercise his pre-emption right. The act of March 3, 1843, was no bar to his making a second filing (*Johnson v. Towsley*, 14 Wallace, 72).

By the same line of reasoning it follows that in order to bring him within the prohibition of section 2261 he must have made a previous filing under section 2259, referred to in the prohibitory statute, and not under the provisions of the act of 1843.

In regard to the remaining objection, it should be observed that Pierce alleges under oath that he performed acts of settlement upon the premises two months prior to the date of his filing, and commenced to build his house the day after, wherein he has since continuously resided, excepting the time that he was at the hospital under treatment for his eyes, pursuant to the advice of his physician.

The ground upon which you base such objection is not well taken, for while the records of your office show that at the date of such settlement the land was covered by E. H. Hathaway's homestead entry No.

324, they also show that the same was canceled July 31, 1876, upward of three weeks prior to the date of his filing, and as it is virtually conceded that he was residing upon and improving the tract when said entry was canceled, no specific act was necessary to constitute a new settlement thereon after its restoration to market. (*Roach v. Myers et al.*, 9 C. L. O., 61.)

But the question of settlement was determined by your predecessor's decision of October 18, 1879, and it was not necessary to reopen it for the purposes of this inquiry. He found from the testimony that Pierce had completed a very comfortable house, built a barn and out-house, cleared, cultivated, and fenced about half an acre of the land, which he had made his home since settlement; that he had endeavored in good faith to comply with legal requirements; and that no attempt had been made to show that he had any other residence.

Inasmuch as he has evidenced his good faith in the premises, I am of the opinion that his proof, if found sufficient, should be received and his entry allowed in accordance with his application.

I am aware that the foregoing is a modification of existing rulings respecting second filings, but a critical examination of the law convinces me that the foregoing is the proper construction.

Your decision is accordingly reversed.

PRE-EMPTION—FILING—SETTLEMENT.

A filing based upon a settlement made at a time when the settler was qualified is valid, although the alleged date of settlement was anterior to the time the settler became qualified.

The date of settlement is a matter of proof, and the settler is not bound by that alleged in his declaratory statement.

Commissioner McFarland to register and receiver, Aberdeen, Dakota. February 12, 1883.

I am in receipt of register's letter of 20th ultimo, asking for a further ruling upon the subject-matter of my letters (G) of December 4, 1882, and January 9, 1883, which are, in his opinion, inconsistent with each other. Said letter of December 4, 1882, advised you that a party must be qualified at date of settlement in order to initiate a valid claim, and that a filing made by a party whose settlement was alleged prior to the date upon which he became qualified as a citizen is illegal and void. The subsequent letter, that of 9th ultimo, further advised you that the settler is not bound by the date of settlement alleged in his declaratory statement, and that the date thereof is a matter of proof, and may be established at the time of offering proof.

This latter proposition was stated in the case of a settler who was not qualified in the matter of citizenship at the date of alleged settlement, but who became qualified prior to filing his D. S.

There is no inconsistency or error in these two propositions, although that first stated might have been laid down with more particularity.

An alien cannot make a valid settlement, and his occupation of the public land invests him with no rights. His filing, therefore, based on an invalid settlement or unlawful occupation, is also illegal and void. But if, *prior* to filing his declaratory statement and *after* becoming qualified by declaring his intention to become a citizen, he performs an act of settlement, that is the act of a qualified settler, and fixes the date at which his right takes effect. In the case of one who has established his residence upon the land, his every-day life is an act of settlement, which takes effect from the time he becomes qualified, in the same manner as does that of one who, at date of restoration of land theretofore reserved, is residing there with an intention of claiming the same, without the performance of a new and distinct act of settlement, and a filing based upon a valid antecedent settlement, although subsequent to the date of settlement alleged therein, is legal.

This proposition is fully elucidated in the decision of the supreme court of Michigan in the case of *Boyce v. Danz* (29 Mich., 146; also reported in *Lewis's Leading Cases*, p. 744), with which the rulings and practice of this office are in complete harmony.

In regard to the remaining proposition: The date of settlement is not only a question of fact, but one of mixed law and fact. Many settlers, through ignorance of what constitutes a valid settlement, allege a date anterior or subsequent to the actual date, such allegation being upon their part to a large extent a conclusion of law. The uniform practice of this office has been in contested and *ex parte* cases to find the date of settlement from the evidence in the cases, and that date so found must control the adjudication of their rights, without regard to the alleged date.

In the light of the foregoing, I do not think it will be difficult to reconcile the ruling that a filing based upon a settlement invalid for the reason that the party was not qualified at date thereof is void with the ruling that a filing based upon a settlement made at a time when the settler was qualified is valid, although the alleged date of settlement was anterior to the time the settler became qualified.

As to the further objection of the register, that the latter ruling is an encouragement to perjury, although not agreeing with him in that statement, I would say that the proper construction and execution of the laws cannot be controlled by such considerations of policy. Congress has been careful in its enactments relating to the disposal of the public lands to provide for the punishment of perjury in connection therewith, and it is in these enactments that the remedy for such an evil as that suggested must be found.

The register's letter of 26th ultimo, just received, upon this same subject, has been duly considered in connection herewith.

*PRE-EMPTION—FINAL PROOF—GOOD FAITH.*FULLEN *v.* THOMAS.

If, where a pre-emptor applies to make final proof under his notice, he is surprised by the introduction of adverse and unexpected evidence, he may defer his offer of proof until any date within the time prescribed by law.

The law recognizes circumstances as well as time in the development of a pre-emptor's good faith after his first act of settlement and before the date at which he is required to make proof and payment.

Commissioner McFarland to register and receiver, Sacramento, California, October 29, 1882.

I have examined the case of James Fullen *v.* B. W. Thomas, forwarded with your letter of February 28, 1881, and involving title to the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 16, 6 N., 11 E.

The records show that this tract of land was formerly covered by the H. E. of John Fullen, which was canceled by this office November 1, 1879; that Marie Gould filed D. S. 7227, November 15, alleging settlement November 13, 1879; that James Fullen filed D. S. 7232, November 19, alleging settlement November 1, 1879, and that B. W. Thomas made H. E. No. 3072, May 12, 1880.

This contest grew out of the published notice of James Fullen to make final proof and payment on the 18th of November, 1880.

Before entering upon the merits of the case, Thomas filed a motion to dismiss, on the ground that Fullen had published a prior notice to make proof and payment on the 12th of May, 1880, and that having appeared to do so, with his witnesses declined to proceed, whereupon the register and receiver dismissed the case.

The facts are as follows: Fullen did appear at the local office on the 12th of May, 1880, after due notice to make his final proof, but was confronted by the affidavits of said Thomas and N. Radwich, alleging non-compliance with the law on the part of Fullen. Fullen's attorney objected to the introduction of said affidavits, but his objection was overruled by the register and receiver, whereupon notice of appeal was verbally given, but never consummated, and Fullen declining to proceed, the case was dismissed without detriment expressed, and Thomas allowed to make his homestead entry.

This action of Fullen can be looked upon in no other light than as in the nature of a nonsuit. When a pre-emptor appears at the local office to make his final proof it is not to be supposed that he is cognizant of all the charges and allegations which may be brought against him, and consequently is not fortified with evidence to successfully combat them. The witnesses he takes with him are ordinarily for the purpose of proving certain features of his claim, and if it should appear upon reaching the office that he is in any way surprised by the introduction of adverse

and unexpected evidence, I cannot see how, under the law or any of the regulations thereunder, it could affect his claim if he saw proper to defer his offer of proof to any date within the time prescribed by law, and when he may be fully fortified against the allegations of his adversaries. Moreover, the objection of Fullen to the introduction of the evidence referred to was well taken and should have been respected by the local officers.

Neither of the parties named was of record in interest, and under the rules of practice could not initiate a contest.

Having disposed of this feature in the case, the next thing to be considered is the *bona fides* of Fullen as a pre-emptor.

The testimony shows him to be qualified as such in every respect. In the month of October, 1879, he went upon the land and built a cabin and was living on the land at the date of cancellation of John Fullen's H. E., November 1, 1879. It appears that the aforesaid John Fullen is the father of claimant, James Fullen, and an attempt is made to show that they are in collusion, and that the son is but the agent of the father in procuring title to the tract in dispute.

This suggestion, for it can be considered in no other light, grows out of the fact that the father had attempted to homestead the tract, but finding himself unable to do so advised his son to take it under the pre-emption law. The evidence is to the effect that the son was poor and that he received some assistance from the father in the progress of his improvements; also that the son has taken his meals during a portion of the time he has been on the land at his father's house, and that his cow was in the habit of going there to be milked; but outside of this nothing else appears to that effect, and the suggestion is denied by the son under oath.

It is also charged that the claimant has committed timber depredations on the land, but I think it is satisfactorily shown that the wood was only cut from that portion of land intended for inclosure and cultivation and not for the mere purpose of speculation. Indeed, the claimant swears that he has since inclosed the land thus denuded of timber and prepared it for cultivation.

From all the testimony in the case I am of the opinion that the claimant has acted in good faith. He has built himself a house and provided it with furniture enough to make it habitable; he has cleared a portion of the land and fenced and cultivated it, and it matters not, as alleged, that some or a majority of his improvements were made after his last notice of contest. His abandonment of the land is not shown, and there is a strong circumstantial show of good faith in the mean time.

The law recognizes circumstances as well as *time* in the development of a pre-emptor's good faith after the first act of settlement and before the date at which under the law he is required to make his proof and payment.

Fullen, therefore, having offered his final proof, you will allow him to complete his entry, and to this end the H. E. of Thomas is held for cancellation, as well at the D. S. of Marie Gould, who made default at the hearing after due notice of the same.

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FINAL PROOF—PROTEST—HEARING.

FENTON v. COLWELL.

Upon application to make final proof, protest being filed by adverse claimant, the proceedings should be suspended, and notices for hearing issued in accordance with rule 8 of practice.

Commissioner McFarland to register and receiver, Dalles, Oregon, February 28, 1883.

I have examined the contested case of Joseph P. Fenton v. Wm. H. Colwell, forwarded with your letter of April 25, 1882; and involving title to the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 8, 6 S., 24 E.

The records show that Colwell filed D. S. 1518, December 15, 1881, alleging settlement April 24, 1878, claiming the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{2}$, Sec. 5, and NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 8.

Fenton made H. E. No. 832, December 16, 1881, for the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 8. Township plat filed November 24, 1881.

Colwell gave notice of his intention to make final proof and entry, fixing as the date January 23, 1882, when he appeared with his witnesses. Fenton appeared at same time, with witnesses, and filed objections to said proof and entry, whereupon you allowed him to cross-examine Colwell's witnesses and offer the testimony of his own witnesses, the written protest of Colwell to the contrary notwithstanding.

In this you erred. Rule 8, rules of practice, requires that at least thirty days' notice shall be given of all hearings before you, unless by written consent an earlier day shall be agreed upon.

In the face of Colwell's protest, therefore, it was your duty to suspend proceedings in the matter of his entry until the expiration of the notice required or such time as may be agreed upon by the parties.

You decide the case upon its merits in favor of Colwell, and Fenton appeals.

The proceedings in this case are dismissed.

The proof of Colwell is regular and sufficient on its face, but you will suspend the entry in view of Fenton's protest for a reasonable time within which he may perfect his contest, if so desired, in accordance with the rules of practice.

The proof is returned herewith, and you will notify all parties of this decision.

HOMESTEAD—APPROPRIATION—PRIORITY—TRANSMUTATION.

27 L 7 62

WOLF *v.* STRUBLE.

A homestead entry is an appropriation of the land, and removes it from liability to any other disposition.

Parties claiming the right to enter under the 3d section of the act of May 14, 1880, land embraced in a homestead entry, required to establish the priority of their claims and secure the cancellation of the intervening entry prior to the allowance of their application.

Pre-emptors applying to transmute their filings to homestead entries required to give notice to adverse homestead claimants, who will be allowed to contest the application to transmute.

*Commissioner McFarland to register and receiver Wa Keeney, Kansas,
September 20, 1882.*

I am in receipt of your letter of 24th ultimo, reporting in the case of Lillie R. Wolf *v.* Alpheus Struble, why you allowed Mrs. Wolf to transmute her pre-emption filing to a homestead entry, without first giving notice to Struble and Reese, homestead claimants to the same land.

I find upon further investigation of the matter that a difference in the rulings in cases of this kind has inadvertently arisen, and that your action in this case is sustained by the later practice of this office.

It was always held that a homestead entry was an appropriation of the land; that one entry could not be allowed over another, and consequently, that in cases where an entry was made subject to a prior pre-emption claim, the pre-emptor, in order to transmute, must first give notice to the homestead party in order that the latter might show that the former did not have a valid filing capable of transmutation, or had not complied in good faith with the requirements of the law, thereby preserving his own entry, which otherwise would be canceled upon the allowance of the application to transmute.

In the case of Esrey *v.* Gleen (7 C. L. O., 148), my predecessor, Mr. Commissioner Williamson, held that the act of May 14, 1880, the third section of which allowed a person who settled upon public land with the intention of claiming under the homestead law, the same time within which to make his homestead entry as is allowed pre-emptors to file their declaratory statements, incorporated a new principle in the homestead law; that such settler could make his entry notwithstanding the fact that the land was already *appropriated* by another entry, and that the rights of the parties should be adjusted when either applies to make final proof.

After a careful examination of this subject, I am unable to concur with the views expressed in that decision.

A homestead entry is an appropriation of the land; it segregates it from the body of public land, and removes it from liability to any other disposition. This proposition, the correctness of which was never disputed in this Department until the rendition of the decision above re-

ferred to, is forcibly presented in the opinion of Mr. Attorney-General MacVeagh of July 15, 1881. (8 C. L. O., 72.)

If an entry was erroneously allowed or conflicts with previously acquired rights, it is voidable, and upon a proper showing may be set aside and annulled.

Said decision will not, therefore, in the future be held to control the action of this office.

In every case where a party applies to make a homestead entry under the third section of the act of May 14, 1880, of land already appropriated by homestead entry, he will be required to give notice to the adverse claimant and establish the priority of his claim. If this is satisfactorily done, the adverse claim will be canceled and the applicant allowed to enter.

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.

In the case relative to which your report was made, the transmutation having been made, you will allow the adverse homestead claimants, Struble and Reese, sixty days within which to show cause why their entries should not be canceled for conflict with the claim of Mrs. Wolf.

RESERVATION—TRESPASS—SECOND FILING.

REES v. CHURCHILL.

All inchoate claims or mere pre-emption rights are extinguished by the reservation of the land embracing them.

After the reservation, one who was before a settler in pursuance of law, is no longer entitled to the possession of land embraced therein, and by retaining possession becomes a trespasser.

If he has filed a declaratory statement he is entitled to file another for other land upon which he may have settled.

*Commissioner McFarlanā to register and receiver, Watertown, Dakota,
January 4, 1882.*

I have examined the case of Cyrus B. Rees v. James B. Churchill, involving the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 22, T. 120 N., R. 63 W., on appeal by plaintiff from your adverse decision. Rees filed D. S. No. 3741, May 22, alleging settlement January 1, 1879, and Churchill filed D. S. No. 3935, June 25, alleging settlement April 3, 1879. You do not report date of filing township plat in your office, but state that the parties filed within the limited time thereafter. The township embracing these settlements was reserved for the Drifting Goose band of Sioux Indians by Executive order of June 27, 1879, and restored to settlement and entry by order of July 13, 1880.

This office holds that all inchoate claims or mere pre-emption rights are extinguished by the exercise of the Presidential power, in reserving

for public uses the land to which they relate. After the reservation one who was before a settler in pursuance of law is no longer entitled to the possession of land embraced therein, and by retaining possession becomes a trespasser and subject to removal by the proper power. If he has filed a declaratory statement he becomes entitled, upon presentation of the facts to this office, to file again for other land upon which he may have made settlement, because he cannot in such case be said to have lost his pre-emption right through his own fault. But his claim to the reserved land is, by the act of reservation, completely obliterated. It follows from this view of the case that neither Churchill nor Rees can claim any rights by virtue of their settlements upon and filings for the land in contest in 1879, and hence it is not necessary to consider the large amount of testimony submitted for the purpose of establishing the validity or determining the priority of their respective claims, nor that submitted by Rees for the purpose of showing that Churchill dispossessed him by threats of violence, and prevented his continued compliance with law.

The proof and payment tendered by Churchill in October, 1880, must be rejected, because the right of entry claimed by him is based upon his settlement and filing in 1879, prior to the reservation, and upon an alleged compliance with law during its existence, when his occupation was that of a *trespasser*, and not that of a pre-emption settler.

It appears, however, that Churchill was in possession of improvements and residing upon the land at date of its restoration. This constituted a settlement upon which he may now base a pre-emption claim, and, by filing his declaratory statement and by compliance with the requirements of law, acquire a right of entry.

Rees was not a settler at date of restoration, and hence the claim of Churchill would have priority over any claim he might present, which would be allowed subject to the former's compliance with law. I therefore reject the claims of both parties, based upon their alleged settlements in 1879, and direct that you allow Churchill, if he so desires it, to file his declaratory statement based upon his settlement at the time of the restoration of the land.

Advise the parties of this decision, and of their right of appeal.

RESERVATION—COMPENSATION—BONA FIDE PRE-EMPTORS.

ALBERT WHITE.

Although the President may reserve for Indian purposes lands upon which are existing *bona fide* pre-emption claims, the government should not deprive the settlers of the fruits of their labor, against their consent, without proper compensation.

Secretary Teller to Commissioner McFarland, February 10, 1881.

I have considered the appeal of Albert White from your decision of April 10, 1882, rejecting his application to file a pre-emption declara-

tory statement upon the SW. $\frac{1}{4}$ of Sec. 13, T. 29, R. 15, Santa Fé, N. Mex., under an alleged settlement of July 1, 1879.

The tract is within the limits of the Navajo Indian reservation, and was withdrawn from sale and settlement by the President's order of January 6, 1880, and set apart as an addition to their (then) present reservation. (Report of the Commissioner of Indian Affairs, 1882, p. 284.)

In reply to the request of the Secretary of War for his opinion whether the Executive could set apart as a military reservation surveyed public lands upon which pre-emption filings and homestead entries have been made in accordance with law, the Attorney-General, under date of July 15, 1881 (8 C. L. O., 72), after reviewing sundry decisions of the supreme court, and discussing the rights of pre-emptors and homestead-entry men, says that the claim of a homestead settler is initiated by an entry of the land, after which it ceases to be at the disposal of the government so long as the claim or entry of the settler subsists, and that his right can only be defeated by failure to comply with the requirements of the law; but that public land covered by a pre-emption filing, as to which there has been no payment and entry by the settler, may be appropriated by Congress to public purposes, or otherwise disposed of, without thereby involving a collision with or invasion of any right or interest of the settler in and to the land, and that such land may be as effectually reserved and set apart by the President—who is regarded as acting by authority of Congress—as by the direct action of Congress.

Admitting that such land may be set apart by the President as well for an Indian as for a military reservation, and that the opinion of the Attorney-General fairly states the legal distinction between the homestead and the pre-emption laws and rights thereunder, I am not convinced of the justice thereof, when carried into practical operation, as respects a pre-emptor. This person is required to settle upon land before he can file for it, and to improve and inhabit before he can enter it. Until entry by proof of compliance with the law and payment of the price, he does not acquire a *vested* right, but he has a *quasi* property in the land, earned by his labor and his money, in the expectation of securing, under the pledges of the government, a home; and it does not seem to me consistent with the fair dealing the government owes its citizens to deprive him of the fruit of his nearly completed toils, against his consent, without proper compensation. The condemnation of private property to public uses without remuneration is odious to our whole system of law, and, in my judgment, should never be resorted to unless absolutely demanded by the exigencies of the government.

The record shows that White (and it is understood others also) settled on and improved land within this reservation prior to the President's order, and, so far as appears, in good faith. Such settlers should,

in the absence of compensation, if possible, be protected in their settlements.

You will therefore cause an examination to be made of the dates and location of the settlements made on this reservation prior to January 6, 1880, with the character and value of the improvements, so that if the President should find it compatible with public interests, and should so see fit, he may release such tracts from the reservation.

Pending such examination, and until the further action of this Department, the case of White and of other settlers on said reservation prior to the date of the President's order, will remain suspended. Your decision is modified accordingly. Upon report of such examination you will transmit the same to this Department.

OCCUPANCY—ACTS AND DECLARATIONS—CONVEYANCE.

STATE OF CALIFORNIA *v.* ALARI.*

Mere occupancy of public land, without pre-emption claim, does not secure to one the benefits of that law.

It is only when the party manifests an intention, by acts or declarations, to claim its privileges that he becomes a pre-emptor.

Where the pre-emptor, prior to entry and without fraudulent intent conveys an inconsiderable quantity of the tract claimed, the law will not, under the maxim *de minimis non curat lex*, hold him to the strict provisions of section 2262, Rev. Stats.

Acting Secretary Joslyn to Commissioner McFarland, August 11, 1882.

I have considered the case of the State of California *v.* Juan de Jesus Alari, involving the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and lots 1, 2 and 3 of Sec 34, T. 1 S., R. 9 W., Los Angeles, Cal., land district, on appeal, by both parties, from your decision of October 13, 1881, holding the State's selection of the tracts subject to Alari's ability to show, when he offers final proof and payment, a reconveyance to himself, or a release by his grantees, or those holding under them, of the lands named in the deeds below mentioned, or an elimination of said lands from his application.

Alari filed declaratory statement December 17, 1877, alleging settlement December 15, 1857; and the State filed indemnity selection November 8, 1877.

The township plat was filed September 28, 1877.

On September 14, 1865, Alari made a quitclaim deed of about one acre of the land to one Vejar, and in November, 1869, a warranty deed for 3.72 acres to one Lobo, stated therein to have been originally a portion of the Rancho de Los Nogales, confirmed to one Lenares.

The State claims that these conveyances, made after the date of Alari's alleged settlement, in 1857, disqualify him as a pre-emptor, under Sec. 2262, Rev. Stat., which requires a pre-emptor, before he is

* See Commissioner's decision, 1 L. D., 407.

allowed to enter lands under the pre-emption law, to make oath that he has not made any contract or agreement by which the title he might acquire from the United States should inure in whole or in part to the benefit of any person except himself; and this because, it is alleged, the title Alari may acquire under the pre-emption law to the land embraced in said deeds, and especially to that named in the warranty deed to Lobo, would pass by operation of law and by the statutes of California to his grantee.

Subsequently to the hearing, Alari moved for amendment of his declaratory statement, by inserting a date of settlement within the last five or six years, alleging that the originally inserted date was by mistake. Counsel for the State consented that the motion "be filed as of the date of the trial." That matter, however, becomes immaterial under the testimony.

At the hearing in 1878 Alari testified that he moved on the land more than twenty years previously, having married a daughter of Lenares, the Mexican grantee of the Nogales rancho, of which the tracts are a part; that his wife was owner in whole or in part of said rancho, as heir at law of Lenares, deceased; that he has ever since lived thereon, with his wife and children during her lifetime, and with his children since her death, claiming it in her right (with the exception of the small parcels named) up to five or six years ago (about 1873), when he was advised by counsel that, as the tract had become government land, he could no longer make said claim; and that he thereafter claimed the land as a pre-emptor. His testimony is not contradicted, and being reasonable in itself and without suspicion of fraud or falsity, must establish the year of his first pre-emption claim and settlement. His prior occupancy was without legal effect, because mere occupancy of public land, without pre-emption claim, does not secure to one the benefits of that law. It is only when he manifests an intention, by acts or declarations, to claim its privileges, that he becomes a pre-emptor.

It is not necessary to consider the decision of the supreme court in the case of *Myers v. Croft* (13 Wall., 291), to the effect that sections 2262 and 2263, Revised Statutes, were intended to apply to *pre-emptors* only, and prevent *them* from making speculative and fraudulent settlements and filings, and that what one does prior to his becoming a pre-emptor is not within its contemplation. Section 2262 provides that "before any person claiming the benefit of this chapter is allowed to enter lands," he shall make the prescribed oath. On behalf of Alari it is claimed that he may, with impunity, take this oath, because the tracts conveyed by him were not lands title to which he had acquired from the United States under the pre-emption law, or which he was then endeavoring to acquire, but were lands claimed under a Mexican grant, which at that date, under the restrictive provisions of the act of 1851 (9 Stat., 631) had not become a "part of the public domain of the United States." (*Newhall v. Sanger*, 92 U. S., 761.)

Without deciding this question or considering the collateral effect of the deeds named, I am of the opinion that, as both of said deeds embrace less than five acres of the land involved, the law will not, under the maxim *de minimis non curat lex*, hold Alari to the strict provisions of said section (Brown's Legal Maxims, 146). As said deeds were not executed with any fraudulent intent under the pre-emption law, and as he has the great body of the tract in his own possession with a house thereon and several acres of the land under cultivation, and seeks to acquire the same solely for his own use and benefit, the title to the small immaterial portions conveyed as recited being merely subordinate and incidental; and as he made his filing within the time required by law after the township plat was filed and his settlement was prior to the State's selection, your decision should be affirmed without the conditions therein named, and the land be awarded to him.

LAND DEPARTMENT—JURISDICTION—LAND OCCUPIED FOR BUSINESS.

WILLARDSON *v.* DUSTERBERG.

The Commissioner of the General Land Office has jurisdiction, by virtue of his supervisory authority, to examine the record in a case in which no appeal was taken from the decision or the local officers, and, if the law has been misconstrued by them, to reverse their decision.

Land occupied for business purposes and not for agriculture cannot be entered under the provisions of the pre-emption and homestead laws.

Commissioner McFarland to register and receiver, Salt Lake City, Utah, November 17, 1882.

I have examined the case of Christian Willardson *v.* Max. Dusterberg, involving the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 10, T. 17 S., R. 3 E.

Willardson filed D. S. 1322 for the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ said section, June 7, 1869, alleging settlement May 15, 1866, and made pre-emption cash entry No. 600 thereof April 5, 1871, upon which patent issued September 30, 1871.

October 20, 1877, he applied for an amendment of said entry and patent to embrace the tract in contest upon the ground that through an erroneous survey by the county surveyor for the purpose of re-establishing the lines of the official survey which had become obliterated he had failed to secure the tract, embracing his improvements, upon which he had settled.

The records of this office, showing that Dusterberg had, July 31, 1877, made homestead entry No. 3170 for said W. $\frac{1}{2}$ SE. $\frac{1}{4}$, a hearing was ordered by my predecessor's letter (G) of December 28, 1877, "to bring out all the facts touching the settlement upon and improvement of the 80-acre tract, by Willardson, and as to the compliance by Dusterberg with the requirements of the homestead law."

Trial was duly had and your opinion rendered August 31, 1878, recommending that Willardson be permitted to make a new entry, embracing the tract in contest, upon surrendering the outstanding patent. There is no appeal from this decision on file in the case, but its absence does not deprive me of jurisdiction over the matter and render it obligatory upon me to act upon your recommendation.

The circular of November 12, 1877 (par. 3), in force at the time the decision in this case was rendered, referring to the subject of appeals, provides that an appeal from the decision of the local officers, when based upon frivolous grounds, will be dismissed, except when "in *the record itself*, either of the case or upon the books of this office, some sufficient cause shall be found for further consideration under the general power of supervision vested in the Commissioner by law.

In the case of *Bell v. Hearne* (19 Howard, 252), the supreme court say:

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 extensive operations of that office for the disposal of the public domain.

The facts stated in your decision are not such as to convince me of the propriety of granting Willardson's application, and in directing the issuance of a patent as prayed for. As an executive officer it is my duty to ascertain that he is, under the law, entitled to the patent, and if he is not, to suspend its issuance notwithstanding your opinion. (See 3 Opinions Attys. Genl., pp. 93 and 697; 10 *Ib.*, p. 56.)

I have not, therefore, hesitated to exercise the general power of supervision vested in me, and to review the whole case.

There is no controversy over the allegation that through mistake the entry of Willardson failed to embrace the tract claimed and intended to be entered.

In 1866 applicant purchased for \$7,000 a grist mill, shown to be upon the dividing line between the NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 10. His filing and entry were made for the purpose of securing title to this property. To entitle him to an amendment of his entry and patent it must appear that he in good faith resided upon, improved, and used this tract for agricultural purposes, and that it was of the class subject to pre-emption. His own testimony, however, shows that the land principally is unfit for cultivation and has no value except for the mill upon it; that for years prior to his purchase it had been used only for the manufacture of flour; that after his purchase he used it for the same purpose; that while he *occupied* he did not *reside* upon it, and that his sole use of it was for business purposes.

There is, in my opinion, a complete analogy between this case and that of the Southern Pacific Railroad Company *v.* James Newton (8

C. L. O., 37), wherein it appeared that Newton occupied and used the land to carry on his business of manufacturing lime, which he sold in the market, and that he failed to cultivate and improve it as required by the pre-emption law. The honorable Secretary held that he was an occupant of the land, but in no sense a pre-emptor, according to a correct definition of that term.

This ruling applies with equal force to the case of Willardson. He was not at date of his entry entitled to a patent under the pre-emption law, and his application is accordingly refused.

The facts in this case show that the patent issued to him in 1871 was inadvertently and irregularly issued, yet it was issued by this office acting within the scope of its authority, and I have consequently no further jurisdiction over the title to the land embraced therein. Said patent will, if this decision becomes final, be returned to Mr. Willardson.

In regard to Dusterberg's entry, the evidence shows that at date thereof the land was used for purposes of business and trade. Lands so used are not subject to pre-emption (Sec. 2258 Rev. Stats.), and consequently are not subject to homestead entry.

Said entry is therefore invalid and held for cancellation.

HOMESTEAD ENTRY—AMENDMENT.

SNODDERLY *v.* FULTON.

A settler who for want of diligence fails to properly describe the land claimed by him cannot subsequently be allowed to take advantage of his own laches to defeat another who settled with notice of his claim as shown by the record. His entry is notice to the world of the tracts to which he had the right of possession, and he cannot by extending his actual possession to tracts not embraced therein, and to which he had no lawful right, exclude settlement or entry by other qualified persons.

Commissioner McFarland to register and receiver, Los Angeles, California, November 28, 1881.

I have examined the case of Emanuel Snodderly *v.* W. H. Fulton, involving the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 24, T. 7 N., R. 5 W., S. B. M., wherein you rendered disagreeing opinions. Snodderly made homestead entry No. 351, February 23, 1878, embracing NE. $\frac{1}{4}$ said section, and was allowed by letter (C) of February 13, 1880, to amend same to embrace in lieu of the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ the tract in contest. Fulton filed D. S. No. 1743 April 30, alleging settlement April 22, 1879.

The testimony shows that prior to his entry Snodderly purchased the improvements of one D. C. Young, a prior claimant of the land, consisting of fences, ditches, and a small field. The house of Young was

on the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, and Snodderly lived therein until, as he states, he discovered the mistake in his entry. He then built a house on the W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and established his residence there. This, according to one Spencer, was in the winter of 1879, or more than a year after the date of his (Snodderly's) entry. The entry as originally made embraced his residence and the major portion of his improvements, although he also had improvements—fencing, ditches, and part of a small field—extending upon the tract in dispute, of which he was in possession, so that whether he had made his entry as amended or as originally, there would still be a tract excluded upon which he had improvements, and he could with as much reason in either case apply for an amendment upon a change of intention. Indeed, in view of the facts shown, and of the evidence tending to show that he was aware there was a tract west of his original location (see testimony of Bemis) upon which the improvements extended, and of the evidence of declarations made by him, I think there is much reason to doubt that he made any mistake in the description of the land he desired to enter. But aside from this, it appears that the settlement of Fulton was made with the knowledge and consent of Snodderly, who witnessed the signature to his declaratory statement, and I concur in the receiver's opinion that he cannot at this late day plead ignorance as to what land was covered by Fulton's filing, nor attack the same.

The land was surveyed at the date of his entry, and by the use of proper diligence he could have discovered the proper description of the tracts he desired to enter. Having failed to do so, he cannot subsequently be allowed to take advantage of his own laches to defeat another who settled not only with notice of his claim, as shown by the record, but with his knowledge and consent.

Moreover, his entry was notice to the world of the tracts to which he had the right of possession, and he could not by extending his actual possession to tracts not embraced therein, and to which he had no lawful right, exclude settlement or entry by other qualified persons. In this respect—if, as does not appear, Fulton had forcibly invaded Snodderly's possession of the tract in contest, or violated his enclosures—the case would come within the decision in case of *Powers v. Forbes* (C. 7, L. O., 149).

In regard to the mortgage shown by Exhibit B to have been executed by Fulton, it is only necessary to state that as he has not applied to make entry the case comes within the principles of the decision of 10th ultimo, addressed to your office, in the case of *State of California v. Alari* (Law Reporter, November 9, 1881, p. 716). The land is awarded to Fulton, who will be allowed to enter, if this decision becomes final. The entry of Snodderly will remain intact, subject to the former's proof. Advise the parties of this decision and allow time for appeal.

DECLARATORY STATEMENT—MISTAKE OF PUBLIC OFFICER.

1817 139
 37 " 354
 22 " 540

VETTEL *v.* NORTON.

Where a pre-emptor filed a declaratory statement for a tract of land that had been "offered," but received a certificate from the register of the local office that the land was "unoffered," and did not prove up within the time limited by law for offered land, such party has a right to depend upon the certificate of the government officer, acting within the scope of his authority, and the law will protect him.

Secretary Kirkwood to Commissioner McFarland, December 19, 1881.

I have considered the case of William Vettel *v.* Michael Norton, involving the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 8, T. 24 N., R. 1 W., Marysville, Cal., on appeal by Norton from your decision of April 29, 1881, holding his entry for cancellation, and awarding the land to Vettel.

The record shows that Vettel filed declaratory statement January 2, 1878, alleging settlement December 31, 1877, and that Norton made homestead entry for the same tracts March 22, 1879.

The land was "offered" June 3, 1861, and under section 2264 Rev. Stat. Vettel was required to make his proof and payment within twelve months from the date of his settlement. Upon the day of his filing, the register issued to him a certificate wherein he stated that the "land has not been offered at public sale;" to which certificate was a footnote stating that, for "offered" lands, proof and payment must be made within twelve months from the date of settlement; but if the land has not been offered, the settler has thirty months within which to enter and pay for it. Relying thereon, as he was justified in doing, Vettel did not offer his proof and payment until about fifteen months from the date of his settlement, and after the entry of Norton, when he was first advised of the erroneous statement of said certificate, and immediately made such application. He has a house and other outbuildings, about 140 acres broken, 70 acres under cultivation. Norton has erected a small cabin in one corner of the land, but has made no other improvements.

Strictly, Vettel failed to comply with a requirement of the law, and in the presence of a valid adverse claim, his filing would be subject to forfeiture. Although he was presumed to know of the proclamation of the President offering this land for sale, and that he was required, under section 2264, to make his proof and payment within twelve months from his settlement, that presumption was overcome by the statement of an official certificate that the lands were "unoffered," and that he could make his proof and payment within thirty months. The register was authorized to certify to the status of the lands. The certificate was is-

sued for the sole and express purpose of instructing and protecting him in his duties and rights; and he is fairly within the ruling of the supreme court in the case of *Lytle v. The State of Arkansas* (9 How., 314), that if an individual fails to attain his rights by the misconduct or neglect of a public officer, the law will protect him. His failure to make proof and payment within the required time was not from laches on his part, but from an erroneous statement of an officer of the government, acting within the scope of his authority. Having trusted to said certificate, he should not now be made to suffer therefrom, and lose his valuable improvements.

PRE-EMPTION—BOARD OF EQUITABLE ADJUDICATION.

LYDIA STEELE.

The entry of a married woman, where all the necessary acts, including publication of notice of intention to make proof, have been performed prior to marriage, should be submitted to the Board for confirmation.

Secretary Teller to Commissioner McFarland, February 13, 1883.

I have considered the appeal of Mrs. Lydia Steele from your decision of May 8, 1882, holding for cancellation her cash entry, No. 449, for the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 3, and the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 10, T. 15 N., R. 23 W., North Platte, Nebr.

Mrs. Steele filed her declaratory statement for said tracts on the 23d of March, 1880, in the name of Lydia Graves, that being her name prior to her marriage, which occurred on the 25th of May, 1881.

The entry was made on the 15th day of July, 1881, and consequently after the date of marriage. For this reason, and in accordance with a long-established practice of the Department to the effect that where a single woman marries after filing her declaratory statement, and before making proof, she should be treated as having abandoned her right as a pre-emptor under the act of 1841, you decided adversely to claimant. In this case proof has been made and the money paid for the land. Though the entry was thus completed subsequent to appellant's marriage, every other necessary act of hers, including the publication of notice to prove up, appears to have been performed prior to her marriage, and there seems to be no doubt that she acted in good faith throughout. No adverse claim has intervened. Without discussing the question raised by your decision, I therefore think the case a proper one to submit to the Board of Equitable Adjudication for its action under sections 2450 to 2457 of the Revised Statutes, and your decision is modified accordingly.

PRE-EMPTION—ACT OF MARCH 3, 1879—INTERVENING CLAIMS.

1872 to 82

48 - 545

RAMAGE *v.* MALONEY.

If notice of intention to make proof and payment under act of March 3, 1879, is given prior to the expiration of the statutory period, the entry, when made, takes effect by relation from the date of such notice, to the exclusion of all intervening claims.

Secretary Teller to Commissioner McFarland, April 28, 1882.

I have considered the case of J. B. Ramage *v.* Michael Maloney, on appeal from your decision of July 18, 1881, allowing the latter to make proof and payment on his pre-emption claim, notwithstanding the lapse of more than thirty-three months from his date of settlement, and notwithstanding the admission of a timber-culture application made by Ramage before final proof and payment by Maloney, but after he had filed and published notice of his intention to make such proof on a day fixed by said notice, as required by act of March 3, 1879 (20 Stat., 472). The tract involved is the NE. $\frac{1}{4}$ of 10, 108, 45, Tracy land district, Minnesota. Maloney filed declaratory statement, March 22, 1878, alleging settlement on that day. His thirty-three months expired December 22, 1880. May 2, 1881, he filed and published notice of his intention to make final proof on the 3d of June, and made proof accordingly. May 6, 1881, Ramage made timber-culture entry No. 1429, with full knowledge of the claim, settlement, and notice of Maloney. The equities are all with the latter. He explains his failure to make proof in December by reason of severe and unusual storms, closing the avenues of business, and also on account of critical illness in his family, rendering it nearly, if not absolutely, impossible for him to offer proof and payment at that time. He has eighty-seven acres in cultivation, and has maintained continuous residence on the land. It is well-settled practice, in harmony with the decisions of the supreme court, and especially in *Johnson v. Towsley* (13 Wall., 72), that a person may comply with the requirements of the pre-emption law after the expiration of the limitation fixed by statute, if at the date of offering such compliance the right of no other settler has intervened. Had the law remained as in 1878, when Maloney settled, he could, at once, on the 2d of May, 1881, when he reached the district office, have made final proof and payment, and secured his certificate before any application on the part of Ramage. The only question to be considered is whether or not the act of 1879, having required notice of not less than thirty days, his notice of intention to make complete entry on a certain day thereafter could operate to save his right for that period, and prevent a third party in the mean time from defeating his claim by an application for entry. You decide that such notice was sufficient; in effect, that it was the beginning of the proper statutory proceeding for making final proof, and one of the connected steps of such proceeding; that the whole matter stands by relation to the initial step, and when consummated, has still further relation to the

original settlement right, entitling the claimant to a patent to the exclusion of all intervening claims.

I affirm your decision. To hold a contrary view would invite any stranger to the land, who might, for the first time, be advised by the notice itself of the previous laches of the claimant, to step in and compel the enforcement of a forfeiture upon such technical default, although the government itself, as declared in *Johnson v. Towsley*, would be unauthorized to take advantage of the laches, and the party has already taken steps to cure the same before any adverse interest has been acquired or claimed. The allowance of such a speculative interest, to defeat an honest settler and deprive him of not only the land, but the expenses of notice, publication, and proof, would not only work essential injustice, but encourage unauthorized trespass upon the rights and property of others in violation of the true intent and purposes of the law.

PRE-EMPTION—TRUSTEE—PATENT—LEGAL TITLE.

JAMES AIKEN.

A person who owns land in trust for others is not the proprietor of such lands within the meaning of the pre-emption act, and is not thereby disqualified from becoming a pre-emptor.

An entry of land for cash or scrip gives the party making it a right to a patent, if it be found regular and valid.

The proprietorship contemplated by the pre-emption act is a legal and absolute one, and not the mere equity of a land-office entry, which may or may not ripen into such ownership.

Secretary Teller to Commissioner McFarland, June 14, 1882.

I have considered the appeal of James Aiken from your decision of March 2, 1880, rejecting his application for reinstatement of his cash entry No. 3464, for the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 2, and the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 11, T. 27 S., R. 13 W., Roseburg, Oreg.

It appears that on March 30, 1872, Aiken filed declaratory statement for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 2, and the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ of Sec. 11 of said township, alleging settlement May 20, 1869; and that on April 16, 1872, he proved up and paid for the same.

It also appears that G. W. Pratt filed declaratory statement April 17, 1872, for (with other tracts) the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 2, and the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 11, being 80 acres of the 160 acres embraced in Aiken's filing. After contest between Pratt and Aiken, respecting the tracts in conflict, they were awarded to Pratt, and he made cash entry therefor, No. 3513, August 19, 1875, and they have been patented to him. Upon the same day (your award of January 24, 1874, in favor of Pratt, having been affirmed by this Department on appeal) Aiken's cash entry, as well for the tracts in conflict with Pratt as for those which were not, was

canceled because he was not a qualified pre-emptor at the date of his filing by reason of his ownership of more than 320 acres of land; and his purchase money for all of the tracts has been refunded to him.

This decision was based on the claim that Aiken being owner in his own right of 160 acres (part of Sec. 36, T. 26, R. 13 W., in said land district) on June 1, 1871, jointly with five others entered at the said land office (cash entry No. 3071) 3,520 acres, and on the same day located with Agricultural College scrip 2,080 other acres, and on February 1, 1872, entered at the same office (cash entry No. 3,352) 1,520 other acres, making an aggregate of 7,120 acres, in which he was a joint owner of one undivided sixth part. At the date of said decision affidavits were on file to the effect that in all of said joint transactions Aiken was the agent of the firm of Flushman & Co., who furnished all the money therefor; that said entries and location were for the exclusive use and benefit of said firm, and that Aiken acted in said matters as agent only, without personal interest.

Since the date of said decision a certified copy of a deed from James Aiken to A. G. Aiken, dated February 19, 1872, has been filed, showing a conveyance to the latter of the undivided one-sixth part of the land embraced in said entries and location for 7,120 acres; and showing also that at the date of his filing James Aiken had no legal interest in said lands.

It also appears that one Ferry, to whom Pratt had assigned the lands patented to him, recovered a judgment against James Aiken for possession of said lands; and that Aiken brought a suit in equity in the United States district court for the district of Oregon, to enjoin Ferry from enforcing the same; that the patent to Pratt be held to inure to his (Aiken's) own benefit, and that Ferry be required to release to him his interest in said lands.

In his decision of the case Judge Deady says: "A person who owns land in trust for others is not a proprietor of such lands within the prohibition of the pre-emption act, and is not thereby disqualified from becoming a pre-emptor." The pre-emption act provides that "no person who is the proprietor of 320 acres of land shall acquire any right of pre-emption under this act." This right of pre-emption is not an interest in the land, but only the right to be preferred as a purchaser of a certain portion of the public lands at the minimum price, irrespective of its real value (*Myers v. Croft*, 13 Wall., 296; 10 Opin., 571). An entry of land for cash or scrip gives the party making it a right to a patent, if it be found regular and valid. But it does not pass the title which remains in the United States until the patent issues. The person making the entry, if there be no valid objection thereto, as against the government, has a right to the conveyance of the legal title, but as the government cannot be sued without its consent such a right is little else than a mere moral one. In my judgment the proprietorship contemplated by the pre-emption act is

a legal and absolute one, and not the mere equity of a land office entry, which may or may not ripen into such ownership. It follows from these premises that the plaintiff was not the *proprietor* of 320 acres of land, and therefore not disqualified to acquire a pre-emption right," and, holding that the patent to Pratt "wrongfully issued upon an erroneous construction of the law, and he took the same in trust for the plaintiff who was entitled to the patent therefor," he directed Ferry to convey to Aiken the tracts patented to Pratt, and enjoined Ferry from enforcing his judgment. No appeal was taken from this decision.

In view thereof, and of the above-named deed of February 19, 1872, I reverse your decision, and direct the reinstatement of Aiken's cash entry upon his repayment to the officers of the local land district of the price of said land.

PRACTICE—NOTICE OF DECISION—TIME FOR APPEAL.

ROACH *v.* MYERS ET AL.

When notice of decision is given to resident counsel, and to the party through the local office, the time for appeal should be computed as commencing to run from date of service of notice upon the party himself.

Commissioner McFarland to register and receiver, St. Cloud, Minn., October 17, 1881.

I have considered the motion filed by defendant's attorneys to dismiss the appeal in the case of Milledge L. Roach *v.* James Myers and Harlan Cole, for the reason that said appeal was not filed in this office within the period limited by the rules of practice.

The decision in said case was rendered June 25, 1881, and the appeal was filed in this office by Roach's resident attorneys September 1, 1881. The notices to resident counsel have even date with the decision, and were mailed June 27, 1881, so that if the 60 days allowed for appeal by rule 86 (exclusive of the day of mailing notice) commenced to run from time of service of notice upon resident counsel, the time for filing appeal expired August 26, 1881.

The local officers were, however, in accordance with the invariable practice of this office, instructed by the closing paragraph of the decision to notify the parties in interest of the contents thereof. When notice of decision is given by the local officers, ten days additional to the time allowed by rule 86 are allowed for transmission of notice and return of the appeal through the mails, thus allowing the party seventy days from date of their notice within which to file his appeal. There may be some question as to when, in case of notice being given both to a party's attorney resident in this city and to himself through the local office, the time commences to run—whether from date of notice to himself or to his attorney. In such a case I am of opinion that the rules should be liberally construed that the party in interest may have every

opportunity to secure his right of appeal, and consequently that the time allowed for that purpose should be computed as commencing to run from date of service of notice upon the party himself. From this standpoint the appeal of Roach was filed in time, and the motion to overrule the same is accordingly dismissed. The case will be transmitted to the Hon. Secretary of the Interior in its regular order.

RAILROAD TITLE—SELECTION—DEFAULT, ETC.

GILBERT *v.* SAINT JOSEPH & DENVER R. R. Co.

While a railroad grant *in presenti* is a title of record, yet as the company must make selections and pay the required selection fees, it is amenable to citations in contests where settlers' rights are involved.

When the railroad company makes default without explanation, the case as herein becomes an *ex parte* one, and the question of compliance with law may be submitted to the Board of Equitable Adjudication.

Secretary Kirkwood to Commissioner McFarland, October 31, 1881.

I have considered the application of the Saint Joseph and Denver City Railroad Company (filed March 28, 1881, by John B. Bloss, its resident attorney) for a reconsideration of my decision of March 11, 1881, in the case of Samuel N. Gilbert *v.* said company, holding that the company waived its right to object to the consummation of Gilbert's title to the NW. $\frac{1}{4}$ of Sec. 27, T. 2 S., R. 4 E., Concordia district, Kansas.

This application is based upon the ground that Gilbert having failed to appeal from the decision of the receiver and register, the Commissioner had no jurisdiction in the premises; that this case does not come within the provisions of the second section of the act of April 21, 1876, because there was no such claim extant upon said tract at the date of the withdrawal for the railroad as said section contemplates; that the company's selection pending the contest was not "gross irregularity" on its part; that the company waived nothing by its failure to appear at the hearing, as its claim was of record, and it was not therefore obliged to select the land in question, although it did so select; and that if this case was confirmed by the act of 1876, it cannot be held for confirmation by the Board of Equitable Adjudication.

Inasmuch as my decision in question, rendered after a careful examination of the facts in this case and due consideration of the law governing the same, held that there had been such "gross irregularity as to bring it within the category of exceptions to the general rule and justify you in disturbing the decision of the register and receiver," I deem it unnecessary to reiterate further upon this point.

In regard to the second point of exception, to wit, that this case does not come within the second section of the act, for the reason stated, that *McKennett* was not shown to have been a qualified pre-emptor, and

because Gilbert did not make proof as required by said act, it is only necessary to state that the record shows that Gilbert appeared at the hearing had February 10, 1879, and introduced testimony establishing the validity of *John I. Brown's* pre-emption claim to the land in question, upon which he resided "until the summer of 1870," which uncontroverted proof rendered it competent for the Department to regard Brown's claim as valid on April 15, 1870, the date on which the withdrawal became effective.

As to the third point, to wit, that the company waived nothing by its failure to appear at the hearing, as its claim was of record, and it was not therefore obliged to select the tract in question, etc., it is only necessary to state that while it is true that a railroad's right to lands within the granted limits by virtue of a grant *in presenti* is a title of record, which the Department, in the absence of an adverse claim thereto, would recognize, and renders the lands properly subject to selection, it is equally true that railroad companies are invariably required to select their lands at the proper local office and pay the regular selection fee therefor; that in all contested cases, when duly and regularly cited thereto upon the motion of an adverse claimant, they are invariably held to be amenable to such citation; it being the purpose of the law-making power to protect all homestead and pre-emption entries made in good faith, and to require the railroad company to assert title to its lands before a *bona fide* settler had obtained even color of title from the United States. Consequently, when said Saint Joseph and Denver City Railroad Company failed to assert title to the tract in question by attending said hearing, it may be considered as having thereby waived its right to object to the consummation of Gilbert's title to the same.

The remaining point of exception is to the effect that if this case was confirmed by the act of 1876, it cannot be held for confirmation by said Board.

In reply thereto, I am of the opinion that where a party is estopped from asserting title in any case, and it is thereafter decided by a competent tribunal, *e. g.*, by the Department, as in this case, to be between the United States and the party who, in the first instance, claimed adversely to the party estopped, the rights, if any, of the latter are thereby determined by relation, in so far as the Department's jurisdiction is concerned, to the time when said estoppel obtained; and he has thereafter no standing before the same. It is therefore, in such a case, competent for the Department to regard the same as *ex parte*, or as between the United States and said adverse claimant. In other words, the rule broadly stated is, that in all cases where there are two parties to the record, and the one is regularly cited to a hearing therein upon the motion of the other, but fails to respond thereto, the party thus failing shall thereafter be regarded as in default, and as having no standing whatever in the premises before the Department, unless he shall within

a reasonable time satisfactorily explain the cause of his default, and obtain reinstatement to his privileges as a party to the record.

As shown by the decision in question, the railroad company, although regularly cited to appear at the hearing had in this case upon Gilbert's motion, failed or refused to respond, and has never pretended to offer any explanations of its laches, but on the contrary claims the right to ignore such citation, as well as the rule prohibiting it from selecting said land pending said contest and while Gilbert's adverse claim therefor was extant upon the record.

It will be observed that the cases of *Gates v. California and Oregon Railroad Company* (5 C. L. O., 150), and of *Conway v. The Little Rock and Fort Smith Railway Company*, decided by the Department October 14, 1880, are clearly distinguishable from this in that there was no default alleged or suggested therein on the part of the railroad company.

The application is accordingly rejected.

PRACTICE—APPEAL—FINALITY OF DECISION.

BROWN *v.* JEFFERSON ET AL.

Failure to appeal from the decision of the register and receiver is a waiver of any rights which the party may have had in the land in controversy; and where the decisions of the local officers have been, without appeal, reviewed by the Commissioner of the General Land Office, the Department, upon appeal, will not review the decision, but will dismiss the appeal and consider the decision of the local officers final.

Exceptions to this rule are where fraud or gross irregularity is suggested on the face of the papers, or the decision is contrary to existing rules and regulations.

Secretary Teller to Commissioner McFarland, September 29, 1882.

I have considered the case of *John Brown v. Thomas Jefferson, Thomas Agan, and George Sharr*, involving the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 9, the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 10, the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 16, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 15, T. 6 N., R. 2 E., Deadwood, Dak., on appeal from your decision of June 25, 1881, reversing the decision of the register and receiver, and awarding such land to said John Brown under his pre-emption filing therefor.

The decision of the register and receiver held that the defendant Jefferson's claim was "good as to the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 15." That the defendant George Sharr was justly entitled to the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 9 and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 10." And that said "NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 16, was not legally held by any of said parties."

This decision of the local office was made on the 31st day of December, 1879. The letter of the register and receiver transmitting the testimony and other papers relating to the contest bears date February 6, 1880, and states that "no appeal has been taken from our decision in this case."

In your letter (decision) of June 25, 1881, addressed to the register and receiver, you state:

No appeal has been filed from said decision, and as you were instructed to notify the parties in interest of the purport of the decision, and advise them of their right of appeal, it is to be presumed that by reason of their failure to appeal the decision has become final.

And you then proceeded to examine the testimony taken in the case, and, upon the facts found by you, reverse the decision of the register and receiver, and award the land in controversy to Brown. It is in proof that notice of the decision of the register and receiver, in proper form as required by the rules of practice in force at that time, was duly served upon Brown. The defendants, Thomas Jefferson and George Sharr, have appealed from your decision, and ask to have the case dismissed, upon the ground that there was no appeal taken to you from the decision rendered by the register and receiver.

There was no appearance before you, and you proceeded upon your own motion to review the case and render a decision. The case is an ordinary contest, in which a large amount of testimony was taken, but involving only the questions of settlement, inhabitancy, and improvement. "Fraud or gross irregularity" was not suggested upon the face of the papers, nor was the decision of the register and receiver contrary to existing laws or regulations," within the meaning of the circular of your office of November 27, 1880, relating to "appeals from decisions of local officers."

It has long been settled in this Department that a party who fails to appeal from the decision of the register and receiver is concluded, and by his acquiescence in such decision waives any rights which he may have had in the land in controversy. (*Brown v. White*, 1 C. L. L., 298; *Shuster v. Grady et al.*, *ib.* 314; *Eaton v. California and Oregon Railroad*, 5 C. L. O., 13; *Favery v. Lansdale*, 4 *id.* 179; *Clark v. Carter*, *Hill's Leading Cases*, 1881, p. 1; *Owen v. Russell*, *Reporter*, vol. 2, p. 107; and see *Moore v. Robbins*, 6 *Otto*, 535.) And where the decisions of the local officers have been without appeal reviewed by you, upon appeal to this Department the decision of your office will not be reviewed, but the appeal will be dismissed, and the decision of the local officers considered as final. (*Benson v. Northern Pacific Railroad*, *Hill's Leading Cases*, 1880, p. 54.)

The exceptions to this rule are when fraud or gross irregularity is suggested on the face of the papers, or the decision is contrary to existing rules and regulations.

This case does not fall within those exceptions, and your action therefore in reviewing the case was erroneous.

The appeals taken from your decision by the defendants, Thomas Jefferson and George Sharr, to this Department are therefore dismissed, and the decision of the register and receiver as to the rights of the litigants must be regarded as final.

PRE-EMPTION—CITATION—HEARING—FINAL PROOF.

38-67

SPRAGUE *v.* ROBINSON.

One whose claim is of record and of acknowledged priority should not be allowed to cite the other claimants to trial otherwise than by the required publication for the purpose of making final proof.

Secretary Teller to Commissioner McFarland, August 2, 1882.

I have considered the case of Milo H. Sprague *v.* James M. Robinson, involving pre-emption right of entry to SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, and lots 1 and 2, Sec. 4, T. 35 N., R. 5 W., and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 33, T. 36 N., R. 5 W., Idaho, on appeal from your decision of March 28, 1882, allowing said Sprague to enter upon satisfactory proof of compliance with the law, and holding the filing of said Robinson for cancellation.

Sprague filed declaratory statement 958, February 7, alleging settlement February 6, 1879. Robinson filed declaratory statement 1233, December 4, 1879, alleging settlement same day.

January 12, 1880, on the application of Sprague, your office ordered a hearing.

The trial was commenced March 12, 1880, at which time a motion was made on behalf of the defendant to dismiss the case, upon "the ground that the complaint does not show the complainant entitled to a hearing in said case." Upon this question the register and receiver held and returned conflicting opinions. The trial was had, and the testimony returned.

Your office overruled the motion to dismiss the case, and upon examination of the testimony held that Sprague had acted in good faith, and had done all that could have been expected under the adverse circumstances detailed in the proofs, and directed Robinson's filing to be canceled, upon the ground that he proved no settlement.

Robinson, on appeal from your decision, assigns the following errors:

1. The Commissioner erred in taking jurisdiction of said contest and refusing the motion of the respondent to dismiss the same.
2. The Commissioner erred in canceling the pre-emption filing of the said respondent.

It will be observed that there was no question between the parties as to the priority of Sprague's filing. His filing was of record, and its priority conceded. There was no necessity for Sprague to contest the filing of Robinson in advance of an application by either to make final proof and payment. His prior right was assured to him, and in order to secure the land it was only necessary for him to comply with the provisions of the law in other respects. If it was true that Robinson had made no settlement it could not avail him. He must stand upon the strength of his own acts.

As was said in *Hanson v. Berry* (8 C. L. O., 188)—

He was in no jeopardy so long as he complied with the law; and should not have been allowed to cite the other claimants otherwise than

by the required publication for the purpose of offering final proof and payment.

No object is to be attained by such a contest unless it be to satisfy the contestant as to the sufficiency of his own acts up to a certain period in the progress of his settlement, or the insufficiency of those of other claimants.

You state that it has been the practice of your office to permit the initiation of such contests, "in order that the parties may proceed with the knowledge of the status of their respective claims."

Under such a rule several contests might be necessary during the progress of a settlement, in order to keep the parties advised of the status of their claims. Such a practice is of doubtful utility to the parties, and must tend greatly to the multiplicity of contests, and become the source of expensive litigation.

I think such contests are premature, and not contemplated by the statute relating to that subject, and the order for a hearing made by your office January 12, 1880, was therefore erroneous.

The motion to dismiss the contest should have been granted and the filing of Robinson been permitted to stand to await further proceedings. I therefore reverse your decision.

As the thirty-three months fixed by the statute for making final proof have already expired, you will direct the district officers to call upon Sprague to come forward, after due publication, and offer proof of his compliance with law, and make final entry within sixty days of notice to him of this decision, provided such proofs shall be found satisfactory.

TESTIMONY ADMISSIBLE IN CONTESTS.

SHULL v. McCORMICK.

Testimony upon matters not incident to the charges upon which the hearing was ordered is wholly foreign to the case and should not be considered.

Evidence in contests under the land laws must be confined to the allegations, as in trials at law, and judgment be rendered on the issues raised by the record only.

Secretary Teller to Commissioner McFarland, November 16, 1882.

I have considered the case of Martin L. Shull v. John McCormick, involving the NE. $\frac{1}{4}$ of Sec. 24, T. 4 N., R. 69 W., Denver, Colo., on appeal by McCormick from your decision of January 21, 1882, holding his declaratory statement for cancellation, and allowing the homestead declaratory statement of Shull to remain intact.

The record shows that McCormick filed declaratory statement March 28, alleging settlement March 19, 1879, and that Shull filed homestead declaratory statement February 17, 1881.

Shull commenced a contest February 17, 1881, alleging that McCormick failed to improve and occupy the land, and had not, to that date, erected a habitable house thereon, nor become a resident of the tract.

McCormick's non-improvement and non-residence were, therefore, the only matters for consideration at the hearing. As held in *Schelter v. Off*, (Hill's Leading Cases, 1881) testimony upon matters not incident to the charges is wholly foreign to the case, and should not be considered. Proofs in contests under the land laws must be confined to allegations, as in trials at law, and judgment be rendered on the issues raised by the records only. (See also *Stevenson v. Garrett*, 1 C. L. L., 321).

It appears from the cross-examination of McCormick that he was born in Ireland. No testimony as to his naturalization, or having filed a declaration of intention to become a citizen, was submitted. One of the grounds of your decision adverse to him was that he failed to show his citizenship or such declaration.

I think this was erroneous, because his qualifications as a pre-emptor were not in issue under this contest, and he was not required to prove them. Had the hearing been upon his application to enter the tract, or under some proceeding wherein that question was involved, proof of his qualification in this respect would have been necessary. But upon a mere question of improvement and residence, that matter was wholly immaterial to the issue, and your decision in this respect must be regarded as mere *obiter dictum* and not pertinent to the case.

It was equally erroneous, I think, in that you held as a ground of decision against McCormick that he filed his declaratory statement before his settlement. However that fact may have been, and whatever its legal effect, if true, that question was not involved in the hearing, but was foreign to the allegations McCormick was summoned to answer. Shull was not authorized to raise an issue at the hearing not legitimate to his charge, nor was McCormick required to defend such matter; and your decision thereon, as ground for cancellation of the latter's filing, was inappropriate, because not relevant to the question submitted for your consideration.

Having thus decided the case upon issues immaterial to the allegations, you fail to decide or even to refer to the only questions involved, viz, McCormick's want of improvement and residence on the tract.

The appeal from your decision alleges error therein in the matter of citizenship, in the matter of settlement and filing, and in holding McCormick's filing for cancellation on these grounds. I think the first two grounds well taken, for the reasons above stated, and the third also, because the cancellation is based on your erroneous decision in those respects.

The whole case upon the real issues is undetermined by your office, and I therefore remit it to you for further examination and decision upon the questions of fact on which the contest was brought, and you are requested to give it early attention with the usual notice of your decision to the parties.

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APPEALS FROM LOCAL AND GENERAL OFFICES.

LYNCH *v.* MERRIFIELD.

The rules for appeal from the local offices and from the General Land Office are separate and distinct, and there is no rule or provision for applying the one to the other.

These rules do not require that notice of appeal from the decision of the local officers shall be served upon the opposing party.

Secretary Teller to Commissioner McFarland, November 17, 1882.

This case, *H. P. Lynch v. L. L. Merrifield* (pre-emption), involves title to the SW. $\frac{1}{2}$ of Sec. 13 and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 14, T. 5. N., R. 4 E., Deadwood, Dak. The issue of fact therein was tried before the register and receiver, who found that Lynch had the prior right to the land. From this decision Merrifield took an appeal to your office. No claim is made but that the appeal is regular in every respect except that notice of the appeal was not given either to Lynch or his counsel. For the reason that such notice was not given, Lynch moved to dismiss the appeal, and upon hearing you sustained the motion, and held that the decision of the register and receiver became final under rule 47.

The case has been properly certified to this Department under rule 83, and the question presented is whether your order dismissing the appeal was under the rules of practice erroneous.

Rule 43 provides that appeals in every case lie from the decisions of the register and receiver to your office; rule 44, that after the hearing is closed the register and receiver shall notify the parties in interest of their decision, and that thirty days will be allowed for appeal; rule 45, that the appeal shall be written or printed, and shall specify the points of exception; and rule 46, that no such appeal will be received at your office unless forwarded by the local officers.

These rules undertake to establish the practice to be pursued in all appeals taken from the decision of the register and receiver to the General Land Office. They are simple and complete in themselves, and in order to perfect an appeal no provision seems to be wanting. While it might be proper that notice of such appeal should be given to the opposite party, such notice is not necessary or essential to the preservation of any right. If the appellant has complied with the rules relating to appeals from the local office he ought not to be deprived of his appeal—certainly not unless there is such an obvious defect in the rules as would be destructive of the rights of the appellee. No such defect appears.

The reason stated by you for holding that such notice should be given is, that while "the rules of practice do not expressly state that notice of appeal must be served upon the appellee or his counsel, they do require that notice of appeal from the decision of this office to the Secre-

tary of the Interior shall be served, and it is held by this office constructively that the same rule applies to appeals" from the local office.

The rule thus referred to is among the rules relating to "appeals from the Commissioner to the Secretary," and is as follows, viz:

RULE 86. Notice of appeal from the Commissioner's decision must be filed in the General Land Office, and served on the appellee or his counsel, within sixty days of the date of the service of notice of such decision.

This rule relates exclusively to appeals from the Commissioner to this Department.

The rules for appeal from each tribunal are distinct and separate, and there is no rule or provision for applying the one to the other. There is no room for constructive application. The rules relating to appeals from your office are quite numerous. Several of them relate to the manner of giving the required notice, and if the rule under consideration is applied by construction to appeals from the local office, it would seem indispensable that some of such rules other than rule 86 should be applied to such appeals.

I do not think that appellants or practitioners in the land department can be expected to understand that the rules, or any of them, relating to appeals from your office, apply to appeals from the local office and to so apply them by construction will lead to confusion and great uncertainty in the practice. If it is essential that notice of appeal from the local office should be given to the appellee, or his attorney, then the rules relating to such appeals should be amended.

The reason, however, for the difference in the rules under consideration is obvious. The subject matter of the controversy is in the vicinage of the local office, and the parties litigant usually reside in the neighborhood, and after receiving notice that the decision had been rendered, could readily learn whether within the ensuing thirty days an appeal had been taken to your office. On the other hand, the parties to cases pending in your office usually reside at a great distance, and notice of the appeal is therefore of vital importance. The parties indeed may have local counsel, but that cannot be presumed.

The rules relating to these appeals seem to be analogous to the rules and statutes relating to the practice in the courts. Notice of appeal from the decisions of local tribunals, like those of justices of the peace, is not required to be given to the opposite party. Nor is any notice to the parties of the decision of the local officer required, and in this respect the rules of your office are more liberal than the general law.

Pursuing the analogy into the higher courts, the rule changes, and notice of appeals and of writs of error are there required to be given to adverse parties.

Your order dismissing Merrifield's appeal must be set aside, and his appeal reinstated.

*TRIAL BEFORE CLERK—IRREGULARITY—WAIVER.**JORDAN v. WRIGHT.*

The local officers cited the parties to trial before the clerk of the district court, in violation of Rule 35 of practice.

But the parties, by consenting to the proceedings, waived any irregularities therein.

Secretary Teller to Commissioner McFarland, November 27, 1882.

I have considered the case of Hugh Jordan *v.* Sylvanus A. Wright, involving the NE. $\frac{1}{4}$ of Sec. 14, T. 99, R. 40 W., Des Moines, Iowa, on appeal by Wright from your decision of November 23, 1881, holding his filing for cancellation and allowing the entry of Jordan to remain intact.

The record shows that Wright filed declaratory statement February 23, alleging settlement February 21, 1880, and that Jordan made timber-culture entry February 25, 1880.

It appears that Jordan filed charges against Wright's claim September 11, 1880; that your office ordered a hearing thereon; that the local officers directed the case to be heard before the clerk of the district court of Osceola County, Iowa, and that testimony was taken before said clerk, both parties appearing and taking part in the proceedings without objection thereto.

It also appears that on September 20, 1880, Wright gave notice of his intention to make final proof of his pre-emption claim; that the register ordered it to be taken before the same clerk; and that it was so taken, Jordan not appearing. The testimony under both orders was transmitted to the local officers, who, in view of Wright's equities, although he had performed no act of settlement prior to the filing of his declaratory statement, nor until after the entry of Jordan, recommended cancellation of Jordan's entry, and that Wright's filing be allowed to stand.

On appeal, you held Wright's filing for cancellation. Arguments of both parties were filed in the local office, in your office, and on appeal in this Department; but no objection was taken to said references to said clerk until October 18, ultimo, the case then pending in this Department, when counsel for Wright moved the dismissal of all proceedings because said orders were in violation of practice rule 35, which provides that "registers and receivers are not authorized to cite contestants before any officer other than themselves." This rule is equivalent to a prohibition of such citation; and although in one case the hearing was on the motion of Jordan, at which both parties appeared, and the other was in behalf of Wright, at which Jordan did not appear, and notwithstanding neither of the parties at any time prior to said motion objected to said orders of the local officers, or to the jurisdiction of said clerk, or to the regularity of the proceedings, it is now claimed that said testimony was irregularly taken and cannot be considered.

If the orders of the local officers were in violation of rule 35, the question arises whether Wright, by appearing at both hearings and participating therein without objection, is not now estopped from denying their validity?

The law seems well settled that consent may give a court jurisdiction of parties to an action, but not to the subject-matter. (*Cleveland v. Walsh*, 4 Mass., 593; *Plank Road Company v. Parker*, 22 Barb., 323; *State v. Tappan*, 29 Wis., 664; 26 N. Hamp., 232); and parties may waive irregularities in proceedings wherein only their own rights are concerned. (*Blanton v. Russell*, Hill's Leading Cases, April, 1880.)

In this case the parties only were cited, the officers retaining control of the case and its disposition. The clerk took no other jurisdiction than to write the testimony of the witnesses and transmit it to the officers, without deciding any question of right, or the subject-matter of the controversy. The orders of the office were merely, in effect, to take depositions which they were authorized to do; and, I think, Wright, by consenting to the proceedings, waived any irregularity therein.

The motion is overruled. Wright's filing of February 23 alleges settlement two days previously, but in his testimony he admits that he did no act of settlement until March 20 following, at which date the adverse claim of Jordan was of record, and the land was under appropriation.

A pre-emption right is initiated by settlement, without which a declaratory statement secures no right. The pre-emptor's declaratory statement is mere notice of his pre-existing claim, and as Wright had no claim at the date of his filing, but the tract had been at that date appropriated by Jordan, the latter has the prior right.

FINAL PROOF—CONFLICTING RAILROAD CLAIM.

ATLANTIC & PAC. R. R. CO. v. FORRESTER.

Where there are two parties to the record, and the one is regularly cited to a hearing therein upon the motion of the other, but fails to respond, the party failing shall be regarded as in default, and as having no standing before the Department, unless he shall satisfactorily explain his default and regain reinstatement to his privileges as a party to the record.

Secretary Teller to Commissioner McFarland, November 27, 1882.

I have considered the case of the Atlantic and Pacific Railroad Company *v.* Andrew J. Forrester, involving the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 13, T. 31 S., R. 11 E., M. D. M., San Francisco, Cal., on appeal by the company from your decisions of September 2, 1881, holding Forrester's homestead entry of the tract for approval for patent, and of January 3, 1882, denying the company's application for a hearing.

The tract is within the 20 miles granted limits of the grant by act of July 27, 1866 (14 Stat., 292), to the company, which became effective, upon filing the map of definite location, August 15, 1872, and the withdrawal for which was made December 9, 1874.

The township plat was filed in the local office October 20, 1880.

It appears that Forrester filed declaratory statement No. 15563 for the tract October 20, 1880, alleging settlement thereon December 6, 1874; that he transmuted his filing to homestead entry No. 4303 February 14, 1881, pursuant to the provisions of the act of March 3, 1877 (19 Stat., 404); and that he made final proof April 2, 1881, whereupon final certificate No. 1568 was issued on the 6th of the same month.

His proof shows him to be a native-born citizen of the United States, and a qualified pre-emption and homestead claimant; that he settled upon the tract December 6, 1874, where he has ever since resided continuously with his family, cultivating and improving the land, his improvements consisting of a dwelling-house, barn, chicken-house, and other out-houses, fencing, about 250 fruit trees, and 20 acres cultivated to wheat, barley, and garden products, the same aggregating \$1,000 in value.

It will be observed that this proof was submitted pursuant to due notice by publication specifying time and place at which the same would be made, but that the company failed to appear. His proof being uncontroverted, was held to be *prima facie* sufficient, and his entry was accordingly held for approval as aforesaid, subject to the usual right of appeal. But it further appears that during such period from your decision of September 2, 1881, to wit, October 28 ensuing, the company's resident attorneys, Messrs. Britton & Gray, filed (under protest) a motion asking for a hearing, basing such application upon certain accompanying affidavits, alleged to traverse Forrester's final proof, touching the date of his settlement, which they claim does not, *per se*, affirmatively prove that the same antedated the railroad withdrawal "with such precision as the law requires." Under date of January 22 last, said attorneys filed the appeal in question, and upon the foregoing statement of facts the question arises: What is the *status* of the company before the Department? In other words, are they regular appellants, or mere protestants, having, as such, no right of appeal?

This question was determined by my predecessor, Mr. Secretary Kirkwood, under date of October 31, 1881, in the matter of the application of the Saint Joseph and Denver City Railroad Company for a reconsideration of his decision of March 11 preceding, in the parallel case of *Gilbert v. said company*.

It was therein held—

That in all cases where there are two parties to the record, and the one is regularly cited to a hearing therein upon the motion of the other, but fails to respond thereto, the party thus failing shall thereafter be regarded as in default, and as having no standing whatever in the premises before the Department, unless he shall, within a reasonable

time, satisfactorily explain the cause of his default and obtain reinstatement to his privileges as a party to the record.

In the light of this precedent, I am constrained to the opinion that the company, having failed to answer the regular citation issued upon Forrester's motion, 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.

I do not think it necessary to discuss the question of practice raised by counsel for the railroad company, inasmuch as Forrester's final proof shows that he settled upon the tract subsequently to the date of the definite location of the company's road, but prior to withdrawal therefor, and has, in good faith, complied with legal requirements. His entry undoubtedly is confirmed by the first section of the act of April 21, 1876.

Your decision is affirmed for the reasons herein stated.

BURDEN OF PROOF—NOTICE—APPEAL.

BALLARD *v.* MCKINNEY.

The burden of proof is upon the party making the allegations upon which a hearing is ordered.

The notice of decision in a contested case should be formal and in writing, such as will advise the parties of the matter decided and fix a time of record from which the right and limitation of appeal will run; and it is error to deny an appeal when such notice has not been given, because not filed within the limited period after alleged *verbal* notice.

Secretary Teller to Commissioner McFarland, December 29, 1882.

I have considered the case of George Ballard *v.* E. F. McKinney, on appeal from your decision of January 10, 1882, awarding to the latter the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 1, and lots 3 and 4 of Sec. 12, 12 S., 2 W., Los Angeles district, California, and canceling Ballard's warrant location thereon, made March 1, 1880, with warrant No. 96884, 120 acres, act of March 3, 1855, in pursuance of my predecessor's decision of February 3, 1880, awarding him the land.

The rehearing ordered by this Department February 10, 1881, directed that certain affidavits filed upon motion for review be made the basis of investigation, and that, without regard to mere technicalities, a fair trial and decision upon the merits be accorded.

This was, in view of manifest and repeated irregularities, fully set forth in the case.

Instead of requiring McKinney, who had moved for the new trial, to proceed and support his allegations as set up by the affidavits, the reg-

ister and receiver ruled that Ballard must assume the burden of the case and proceed as an original claimant, notwithstanding the fact that the former decision was vacated only upon the ground that there had been no proper decision of your office from which appeal could be taken, and that such decision by you should be had upon the case as presented, aided by such additional matter as might be adduced at the new trial. The burden was clearly upon McKinney to substantiate his allegations, and the ruling of the district officers was erroneous.

The case was, however, tried, and testimony on both sides introduced.

The register and receiver found for McKinney, and at the expiration of thirty days forwarded the case, with the statement that due notice had been served upon the parties, and no appeal had been filed. Three days afterward they transmitted an appeal filed by counsel for Ballard, and accompanied by a motion on behalf of McKinney to dismiss the same, on the ground that it had not been filed in time under the rules of practice. You allowed the motion January 10, 1882, and proceeded to cancel the entry of Ballard upon the finding of the register and receiver, without examination of the testimony.

Afterward a motion was made for a decision on the merits, and it was alleged that the appeal was not barred because no proper notice of the decision was given by the register and receiver, and it was claimed upon oath by the attorney that he was merely told upon the street by the register that the decision was in favor of McKinney; that he never had written notice of the contents; that he was then about to leave town, and that as soon as he was able to gain a knowledge of the decision by his own efforts, and examine the same, he did so, and filed his appeal within thirty days thereafter, which was only thirty-three days from the date of closing the hearing. You declined the request for a decision on the merits by letter of March 15 last, and refused to consider the appeal.

I think the request was a reasonable one, and should have been allowed. It appears to be conceded that the affidavit was true; and that no formal notice was given upon which a proper appeal from the decision of the register and receiver could have been formulated. It is not to the discredit of the attorney that he proceeded with reasonable diligence to prepare the appeal from his own acquired knowledge of the decision, without due notice, nor was such fact an admission of service, as assumed by you in your rejection of his motion. The rules of practice contemplate such formal notice to contestants as will not only advise them of the matter decided, but fix a time of record from which the right and limitation of appeal will run; and it is a gross error, where such notice has not been given, to deny an appeal because two or three days over the thirty may have elapsed, after alleged verbal notice, before appeal is filed.

All the rules of practice, commencing with rule 9, respecting notices, require such notice to be written or printed. Rule 10 specifies service by copy, as the principal mode. Rule 17 requires "notice of interlocutory motions, proceedings, orders, and *decisions*," to be in writing. Rule 44 requires the register and receiver, after hearing in a contested case, to "notify the parties in interest of the conclusions to which they have arrived, and that thirty days are allowed for an appeal from their decisions."

It clearly was never intended that notice of this final decision might be served by a passing remark on the street, when all of the less important and interlocutory orders and decisions are required to be reduced to writing and formally served. The notice to be served in this Department must conform to the legal definition, to wit: "A writing containing formal, customary, or presented information."

I might now insist upon a decision by you on the merits, and remand the case; but in view of the fact that for six years the matter has been in controversy, and to avoid further delay, I shall consider the whole subject before me on the present appeal, and dispose of it accordingly.

The objection to the claim of Ballard relates to good faith as a pre-emptor, it being alleged that his settlement was made in the interest of other parties, and that a deed of the land made by him on the day succeeding his final entry was executed in pursuance of a prior agreement. Both himself and his grantee swear that such was not the case, but that the sale was *bona fide*, after entry, and by way of settlement of an open account between them; that the grantee proposed to take a mortgage only, but Ballard finally proposed direct terms of sale, which were accepted. This is not overcome by the testimony on the other side, and must in this Department be held conclusive of the facts.

Ballard was the first settler by several years. McKinney's only show of settlement was upon a marginal strip beyond the inclosure of Ballard, where he had a small garden, and where he was from time to time aided by others, including Ballard, who had no idea that the survey would throw him upon his own claim. And it is reasonably shown that McKinney himself did not intend at first to claim against Ballard, but avowed his intention to hold an adjoining tract. This is not such a claim as will entitle him to an award of a subdivision, or of joint entry with Ballard, all the elements of priority or equal right being wanting.

I accordingly reverse your decision, and direct that patent issue to Ballard upon his warrant location.

ATTORNEY—APPEARANCE—HEARING.

RENVILLE *v.* GIVENS.

It is contrary to custom to require a practitioner of good standing to produce his authority for appearing as attorney in a case; and this doctrine applies as well to the initiation of contests as to the subsequent proceedings.

Rules of practice not violated by the ordering of a hearing upon the affidavit of the attorney.

Commissioner McFarland to register and receiver, Bozeman, Montana, February 10, 1883.

I have examined the case of Julia Renville *v.* N. B. Givens, forwarded with your letter of December 27, 1882. This contest is brought in the name of Julia Renville, S. H. B. scrip claimant, by her attorney, Arthur O'Connor.

Personal service of notice was made and acknowledged.

Final proof had been made by the pre-emptor, Givens, before the clerk of a court. You suspended the entry and allowed the protestant to offer testimony against its allowance.

During the progress of the hearing Mr. Givens objected to any further testimony in the case until it was shown who the contestant was.

The record shows that Givens filed D. S. for the NE. $\frac{1}{4}$, Sec. 32, 1 N. 26, September 13, alleging settlement August 31, 1881, and that Julia Renville made S. H. B. scrip location for the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 32, December 14, 1881.

The suit is brought upon affidavit of O'Connor, setting forth that he is the attorney of Julia Renville, the scribee, and alleging bad faith and non-compliance with the law on the part of Givens.

Said scrip was located by one Dickenson, attorney in fact of Julia Renville. Dickenson's power of attorney is in the usual form, empowering him to select and locate the lands which the scribee is entitled to, and to solicit and receive patent on the location. In short, he is irrevocably vested with all power and authority which the scribee might or could personally exercise if present and acting.

The character and standing of O'Connor as an attorney is not impeached. He swears that he appears for a party who represents himself to be in interest; and the mere fact that he refuses to divulge, or is ignorant of the means by which his client became a party in interest, is not sufficient ground for dismissal of the case.

He could not appear directly as the attorney of Julia Renville, for the reason that she has delegated all her powers in the premises; but *indirectly* he may appear for her as the party of record through any party to whom her powers may have been delegated.

In the case of *Carduff v. Connack* (9 C. L. O., 9), it is held to be contrary to custom and usage to compel a practitioner of good standing

before tribunals to produce his authority for appearing as attorney in the case.

This doctrine will apply to the initiation of contests as well as to subsequent proceedings therein, and I fail to see wherein the rules of practice have been violated in this case.

Your action in dismissing the case is overruled, and the papers are herewith returned, with instructions to continue the hearing to its conclusion.

HEARING—PRE-EMPTION—TIMBER CULTURE.

LEVI ACKROYD.

The local officers have no jurisdiction to order hearings as between pre-emption and timber-culture claimants.

Commissioner McFarland to register and receiver, Denver, Colorado, March 9, 1883.

This office is in receipt of your letter of the 9th ultimo, transmitting the pre-emption proof of Levi Ackroyd for the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 14, 5 S., 68 W.; also cross-examination of Ackroyd's witnesses by John J. Nilan, party to timber-culture entry No. 966 for same land.

Ackroyd gave published notice that he would make final proof and payment on the 16th of January, 1883.

Nilan filed notice on the 15th of January, 1883, that he would appear and cross-examine witnesses, and produce testimony against the good faith of Ackroyd as a pre-emptor. You allowed Nilan to cross-examine Ackroyd and his witnesses, but refused his application to offer testimony showing fraud and falsity of the proof, on the ground that the rules of practice do not provide for a hearing in contest between pre-emption and timber-culture claimants without authority for the same from this office.

The proof was satisfactory to you, but you refused payment on the ground that the case was not yet determined and referred the matter to this office for instructions.

Your action under the circumstances was correct.

Under the rules of practice you have no authority to order hearings as between pre-emption and timber-culture claimants. Rule 5 clearly specifies in what cases you may order hearings, and contests of the character of the one under consideration are not enumerated therein.

I therefore return the proof, and you are hereby authorized to allow Mr. Nilan the same remedy as in contests within your jurisdiction, and in accordance with the rules in such cases provided.

PRE-EMPTION—FINAL PROOF—FINAL AFFIDAVIT.

CALVIN HAWKINS.

Where the pre-emptor's affidavit is taken before the clerk of a court of record it is not required to bear even date with the entry, but will be deemed sufficient if a reasonable time only for transmission thereof to the local office has elapsed.

Commissioner McFarland to register and receiver, Montgomery, Alabama, August 23, 1881.

I have examined the pre-emption cash entry, No. 16684, of Calvin Hawkins, embracing the W. $\frac{1}{2}$, NW. $\frac{1}{4}$, Sec. 24, T. 17 S., R. 4 W., Huntsville meridian.

The proofs, including the pre-emption affidavit in said case, were made before the probate judge, ex-officio clerk of the Jefferson county court, January 25, 1881, and were presumably transmitted immediately to your office. You found them satisfactory, and allowed the entry February 2, 1881. There thus appears a discrepancy of eight days between the date of the pre-emption affidavit and the date of entry.

This office has always required that the pre-emption affidavit required by section 2262 Rev. Stats., should be sworn to on the date of entry, and in cases where said affidavit antedated the entry, required a new affidavit which should cover that date. This requirement was for the purpose of preventing, so far as possible, evasions of the law in respect of making agreements or contracts whereby the title which the pre-emptor might acquire should inure to the benefit of any other person. So long as the affidavit was required to be sworn to before one of the local officers, no difficulty existed in enforcing the rule. The pre-emptor might take the testimony of his witnesses before any officer authorized to administer oaths in the county in which the land was situated; but before his proof was complete he was required to swear to the pre-emption affidavit before one of the land officers, and until that affidavit was furnished an entry could not properly be allowed.

By act of June 9, 1880, it was enacted that the affidavit required to be made by section 2262 Rev. Stats.—

May be made before the clerk of the county court or of any court of record of the county and State in which the lands are situated, and the affidavit so made and duly subscribed shall have the same force and effect as if made before the register or receiver of the proper land district, and the same shall be transmitted by such clerk of the court to the register and receiver, with the fees and charges allowed by law.

This enactment was remedial, and obviously for the purpose of enabling the settler to save the expense of, in many cases, a long journey from his claim to the local office, by authorizing him to complete his proof before a duly authorized officer in the vicinity of the land, and of necessity contemplates the lapse of a sufficient interval of time after the

execution of the proofs for transmission to the local officers, examination by them, and allowance of entry if the proof is found satisfactory. It is evident that, unless this is so, the law can be given no effect whatever, for the reason that an entry cannot properly be allowed in the absence of the affidavit; and to make the affidavit bearing even date with the entry the settler would be required to present himself at the local office.

The act, in my opinion, designed that the pre-emption proof, including the affidavit taken before the clerk of the county court or other court of record, duly transmitted to the local office, should, if in other respects satisfactory, be deemed sufficient, and entry allowed.

The effect of the act in necessitating a discrepancy between the date of proof and affidavit and date of entry is too obvious to require discussion; and therefore, in all cases when the affidavit is executed in accordance with the provisions of said act of June 9, 1880, if the interval between the execution thereof and date of entry does not exceed a period reasonably sufficient to permit transmission to the local office and examination of the proof in the regular course of business, the affidavit will be considered sufficient.

There is no defect in the entry under discussion except that you failed to transmit register's certificate that notice of intention to make final proof remained posted in the local office for thirty days during the period of publication. You will supply the required paper, if notice *was* so posted, without delay, and transmit the same to this office.

PRE-EMPTION—FINAL PROOF—INSTRUCTIONS.

In cases where the pre-emption affidavit is executed before the clerk of a court the local officers, after considering all the circumstances in the case, must exercise a sound discretion in determining whether a reasonable time only has elapsed between date of its execution and receipt at the local office.

Commissioner McFarland to register and receiver, Montgomery, Alabama, April 17, 1882.

Referring to receiver's letter of March 20 last, relative to the allowance of entries in cases where the pre-emption affidavit is sworn to before the clerk of the county court, in pursuance of the provisions of the act of June 9, 1880, and as to what shall be considered "reasonable time" for the transmission of such affidavit from the place of its execution to the local office, I have to state that no specific rule can be laid down. In my decision of August 23, 1881, in the case of Calvin Hawkins, it was held that the affidavit would be deemed sufficient in cases where the interval between date of its execution and date of entry does not exceed a period reasonably sufficient to permit transmission to the local office and examination of the proof in the regular course of business. My decision in that case, you will observe, contemplated the

probability that the entry was not allowed on the day of the receipt of the proofs at your office, and hence the period of eight days which had elapsed from date of affidavit and date of entry was not considered excessive. Your action will depend upon the circumstances of each case, and in determining whether a reasonable time only has elapsed between the date of execution of the affidavit and date of its receipt at your office, you must necessarily take into consideration the distance between the points of mailing and delivery, mail facilities, and any other circumstances that may be shown to exist affecting the matter, and thereupon exercise a sound discretion in allowing or rejecting an entry.

In case of a rejection your action should be indorsed upon the application, the party notified, and allowed to appeal as provided by the rules of practice.

I desire to call your attention to the fact that it is made the duty of the clerk of the court to transmit the affidavit to your office, and in this connection to say that an applicant to enter should not be made to suffer where delay in transmission is caused by negligence in the clerk's office and not by any act of himself. I would also suggest that the date of mailing, as shown by the postmark upon the envelope, might aid you in determining whether proper diligence had been exercised in the transmission of the affidavit.

FINAL PROOF—BOARD OF EQUITABLE ADJUDICATION.

JOSEPH M. DIEFFENBACHER.

Where the pre-emptor's final affidavit and personal testimony is not sworn to before the officer named in his published notice, because of inability, through sickness and distance from the place of taking proof, to appear, but is sworn to before a clerk of court, the case should, in the absence of an adverse claim, be submitted to the Board for confirmation.

Secretary Teller to Commissioner McFarland, April 3, 1883.

I have considered the appeal of Joseph M. Dieffenbacher from your decision of May 15, 1882, rejecting his final proof for lots 1 and 2 (otherwise W. $\frac{1}{2}$ of NW. $\frac{1}{4}$, and W. $\frac{1}{2}$ of SW. $\frac{1}{4}$) of Sec. 32, T. 23, R. 25, Larned, Kans.

Dieffenbacher filed declaratory statement for the tracts, March 25, alleging settlement March 15, 1879, and gave notice of his intention to offer final proof before the local officers November 29, 1881. The printed notice described the land, through no fault of his own, as lots 1, 2, and W. $\frac{1}{2}$ of NW. $\frac{1}{4}$, and W. $\frac{1}{2}$ of W. $\frac{1}{4}$, of said section. On the designated day two of the witnesses named in the notice appeared before the local officers and testified, but by reason of sickness and distance from the land office Dieffenbacher was unable to appear before them, but made his final affidavit and personal proof on a subsequent day, before a clerk of court outside of the district in which the land is located. He is a

qualified pre-emptor, has valuable improvements, and has continuously resided on and cultivated the land, except when absent, under the provisions of the act of June 4, 1880, and there is no adverse claimant.

You reject this proof because the affidavit and testimony of a pre-emptor on final proof must be made before the local officers, but without prejudice to his rights when such proof is properly perfected.

I think this a proper case for the Board of Equitable Adjudication, and your decision is modified accordingly.

PRE-EMPTION ENTRY FOR EIGHTY ACRES EXHAUSTS RIGHT.

JOHN H. LESSINGER.

A pre-emptor, having filed for one hundred and sixty acres of land, and subsequently made entry of only eighty acres thereof, has exhausted his pre-emption right, and cannot thereafter, having made a homestead entry of the remaining eighty acres, claim the benefits of the act of Congress of May 27, 1878, and thereby secure credit on said entry for the period of residence under his pre-emption filing.

Secretary Kirkwood to Commissioner McFarland, March 25, 1882.

I have considered the appeal of John H. Lessinger from your decision of September 12, 1881, rejecting his application for cancellation of his pre-emption cash entry upon the east half of the SW. $\frac{1}{4}$ of Sec. 12, T. 21, R. 17 W., Larned, Kans., and to be allowed to enter said tract as additional to his homestead entry for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section, or upon refusal thereof, that he be allowed to date his homestead entry from the date of his settlement under his pre-emption filing instead of its actual date of record.

It appears that Lessinger filed pre-emption declaratory statement for the SW. $\frac{1}{4}$ of said section April 9, alleging settlement April 7, 1874, and made cash entry for the E. $\frac{1}{2}$ of said SW. $\frac{1}{4}$ June 11, 1878, and homestead entry for the W. $\frac{1}{2}$ of said SW. $\frac{1}{4}$ on the same day.

The tracts are double-minimum land, and patent has issued and been delivered to Lessinger for the E. $\frac{1}{2}$ of said SW. $\frac{1}{4}$. As title to this tract is now in Lessinger and not in the government, the latter can exercise no further control over it, and his cash entry therefor cannot be canceled. Nor can Lessinger receive any benefit from the act of March 3, 1879 (20 Stat., 472), for the reasons stated by you.

The act of May 27, 1878 (20 Stat., 63), authorizes a person who has made a settlement under the pre-emption laws, and subsequently to such settlement has changed his filing for a homestead entry upon the same tract of land, to have the time required to perfect his title under the homestead laws computed from the date of his original settlement, made before or after the passage of the act, subject to all the provisions of the law relating to homesteads. Lessinger asks, in case he cannot be permitted to extend his homestead claim over the patented tract and

have his pre-emption entry canceled, that he be permitted to claim settlement upon the eighty acres embraced in his homestead, as of the date of his original filing, and be allowed the time in computing the five years of required residence and cultivation.

This, in my judgment, cannot be done. By his final proof and entry of eighty acres under the pre-emption law he included his residence and used his pre-emptive right on that tract and abandoned it as to other land; and it makes no difference that he might have included the whole tract in his claim and paid for it under the pre-emption law. He elected to take the eighty acres. Section 2261 of the Revised Statutes declares that "no person shall be entitled to more than one pre-emptive right." Having used this pre-emptive right and consummated title, he had no other settlement right under the pre-emption law. He did not actually reside on the eighty acres dropped from his pre-emption claim, but used his residence for the purposes of his pre-emption entry on the eighty paid for. Consequently, he has no residence antecedent to his homestead entry to include with the subsequent residence in the period which he will be required to prove before acquiring title, and his application must be rejected.

Your decision is affirmed.

TIMBER-CULTURE ENTRY—CONTESTANT.

THOMAS *v.* DRUMHILLER.

The preference right of entry allowed a contestant by the third section of the timber-culture act does not reserve the land from other disposal.

After cancellation of the contested entry the land becomes subject to settlement or entry by any other qualified person, subject to the exercise of the contestant's privilege.

Commissioner McFarland to register and receiver, Kirwin, Kansas, November 26, 1881.

I have examined the case of Hezekiah Thomas *v.* Wm. Drumhiller, involving the NW. $\frac{1}{4}$ Sec. 25, T. 4, R. 21, wherein you rendered disagreeing opinions.

Thomas filed D. S. No. 15921 January 2, 1880, alleging settlement December 23, 1879, and Drumhiller made T. C. entry No. 6437 January 2, 1880.

The land was embraced in T. C. entry No. 463 of J. H. Jones, which was canceled by letter C of December 13, 1879, and cancellation noted on your records December 23, 1879; at that time Thomas was residing upon the land, intending to claim under the pre-emption law, and had, and has since, made valuable improvements.

The facts upon which Drumhiller relies are as follows:

In October, 1878, one Frank Watrous instituted contest against the entry of Jones, and at the same time filed application under the third

section of the timber-culture act of June 14, 1878, for the purpose of securing to himself a preference right to enter upon cancellation of Jones's entry.

December 16, 1878, Watrous executed a paper transferring to Drumhiller, in consideration of \$50, all the right, title, and interest he may have acquired to the tract in contest, by virtue of his contest, and authorizing his attorneys to substitute Drumhiller as contestant in his stead, and to withdraw his application to enter and substitute that of Drumhiller.

The receiver held that Watrous had acquired an inchoate right constituting him an adverse claimant to the party whose entry was contested, and that he was possessed of equities which were transferable, and that as Drumhiller had purchased those equities his entry should be held intact, and the filing of Thomas for cancellation.

This position is not, in my opinion, tenable.

Watrous undoubtedly, by his preliminary proceedings, acquired preference right to enter the land which, had it been exercised, would have excluded all adverse claims. But, even had he not withdrawn his application, his preference right did not *reserve* the land from other disposal. After the cancellation of Jones's entry, the land was subject to settlement or entry by any other qualified person, but such settlement or entry in its turn was subject to the exercise of the privilege conferred by law upon the contestant.

Watrous by sale could not invest Drumhiller with the privilege that the law conferred upon him personally, as the contestant of an abandoned timber culture entry, and while the attempt to purchase such rights or privileges might be considered as evidence of the good faith of the purchaser, it could not give him superior advantages in the entry of the land involved. He must take his chance with other qualified persons in securing it when it becomes subject to entry.

Thomas has the prior claim, and I award the land to him. The entry of Drumhiller will remain intact, subject to Thomas's proof of compliance with law to date of application to enter.

Advise the parties of this decision, and allow the proper time for appeal.

FINAL PROOF—FORFEITURE—ADVERSE INTEREST.

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LARSON v. PARKS.

Because a party fails only in the matter of time in submitting proof and making payment, he should not be subjected to forfeiture unless a valid adverse interest has attached. Such adverse interest must be shown by affirmative proof.

Secretary Kirkwood to Commissioner McFarland, December 10, 1881.

I have considered the case of Charles Larson v. Robert B. Parks, involving lots 1, 2, 3, and 4, Sec. 23, T. 1 N., R. 11 E., M. D. M., Stock-

ton, Cal., on appeal by Larson from your decision of May 14, 1881, holding his declaratory statement for cancellation.

Larson filed declaratory statement November 12, alleging settlement August 15, 1876.

Parks filed declaratory statement May 17, 1879, alleging settlement the same day.

A hearing was held August 7, 1879, to determine their respective rights, upon Larson's application to make final proof and payment.

The testimony shows that Larson erected a house on the land in August, 1876 (which he has since continuously occupied), and other out-buildings, and that he has fenced a small parcel for a garden. He has never cultivated any portion of the land, but has used it for grazing purposes, for which it is adapted. He, however, failed to offer his proof and payment within 33 months from the date of his settlement (Sec. 2267, Rev. Stats.), whereby his filing became forfeited in the presence of a valid adverse claim. Parks was present with counsel at the hearing. He offered no testimony, but cross-examined the witnesses of Larson.

The testimony submitted by Larson shows that Parks erected a small shanty on the land in May, 1879, built of old lumber, and scarcely fit for habitation; that he never occupied the house, nor resided on, nor otherwise improved, nor cultivated any portion of the land.

Your decision holds that the evidence fails to show whether or not Parks made a settlement and otherwise complied with the requirements of the law, but that a filing of record is *prima facie* evidence of a valid adverse claim, in the absence of proof to the contrary; and that as Larson did not make proof and payment within the required time, the claim of Park must be recognized as valid.

I think the latter clause of your decision erroneous. The claim of Parks, to entitle it to recognition, must be sustained by the usual and accepted affirmative proofs. These would be required in case there was no opposing claim, and should the more especially be insisted upon when the alleged pre-emption right is set up to defeat a prior settler who has confessedly complied with the law in everything but the matter of time, and should not be subjected to forfeiture except upon the positive requirements of law. All presumption in favor of the validity of Park's claim is overcome by the testimony, which shows a want of good faith on his part in respect to residence and cultivation of the land, which were essential in order to give him standing as an adverse claimant, and insufficient, in my opinion, to defeat the claim of Larson, who, although he did not make his proof and payment within the time required by law, did make it—or offered to make it—before any other valid claim had attached. It must therefore be sustained, under the rulings of the supreme court in the case of *Johnson v. Towsley* (13 Wall., 72).

Your decision is reversed.

PRE-EMPTION—TREATY WITH MEXICO—CITIZENSHIP.

28 LD 138

AUBREY v. CLAPP.

Under treaty *Mexicans* had the privilege within one year of electing to remain Mexican citizens, or to become citizens of the United States. Subjects of other governments were not included.

Secretary Kirkwood to Commissioner McFarland, February 4, 1882.

* * * The principal question in the case respects the qualification of Aubrey as a pre-emptor, the local officers holding that he was not qualified for want of citizenship, and your decision the contrary.

The testimony shows that Aubrey and his father were natives of England; that the father went to Mexico in 1837, and that in 1844 (the son being then 15 years of age) both were resident in California, then a Mexican province, the father dying there in 1851, and that the son resided there since 1844. It does not appear that the father ever became a citizen of Mexico, by process of naturalization or otherwise, but that he resided there only. Neither the father nor son were ever naturalized in the United States, nor did either ever file a declaration of intention to become a citizen. The son, however, claims to have exercised rights of citizenship in California, and his name was registered on the Great Register of Placer County in December, 1877.

On these facts you held that, under the eighth article of the treaty of Guadalupe Hidalgo (February 2, 1848), between the United States and Mexico, the father became a citizen of the United States, by virtue whereof the son, when a minor, also became a citizen.

I do not concur in these conclusions.

The eighth article of the treaty provides that *Mexicans* then established in territories belonging to Mexico, but which thereafter were to remain within the limits of the United States, should be free to continue where they then resided, or to remove at any time to the Mexican Republic; that those who remained in said territories might either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States; but they were required to make their election in this respect within one year from the date of the exchange of ratifications of the treaty; and those who should remain in said territories after the expiration of that year, without having declared his intention to retain the character of *Mexicans*, should be considered to have elected to become citizens of the United States.

This provision did not include the subjects of other governments resident in Mexico, but related to *Mexicans* exclusively. As Aubrey, the father, never acquired the right of citizenship in Mexico, but was resident there only, he was not, as an Englishman, the recipient of any benefit or right under this article of the treaty. He had no right of election to become a citizen of the United States thereunder, nor does

it appear that he ever attempted to exercise such election. And as he was never naturalized in the United States, nor declared his intention to become a citizen thereof, but after the date of the treaty was resident only in the United States, as he had previously been resident in Mexico. the son can claim no right of citizenship in this country through him.

The allegation of the son that in the absence of his naturalization, or declaration of his intention to become a citizen, he has exercised rights of citizenship in California, and the fact that he has been registered on the Great Register of Placer County, California, cannot aid his pre-emption right, because this right is governed by United States laws, which require naturalization, or a declaration of intention to become a citizen, from an alien, as a prerequisite to the exercise of pre-emption rights. Besides, such registration, made in December, 1877, if otherwise of any force, could give no validity to a settlement and filing made in 1876. A person must have the qualifications of a pre-emptor at the date of his settlement. (*McMurdie v. Central Pacific Railroad Company*, 8 C. L. O., 36.)

I am of the opinion that Aubrey was not a qualified pre-emptor at the time of his settlement, and acquired no right to the land in dispute. I therefore reverse your decision, and award it to Clapp.

REMOVAL FROM RESIDENCE IN CITY.

STURGEON *v.* RUIZ.

A settler is not disqualified under Section 2260 who moves from his own home in a city, town, or village to a pre-emption claim.

Secretary Teller to Commissioner McFarland, March 7, 1883.

* * * * *

The testimony shows that Sturgeon is a practicing lawyer and real estate agent, doing business in the city of Santa Barbara, and having his residence on a tract of eighteen to twenty acres within the surveyed limits of said city, about one mile from its court-house. He used the land as a residence only, without other cultivation than raising fruit and vegetables for his own consumption, and moved thence to the land in dispute.

The tenth section of the act of 1841 (Section 2260, Rev. Stats.) has been uniformly held to extend to residents upon agricultural lands only, and not to debar a pre-emptor who moves from his own home in a city, town, or village, upon a pre-emption claim.

Your decision is affirmed.

INDIANS—PRE-EMPTORS—NATURALIZATION.

SOLOMON SCOTT.

There is no law that confers upon Indians the right to acquire public lands as pre-emptors, nor do the general statutes of naturalization apply to them.

Commissioner McFarland to register and receiver, Colfax, W. T., June 5, 1882.

I am in receipt of your letter of the 19th ultimo, inclosing the appeal by Solomon Scott (an Indian) from your ruling of April 26, last, rejecting his application to file a D. S. on the SE. $\frac{1}{4}$ Sec. 28, T. 26 N., R. 41 E. Your reasons for rejecting said application indorsed on the back of his D. S. are as follows:

The pre-emption laws do not confer upon an Indian, who has not been made a citizen of the United States, and who is not taxed, the right to file a pre-emption declaratory statement or provide any way for an Indian, not a citizen and not taxed, to assert a legal claim under pre-emption laws to the public lands. . . . There has been no evidence adduced to show that the applicant is a citizen of the United States, or that he is taxed. (See sections 2259 and 1992, Rev. Stat.)

It is urged by the attorney for Scott that he was born in the United States and having severed his tribal relations with the Deep Creek colony of the Spokane Indians, of which he was formerly a member, and being now subject to the taxes imposed by the legislature of Washington Territory, that he is a qualified pre-emptor and should be allowed to file his declaratory statement for the land described. Mr. Scott's attorney also represents that he (Scott) "would gladly avail himself of the benefits of naturalization in the courts, but they refuse to confer upon him that right."

There is no law which confers upon an Indian the right to acquire title to the public lands as a pre-emptor, nor do the general statutes of naturalization apply to Indians, as they can only be naturalized by a special act of Congress, or by treaty. The opinion of Mr. Attorney-General Cushing, of July 5, 1856 (7 Opinions Attorney-General, 746), is very explicit on these points, and sets forth that Indians are not capable of pre-empting the public lands. Your decision is therefore affirmed.

I see no reason, however, why Mr. Scott, if qualified, may not avail himself of the privilege granted in section 15, act of March 3, 1875, (General circular, page 65), and enter said tract under the homestead law.

PRE-EMPTION—STATUTORY INHIBITION.

INSTRUCTIONS.

Whether the prohibition of second clause of section 2260, Revised Statutes, will or will not apply depends to a large extent upon the circumstances of each case and upon the intention of the party.

Commissioner McFarland to register and receiver, Huron, Dakota, March 1, 1883.

I am in receipt of register's letter of 19th ultimo, requesting instructions as to the prohibition of the second clause of section 2260, Rev. Stats. This provision of law is that no pre-emption right shall be acquired by any "person who quits or abandons his residence on his own land to reside upon the public land in the same State or Territory.

If a person removes directly from his residence upon land of his own to settle upon the public land he is unquestionably within the prohibition of the statute. But there are many cases where the removal is mediate or remote. In them the prohibition will apply, or not, according to the circumstances of the case, and no general rule can be laid down. For instance, if a person abandons a residence upon his own land, goes away and engages in business, or other pursuits, and after a period of time returns and makes pre-emption settlement upon public land, in the State or Territory where he had formerly resided, the prohibition would not apply. But if, on the other hand, the change of residence was intended only as a preliminary step to making a pre-emption settlement, that is, if in order to render himself qualified a party leaves a residence upon his own land, without any other object, and without acquiring a residence elsewhere, the prohibition would apply. Such cases are largely controlled by the evident intention of the party. *Owings v. Lichtenberger* (9 C. L. O., 197), *Weir v. Haskins* (Secretary's decision, February 23, 1882). Applying the foregoing to the cases stated by you, if by the language "where a man proved upon his homestead by commuting same," is meant a case where entry is made under the act of June 15, 1880, by one *who had failed to establish his residence upon the land*, the prohibition would not apply because there would be no removal from a *residence* upon his own land. But if by commutation of his entry you mean an entry under section 2301, Rev. Stats., then his proof of settlement would include *proof of residence* also, and a removal therefrom would disqualify him as a pre-emptor. In the second case, where one who has made final homestead proof, makes pre-emption settlement immediately or after a short absence from a residence upon his homestead, such absence being only temporary and not an actual and *bona fide* change of residence, the prohibition applies, and this without reference to the issuance of patent. For where one has received the patent certificate he is possessed of the equitable title to the land, and the right to a patent conveying the legal title of the government

which, when issued, relates back to and takes effect from the time his equitable title vested. And this right is subject only to be defeated by the discovery of a radical defect in his entry which cannot be presumed to exist.

PRE-EMPTION—RESIDENCE—GOOD FAITH.

ALEXANDER BLAIR ET AL.

Under the rules of the Land Department, six months' residence is required of pre-emptors, but this rule should not be indiscriminately applied, nor where good faith otherwise sufficiently appears.

Secretary Kirkwood to Commissioner McFarland, April 13, 1882.

I have considered the appeals of Alexander Blair, John Roach, and Joseph N. Austin, respectively, from your decision of June 15, 1881, holding for cancellation their respective cash entries . . . all within the Harrison, Ark., land district.

It appears that the parties each filed a pre-emption declaratory statement upon the lands named on June 17, each alleging settlement on June 16, 1879, and that each made cash entry therefor on August 18, 1879, upon proof substantially the same in each case (they being witnesses for each other), of the erection of a house, the setting out of a few trees, and the clearing of about one acre cultivated as a garden—all valued in each case at about \$30. They each subsequently conveyed the tract named in their entry to one Massman—Blair and Austin on August 21, and Roach on August 29, 1879; and on October 15 following, Massman conveyed the same to her son, Louis Haucke.

In April, 1880, before knowledge of said conveyances was received at your office, you found the proof of residence on the respective tracts insufficient in each case, and allowed the parties to show continuous residence thereon for six months; but they appear to have abandoned the land upon their conveyance thereof, and have made no further residence thereon.

Your decision finds that their brief residence, their limited improvements, and the immediate transfer of the lands, show that their entries were made for speculative purposes, not in good faith, and in the interest of their grantee, and hence were erroneously allowed. Section 2263, Rev. Stat., requires that prior to entries under section 2259 proof of *settlement* and *improvement* shall be made to the satisfaction of the register and receiver of the district within which the land lies, agreeably to such rules as may be prescribed by the Secretary of the Interior. The statute is silent in respect to *residence* for any prescribed period.

Pre-emptors are required to take notice of the public laws relating to pre-emption entries, but not, I think, of the rules of your office, except when the same are brought to their special notice, either by personal communication or public promulgation. The latter are promulgated through the local officers, and if they neglect to make known such rules, or erroneously advise pre-emptors in respect thereto, and the pre-emptor,

acting on such advice, pays his money to the government for the land in good faith (especially if there is no adverse party), he should not be held for any failure to comply with the rule, because the fault is with the officer, and not with the party.

The rule of your office requiring six months' residence on a tract of public land, as an evidence of good faith, prior to entry, is (as held in the case of *Conlin v. Yarwood*, 7 C. L. O., 118) wise and proper as a general rule, but not to be applied indiscriminately, nor when the good faith otherwise sufficiently appears.

In their supplementary affidavits Blair, Roach, and Austin severally swear that they were advised by the local officers, at the date of the entries, that their proofs were sufficient, and the officers corroborate the same, stating that at that time there were no instructions in their office relative to the required time of residence by a pre-emptor prior to entry, and that they had followed the practice of their predecessors in this respect, who had held such proof immaterial.

After entry, the pre-emptors had the right to convey such title as they had (*Myers v. Croft*, 13 Wall., 291). That the sales indicated bad faith, and that their entries were for speculative purposes, is inferential only from the above stated facts; and this, in my judgment, is controlled by the affidavits of the parties and their grantee, that the sales were made in good faith, for a valuable consideration, and under the supposition that such sales were permitted under the law.

While the proofs as to settlement, improvement, and residence are not wholly satisfactory to this Department, yet, as they were to the local officers, and as the parties have paid to the government its price for the land, and since their appeal, upon the requirement of the Department, have filed (as have also the said Massman and the said Haucke) affidavits to the effect that, prior to their respective entries, no contract or agreement, expressed or implied, was made by either of the parties for the sale or transfer of said land, the evidence of want of good faith is not sufficient, in my opinion, to warrant a cancellation of the entries in the absence of an adverse claim.

Your decision is reversed.

PRE-EMPTION—STATE SELECTION—ADVERSE RIGHT.

GARLICK *v.* STATE OF CALIFORNIA.

There is no law which grants to or authorizes the selection by any State or Territory of lands to which a valid adverse right had attached, and the approval and certificate of a selection so made is therefore null and void.

Commissioner McFarland to register and receiver, San Francisco, California, December 15, 1881.

The attention of this office has been called to a discrepancy between the decision of my predecessor of January 21, 1881, in the case of *E. L. Garlick v. State of California*, as set forth in his letter O of that date,

and my decision of the 12th September last (letter G), in the case of William Hysell *v.* The University of said State.

In the former case Edward Garlick filed D. S. No. 12639, November 28, 1876, for the SW. $\frac{1}{4}$ Sec. 14, T. 12 N., R. 16 W. M. D. M., alleging settlement November 23, 1876; and the 19th of May, 1879, before his said filing had expired (under instructions contained in letter G from this office of May 14, 1878), he transmuted same to homestead entry No. 3623.

It appears that through some inadvertence the D. S. of Garlick was not entered upon the record here until August 30, 1879.

The State of California selected the above described tract January 27, 1873, per register and receiver No. 2984, under the indemnity school-land grant, in lieu of part of the N. $\frac{1}{4}$ of Sec. 16, T. 10 N., R. 24 W. S. B. M. This selection, however, was illegal and void *ab initio*, the land for which it was taken having been granted in place, and the same was canceled by this office July 22, 1879.

On the 29th of November, 1876, the State reselected the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of said section, per applications No. 3501 and 3502, in lieu of lands lost in Sec. 36, T. 16 N., R. 4 W., and the same section in T. 29 S., R. 12 E. M. D. M., and there being no adverse claim of record at that time, the selections were approved and certified to the State March 13 and October 3, 1877, in lists Nos. 42 and 44.

It having subsequently been ascertained that Garlick had filed declaratory statement for the land, alleging settlement prior to any legal selection of the same by the State, register and receiver were instructed by letter G from this office of May 14, 1878, to allow him to enter the land upon furnishing proof, and with due notice to the State authority; and in accordance with said instructions notice for a hearing was issued, service of which was acknowledged by the State agent, and no appearance having been made by the latter, Garlick's proof was accepted and his entry allowed.

A subsequent examination of the homestead entry having disclosed the fact that it was in conflict with the State selections referred to, this office on the 22d of September, 1879, requested the governor of the State to relinquish; and upon his declining to do so for want of authority, the homestead entry of Garlick, notwithstanding the same had been made under instructions from this office, was held for cancellation.

In my decision in the case of Hysell *v.* The University of California it was held that the right of the plaintiff having attached prior to the date of the State selection, the same should be maintained notwithstanding the fact that the selection had been approved and certified to the State; that the wording of the certificate of approval, "The foregoing list is hereby approved subject to any valid interfering rights which may have existed at the date of selection," was intended to cover just such cases and protect the rights of settlers whose claims, through inadvertence or other causes, did not appear of record, or were unknown at the time of the approval; and that the approval of a selection is of

no effect where a prior adverse claim is shown to have existed.

The act of Congress which authorizes the certification of lands granted to the several States and Territories by the Commissioner of the General Land Office expressly provides that—

* * * 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 lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby. (10 Stat., 346.)

There is no law which grants to or authorizes the selection by any State or Territory of lands to which a valid adverse right had attached, and the approval and certificate of a selection so made is therefore null and void under the law.

In view of the fact that Garlick's right was prior to that of the State; that he has resided continuously upon the land since the time of his settlement, and has valuable improvements thereon; and that his entry of the land was in conformity with and under authority of instructions from this office, the State having made default at the hearing ordered, after due and legal notice thereof, I think the action of my predecessor in holding his said entry for cancellation was erroneous.

The decision of January 21, 1881, referred to, is therefore modified to conform with that of September 12 last, and the State selections R. and R. Nos. 3501 and 3502 are accordingly held for cancellation, leaving the homestead entry of Garlick intact.

You will notify the parties in interest of this decision, and allow the usual time for appeal.

EQUITABLE RIGHT—CONTESTANT—LACHES.

GARDNER v. SNOWDEN.

Whoever relies upon a technicality to defeat an equitable right must himself show technical compliance with legal requirements.

If a contestant does not publish and prove his own claim within the thirty-three months allowed by law, he is in no condition to ask cancellation of entry on the ground of preference under section 2265, upon allegation of *laches* on the part of another.

Acting Secretary Joslyn to Commissioner McFarland, August 11, 1882.

I have considered the case of James Gardner v. Adam D. Snowden pre-emption claimants for the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 15, and W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 14, T. 23 S., R. 43 W., Pueblo district, Colorado, on appeal by the former from your decision of November 5, 1881.

It appears that Snowden's settlement on the land continued for several years, commencing about 1873, without any filing of a declaratory statement, by the occupation of a small house or cabin as bridge tender or watchman of the Atchison, Topeka and Santa Fé Railroad Company, within the 100 feet right of way, and some little cultivation and raising of vegetables was done by him within such right of way.

He afterward enlarged the house, which he had at first obtained by gift from the railroad company, by placing in connection therewith another which he had purchased, and has continuously resided with his family as an inhabitant therein.

He filed February 15, 1879, alleging settlement May 27, 1878. On the 7th of May, 1879, he changed his filing to homestead entry No. 1317, and offered final proof, after due publication, January 22, 1881.

Gardner filed February 15, 1879, alleging settlement on the 12th of the same month, and contests the good faith and priority of Snowden on several grounds.

The register and receiver decided in Gardner's favor, but you reversed their decision and awarded the land to Snowden.

Upon one ground alone I think your decision was erroneous.

Section 2265, Rev. Stats., requires every claimant to make known his claim in writing within three months from the time of the settlement; "otherwise his claim shall be forfeited and the tract awarded to the next settler in the order of time on the same tract of land who has given such notice and otherwise complied with the conditions of the law."

Under these provisions Snowden has manifestly failed to put his claim of record prior to the settlement and filing of Gardner, and if the latter has complied with the law, he must prevail. But whoever relies upon a technicality to defeat an equitable and otherwise legal right must himself show technical compliance with legal requirements.

The thirty-three months within which Gardner, under section 2267, was required to offer final proof and payment expired on the 12th of November last; and if he did not prior to such expiration publish and prove his own claim as required by law, he is not in condition to ask for the cancellation of Snowden's entry on the ground of preference under section 2265.

Your decision is accordingly modified as above, and you will take action in consonance with such modification.

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21 " " PUBLIC LAND—PORTERFIELD SCRIP—TOWNSITE.

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LEWIS ET AL. v. TOWN OF SEATTLE ET AL.

Land within the incorporated limits of a town, which it is not entitled to enter by reason of its population, and which is not actually settled upon, inhabited, improved, and used for business and municipal purposes, is subject to pre-emption claim by virtue of section 1, act of March 3, 1877.

Porterfield scrip may be located upon offered or unoffered land, and upon land within the limits of an incorporate town; is locatable upon any surveyed land of the United States not mineral and not *legally* appropriated. No mere *de facto* appropriation can defeat or preclude a location by said scrip.

Secretary Kirkwood to Commissioner McFarland, October 26, 1881.

I have considered the case of Lewis and Hill v. The town site of Seattle, Olympia district, Washington Territory, on appeal from your decision of April 6, 1881.

It appears from the record that the tracts enumerated in your decision of April 8, 1880, in this case, were formerly covered by the donation claim of one Catherine P. Maynard, which was rejected by decision of Secretary Delano under date of March 1, 1873. After the rejection of said claim the public surveys were extended over the land, and a plat of survey filed in the local office March 18, 1874.

In 1869 the said tracts were included by act of the Territorial legislature in the incorporation of the town of Seattle, and again by a new act of incorporation of November 12, 1875.

Certain pre-emptors, some of whose claims were initiated in the year 1869, having filed for the land in question, and applications to locate Valentine scrip on a portion thereof having been made, the contest of the Town site of Seattle *v.* Thomas B. Valentine *et al.* arose, and the case was finally decided by Mr. Secretary Schurz, March 19, 1879 (6 C. L. O., 136), *infra*.

On May 8, 1879, one Charles M. Bywater applied to file his D. S. for lots 7, 8, 11, and 12 in section 4, T. 24 N., R. 4 E., in the district aforesaid, alleging settlement October 7, 1877, but the register and receiver rejected his application because the said lots were within the corporate limits of the said town of Seattle. This action was affirmed by your office July 10, 1879, and Bywater appealed to this Department.

On December 9 ensuing, my said predecessor directed that proceedings be instituted under the third section of the act of March 3, 1877 (18 Stat., 392), and that the application be considered in view of the fact, as developed by such procedure, inasmuch as the allowance of the same might depend upon the corporate limits of the city as finally determined.

On March 24, 1880, the day fixed by the register and receiver upon which the city should elect what portion of said lands it would retain, Bywater appeared and submitted testimony showing that the land which the city elected to retain, to wit, all and only that portion of the land within the corporate limits embraced within sections 5 and 6, and the W. $\frac{1}{2}$ of Sec. 4, T. 24 N., R. 4 E., and Sections 31 and 32, and the W. $\frac{1}{2}$ of Sec. 33, T. 25 N., R. 4 E., was in the same condition respecting its occupancy and use for municipal purposes, as shown by the evidence taken at the former trial, upon which the departmental decision of March 19, 1879, aforesaid, was based. It seems that by a written stipulation between said city and Bywater the testimony was closed. The former was thereby estopped from making any further showing, and has failed to show itself entitled to any of the land it claimed.

Thus it appears that Seattle never was entitled to claim *any land* (in sections 4, 5, or 6, in said township) by virtue of the town-site laws, inasmuch as the site thereof was wholly located on *private* land, and is not, therefore, such a town as was contemplated by the said laws. From this state of facts it would appear that no further procedure under the said third section was necessary so far as Bywater's right to claim said

lots by virtue of the first section of said act is concerned. By the decision last cited the town-site claim, the pre-emptors' claim, and the Valentine scrip location were rejected, thus leaving the *status* of the land in question as that of public land within the limits of an incorporated town, to which there was no *legal* claim. So that when Bywater, on May 8, 1879, applied to the local office to file his D. S. for the lots aforesaid, claiming the same under section 2259, Rev. Stat., and the act of March 3, 1877, as well, his application should have been allowed by the register and receiver, as the same was permissible, no adverse claim having intervened in the interim of March 19, 1879, and May 8 ensuing.

Although Bywater applied to file at a time when the records were expunged of all adverse claims, it should be observed that at the date of his filing the incorporated city of Seattle, as such, was still extant, and embraced within its corporate limits the lots in question, so that it was necessary for him to invoke the remedial agency of the said act in order to acquire title to these lots.

Inasmuch, therefore, as Bywater did so invoke the remedy provided by said act, and as these lots were afterwards ascertained never to have been "actually settled upon, inhabited, improved, and used for business and municipal purposes," his claim was valid, and should be allowed upon the usual conditions.

It is urged by counsel that Mr. Secretary Schurz, in his decision of March 19, 1879, expressly held the pre-emption cash entry of Charles O. Rich, covering the identical lots in question, for cancellation, because they were within the corporate limits of the city of Seattle. It should be observed in this connection that Rich's entry was rejected for the further reason that he was not a qualified pre-emptor, and that he filed his D. S. July 2, 1874, long prior to the passage of said remedial statute, so that neither his nor any of the other pre-emptors' claims could derive validity therefrom. My said predecessor also held that "the application of the city of Seattle to enter the lands in question was properly rejected. . . . The evidence in this case shows that at the date of this application there were not to exceed six persons residing upon the lands applied for, and there was no error in your decision rejecting the same." Counsel also cite the cases of *Root v. Shields* (1 Woolworth, 340), and *city of Grantsville v. McBride* (6 C. L. O., 110) as governing this case. The decision in the former of the cases cited was rendered at the November term, 1868, of the United States circuit court for the district of Nebraska, by Mr. Justice Miller, upwards of nine years anterior to the date of the passage of the said act of 1877.

While the general principle therein enunciated might be so contorted as to apply to the case under consideration, it cannot be seriously maintained that it should be regarded as a precedent governing this case, the said act to the contrary notwithstanding.

As regards the case of *McBride*, it should be observed that prior to the year 1877 the provisions of the town-site act (March 2, 1867, 14

Stat., 541), by an exceedingly elastic method of construction, especially in the Territory of Utah, had been made to work wonders when the patent showing of the corporated limits of innumerable town sites was accepted as the criterion of actual *bona fide* municipal improvements used for purposes of business. The abuses growing out of this system had become so egregious in said Territory that it had been truly said to be impossible for one man to step from one town site without being within the limits of another. Such a hue and cry was raised in consequence of these abuses that Congress came to the relief of the pioneers and would-be settlers upon the public domain by enacting this law of March 3, 1877. By this act the quantity of land that could be embraced within corporate limits was limited to the maximum area (*i. e.*, 2,560 acres), or one in excess of that specified if actually occupied "and used for business and municipal purposes."

Although it thus appears that under certain prescribed conditions an area in excess of the maximum may be embraced within a town-site entry, it should be observed that it is held in the decision of March 19, 1879, aforesaid, in literal accordance with the express terms of the statute, section 2389, Rev. Stats., that the right of a town to make an entry must be computed upon the basis of the number of occupants of the *public* lands; and that in case some of the inhabitants of such town reside upon *private* lands, they cannot be considered as occupants of the *public* lands for the purpose of supplying the number of inhabitants necessary to authorize an entry of the same.

It further appears from the record that on January 8, 1880, J. Vance Lewis and W. C. Hill made application to locate Porterfield scrip (per warrants numbered 79, 101, 103, 105, 110, 118, and 127) on certain lots in Secs. 4 and 5, T. 24 N., R. 4 E., in the district aforesaid, and within the incorporated limits of the city of Seattle. But the register and receiver on the same day rejected the application, for the reason that "the land applied for, herein described, being within the limits of the city of Seattle as incorporated by the Territorial legislature November 12, 1875, and thus appropriated, the location of Porterfield scrip No. 118 must be refused." On February 6, 1880, said applicants appealed from the action of the register and receiver.

In order to determine the question at issue, to wit, what land is subject to Porterfield scrip location, and what is the meaning of the term "appropriated," as used in the statute, I will cite a portion of the act of April 11, 1860 (12 Stat., 836), under and by virtue of which these scrip claimants prefer their claims. This act provides that Porterfield warrants may be "located on any of the public lands which have been or may be surveyed, and which have not been otherwise *appropriated* at the time of such location, within any of the States where the *minimum* price for the same shall not exceed the sum of \$1.25 per acre," etc. The United States supreme court has given us an exact definition of this term, as it is invariably used in public land legislation, in the case of *Wilcox v. Jackson* (13 Peters, 498): "Now, this is appropriation, for

that is nothing more nor less than setting apart the thing for some particular use." In subsequent adjudication, involving the construction of statutes wherein this term occurs, the foregoing definition has invariably been accepted as the proper one.

I will endeavor to show that the land in question, excepting that covered by Bywater's claim, was not "otherwise appropriated at the time of such location," or attempted location, of said Porterfield warrants, as contemplated by the statute in question.

The *status* of these lands was the same on January 8, 1880, as it was hereinbefore shown to have been at the date of Bywater's application to file for a portion of said lands, *i. e.*, public land within the limits of an incorporated town to which there was no legal claim.

Now, with reference to what land may be located with Porterfield warrants, I find departmental decision dated March 22, 1864, in the case of Byron Reed, wherein it was strenuously urged in argument that said warrants could be located only upon land subject to *private* entry, but it is therein held that they could be located upon *unoffered* lands, and that Reed's location of said scrip within the incorporated limits of the town of Omaha was valid (Hill's Leading Cases, vol. 1, No. 3, p. 74).

In the case of Bovard *v.* Bunn it was also held that a mere *de facto* appropriation does not run against the government nor preclude the location of said scrip, notwithstanding the equities of an adverse claimant. In other words, that this scrip may be located upon any of the public lands, offered or unoffered, not otherwise *legally* appropriated at the time of such location.

I therefore concur in your opinion that the said scrip may be located upon offered or unoffered land, upon land within the limits of an incorporated town, and that no mere *de facto* appropriation can defeat or preclude the location of the same. Hence, I am of the opinion that the scrip in question may be properly located upon lots numbered 9, 10, 13, and 14 of section 4, and lots numbered 6, 7, 8, and 9 of Sec. 5, T. 24 N., R. 4 E., in the district aforesaid.

I further concur with your holding in the matter of the applications of Hugh McAleer and Edgar A. Hansee.

Your decision is accordingly affirmed.

TOWN LOTS—NOTICE TO ADVERSE CLAIMANTS.

INSTRUCTIONS.

Claimants of town lots are not required to give notice of their intention to make entry by publication, under act of March 3, 1879.

The notice to adverse claimants may be by personal service or through the mails.

Declaratory statements are not required to be filed within three months after settlement.

Commissioner McFarland to register and receiver, Boise City, Idaho, July 14, 1882.

In reply to the inquiries in the register's letter of the 30th ultimo, I have to state (1) that persons claiming lots in a town, and upon which

they have filed declaratory statements, with a view of purchasing the same as a pre-emption, under section 2383, Rev. Stats., are not required to give notice by publication of their intention to make entries, town lots not being regarded as agricultural lands within the meaning of the act of March 3, 1879.

Notice to adverse claimants of an intention to prove up and enter a town lot may be made by personal service or through the mails; (2) the law which requires pre-emption claimants to file their declaratory statements in three months from date of settlement or the date of the filing of the township plat does not apply in town-lot cases under section 2382, Rev. Stats.

RESIDENCE—RESTRICTION—QUALIFICATION—CONTESTS.

TOWN SITE OF KETCHUM.

The "actual settler" upon a town lot must be an actual resident.

The right of pre-emption granted by section 2382, Rev. Stats., is restricted to the lot settled upon and one additional lot upon which the settler may have substantial improvements.

Settlers are required to have the personal qualifications of pre-emptors and to file their declaratory statements.

Contests between claimants for town lots will be governed by the rules of practice, as in other cases.

*Commissioner McFarland to register and receiver Boise City, Idaho,
August 14, 1882.*

I am in receipt of registered letter of 25th ultimo, transmitting a letter of William Hyndman of the 22d ultimo, which presents certain questions and suggestions relative to the disposal of lots in the town site of Ketchum.

It appears from this letter that some doubt and misapprehension exists as to the rights of settlers upon town lots, and the method of adjusting conflicting claims. This town site is one founded in pursuance of the act of July 1, 1864 (13 Stats., 343), embodied in section 2382, *et seq.*, Rev. Stats.

In reply to the questions presented by Mr. Hyndman, I have to state: 1st. The plat filed in this office corresponds with that in your office as to the numberings of the lots. The numberings in the blocks north of Main street, commencing at the southeast corner, run west to No. 4, and are continued from the northeast corner of the block, as shown in Mr. Hyndman's diagram. South of Main street the numberings commence at the northwest corner, running east. If the plat filed in the recorder's office shows a variation from this method in the numberings of the lots, it should and may easily be made to correspond with the plats filed in your and this office.

2d. The "actual settler" upon any one lot must be an *actual resident*, as stated in my instructions to you of November 11, 1881. (See also 2d Lester, p. 310, and Mr. Commissioner Wilson's report for 1866.)

It is true that in his opinion of November 7, 1877, in the case of *Allman v. Thulon* (1 C. L. L., 690), Mr. Assistant Attorney-General Smith held that under this act actual residence upon the lot settled upon was not required; but the Secretary (Mr. Delano), while expressing neither dissent from nor concurrence in this opinion, declined to reverse the decision of this office, which rejected the claim of Allman upon two grounds, one of which was that he was not an actual resident of the lot claimed. I am unable to discover that, in the adjudication of cases under this act, the former construction requiring claimants to be actual residents of the lots has ever been varied, and I do not feel justified in now departing from the established rule.

3d. It is well settled that the right of pre-emption granted by section 2382 is restricted to the lot settled and resided upon and *one* additional lot upon which the settler may have substantial improvements. (See 2 Lester, p. 310, before cited.)

4th. Settlers are required to file their declaratory statements, and must have the personal qualifications prescribed by the pre-emption act of 1841. This is so stated in my instructions of November 11, 1881.

5th. When contests arise between claimants for the same lots, such contests will be governed in all respects by the rules of practice approved December 20, 1880, in like manner as other contested cases.

You will advise Mr. Hyndman of the contents of this letter.

TOWNSITE—ENTRY—PROOF—PAYMENT; MINERAL LAND.

TOWN OF BELLEVUE.

Proceedings where the town is situated on unsurveyed land.

Commissioner McFarland to register and receiver, Boise City, Idaho, March 18, 1882.

In the receiver's letter of the 24th ultimo, referring to the application made to you for an entry of the town site of Bellevue, he asks the following questions:

1. After the survey has been made as required, is the pre-emption filing to be made in the name of the county judge or the trustees of the town?

Section 2387, Rev. Stats., is explicit as to what officer shall represent the town; if the town is incorporated, the "corporate authorities;" if unincorporated, the judge of the county court for the county in which such town is situated.

It is not necessary that a declaratory statement be filed at all, except to save the rights of the town in the event of a public sale, as indicated in section 2388, Rev. Stats. It is, however, proper to make such filing at any time, and it should be made, if at all, by the officer authorized by section 2387 to represent the town.

2. Must proof be made, as in cases of pre-emption; and must notice be given by advertisement in a newspaper; and can proof and payment be made any time after filing?

The proof required in support of an application to enter a town site is that showing (1) municipal occupation of the tracts claimed, (2) the number of inhabitants, (3) the extent and value of the town improvements, (4) the date when the land was selected and occupied as a town site, and (5) a certificate from the proper officer showing the official character of the mayor, trustee, or judge making the entry. Whenever a town is qualified to make a filing, it is qualified to make an entry, and, as aforesaid, an entry can be made without a filing.

A notice of intention to make entry, provided for in the act of March 3, 1879 (20 Stats., 472), is not required in ordinary town-site entries; but where the land has been returned as mineral, or where affidavits have been filed in your office alleging that the land is mineral in its character, you will proceed in accordance with the instructions in circulars of September 23, 1880, and October 31, 1881, copies inclosed.

SWAMP LAND—SELECTIONS—INDEMNITY LOCATION.

STATE OF ILLINOIS.

Indemnity locations must be limited to the State in which the original selections were situated, and to lands liable to be taken under the act of March 2, 1855, and where no public lands are found in the State, the indemnity fails.

This question, by former decisions cited, held *res judicata*.

Secretary Kirkwood to Commissioner McFarland, October 19, 1881.

I have considered the appeal of the State of Illinois from your decision of September 6, 1880, rejecting her claim under the act of March 2, 1855, (10 Stats., 634), to indemnity in lieu of 12,346.51 acres of certain swamp lands situate in Champaign County in said State, disposed of by the United States in the interim of the passage of the swamp grant of September 28, 1850 (9 Stats., 519), and the indemnity grant of March 3, 1857 (10 Stats., 251).

It appears from the records that the proof in support of the State claim to indemnity for said lands, located with military bounty-land warrants or scrip, was duly examined by your office, and a list of such as were ascertained to be swamp and overflowed submitted to the Department in the year 1863, with certificate, of which the following is a copy:

GENERAL LAND OFFICE, August 26, 1863.

I hereby certify that the above-described tracts, situated in Champaign County, Illinois, were duly selected and claimed by said State as swamp lands, but have been disposed of by the United States at the dates stated, and the said State would be entitled to an equal quantity

as indemnity in other public lands within the limits of said State of Illinois, if such lands could be found there liable to be taken under said act of 2d March, 1855.

J. M. EDMUNDS,
Commissioner.

The area of the tracts described in said list is given as 12,346.51 acres, and the finding of Commissioner Edmunds was approved by my predecessor, Mr. Acting Secretary Otto, August 31, 1863.

In January, 1866, the agent of said State for the county aforesaid called attention to the claim in question, and on the 5th of the following month he was advised that such indemnity "must be limited to the State in which the original selections were situated, and as there are no public lands in Illinois with which to satisfy such awards, if made, this office declines to take such cases as the one in question into consideration."

It will be observed that the form of the certificates in such cases was approved by the Secretary of the Interior, September 6, 1855, with full knowledge of this restriction, and the action of your office in declining to issue certificates without such restrictive clause has been uniformly sustained by the Department, as will more particularly appear from the following recital of precedents:

The first application for such indemnity appears to have been made by the State of Indiana. In this case your predecessor, Mr. Commissioner Hendricks, held "that selections for such indemnity must be made out of any of the unsold public lands in said States;" and this construction of the act was approved by the Department on the 6th of September, 1855.

March 31, 1858, on appeal from the decision of your office by the agent of the State of Illinois for Henry County, the action of your predecessor in holding that such selections must be confined to said State was affirmed by Mr. Secretary Thompson.

On May 8, 1861, Mr. Secretary Smith adhered to the policy adopted by the Department in the first instance. On January 26, 1863, the same question was again presented to Mr. Secretary Usher, upon the application of the agent of said State for Vermillion County for a reconsideration of the matter in question, in which case Mr. Acting Secretary Otto adhered to the rulings of his predecessors.

On February 8, 1868, Mr. Secretary Browning, the same question having been submitted to him in the matter of the application of Livingston County, said State, held it to be *stare decisis*, and affirmed the decision of your office.

February 2, 1874, Mr. Secretary Delano, after reviewing at length the decisions aforesaid, held the question to be *res judicata*, and that it "must so remain until Congress orders otherwise."

Thus it appears to have been the immemorial policy of this Department to confine indemnity selections in such cases to the limits of the

respective States entitled thereto; and this policy is based upon a construction of the act of 1855 aforesaid, as in *pari materia* with the said swamp act of 1850, which expressly restricted the original grant to lands within the limits of the respective States to which the grant inured.

The act of 1855 aforesaid (under and by virtue of which the claim in question was preferred) is re-enacted in part by section 2482, Rev. Stat., which provides as follows:

Upon proof by the authorized agent of the State, before the Commissioner of the General Land Office, that any of the lands purchased by any person from the United States prior to March 2, 1855, were "swamp lands" within the true intent and meaning of the act entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September 28, 1850, the purchase money shall be paid over to the State wherein said land is situated; and when the lands have been located by warrants or scrip, the said State shall be authorized to locate a like quantity of any of the public lands subject to entry, at \$1.25 per acre or less, and patent shall issue therefor.

The decision of the Commissioner of the General Land Office shall be first approved by the Secretary of the Interior.

While only the latter clause of the first sentence and the whole of the second sentence of said section are applicable to the question at issue, I quote the same in its entirety, as showing the context in the light of which the clause in question must be construed, and not abstractly as an isolated statute.

Counsel for the State cite a number of authorities on the subject of construction of statutes, the applicability or relevancy of which to this case I fail to appreciate.

Said section, "in defining the right of indemnity selections, fixes its basis by specific reference to the act of 1850, and not to the enactment by way of revision, thus clearly indicating an intent to bound the new declaration of the grant by the limitations of the original statute, and not to modify or enlarge the provisions. If other terms were employed, indicating an intention to bring within its purview other objects of legislation, or to correct any obvious misapplication of the legislative intent depending upon former construction, effect must be given to the new statute in the very words of its enactment; but if no new matter be inserted, . . . the old statute is still existing law, because by its re-enactment it has neither been modified, enlarged, nor diminished"—my predecessor's decision of June 28, 1880 (7 C. L. O., 70).

It is further urged by the State's counsel that the questions at issue were never before any of my predecessors "respecting the particular lands in this case, and said decisions are binding in the case only in so far as the conclusions upon which they are based are sound as matters of legal construction;" in other words, that the questions involved in the case under consideration are *stare decisis*, and not *res judicata*.

Counsel's statement is not borne out by the record, and their position is therefore untenable. The foregoing copy of your predecessor's certificate, dated August 26, 1863, shows the patent fact that the identical

tracts in question, to wit, the said 12,346.51 acres, situate in Champaign County, State of Illinois, having been duly selected and claimed by said State, and ascertained to be "swamp and overflowed," the same were thereby listed as such, and submitted to the Department for approval in the year 1863; and that the finding of your predecessor, Mr. Commissioner Edmunds, as aforesaid, was approved by Mr. Acting Secretary Otto, August 31, 1863, in literal compliance with the terms of said section. Thus it appears that this scrip indemnity question is in all respects *res judicata*, inasmuch as it has the prerequisite elements of this well-established doctrine, to wit, identity in the thing sued for, of the cause of action, of parties to the action, and identity of the quality of the parties for or against whom the claim is made.

But for the purposes of argument I will grant the truth of so much of counsel's tentative proposition as that the questions at issue were never before any of my predecessors respecting the *particular lands* involved in this case. As far as the consideration and determination of the questions in the premises are concerned, the Department does not know the respective counties as such, but only the State of Illinois, as contemplated by the statute in question. Inasmuch, therefore, as the identical questions of law have been determined by my predecessors upon exactly the same state of facts in the matter of the claims of other counties of said State, predicated upon the same provisions of said statute, I would be disposed, even in this view of the case (were it the true one), to regard this indemnity question as *res judicata*, because in matters involving a State's right to make selections under the provision of the act of 1855, it is obvious that in the nature of things each parcel must be treated individually with reference to the claim presented. But while this is so, the fact of a designation by classes often appears; so that when found to be in a particular class, such finding in and of itself may bring certain specific tracts within a binding decision governing the class. This is especially true in the case under consideration, wherein a claim is preferred by a State under the provisions of a statute which has time and again been construed in the light of and in harmony with another statute, which expressly restricted the original grant to lands situate within the respective States to which the grant inured.

If, by the decisions cited above, the State deems important interests have been prejudiced, she has her remedy in a test case before the courts to determine the validity of the scrip locations upon any of the public lands claimed by her within the described limits.

She has enjoyed full opportunity since 1858 (when the adverse decision was rendered) to seek proper indemnification through Congressional action. This Department cannot be expected to vacate decisions of long-established authority, after such lapse of time and the repeated refusals of successive administrations to reopen them or disturb them.

Moreover, "the principle that the final decision of a matter before

the head of a Department is binding upon his successor in the same Department, under certain well-defined exceptions, has been so frequently declared that it is now entitled to be regarded as a settled rule of administrative law." (13 Opinions of Attorneys-General, 456, and cases cited.) See also 15 *ibid*, 315, and heirs of Murray McConnell (2 C. L. O., 83.)

It would give the foregoing doctrine an exceedingly limited construction to hold that it affected only an individual tract of land, when precisely the same question had been presented in reference to other tracts of land. The opinion of the Attorney-General of February 21, 1881, adopted by this Department (8 C. L. O., 59).

If, therefore, a decision previously rendered is binding upon other tracts of land, even if they have not been specifically named, but which come within the particular class to which the decision relates, *a fortiori* is such a decision binding upon the identical tracts, as in the case under consideration.

I therefore decline to reconsider my predecessor's decisions, and accordingly affirm your decision.

SWAMP LAND—SELECTIONS PRIOR TO ACT OF MARCH 3, 1857.

STATE OF LOUISIANA.

Lands selected and reported to the General Land Office as swamp, prior to March 3, 1857, if otherwise unappropriated, were confirmed to the State by act of that date, even though the plat of survey showed them to be the bed of a lake.

Secretary Schurz to Commissioner Williamson, January 15, 1879.

I am in receipt of your report of the 8th instant, relative to Secs. 6, 7, 18, 19, and 30, T. 30 N., R. 14 W., Louisiana, claimed by the State as swamp land.

From your report it appears that sections 6, 7, 18, and 19 were selected and approved as swamp lands by the United States surveyor-general for the State of Louisiana, May 18, 1852, and transmitted to your office on that day. These four sections were, therefore, of the character of lands mentioned in the act of Congress approved March 3, 1857, as a "selection of swamp and overflowed lands granted to the several States by act of Congress, approved September 28, 1850, . . . and the act of 2d March, 1849, . . . heretofore made and reported to the Commissioner of the General Land Office," and were confirmed to the State of Louisiana by said act.

You report that on the map of the township, approved February 17, 1840, the lands in question are designated as Soda Lake. This might raise the presumption that said sections were not swamp lands at the date of the granting acts in 1849 and 1850. On the contrary, we have the certificates of the surveyor-general that in 1852 the lands were swamp and that they inured to the grant.

In accordance with the subsequent survey of January 25, 1872, the surveyor-general reported the sections in question, together with section 30, as swamp land.

In the recent case of *Martin v. Marks*, the supreme court held that when the land had been selected and reported as swamp to the Commissioner of the General Land Office by the surveyor-general, prior to March 3, 1857, and remained vacant and unappropriated at that date, it was confirmed to the State. The tract in controversy before the court was a portion of section 7, now under consideration.

It must be held, I think, from the action of the surveyor-general in 1852, and the presumption which arises from that act, viz: that the land in question was swamp at that date, that the same was confirmed to the State by the act of March 3, 1857.

In the year 1872 your office rejected the claim of the State to the lands in question, basing its action upon the fact that the plats of survey approved in 1840 and 1872, represented the lands in question to have been the bed of a lake at the date of the swamp grant, hence that the same did not inure to the grant as swamp land.

Without discussing the question of the effect of the action of the surveyor-general in 1852, together with the confirmatory act of 1857, and the recent decisions of the supreme court above cited, in case the fact had been as assumed by your predecessor, I am of the opinion that the evidence before your office did not justify the action taken.

There was no sufficient evidence that the land was not swamp in 1849 and 1850.

If the lands in sections 6, 7, 18, and 19 were vacant and undisposed of March 3, 1857, I am of the opinion that the same were confirmed to the State, and that entries made subsequent to that date must be canceled.

As the land in section 30 was not reported to your office prior to March 3, 1857, the same was not confirmed, and the rules applicable to the judgment of the swamp grant should be applied thereto.

You are hereby instructed to take action in accordance with the views herein expressed.

SWAMP SELECTIONS—RAILROAD GRANT.

STATE OF LOUISIANA.

Where one grant of lands has been fully executed, no action should be had looking to the certifying or patenting of the same lands to the same grantee under another grant.

Therefore lands selected by the State as swamp prior to June 3, 1856, were excluded from the operations of the grant of that date to the State for railroad purposes.

*Commissioner McFarland to register and receiver, New Orleans, La.,
February 14, 1883.*

I am in receipt of an argument filed by Messrs. Pomeroy and Ingersoll, of this city, on the 23d of March last, relative to the status of cer-

tain lands described in the accompanying list, hereinafter described, said to be within the limits of a grant of lands to the State of Louisiana, dated June 3, 1856, to aid in the construction of certain railroads, and also selected by the State as swamp lands under act of March 2, 1849.

It is claimed by said attorneys that the lands in question having been selected as swamp prior to June 3, 1856, there was such a reservation of the tracts as would, under the proviso of the first section of act of that date, exclude them from the grant for railroad purposes, and therefore they were confirmed to the State as swamp by act of March 3, 1857.

The following-described tracts within the limits of the constructed portion of the N. O., O. & G. W. R. R. east of Brashears, were selected by the State as swamp land; but on the 29th of January, 1861, they were approved to the State for railroad purposes under act of June 3, 1856, viz:

All of Sec. 153, T. 15 S., R. 16 E.

Lots 1 & 3, Sec. 73, T. 17 S., R. 16 E.

All of Sec. 37, T. 13 S., R. 18 E.

Lots 2, 3,

4, W. $\frac{1}{2}$ of S.

E. $\frac{1}{4}$ and S.

W. $\frac{1}{4}$ of N.

W. $\frac{1}{4}$, Sec. 59, T. 15 S., R. 18 E.

All of Sec. 73, T. 15 S., R. 18 E.

All of Sec. 71, T. 13 S., R. 20 E.

All of Sec. 75, T. 13 S., R. 20 E.

All of Sec. 21, T. 13 S., R. 20 E.

All of Sec. 25, T. 13 S., R. 30 E.

All of Sec. 103, T. 13 S., R. 20 E.

All of Sec. 105, T. 13 S., R. 20 E.

All of Sec. 107, T. 13 S., R. 20 E.

All of Sec. 109, T. 13 S., R. 20 E.

All of Sec. 111, T. 13 S., R. 20 E.

All of Sec. 113, T. 13 S., R. 20 E.

All of Sec. 115, T. 13 S., R. 20 E.

All of Sec. 117, T. 13 S., R. 20 E.

All of Sec. 59, T. 13 S., R. 21 E.

All of Sec. 51, T. 14 S., R. 24 E.

All of Sec. 97, T. 14 S., R. 24 E.

It has been repeatedly decided by the Department that where one grant has been fully executed, no action should be had looking to the certifying or patenting of the same lands to the same grantee under another grant; therefore this office cannot consider the claim of the State to the above-described tracts under the swamp grant, as they have already been certified to under the railroad grant. (See State of Iowa v.

Cedar Rapids and Missouri River, Dubuque and S. C., and Iowa Falls and S. C. R. R. companies (3 C. L. O., 84; also same vol., p. 99; State of Minnesota *v.* St. Paul and S. C. Railroad Company, and State of Arkansas (4 id., 63).

The status of the following-described tracts selected as swamp prior to June 3, 1856, differs from the foregoing in this respect, that under the provisions of the act of Congress, dated July 14, 1870, U. S. Stats., vol. 16, p. 277, declaring forfeited the claim of the railroad to certain lands, they were restored to the public domain, March 15, 1873, and some of them have been entered with cash or under the homestead act, viz:

All of Sec. 31, T. 11 S., R. 10 E.; all of Sec. 1, T. 3 S., R. 12 W.; all of Sec. 11, T. 3 S., R. 12 W.; W. $\frac{1}{2}$ NE. $\frac{1}{4}$ Sec. 13, T. 3 S., R. 12 W., entered December 2, 1878. Homestead No. 5076.

W. $\frac{1}{2}$ Sec. 13, T. 3 S., R. 12 W. All of Sec. 15, T. 3 S., R. 12 W.; W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 29, T. 2 S., R. 6 W.; homestead entry No. 974, for which patent has issued; NE. $\frac{1}{4}$ of NE. $\frac{1}{2}$ Sec. 31, T. 2 S., R. 6 W., entered with cash No. 4802, September 27, 1880.

All of Sec. 23, T. 3 S., R. 12 W.; SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ Sec. 25, T. 3 S., R. 12 W.; all of Sec. 27, T. 3 S., R. 12 W.; all of Sec. 33, T. 3 S., R. 12 W.; all of Sec. 35, T. 3 S., R. 12 W.; all of Sec. 3, T. 4 S., R. 12 W.; all of Sec. 5, T. 4 S., R. 12 W.; NE. $\frac{1}{4}$ Sec. 3, T. 10 S., R. 5 E. Lots 8 and 9, or E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ Sec. 9, T. 16 S., R. 12 E., entered under the homestead act, No. 1040. F. C. 78, dated September 29, 1874, and NW. $\frac{1}{4}$ Sec. 29, T. 16 S., R. 12 E.

The following-described tracts were selected by the State as swamp land, subsequent to the act of June 3, 1856, and their being included in the list as selected prior to that date, and hence confirmed to the State by act of March 3, 1857, as claimed, was I presume an oversight, viz: lot 8, Sec. 37, T. 1 S., R. 2 E.; all of Sec. 1, T. 3 S., R. 2 E., and NW. $\frac{1}{4}$ Sec. 3, T. 3 S., R. 2 E.

The W. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 12, T. 3 S., R. 2 E., is a part of an even section, and was approved to the State as swamp land September 15, 1870.

The following-described tract was approved to the State for railroad purposes, and has not been selected as swamp, viz: all Sec. 21, T. 10 S., R. 6 E.

Lots 1 and 5, Sec. 33, T. 16 S., R. 2 E., were approved to the State as swamp land May 5, 1852, and are not claimed by the railroad.

The following-described tracts do not appear to have been selected as swamp, viz; W. $\frac{1}{2}$ NE. $\frac{1}{4}$ lots 1 and 2, Sec. 5, T. 17 S., R. 13 W.; SE. $\frac{1}{4}$ Sec. 7, T. 17 S., R. 13 W.; NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ lots 4 and 5, Sec. 17, T. 17 S., R. 13 W.

All of Sec. 5, T. 15 S., R. 13 W., selected prior to June 3, 1856, except the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, which has not been claimed as swamp, was approved to the State as such May 5, 1852.

The following-described tracts were selected by the State as swamp land prior to the act of June 3, 1856, and the State's claim to the same was rejected by this office January 2, 1861, and on the 29th same month they were approved to the State for railroad purposes; but the claim of the railroad to the same was declared forfeited by act of July 14, 1870.

E. $\frac{1}{2}$ N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 1, T. 3 S., R. 2 E.; all of Sec. 13, T. 3 S., R. 2 E.; SE. of NW. $\frac{1}{4}$ Sec. 15, T. 2 S., R. 3 E., and W. $\frac{1}{2}$ Sec. 21, T. 2 S., R. 3 E.

The following-described tracts were selected as swamp prior to June 3, 1856, and have been approved to the railroad, but the State claim under the swamp grant has not been rejected; in other respects their status is the same as those last above described:

Lots 5, 7, and 8, Sec. 1, T. 17 S., R. 12 W., lots 2, 3, 5, 6, 8, N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 15, T. 20 N., R. 4 E.

The following-described tracts are within the granted limits of the contested portion of the N. O., O. and G. W. R. R., act June 3, 1856, but do not appear to have been selected by said road. They were, however, selected by the State as swamp lands prior to June 3, 1856, but have not been certified to it, viz:

All of Sec. 21, T. 14 S., R. 23 E.; all of Sec. 15, T. 10 S., R. 6 E.; all of Sec. 25, T. 14 S., R. 20 E.; all of Sec. 27, T. 14 S., R. 20 E.; all of Sec. 29, T. 14 S., R. 20 E.; all of Sec. 31, T. 14 S., R. 20 E.; all of Sec. 33, T. 14 S., R. 20 E., and all of Sec. 35, T. 14 S., R. 20 E.

The following-described tracts are within the indemnity limits of the road named, and had been selected by the State as swamp lands prior to June 3, 1856, but the title is yet in the government, viz:

S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ of SW. $\frac{1}{2}$, SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 11, T. 3 S., R. 2 E.; all of Sec. 15, T. 14 S., R. 13 E.; lots 1, 2, 3, and 4, Sec. 19, T. 14 S., R. 23 E.

The proviso in the act of June 3, 1856, above referred to is as follows:

And provided further, 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 improvements, or for any other purposes whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act; and in support of the views urged the following United States supreme court decisions are cited: *L. L. and G. R. R. v. U. S.* (2 Otto, 733); *Newhall v. Sanger* (2 Otto, 761); *Railroad Co. v. Fremont Co.* (9 Wallace, 89).

The question for decision is, were the tracts selected and reported to this office by the State as swamp land prior to June 3, 1856, whether swampy or not in character, excluded from the grant of lands for railroad purposes of that date to the State of Louisiana?

The opinion of the Attorney-General, dated November 10, 1858 (1 Lester, 564), involving the question of respective claims under the swamp and railroad grants, formed the basis of a letter of inquiry ad-

dressed to the Department by this office, December 2, 1858 (see 1 Lester, 565), as follows:

Were lands within the limits and description of a railroad grant which were not in fact *swamp* or *overflowed*, but were selected and reported as such prior to final location of the railroad, and said road became located prior to the act of 3d March, 1857, did that act confirm such selections as unappropriated lands, and must the lands be patented to the State under the swamp grant? or on the other hand, did they become appropriated by the railroad grant and the final location of the road, and shall the investigations proceed upon contests made by the railroad companies with a view to ascertain the real character of the lands, whether they be swamp or dry?

These inquiries, which involve the identical questions at issue, were answered by the Department December 10, 1858, to the effect that the act of 1857 did not confirm such selections, and the character of the land was therefore a matter that could be inquired into (1 Lester, 567).

The same views were maintained and instructions issued in accordance therewith by Secretary Thompson July 23, 1859 (1 Lester, 570).

It is argued that this manner of adjusting the grants is not sustained by the United States supreme court decision cited, but that, on the other hand, entirely opposite views are set forth.

Under the proviso in the grant of June 3, 1856, above quoted (all railroad grants referred to having a similar proviso), restricting the grant, the supreme court, in case of Railroad Company *v.* Fremont Company, *supra*, held (referring to the lands selected as swamp) "in the language of the railroad act, the whole of the lands in controversy were 'otherwise appropriated,' and were 'reserved' for the purpose of aiding the States in their objects of internal improvements."

In the case of L. L. & G. R. R. Co. *v.* United States, *supra*, the question being the construction placed upon the proviso restricting the grant to the railroad company, the court held that "these grants have always been recognized as attaching only to so much of the public domain as was subject to sale or other disposal."

The selection of a tract as swamp land, and placing the same of record, has always been held by this office as withdrawing it from entry or location.

Under the decisions as cited, lands herein described selected by the State as swamp lands prior to June 3, 1856, whether swamp or dry, were otherwise appropriated within the meaning of the act, and were, therefore, excluded from the operations of the grant of that date to the State of Louisiana for railroad purposes; from which it follows that said grant did not interfere with or prevent their confirmation to the State as swamp lands under act of March 3, 1857, and I decide that if they were otherwise vacant and unappropriated at that date, they were so confirmed.

In view of this decision, the action of this office, as stated, in rejecting the State's claim to any of the tracts selected as swamp prior to

June 3, 1856, was erroneous, as was also the certifying of these lands to the State for railroad purposes.

The action of this office was also erroneous in restoring the tracts above named to market; and you will note on your records the fact that the lands described as having been selected prior to June 3, 1856, are confirmed swamp selections, and refuse to allow entries of the same, and also advise parties who have made the entries, as stated, that they will be canceled and the purchase-money refunded; and in case of homestead entries the parties will be allowed to make new entries, with credit for the fees and commissions paid, or on application the money so paid will be returned to them.

SWAMP SELECTIONS—FIELD NOTES.

STATE OF MICHIGAN.

The State and the United States having agreed that the field notes of survey should form the basis of adjustment of the State's claim for swamp lands, and the same in case of resurvey; and a resurvey having been made, in the field notes of which the tract in question appeared to be of the character contemplated by the act of September 28, 1850, the same inured to the State, though not embraced in the list of selections reported.

Secretary Kirkwood to Commissioner McFarland, October 1, 1881.

I have considered the appeal of the Flint and Pere Marquette Railroad Company from your decision of December 16, 1880, which held the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 33, T. 14 N., R. 1 W., East Saginaw, Mich., to be swamp land, and granted to the State of Michigan under the act of September 28, 1850.

By agreement between the State and the United States, the field notes of survey were made the basis of adjustment of the swamp claim of the State; and in case of a resurvey the adjustment was also to be made on like notes.

The tract in question is embraced in a list of swamp selections for that State, reported to your office December 24, 1852. A resurvey of the township was made and approved in June, 1853, and a new list of selections in lieu of the former list was reported by the surveyor-general in October, 1853, in which the tract is not embraced. It appears, however, from the field notes of such resurvey that the tract is of the character contemplated by the said act. It is immaterial, therefore, whether or not it was named in said list; but being of the character named, it inures to the State, under said agreement, regardless of the list.

Your decision is affirmed.

3317 10/ SWAMP LAND—SELECTION—PRIOR SALE—EVIDENCE.

ARANT *v.* STATE OF OREGON.*

The swamp grant act to Oregon does not include lands which the government sold, reserved or disposed of prior to confirmation of title—*i. e.*, the approval by the Secretary of the Interior of the State selection

Arant made his pre-emption filing prior to the assertion of any claim by the State.

Besides the evidence fails to show that the land was swamp.

Pre-emption allowed, and claim of the State held for rejection.

Commissioner McFarland, to register and receiver, Lakeview, Oregon, April 14, 1882.

I have examined the case of *W. F. Arant v. State of Oregon*, involving lots 1, 2, 3, and 4, Sec. 2, 40 S., 8 E., W. M.

Mr. Arant filed pre-emption D. S. No. 82, June 13, 1873, alleging settlement November 5, 1872. The State selected the tracts December 1, 1872, under the swamp land grant of March 12, 1860.

This act extended the swamp land act of 1850 to the States of Oregon and Minnesota, subject among other conditions to the following provisions:

That the grant hereby made shall not include any lands which the government of the United States may have sold, reserved, or disposed of (in pursuance of any law of Congress heretofore enacted) prior to the confirmation of title to be made under the authority of the said act.

Land that should be so disposed of by the United States prior to the confirmation of the State title as aforesaid was therefore not granted to the State of Oregon.

The confirmation to be made was the adjudication and approval to the State by the Secretary of the Interior of lands found to be swamp in the manner provided by the act of 1850.

In the case of *Crowley v. State of Oregon*, the Secretary of the Interior held that the proviso of the act of 1860 was not intended to continue the disposal under general laws of land found to be swamp, or to dispose of lands in the face of an asserted and undetermined claim of the State, and the Secretary expressly declared that "to this extent only is it here intended to construe this proviso."

In the present case the settler claimed to have initiated his pre-emption right prior to the assertion of any claim by the State.

The evidence taken at the hearing in the case and reported by you establishes this fact:

The land was not swamp land as shown by the public surveys or as found by the testimony in the case.

The State relied upon the deposition of William M. Turner to prove the swampy character of the land. Turner was one of the deputy United States surveyors who surveyed this land in 1872. He again

* See 2 L. D., 641.

examined it unofficially in 1876. In 1872, when an officer of the United States, he found the land not swamp but among "the most valuable and desirable land in the whole township." In 1876, when employed in some other capacity, he found the land submerged. The evidence in the case shows that there was an extraordinary overflow in 1876. It is evident that the conclusion reached by Mr. Turner at a period of unusually high water, that the land was swamp, cannot be relied upon to establish the swampy character of land which he had carefully examined and officially reported in 1872 as "rich bottom."

The rebutting testimony shows, besides, that the general character of the land was properly described by the survey of 1872. In 1879 another official survey of this land was made, and the field notes of the latter survey correspond with the survey of 1872, and both confirm the testimony of the inhabitants that the land is not swampy in character, but good arable land.

The prior right of the pre-emptor having been established, and the land not having been found to be swamp, the pre-emption entry will be allowed and the claim of the State held for rejection, subject to the usual right of appeal.

CASH ENTRY—AMENDMENT.

THOMAS UNDERHILL.

Amendment cannot be allowed except in the cases provided for by law, where an error has been made in the description by the entryman, or where the records are defective in not showing the correct description of the land.

Commissioner McFarland to register and receiver, Gainesville, Florida, September 29, 1882.

Referring to your letter of 25th January last, inclosing the affidavit of Thomas Underhill, duly corroborated, setting forth that the land embraced in his cash entry No. 1494, for the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 7, T. 15, R. 29 E, lies under water, and is totally untillable and worthless for any purpose, and asking that he may be allowed to apply the purchase money on said entry to a new entry on land such as he may select.

You are informed that it is not shown that any mistake was made by Mr. Underhill in making said entry No. 1494, nor is it shown that he intended to purchase a tract different from that purchased; no error was occasioned by original incorrect marks made by the surveyor or by obliteration or change of the original marks and numbers at corners of the tract of land; neither did the mistake arise from error of the surveyor or officers or the land office.

Mr. Underhill applied to purchase the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 7, T. 15 S., R. 29 E., and it is not shown that he intended to purchase any other

tract of land, or that any mistake was made of the true numbers of the tract purchased.

From the evidence submitted, I am of the opinion, that no mistake was made by Mr Underhill in making entry No. 1494, and he is therefore not entitled to the relief provided for in sections 2368 and 2372 Rev. Stats., to which you are referred.

The law only provides for change of entry where an error has been made in the description by the entryman himself, or when the records themselves are defective in not showing the correct description of the land.

ACCOUNTS—FEES AND COMMISSIONS.

INSTRUCTIONS.

Instructions as to the fees to be charged by registers and receivers for filing and acting upon applications for patent for mineral lands and the charges to be made for writing actually done to establish proof in such cases.

*Commissioner McFarland to register and receiver, Lake City, Colorado,
July 8, 1881.*

I am in receipt of your letter of the 28th ultimo in reply to "M" of June 21, in reference to the charge of \$5 in addition to the regular fee of \$10 in applications for patents for mineral lands, and in reply have to inform you as follows :

You are authorized by the law and by instructions from this office to charge and collect a fee of \$10 for filing and acting upon applications for patent for mineral lands, and where any writing is done by the register, receiver, or any other person employed by them to do such writing, a further charge of 22½ cents per hundred words for writing actually done to establish proof to such mineral claims, provided said writing is done in the office of the register and receiver, is to be charged and collected, said money to be accounted for in the receiver's monthly and quarterly accounts as fees received for reducing testimony to writing. Messrs. Cobb and Arnold, of Denver, Colo., have this day been furnished with a copy of this letter.

FEES FOR REDUCING TESTIMONY TO WRITING.

Instructions to registers and receivers as to their duties therein ; also in examining testimony, furnishing transcripts, etc. Fees chargeable by them therefor.

*Commissioner McFarland to register and receiver, La Crosse, Wisconsin,
July 29, 1881.*

I am in receipt of the register's letter of the 13th of June last, requesting that the receiver at your office be instructed as to his duties

in reducing testimony to writing, examining testimony, furnishing transcripts, etc., and in reply have to state as follows:

Paragraph 10, section 2238, Rev. Stat., in fixing the compensation of registers and receivers for reducing testimony to writing, provides that "the register and receiver are allowed jointly at the rate of 15 cents per one hundred words for testimony reduced by *them* to writing," implying, though it does not expressly state, that it is the duty of *both officers* to perform this work.

Section 2239, Rev. Stat., in reciting the duties of registers of consolidated land offices in making transcripts or furnishing other information from the records, expressly states that "the receiver shall receive his equal share of the fees, and it *shall* be his duty to aid the register in the preparation of the transcripts or giving the desired information."

Correspondence addressed to the register or receiver, or to register and receiver, is to be answered by the officer to whom the subject especially pertains; or if the information or the business is of a joint nature each officer will assist in giving said information or attending to the business referred to.

It is expected and required that the register and receiver will each cheerfully assist the other in conducting the business of the land office for the best interests of the government and the welfare of the people.

FEES FOR REDUCING TESTIMONY TO WRITING.

Instructions to register and receiver as to proper charge therefor in mineral cases, and as to other proper and improper charges.

Commissioner McFarland to register and receiver, Lake City, Colorado, May 6, 1882.

I have to acknowledge the receipt of your letter of the 10th ultimo, replying to ours of the 24th March, relating to fees received for reducing testimony to writing in mineral cases, and in reply thereto have to state as follows:

You refer to the method employed by you in computing fees received for reducing testimony to writing and detail the charges under several heads, and say you charge for,

1st. Notice for publication; this you have a right to charge for at the rate of 22½ cents per 100 words for writing actually done by you.

2d. Writing done in filing and briefing all the papers; this is an illegal charge and must not be made.

3d. Letters written to the parties, often a long correspondence; this you must not charge for, as you are each paid a salary of \$500 per annum to conduct the business and correspondence of the office.

4th. Writing done in final entry, embracing register's certificate and certificate of posting, receiver's receipt, and making the application to

purchase. You will not make any charge for these services, as they are part of the duties connected with your office, with the exception of the application to purchase, which is to be made out by the applicant; but if made by you (and every facility should be given to purchasers of lands), you can make no charge therefor.

5th. Letters to the parties again; no charge for this can be made, as you must conduct the correspondence of your office without any charge to your correspondents.

6th. Letters of transmittal to General Land Office; the same answer as is given to No. 5 applies to this.

7th. Correspondence from time to time with the Department and applicants, up to the time the patent issues. No charge is to be made for this.

You are now informed that you will be held to a strict compliance with instructions contained in the circular letter of this office, dated January 27, 1881 (copy herewith), and to the charges authorized by the fee bill transmitted under date of April 7, 1881. You will inform this office whether you keep the fee bills referred to posted in a conspicuous place in your office or not.

FOR REDUCING TESTIMONY TO WRITING WHEN TAKEN BEFORE SOME OFFICER OTHER THAN REGISTER AND RECEIVER.

When testimony is taken as above in contested cases, the register and receiver are not entitled to compensation aside from their salaries.

Commissioner McFarland to register and receiver, North Platte, Nebraska, July 18, 1882.

I have to acknowledge the receipt of the register's letter of the 12th ultimo, inquiring "whether, in contest cases, where all the evidence is taken before some officer other than the register or receiver, the receiver is authorized to charge for and receive any compensation under the head of reducing testimony to writing, for the writing done in making up the record and decision in the case, and the transcripts thereof, and also for the writing entering in the commission to take depositions and copy of interrogatories," and in reply thereto, you are informed that you are not entitled to receive any compensation for these services, as they are a part of the duties of your office, for which you receive an annual salary of \$500.

Your attention is called to the inclosed circulars from this office, dated May 24, 1879, and January 27, 1881, respectively, from which you will learn the proper items to charge for under the laws and regulations relating to fees for reducing testimony to writing.

The letter of this office, dated May 6, 1882, to the register and receiver at Lake City, Colo. (9 C. L. O., 35), relating to fees allowed for testimony reduced to writing in establishing claims to public lands, is modified to the extent that no charge is to be made for the preparation of the notice of publication.

INDIAN LANDS—PROCEEDS OF SALES—HOW DISPOSED OF.

Receivers are to pay into the Treasury the gross amount of proceeds of such sales. No part can be withheld for compensation of register and receiver or for clerk hire.

Decision of First Comptroller of Treasury.

First Comptroller Lawrence to Commissioner McFarland, July 2, 1881.

I have received the letter of the Acting Commissioner of the General Land Office, under date of June 4, 1881, in which he states that, owing to a deficiency in the appropriation for salaries, fees, and commissions of registers and receivers for the current fiscal year (1881), the honorable Secretary of the Interior has directed that a *pro rata* distribution be made of the unexpended balance of the appropriation, based upon the receipts of the various offices for the quarter ending March 31, 1881. He states that the office at Independence, Kans., is a maximum office, and that an advance of \$600 was made to the receiver for 40 per cent. of his estimate of \$1,500. In addition to the public lands disposed of in this district are included Osage trust and diminished reserve lands, and the receiver has, under date of May 30, 1881, requested that he be permitted to transfer to his account, as disbursing agent, the sum of \$900 from the proceeds of the sale of said Indian lands, with a view of supplying the deficiency in the salaries, fees, and commissions of himself and the register. He bases his application upon a letter from the General Land Office, dated April 28, 1878. The Acting Commissioner refers to section 5 of the act of May 28, 1880 (Public Laws, page 143, chap. 107), providing that in the disposal of the Osage trust and diminished reserve lands, the register and receiver shall be allowed the same fees and commissions as are allowed in the disposal of public lands, and the net proceeds of the sales of public lands, after deducting the expenses of such sales, shall be deposited, etc. He further states that all clerks in local land offices employed upon work connected with the disposal of Indian lands are paid from the proceeds of the sales of said lands, and that it has been the custom heretofore, where a deficiency existed in salaries, fees, and commissions, to supply it from the proceeds of the sales of Indian lands in districts where such lands are situated. He further states that there seems to be no authoritative decision from this office relative to this and the proceeds of the sales of other Indian lands; and he submits the question for my decision, with a request that it be made at as early a day as practicable.

The large amount of business forced upon this office by reason of the close of the fiscal year, and the operations of the Loan Division in converting outstanding 5 per cent. bonds into 3½ per cents, has necessarily delayed an answer until this date.

I have considered the question submitted with care, and in due time will print a decision.

The Osage treaty, proclaimed June 1, 1867 (14 Stats., 687), and the act of May 23, 1880 (Public Laws, page 143, chap. 107), both require the net proceeds of sales of the lands referred to to be paid into the Treasury to the credit of the Indian civilization fund. It is not expressly declared what shall be done with that portion of the proceeds of sales applicable to reimburse the United States the cost of survey and sale, but the treaty provides that the United States shall be reimbursed the cost of survey and sale. The entire proceeds of the sales of these lands, as well that which is to go to the credit of the Indian civilization fund as that portion which is applicable to the reimbursements of the United States for the cost and expenses of survey and sale, are required by law to be paid into the Treasury.

Section 3617 of the Revised Statutes expressly provides that the gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided in the next section, shall be paid by the officers who have received the same into the Treasury at as early day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, or expenses or claim of any description whatever. The exception named in this section of the Revised Statutes is not material, as it does not relate to this subject. It is entirely clear that that portion of the proceeds of sales which are applicable to the reimbursements of the United States for the expenses of survey and sale is money received for the use of the United States, and by the express terms of section 3617 must be paid into the Treasury.

If clerks in local land offices, who have been employed upon work connected with the disposal of Indian lands, have been paid from the proceeds of the sales of said lands, without an explicit provision in some act of Congress, the payment has been unauthorized, and the custom of supplying deficiencies in appropriations for the salaries, fees, and commissions of registers and receivers from the proceeds of said sales is equally unauthorized.

It is the duty of the receivers of public moneys to pay into the Treasury of the United States the gross amount of the proceeds of all such sales. The costs and expenses of survey and sale of these Indian lands are to be ascertained and stated to the Treasury Department, and that portion of the proceeds necessary to reimburse these costs and expenses is to be paid into the Treasury of the United States as miscellaneous receipts, applicable to the reimbursements of the United States under appropriations by Congress. That portion of the proceeds of sales not so used of the lands now in question is to be carried to the credit of the Indian civilization fund.

Hereafter the receivers of public moneys will be chargeable in accordance with this decision, and disbursing officers cannot receive credit for any disbursement in excess of the appropriation made by Congress.

INDIAN LAND—HOW PAID FOR.

No purchase of the Pawnee Indian lands can be consummated until the required payment is made *in money*. The receipt of drafts not authorized.

Acting Commissioner Harrison to receiver, Grand Island, Nebraska, October 24, 1882.

I have to acknowledge the receipt of your letter of the 27th ultimo, stating that the Treasury Department has called your attention to the regulations of the same in reference to depositing the public moneys, in which you state that the moneys remaining in your hands as shown in your weekly statements, in excess of the amount authorized by existing regulations, is caused by you receiving drafts from purchasers of Pawnee Indian lands, and retaining the receipts issued for said lands until the drafts are cashed, in the meanwhile reporting the amount of said sales as on hand in personal possession. This you state you do in order to save trouble and loss to the purchasers of said lands, who might otherwise, on account of the delay in having their drafts cashed, lose the land.

While this office appreciates the motive that prompts your actions in the premises, yet it is not optional with you to accept payment for lands sold in this manner.

The law provides for the sale of the Pawnee Indian lands for money, and no purchase of the lands can be consummated until the required cash payment is received in money; therefore, should you receive drafts in payment for lands sold, you do so at your own risk, and you will be held responsible for the amount of money reported as received by you on all lands returned as sold.

In future you will receive in payment for lands sold current funds of the United States only.

INDIAN LAND—CERTIFICATES OF DEPOSIT.

Certificates of deposit on account of surveys cannot be received in payment for Sioux Indian lands. The act of March 3, 1863, requires such lands to be sold for cash.

Commissioner McFarland to receiver, Redwood Falls, Minnesota, April 12, 1882.

On July 23, 1881, you received in payment for cash entry register and receiver No. 199, Sioux Indian lands, made by Cornelius H. Byington, certificates of deposit on account of surveys No. 2298, issued by the First National Bank of Santa Fé, N. Mex., in favor of Margarito Chavez, dated May 13, 1881, and No. 6558 issued by the Colorado National Bank of Denver, Colo., in favor of Samuel B. Stewart, dated June 25, 1881, for \$140 and \$100, respectively.

The above described certificates are returned to you with the following statement:

Triplicate certificates of deposit are receivable in payment for any public lands, entered under the homestead or pre-emption laws, but are not to be received in payment for Indian lands, timber or stone lands, nor for desert, coal, or mineral lands. (See marked paragraph of inclosed circular, also decision of the Honorable Secretary of the Interior, on the appeal of Robert Sproul, Land Office Report, 1877, p. 143.)

Under the provisions of the act of March 3, 1863 (Statutes at Large, vol. 12, p. 819), Sioux Indian lands in Minnesota are to be sold for cash and the proceeds thereof deposited for the benefit of said Indians; therefore, certificates of deposit on account of surveys are not receivable in payment for Sioux Indian lands.

The receiver's receipt, quarterly detailed and condensed accounts, monthly account current, and abstract of Sioux Indian lands sold for the month of January last are returned for correction.

You will require Mr. Byington to pay for the land in cash, and when this is done inform him that on the return of the triplicate certificates to this office a certificate will be placed thereon, allowing them to be again used, in payment for public lands entered under the pre-emption or homestead laws.

As soon as possible you will return the papers in the case to this office.

MAKING ABSTRACTS OF RECORDS.

Abstracts of records in the local offices, for county clerks, may be made by persons not employed in nor paid by the office, provided the work does not interfere with the business of the office.

Commissioner McFarland to receiver, Concordia, Kansas, February 23, 1882.

I have to acknowledge the receipt of your letter of the 13th instant stating that certain county clerks had made application to you for abstracts of records from your office for the purpose of taxation in their respective counties, and requesting information as to how such abstracts can be made, and in reply have to state as follows: As there is no provision of law allowing you to receive pay for transcripts of records, and as you state that prior to 1881 it was the practice of your office to allow a person familiar with your tract books to make such abstracts and receive pay from the county clerks, you are authorized to continue the same practice in these and like cases, providing the work does not interfere with the business of your office and is not done by the register and receiver, nor by any one in their employ.

Your attention is called to marked paragraphs of inclosed circular dated January 27, 1881.

ACCOUNTS.

Instructions with respect to the disposition of money paid at the local offices.

Commissioner McFarland to registers and receivers, May 24, 1882.

The attention of this office having been called to a difference of opinion existing among persons having business at local land offices as to the proper officer to receive money to pay for entering lands, or for fees for transcripts of records and other services rendered, I have to call your attention to the following instructions:

Registers of land offices have no right, officially, to receive any moneys whatever except such as are paid to them by receivers as salary, fees and commissions, and the fee of one dollar they are especially entitled to receive for giving notice of the cancellation of pre-emption, homestead, and timber culture entries, under the act of May 14, 1880.

All moneys received for other services rendered by either registers or receivers are to be paid to the receiver, and deposited and accounted for by him as other public moneys.

Should any money be forwarded to the register, or paid to him, he will at once pay over the same to the receiver; and where parties address the register as to the value of any lands, or the cost of any service required, he will instruct them that the receiver is the proper officer to receive public funds.

REPAYMENT.—DOUBLE MINIMUM LAND.

J. GARAGHTY.

Where the definite location of a railroad raised the price of the land settled upon to \$2.50 per acre, prior to the date of settlement, repayment of the enhanced price cannot be made.

Acting Secretary Bell to Commissioner McFarland, July 16, 1881.

I have considered the appeal of J. Garaghty from your decision of January 22, 1881, rejecting his application for the return of \$1.25 per acre in excess of the minimum price paid by him for the NW. $\frac{1}{4}$ Sec. 36, T. 89, R. 29, per Fort Dodge, Iowa, pre-emption cash entry No. 4766, for the reason that the act of Congress of May 15, 1856, to aid in the construction of certain railroads in the State of Iowa, raised the price of the alternate sections within the six-mile limits on each side of said roads to \$2.50 per acre; and that the definite location of the Dubuque and Sioux City Railroad on July 5, 1856, raised the price of the even alternate sections, of which the tract named is one, to said price.

Garaghty's settlement was on October 16, 1856; his final proof and payment were made June 19, 1858, and the land was patented to him on October 1, 1859.

On December 19, 1874, you rejected a like application of Garaghty, and for the same reasons upon which you reject his present application. As no appeal was taken from that decision, it therefore became final, and his present claim rests solely upon the act of June 16, 1880, the second section of which provides that "in all cases, where parties have paid double-minimum price for land, which has afterwards been found *not* to be within the limits of a railroad land grant, the excess of \$1.25 per acre shall be repaid to the purchaser, his heirs or assigns."

The question submitted, therefore, is one of fact only, viz, whether or not the tract is within the limits of the grant to said Dubuque and Sioux City Railroad (afterwards the Dubuque and Pacific Railroad).

As it appears from the files and maps of your office that said tract is *within* the limits of said grant, the application of Mr. Garaghty is not aided by the said act, and your decision is accordingly affirmed.

[Re-affirmed by decision of Department of September 19, 1881, on motion for reconsideration.]

REPAYMENT—ADDITIONAL HOMESTEAD ENTRIES.

By the act of March 3, 1879, no fees and commissions are chargeable upon such entries, and amounts received therefor must be returned.

Commissioner McFarland to register and receiver, North Platte, Nebraska, July 26, 1881.

I have to acknowledge the receipt of the receiver's letter of the 25th ultimo, in reply to letter "C" of the 18th of June last in relation to the practice followed at your office of charging and collecting commissions on additional homestead entries under the act of March 3, 1879, and in reply have to inform you as follows:

The act of March 3, 1879 (see Statutes of the United States, 1878-'79, page 472), provides that—

Any person who has under existing laws taken a homestead on any even section within the limits of any railroad or military road land grant, and who, by existing laws, shall have been restricted to eighty acres, may enter under the homestead laws an additional eighty acres adjoining the land embraced in his original entry.

It further provides that the settler may elect to have his original entry canceled, and be entitled to make a new entry of one hundred and sixty acres the same as though the first entry had not been made, and it is provided further that said additional entry, or a new entry after the cancellation of the old one, shall be allowed to be made *without* the *payment* of *fees* and *commissions*. The statute is definite in its terms. The entry is to be allowed "without the payment of fees and commissions."

This office understands the law to be that no entry fees or commissions are to be charged in such cases. There is no exception stated in the act which would imply that final entry commissions are chargeable on making final proof.

The language "without the payment of fees and commissions" requires the entry to be allowed without the payment of either original or final entry fees or commissions, and the Secretary of the Interior has ruled that the act is a remedial one and must be liberally construed. As the law stands, therefore, persons making final proof on additional or new entries under the above act are entitled to do so without the payment of any entry *fee* or *commissions*, and the register and receiver are only entitled to the fee for reducing testimony to writing in making final proof, which at your office is fifteen cents per one hundred words.

The final receipts in additional homestead entries, register and receiver Nos. 438, 447, 457, 464, 465, and 466; the register and receiver abstracts of final proofs for the months of January, March, May, and June last; the receiver's accounts-current and fee statements for the same months, and his accounts for the first and second quarters of 1881, with the register's vouchers for the same quarters, are herewith returned. The receiver will return the commissions collected in the cases above referred to to the parties paying the same, taking from them vouchers for the respective amounts, which he will transmit to this office.

The receiver will collect from the register the amount allowed said officer as his share of the disallowed commissions, taking from him a corrected voucher for his salary, fees, and commissions.

The receiver will correct his accounts and return all the papers in the cases to this office as soon as possible. As the accounts for the third and fourth quarters of 1880 have been adjusted by this office, and transmitted to the Treasury Department, and the commissions received in those quarters covered into the Treasury, there can be no relief to the parties who made final proof in additional homestead entries Nos. 401, 412, 426, 430, and 431, without a special act of Congress.

REPAYMENT—MINERAL LAND.

JOHN R. MAGRUDER.

The cancellation of a mineral entry for non-compliance with antecedent statutory requirements does not affect the possessory rights of the applicant.

Effect of relinquishment of defective entry and repayment of purchase money in such a case.

Distinction between mineral and agricultural entries in this respect.

Commissioner McFarland to Secretary Kirkwood, July 29, 1881.

I have the honor to submit herewith for your action, an account in favor of John R. Magruder for return of purchase money for land erroneously sold to him by the United States, per Santa Fé, N. Mex., mineral entry, No. 8, for lot No. 38, known as the Chino Mine Claim.

It appears from the evidence herewith submitted, that the local land officers declined to receive the money, \$105, from said Magruder on the

ground that the publication notice and application bore different dates, and the party was allowed to appeal to this office. Upon appeal, this office directed the local officers to accept the money from Magruder, because the objections of the local officers were not well taken. (See copy of letter herewith, marked A.) Upon the receipt of the papers in the case by this office, and an examination of the same, the entry was canceled for the reason stated in the adjustment. (See copy of letter of cancellation herewith, marked B.)

It is my opinion that the entry was erroneously allowed, and comes within the provisions of the act of June 16, 1880, and I therefore submit the case for your consideration.

Acting Secretary Bell to Commissioner McFarland, August 3, 1881.

The claim of John R. Magruder, forwarded with your letter of July 29, 1881, for the repayment, under the act of June 16, 1880, of \$105, paid by him at the Santa Fé land office, New Mexico, November 22, 1875, on mineral entry No. 8, as per receiver's receipt of that date, and of \$10 paid by him in the matter of said entry as fee for filing his application for patent, amounting altogether to \$115, is herewith returned with my approval.

It must be understood, however, that the approval of this claim cannot be treated nor considered as a precedent in cases of repayment of moneys paid upon agricultural entries, for this reason, that in case of an agricultural entry the lawful cancellation thereof leaves no right or title to the land in the entryman, and therefore the requirement of the law (sec. 2, act of June 16, 1880) and of your regulations regarding the relinquishment of all claim to the land should be enforced in such a case; but it is quite different as regards a mineral entry where, as in this case, the entry was canceled for the reason that the antecedent statutory requirements necessary to authorize a sale by the local officers had not been performed, and not for the reason that the claimant had no legal possessory title. The cancellation of Magruder's entry therefore simply set aside all that had been done towards the acquisition of a patent, and left his rights of possession under his location and compliance with law as to yearly improvements, whatever those rights were, intact, and Magruder free to sell his possessory title the same as if no entry had been made or attempted. His conveyance, therefore, of March 1, 1876, after the cancellation of his entry, must be treated by the Department simply as a conveyance of his possessory title, and not an attempted disposal of the title which he might claim under his entry; in other words not an attempted disposal of the fee. On the other hand his relinquishment on the back of his duplicate receipt, made April 21, 1881, whereby he in terms relinquished to the United States all his right, title, and claim in and to the land described in the receipt cannot be construed as a relin-

quishment of his possessory title, but as a relinquishment of all claim by virtue of the said receipt and entry, such a relinquishment, in my opinion, is in this case a compliance with the second section of the act aforesaid.

REPAYMENT—FRAUDULENT PRE-EMPTION.

F. W. MARCHANT.

Where entry is canceled on the ground of fraud, repayment will not be allowed.

*Commissioner McFarland to Messrs. Bird & Lowe, Salt Lake City, Utah,
November 25, 1881.*

In reply to your letter of 14th instant, relative to the application of Franklin W. Marchant for repayment of the purchase money paid on Salt Lake City pre-emption cash entry No. 1,038, you are advised that the records of this office show that Mr. Marchant filed for the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ Sec. 23, T. 1 S., R. 5 E., as per declaratory statement No. 2,193, April 12, 1870, and made final proof and payment July 11, 1872, per cash entry No. 1,038.

By our letter "F," of October 2, 1874, Mr. Marchant was called upon to furnish additional proof as to his citizenship and actual date of settlement.

On March 26, 1875, a report was received from the local officers at Salt Lake City stating that Mr. Marchant had appeared at their office and stated that he had relied upon his father's naturalization papers for his citizenship, and that he was but twenty-one years of age at the present time. Thereupon his entry was canceled April 7, 1875, because he was not a qualified pre-emptor, being a minor at date of filing and entry.

Under section 2362 of the Revised Statutes repayment is authorized upon satisfactory proof, "that any tract of land has been erroneously sold by the United States, so that from any cause the sale cannot be confirmed," while in section 2 of the act of June 16, 1880, it is provided that the Secretary of the Interior shall cause repayment to be made, "when from any cause the entry has been erroneously allowed and cannot be confirmed."

In this case the proofs at date of entry showed a compliance with law (he, Marchant, having sworn that he was twenty-one years of age); but it was subsequently proven that he was not of age at date of said entry (he, Marchant, having acknowledged that he was not of age when he made said proof); therefore the proofs upon which the entry was based were false; and in such a case it cannot be held that the entry was erroneously allowed, for it was his (Marchant's) own fault that the entry could not be completed.

Therefore I decline to recommend the repayment of the purchase money as asked for. Sixty days are allowed for appeal to the honorable Secretary of the Interior.

REPAYMENT—OSAGE TRUST LAND.

G. C. DAY.

Party failing to comply with provisions of act of July 5, 1876, is not entitled to repayment.

Commissioner McFarland to register and receiver, Topeka, Kansas, July 26, 1882.

Referring to your letter of 19th May, in the matter of the return of \$39.96, being the first installment paid by G. C. Day for lots 1 and 2 of NE. $\frac{1}{4}$, Sec. 3, T. 15, R. 9, per receipt No. 607, "Kansas trust and diminished reserve lands," you are informed that the second section of the act of July 5, 1876 (19 Stat., 75), provides—

That if any person or persons applying to purchase land under the provisions of this act shall fail to make payment or to perform any other conditions required by the provisions of this act, or by rules and regulations which may be prescribed in the execution hereof, within ninety days after such payment shall become due or performance be required by the terms hereof, or by the rules and regulations which may be prescribed in the execution hereof, such person or persons shall forfeit all rights under the provisions of this act, and all claim or right to reimbursement or compensation for previous action or payment by said person or persons under the provisions hereof; and the land proposed to be purchased by such person or persons shall again be subject to sale as though no action had been had in regard to the same.

As the case of Mr. Day clearly falls within the provisions of the above-cited section of the act of July 5, 1876, an application from said Day cannot be favorably entertained.

REPAYMENT—RELINQUISHED DESERT LAND ENTRY.

GONZALES ET AL.

Where parties voluntarily abandon or relinquish an entry on desert land, it not having been erroneously allowed, repayment cannot be made.

Commissioner McFarland to Messrs. Curtis, Earle, & Burdett, Washington, D. C., December 5, 1881.

Referring to your letter of 26th ultimo, in the matter of the application of José Ygnacio Gonzales and Florencio Chaves, respectively, for repayment of the purchase money paid by said parties on desert land entries Nos. 10 and 11, La Mesilla, N. Mex., you are informed that said entries were canceled November 29, 1881, for relinquishment, the parties having relinquished their entries, for the reason that the land embraced therein was mountainous and hilly, and after repeated efforts they found it impossible to conduct water in ditches on the land to irrigate and improve the same.

Section 2362 of the Revised Statutes authorizes the repayment, "where a tract of land has been erroneously sold by the United States, so that from any cause the sale cannot be confirmed."

The second section of the act of June 16, 1880, provides that in all cases where homestead or timber culture or desert land entries, or other entries of public lands, have heretofore or shall hereafter be canceled for conflict, or where from any cause the entry has been erroneously allowed and cannot be confirmed, the purchase money shall be refunded.

At the date of said entries there were no adverse rights to the lands embraced in said entries, neither were the entries erroneously allowed, but the fault was on the part of the purchasers, Messrs. Gonzales and Chaves.

It is the ruling of the Department that where a party voluntarily abandons or relinquishes his entry, or fails to comply with the law under which his entry was initiated, the purchase money cannot be refunded.

Therefore I decline to recommend the return of the purchase money as asked for in these cases.

Sixty days will be allowed for appeal to the honorable Secretary.

SAME, ON APPEAL.

Where parties voluntarily abandoned their entry on desert land for the alleged reason that it could not be reclaimed, there being no conflict, and the entry not erroneously allowed, the matter complained of originating in their own misjudgment, repayment will not be directed.

Secretary Teller to Commissioner McFarland, October 11, 1882.

I have considered the appeals, respectively, of José Ygnacio Gonzales and Florencio Chaves (erroneously submitted by you as one case) from your decision of December 5, 1881, rejecting their respective applications for repayment of the purchase money paid by them on desert land declarations Nos. 10 and 11, La Mesilla, N. Mex.

The act of March 3, 1877 (19 Stat., 377), authorizes a declaration by a qualified person of his intent to reclaim a specified quantity of desert land, not exceeding 640 acres, by conducting water upon the same within the period of three years, and upon payment of 25 cents per acre, and upon proof of such reclamation within that time and the further payment of \$1 per acre, a patent for the reclaimed land is required to issue to him. The act also describes desert land as "lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop."

The declarations in question were filed October 9, 1877, when Gonzales paid into the local office the sum of \$130 as his first payment on purchase of 520 acres, and Chaves the sum of \$160 for 640 acres. Their

declarations expired by limitation October 9, 1880, of which they were officially notified on the 15th of the same month. It does not appear that either of them had reclaimed any portion of the lands. On January 25, 1881, they each applied for repayment of their purchase money under the act of June 16, 1880, alleging that the lands covered by their respective declarations were mountainous and hilly, and that after repeated efforts they had been unable to conduct water to irrigate and improve them.

The second section of the act of June 16, 1880, provides that where entries of public land, including desert land, have theretofore or thereafter shall 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 the entry, or to his heirs or assigns, the fees, commissions, and purchase money so paid upon surrender of the duplicate receipt and the execution of a proper relinquishment of all claim to the land whenever such entry shall have been duly canceled by the Commissioner of the General Land Office.

Repayment of the purchase money in these cases is not, in my opinion, authorized by this statute. The parties knew, or are presumed to have known, the character of the land and the difficulties attending its irrigation when they made their payments.

That it was more difficult than they supposed, or even that it was impossible, does not aid their applications. There is no conflict; the entries were not erroneously allowed, and no reason appears why they could not be confirmed. The cases show a voluntary abandonment of the land by the applicants, without fault, on the part of the government, and in such case the statute affords no relief.

Your decision is affirmed.

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REPAYMENT—VOLUNTARY ABANDONMENT.
JOHN CARLAND.

The act of June 16, 1880, does not provide for the payment of fees and commission to parties who voluntarily abandon their right to complete their entry.

Commissioner McFarland to John Carland, Fort Hall, Idaho, January 20, 1882.

In reply to your letter of 16th ultimo transmitting application for repayment of the fee and commissions paid by you in making Bismarek, Dak., homestead entry No. 71, you are informed that the act Congress, approved June 16, 1880, does not provide for the repayment of fees and commissions to parties who voluntarily abandon their right to complete their entry.

SAME, ON APPEAL.

Secretary Teller to Commissioner McFarland, October 20, 1882.

I have considered the appeal of John Carland from your decision of January 20, 1882, declining to recommend the return to him of the fees and commissions paid on Bismarek, Dak., homestead entry No. 71.

It appears that Carland, an officer in the Army of the United States, made said entry under the supposition that the homestead laws did not require his residence on the tract. On being advised of his mistake, he voluntarily abandoned the entry, and now applies for repayment of the fees and commissions.

The act of June 16, 1880, allows such repayment in cases where an entry has been canceled for conflict, or has been erroneously allowed and cannot be confirmed.

The present case, so far as appears, is not within either of these provisions. There was no conflict, the entry was not erroneously allowed, and might have been confirmed. As there has been no fault or error on the part of the government, this Department is without authority in the matter.

Your decision is affirmed.

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REPAYMENT—HOMESTEAD ENTRY.

DUTHAN B. SNODY.

The act of June 16, 1880, is remedial, and as such should be construed liberally. Where "from any cause" the entry has been erroneously allowed, no fraud appearing, repayment should be made.

Secretary Teller to Commissioner McFarland, March 9, 1883.

I have considered the application of Duthan B. Snody for repayment of fees and commissions on homestead entry No. 7983, final certificate No. 2346, Boonville, Mo., on appeal from your decision of April 25, 1882, declining to recommend repayment.

Snody had made homestead entry previous to the one above mentioned, which he abandoned.

The proof shows that he made the second entry in good faith, settled upon and improved it, and at the proper time made his final proof, believing his entry to be valid; that at that time no affidavit or other statement was required to the effect that he never had made any other entry, and that he did not learn until after he had made his final proof that he could make but one entry, but supposed he could make another because he had not obtained any land under the first. Upon learning, however, that he could not, he executed in due form a release and quit-claim to the United States of all his interest in the land described in his second entry.

At the time of the last entry there was no inquiry to develop the fact of the former entry, and there was no fraud and no intentional concealment by the claimant.

The act of June 16, 1880, provides that "where from any cause the entry has been erroneously allowed and cannot be confirmed" the fees and commissions shall be returned.

You say in your decision that "there was no error on the part of the government in allowing the second entry," and seem to assume that in order to afford the relief provided for in the act the error must always be one committed by the government. I think such construction is too narrow. The statute says, "where *from any cause* the entry has been erroneously allowed." The entryman in a case like the present necessarily forfeits his improvements, which often, as in this case, are of much value. The law does not favor forfeitures, and the object of this act was to prevent them, in certain cases, to the extent of fees, commissions, and purchase money.

The effect of the maxim that ignorance of the law does not excuse is removed, to a great extent, by the act, because the cases provided for are those of erroneous entries "from any cause," which would include errors of law as well as of fact; and it would be a singular construction to limit the errors to those committed by the government officers, who are presumed to know the law at least as well as the settlers and other persons dealing with them. The statute is one of remedies, and remedial statutes "are to be construed liberally and beneficially, so as to promote as completely as possible the suppression of the mischief intended to be remedied, and to give life and strength to the remedy." (Maxwell, 203.) The fact that the acts of the entryman have contributed to or caused the erroneous entry ought not, under the statute, to deprive him of the remedy in cases where he has acted in good faith.

The claimant in this case was guilty of no fraud or intentional wrong. He acted innocently but ignorantly; and his second entry was erroneous. I think his claim comes within the scope and intent of the act.

I reverse your decision, and direct repayment of the fees and commissions in this case.

33173 / S REPAYMENT—CERTIFICATES OF DEPOSIT.

INSTRUCTIONS.

Where lands have been paid for with certificates of deposit on account of surveys, and the entry fails, the certificate being within the control of the Commissioner and not in fact satisfied, may be returned and the invalid entry canceled.

Where the payment has been carried into the Treasury as cash, repayment must be made as provided by the statute out of money in the Treasury, etc.

In cases of exception, falling within the repayment acts, the repayment must be made in the same manner.

Secretary Teller to Commissioner McFarland, March 9, 1883.

I have considered your letter of 15th July last, referring to a previous letter of May 10, 1881, respecting the repayment of purchase money

under the act of June 16, 1880 (21 Stat., 287), in cases where payment was made under section 2403 Rev. Stat., in certificates of deposit for money advanced for surveys under section 2401.

Section 2403, as amended by act of March 3, 1879 (20 Stat., 352), makes these certificates assignable by indorsement and receivable in payment for lands entered by settlers under the homestead and pre-emption laws.

The act of June, 1880, provides for repayment of the amount paid in the cases specified therein, and authorizes the Secretary of the Interior to make the payments "out of any money in the Treasury not otherwise appropriated" by drawing his warrant on the Treasury.

As this is a specific direction of law, and as the certificates represent money previously paid into the Treasury and confessedly due the parties, I am of the opinion that repayment should be made in cash, and not by copy of the certificate with a recognition of the right to use it in the same manner as the original.

With respect to repayment where the payment was made in what is known as supreme court scrip, referred by your letter of November 18, 1881, there being no alternative provision, the act of June 16, 1880, unless the original purchase was governed by different conditions, would also seem to require repayment out of money in the Treasury.

This scrip is issued by your office pursuant to the decrees of the supreme court, where it has been adjudged that the United States has sold, as public lands, or otherwise appropriated, lands covered by grants to individuals, and by act of January 28, 1879 (20 Stat., 274), is required to "be received from actual settlers only in payment of pre-emption claims or in commutation of homestead claims in the same manner and to the same extent as is now authorized by law in the case of military bounty-land warrants."

Section 2277, Rev. Stat., provides that "all warrants for military bounty lands which are issued under any law of the United States shall be received in payment of pre-emption rights at the rate of \$1.25 per acre for the quantity of land therein specified; but where the land is rated at \$1.25 per acre and does not exceed the area specified in the warrant, it must be taken in full satisfaction thereof.

In cases of warrants, except revolutionary bounty warrants, I understand that in practice the entry takes the form of a specific location, and that upon cancellation the warrant is returned to the locator to be relocated the cancellation operating to vacate the original location, and it being considered in such case that the warrant has never been satisfied, and consequently remains the individual property of the owner in its real character as a chattel and not as money in the hands of the government.

The same practice also prevails with the scrip in question.

But the act of 1880 introduces a new feature into the case by providing not for cancellation of the location but for repayment of the excess.

merely of \$1.25 per acre for the land, the title still remaining in the purchaser.

In such case the warrant has been laid upon the land and was received as payment therefor, although too much was charged, and the law requires a repayment of the overcharge. It would be manifestly inconvenient, both to the purchaser and the government, to require the warrant or scrip to be lifted, and money or other scrip or warrant representing the exact amount to be laid in its place. This, especially after issue of patent, would involve confusion of records and titles without good or apparent reason. It is much simpler in practice to take the words of the statute in their natural sense, and, without disturbing the entry and title papers, make the repayment as provided, by account with the Treasury, with an indorsement of the transaction upon your records as in other cases under the same law, without reference to the question whether the payment was made in money or in paper receivable as cash under the law providing for its use. And such I understand to be the true intendment of the act.

1. Wherever, therefore, the entry is made by specific location, and wholly fails, the scrip or warrant, being within the control of your office and not in fact satisfied, may be returned for proper location upon cancellation of the former invalid entry. And this, I understand, is already the practice, the case not being one falling under the repayment laws.

2. But where the consideration is carried into the Treasury as cash, and can only be withdrawn by application under the repayment statutes, it seems clear that it must be repaid, in the manner provided by the statutes, out of money in the Treasury not otherwise appropriated.

3. And in cases of excess, where they fall within the provisions of the repayment acts, the excess must also be repaid, as provided by the law, out of such moneys.

This construction will harmonize the whole law and conduce to uniformity in the practice of your office.

REPAYMENT—FRAUDULENT ENTRY.

JOHN LONGNECKER.

Where one removed from his own land and made filing upon public land, negating the fact as to removal, etc., by his affidavit, his entry was illegal and properly canceled.

By such false swearing he forfeited the money paid on entry, and repayment was properly refused.

Secretary Teller to Commissioner McFarland, March 12, 1883.

I have considered the appeal of John Longnecker from your decision of May 15, 1882, rejecting his application for repayment of purchase money on cash entry No. 395, of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 9, T. 3 N., R. 28 W., North Platte district, Nebraska.

It appears that Longnecker made homestead entry No. 6164 January 10, 1872, of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 8 and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 9, T. 3 N., R. 28 W., and that final certificate No. 256 issued thereon March 18, 1878.

June 11, 1879, he filed declaratory statement No. 1321 for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said Sec. 9, alleging settlement on the 5th of the same month, and entered the tract per cash entry No. 395, September 29, 1880.

It appears from certain evidence in the premises that at the date of his alleged settlement upon the latter tract he was seized of his homestead claim, of which he divested himself in favor of his wife by warranty deed dated February 28, 1880.

He alleges, however, by way of extenuation, that he did not establish his residence upon his pre-emption claim until March 10 ensuing. This can avail him nothing, because on the one hand he is confronted with his allegation of settlement as of June 5, 1879, which would operate as an estoppel to his alleging settlement upon any other date; while on the other hand he is precluded from asserting title by virtue of his alleged settlement of March 10, 1880, because it is not permissible to file before settlement.

Thus he appears to fall within the category of persons who are expressly prohibited by the statute (section 2260 Rev. Stat.) from acquiring the right of pre-emption, because it is manifest that at the date of the initiation of his claim he removed from his own land "to reside on the public lands in the same State or Territory."

Hence his filing was illegal and his entry based thereon was properly canceled.

You rejected his application for repayment because his entry was not erroneously allowed, as at the date thereof it had not been shown that he had removed from his own land to his pre-emption claim, "and therefore it was no fault on the part of the government in allowing the entry."

The fact of such removal was not known by the register and receiver September 29, 1880, when Longnecker entered his pre-emption claim, nor did he disclose the fact until November 23, 1881, the date of his affidavit alleging the same. Consequently, he swore falsely in his final proof when he stated categorically that he had not removed from his own land, etc. In such a case, section 2262, Rev. Stat., provides that "if any person taking such oath swears falsely in the premises he shall forfeit the money which he may have paid for such land, and all right and title to the same."

I am, therefore, of the opinion that Longnecker has forfeited his rights in the premises, and your decision is accordingly affirmed.

DEPARTMENT OF THE INTERIOR,
 GENERAL LAND OFFICE,
 Washington, D. C., July 24, 1882.

JAMES W. SHANKLIN, Esq.,
State Surveyor-General, Sacramento, Cal.:

SIR: I have to acknowledge the receipt of your letter of the 13th instant requesting a definition of the words "final location of State selections," on which location a fee of \$2 is chargeable for each 160 acres or fractional part thereof. In reply you are informed that final location is made when the list of selections has been examined by the register and receiver for approval, and in no case are registers and receivers to approve and post such lists until the fees are paid. Your attention is called to the marked paragraphs pages 7 and 8 of inclosed circular. A copy of this ruling will be forwarded to each local office within the State of California for the guidance of the register and receiver.

Very respectfully,

N. C. MCFARLAND,
Commissioner.

ACCOUNTS—LOCAL OFFICE—CLERK HIRE.

HENRY BOOTH.

When registers and receivers make unauthorized expenditures, claims therefor cannot be allowed.

Commissioner McFarland to Hon. Thomas Ryan, House of Representatives, January 24, 1882.

I have to acknowledge the return of our letter of the 12th instant, with your indorsement thereon, referring to the claim of H. L. Isbell for \$167.67, which was paid by Henry Booth, esq., receiver of public moneys at Larned, Kans., in December last, and requesting that the same be allowed, and in reply have to call your attention to sections 3677 and 3683 Rev. Stat.

The work performed by H. L. Isbell was in the fiscal year ending June 30, 1878, and was properly chargeable to the appropriation for contingent expenses of land offices for that fiscal year, provided the receiver had previously been authorized to incur the expenditure, as is required by section 3683 Rev. Stat., which provides that—

No part of the contingent fund of any Department, Bureau, or office shall be applied to the purchase of any articles except such as the head of the Department shall deem necessary and proper to carry on the business of the Department, Bureau, or office, and shall by written order direct to be procured.

This section, while it does not expressly so state, has been construed to cover clerk hire, rent, etc.

The appropriation for the fiscal year 1878 having been exhausted, there is now no appropriation available for the payment of the claim of Mr. Booth, as this office is precluded by section 3679 Rev. Stat. from incurring or authorizing any expenditure whatever in excess of appropriations.

You state further that Mr. Booth desires to have determined the question whether this office on consideration of the merits of the claim will or can lawfully allow it.

While the terms allow a claim and pay a claim are not synonymous, the fact of allowing a claim would carry with it a provision for payment, and as the employment of Mr. Isbell was without authority of law, and therefore an unauthorized expenditure, the approval of the claim where there is no appropriation available would be a violation of the law, and I have therefore to decline to approve the claim.

The voucher of Mr. Booth and our letter of the 12th instant are herewith returned.

MINING CLAIM—ALLEGATION—NOTICE—JUDGMENT.

ROBINSON ET AL. v. MAYGER.

An allegation of an adverse claim, shown upon a proper map, is good notice, and if sufficient as a basis for court proceedings the Land Department should await the judgment.

Secretary Teller to Commissioner McFarland, December 18, 1882.

The adverse (mining) claim was filed in time, and suit in court duly commenced upon a stay of proceedings by the register. You dismiss the same on the ground that it fails in the matter of a sufficient averment on account of certain matters appearing in the location paper limiting the right to surface ground so "as not to interfere with the location of the Saint Louis lode claim."

This you hold as so far controlling the claim that nothing could be set up by such location within the lines of the survey plat of the pending application unless upon express averment that the patent plat had floated the claim outside the original location; and as the conflict of location was only shown by exhibit upon a plat of survey, with an averment of possessory right only, without explanation, you decided that the adverse claim was bad on general demurrer to its sufficiency and should be dismissed.

Without asserting that a better and fuller showing might not have been made, I am of the opinion that an allegation of adverse possessory right, upon a plat showing distinctly the ground claimed, is good notice of such claim, and if it has been found sufficient upon which to frame a declaration for a proceeding in court, and the issue has actually been carried before the competent legal tribunal, this Depart-

ment should not declare it ineffective and attempt to execute title papers without awaiting the judgment of such tribunal.

Your decision is accordingly reversed, and the proceedings will be stayed as required by law until the final action of the court.

MINING CLAIM—PENDING ADVERSE SUIT.

IOLA LODGE CASE.

Where entry was allowed upon certificate that no suit was pending, and the judgment in applicant's favor was set aside and the clerk directed to recall said certificate, said entry was properly canceled upon the filing of a certificate showing that the suit was still pending.

Secretary Teller to Commissioner McFarland, November 16, 1882.

I have considered the case of mineral entry No. 577, Leadville, Colo., made by T. D. Anthony, upon the Iola lode, upon appeal by Anthony from your decision of January 4, 1882, holding his entry for cancellation.

It appears that an adverse claim was duly filed, and suit commenced thereon, which was pending May 3, 1881. Upon that day, the adverse claimant having failed, as alleged, to file a replication to some proceeding of the applicant for patent, the latter moved the court for a default against the former which was allowed, and judgment was rendered thereon. Upon the following day (the 4th) the clerk issued his certificate that no suit involving the right of possession to the Iola lode was pending, which certificate was forthwith filed with the local officers, and the entry in question was made. Upon the same day, after the entry, the attorney for the adverse claimant notified these officers that a suit *was* pending, and he was advised that upon presentation of a certificate from the court to the effect that the certificate under which the entry was allowed erroneously issued, the entry would be suspended. The matter having been brought to the attention of the court, the default and judgment were set aside, and the clerk was directed to recall his former certificate, and that it be held for naught. He, thereupon, issued another certificate, reciting the action of the court and showing pendency of a suit upon the adverse claim, which certificate was filed in the local office. Your decision, from which appeal is taken, was rendered upon request of the local officers for instructions.

The question submitted is upon the validity of this entry. It is the duty of your office to pass upon the papers for application for a patent and upon the protest of the adverse claimant. But when suit is commenced upon the adverse claim all questions touching the possessory rights of the parties are transferred to the court, and action by your office must be suspended pending determination of that question. As the court has exclusive jurisdiction in this matter, its proceedings must

be respected. If it errs the error can only be corrected by its proper appellate tribunal, and not by your office or by this Department, neither of which is invested with such authority, nor will interfere with or attempt to control or revise its decisions. It must be presumed that its action in respect to this case was within its jurisdiction, and was legally performed; and, consequently, that the first certificate erroneously issued, and that the second was within its judicial right and discretion. As such, it must have its due and legal force.

So far as appears, the suit is still pending, and until final determination of the questions therein involved, the entry must be held erroneous, equally with the certificate on which it was based.

Your decision is accordingly affirmed.

COAL LAND—PRICE—HOW DETERMINED.

INSTRUCTIONS.

The price depends upon the distance from a completed railroad. If at date of proof and payment the land is more than fifteen miles from such road the price should be not less than \$10 per acre; if less than fifteen miles not less than \$20.

Secretary Kirkwood to Commissioner McFarland, October 17, 1881.

I have considered the question submitted for my consideration by your letter of September 29th ultimo, viz, the price government should charge for coal lands—whether \$10 or \$20 per acre—where the land is situated more than fifteen miles from any completed railroad at the time the claimant commenced opening and improving the mine, and at the date he filed his declaratory statement, but which is within fifteen miles of such road at the date of his application to purchase the land.

The answer rests upon a construction of sections 2347, 2348, 2349, and 2350, Rev. Stat.

Section 2347 provides that—

Every person or association of persons shall have the right to enter any quantity of vacant coal lands not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than \$10 per acre for such land, where the same shall be situated more than fifteen miles from any completed railroad, and not less than \$20 per acre for such lands as shall be within fifteen miles of such road.

Section 2348 provides that—

Any person or association of persons who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved. * * *

Section 2349 provides for the presentation of all claims, under the preceding section, to the register of the proper land district within sixty

days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; and if the township plat is not on file at the date of such improvement, the filing must be made within sixty days from receipt of the plat at the district office.

Section 2350 provides that persons claiming under section 2348 shall prove their respective rights and pay for the land filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

These sections are a re-enactment of the act of March 3, 1873, which was not a part of the pre-emption system for the disposition of the public lands, but "An act to provide for the sale of lands of the United States containing coal." As an independent act it must, therefore, be construed by itself, unaided by other acts, unless by analogy. It is not, in my opinion, difficult of interpretation.

Under the sections named coal lands, when subject to sale, may be disposed of by private cash entry; or a person opening and improving the same, and in actual possession, may acquire a preference right to enter the same by presenting his claim to the district land office within sixty days after date of his actual possession and commencement of improvements, and filing his declaratory statement therefor within the time required by section 3249; in which case he must prove his right and pay for the land within one year from the time prescribed for filing his claim; in default of which his preference right expires, and the land becomes subject to entry by another, as provided in section 2350. This preference right is a mere right of entry secured to such persons, as against others, and affects no other question. If waived by neglect to prove up and pay for the land, it ceases. It has no relation to the price of the land, but to an entry only. The price is otherwise determined. The provision of section 2348 that the persons named "shall be entitled to a preference right of entry, *under the preceding section,*" means, I think, that they may enter the land upon the terms and conditions named in section 2347, which section fixes the price of the land. The preference right to enter a tract, and the actual entry thereof, are quite distinct in their legal significance and effect; and when the statute gives the "right to enter a tract," upon payment of a certain price, it confines the entry to that price, and does not permit the entry to be controlled by conditions affecting the price, which may have existed when the preference right was secured—perhaps a year previously—and when the relation of the land to a completed railroad may have been quite different. The preference right has reference to a subsequent entry; but the price is to be determined at the date of entry, as if the party made private cash entry, and notwithstanding he may have secured a preference right;

and is regulated by the relation of the land to the road at the date of proof of payment.

I am of the opinion, therefore, that the price of the land depends wholly upon its distance from a completed railroad at the date of entry, irrespective of the preferred right of entry, and that if, at the date of proof and payment (which constitutes the entry), the land is more than fifteen miles from such road, the price should be not less than \$10 per acre; and that if it is within fifteen miles the price should be not less than \$20 per acre.

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MINING CLAIM—APPLICATION—CONFLICT.

REBELLION MINING COMPANY.

Application for patent of a mining claim, which conflicts with a claim, embraced in a prior pending claim, cannot be received.

The rule is derived from that provision of the statute which prescribes the method of filing adverse claims.

Where the statute prescribes one way in which a thing shall be done, it precludes every other way.

*Commissioner McFarland to register and receiver, Salt Lake City, Utah,
October 1, 1881.*

On the 7th of May last, the Rebellion Mining Company presented at your office two applications for patent, one being for the Rebellion lode, designated as lot No. 193, and the other for the Mulkahy lode, lot No. 194, which applications were rejected by the register for the reason that a portion of the land embraced in each application conflicts with claims previously applied for, to wit: The Rebellion lode conflicts with the Bibleback, lot 177, the Samuel, lot 178, and the Fallon, lot 179; while the Mulkahy conflicts with the Samuel and Fallon claims, for all of which applications for patent are now pending in your office, and to which the Rebellion Mining Company duly filed adverse claims for the area in conflict thereafter, in due time instituting suits in court to determine the right of possession.

From the register's action in rejecting the Rebellion Company's application, an appeal has been taken to this office. Inasmuch as the decision is in accordance with the previous rulings of this office (*Haggin v. Chavanne*, S. M. D., 243), and a correct construction of the law, no error was committed.

In the case cited, it was held that "the rule which forbids the reception of an application for patent to a mining claim which conflicts with a claim embraced in a prior pending application, is derived from that provision of the statute which prescribes the method of filing adverse claims." Where the statute prescribes one way by which a thing shall be done, it precludes every other. *Chavanne*, having made application

for patent to the Elk Mining claim, Haggin, as owner of a conflicting claim, had but one method open to him to protect his interest and have his rights determined. It is easy, it would seem, to see that this rule is a salutary one; for were it otherwise, application after application might be accumulated in the local offices, all relating to the same land, thus nullifying the law which requires adverse claims to be filed and prosecuted.

From the argument of counsel, I understand that the Rebellion Company simply desires these proceedings for patent to progress so far that it may, in the event of judgment in its favor by the courts, in the controversies pending against the Bibleback, Samuel, and Fallon claimants, enter its claims entire.

The proper method to accomplish this end is by excluding from its applications the areas in conflict with the claims previously applied for, as shown by the accompanying plats.

It is urged, however, that should this be done it would amount to an abandonment of all the ground in conflict. This is clearly a mistaken conclusion. Such an exclusion is not a relinquishment. The company's right to the land in conflict has been asserted by the filing of adverse claims, which relate only to the land in conflict; and this was the only way by which it could assert title to such portions of its claims. The proposed applications will amount to an assertion of its right to the remaining portions. Now, the plats of surveys and the field notes properly describe and show the entire claims, also correctly representing the areas of conflict.

It would be a somewhat difficult matter to prepare, for publication and posting, notices which shall describe only those portions of the claims not in conflict, thus requiring no words of exclusion, without having prepared amended surveys. In order to avoid the trouble and expense incident to such amendment, it is regarded as sufficient for executive purposes if words of exclusion be used in the application and notices, which affect only the present proceedings; but patents could not issue for the portions so applied for separately from the portions in controversy without amended surveys.

The company must amend its applications so as to exclude the conflicting areas therefrom, which exclusion must also be recited in the published and posted notices; and I see no objection to adding thereto an express declaration that it thereby relinquishes no right or title to the areas so excluded, although I deem such declaration wholly unnecessary.

Should it appear, upon proper proceedings being had, that the company is entitled to the land so applied for, and the courts adjudge it to be the owner of the areas in conflict, it may make entry of each lot as if applied for entire.

MINING CLAIM—CO-TENANTS—ADVERSE CLAIMANTS.

GRAMPIAN LODGE.

Permitted - 1875
 Section 2324, Rev. Stat., must be construed in connection with section 2325. Co-tenants, who are alleged to be delinquent, even when they are not so in fact, must protect their rights as adverse claimants.

Secretary Teller to Commissioner McFarland, August 7, 1882.

I have considered the appeal of the Grampian Silver Mining Company (Mineral entry No. 748, Salt Lake City, Utah) from your decision of July 25, 1882.

It appears that this claim, embracing 1,400 linear feet, was located August 15, 1871, by one O'Neil and nine others, and that on July 7, 1875, the possessory title thereto had vested as follows, viz: William Plunkett, Matt. Welsh, Barney Mullen, John Kennedy, John Hawkes, and J. C. Lynch, 100 feet each; Samuel Hawkes, 200 feet, and James Ryan, 600 feet; and that upon the day last named, Samuel Hawkes addressed a notice, under oath, to Plunkett, Welsh, Mullen, and Kennedy (which notice was recorded January 10, 1876, in the county in which the claim is situated) setting forth that he had performed assessment work on the Grampian ledge, and that unless the delinquent owners paid their proportion of the expense within the time prescribed by law, their interest in the mine would be forfeited, and become the property of the co-owners.

On August 18, 1879 (John Hawkes having conveyed his interest to Samuel Hawkes and Ryan), Samuel Hawkes, Ryan, and Lynch conveyed the entire mine to the Grampian Company.

Section 2324, Rev. Stat., requires that upon the failure of one of several co-owners to contribute his proportion of the required expenditure, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give the delinquent co-owners personal notice in writing, or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if, at the expiration of ninety days after such notice in writing, or by publication, such delinquent shall fail or refuse to contribute his proportion of the expenditure required by the section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.

Under its said purchase the Grampian Company applied, July 20, 1881, for patent. It is not objected that its publication of notice thereof, or any of its proceedings in that respect, were irregular; but your decision holds that, as no evidence has been submitted showing in what manner the notice of forfeiture was served upon the delinquent co-owners, or that the delinquent co-owners did not within the required time pay their proportionate share of the annual expenditure, the company must show, before issue of patent, the manner of serving said notice, and that the delinquent co-owners did not pay their said proportion.

Section 2324, the only statute affecting this question, must be construed in connection with section 2325. Both have reference to the possessory title of an applicant for patent, and the mode of acquiring patent; the latter providing that if no adverse claim is filed during the period of publication, it shall be assumed that none exists. It would, therefore, seem immaterial, after proceedings under section 2325, whether or not the requirement of section 2324 is complied with to the extent named in your decision; because if parties have not been properly notified, or have paid their share of assessment work, they must still file their adverse claim under the proceedings contemplated in section 2325. They waive their rights by failure to file such claim. And upon such failure the law not only assumes that no such claim exists, but if the antecedent publication and attendant proceedings have been regular, all that might be set up by suit in court has been adjudicated in favor of the applicant. I will, therefore, assume in the present case that the notice of forfeiture required by section 2324 was not only given as required, but that the delinquent co-owners did not pay their share of the assessment work.

It appears, however, that on November 4, 1881, James M. Graham *et al.* commenced an action against the Grampian Company involving the latter's right of possession and title to the claim in dispute, but that, as appears from a certificate of the clerk of the proper court, dated May 2, 1882, there was then no suit or action pending which involved said right to any portion of the Grampian mine, and that there had been no litigation affecting the title of said company to said mine for two years then last past, other than what had been decided in favor of said company. This certificate is filed in lieu of the judgment roll, and is equally satisfactory for the purpose of this proceeding.

I am of the opinion that, in view of the facts and the law, it is not necessary for the Grampian Company to furnish the proofs required by your decision, but that these matters must be held determined in favor of the company by the failure of the objectors to file and prosecute to a favorable issue an adverse claim, as required by section 2325.

I therefore modify your decision, and direct that patent issue to the Grampian Company, as applied for.

227D 318

267 363 MINING CLAIM—ACTS OF AN OFFICER DE FACTO.

DEAN RICHMOND LODGE.

Where the register of a land office was suspended from office and the Commissioner directed the receiver to take charge of the office, and the receiver kept the office open and performed the duties of register pursuant to such order, and received and allowed an application for mineral patent and made publication thereof, such acts were those of an officer *de facto* acting *colore officii* and valid as to the public and to third parties having an interest therein.

Acting Secretary Joslyn to Commissioner McFarland, August 18, 1882.

I have considered the matter of the application of Charles F. Hine *et al.* for patent for the Dean Richmond lode, and in connection there-

with the conflicting applications of S. R. DeLong *et al.*, claiming for the Bronknow, and E. N. Nash for the first easterly extension of the Bronknow mines, Tucson land district, Arizona, on appeal from your decision of May 18, 1882, directing the register and receiver to allow the applicants of the Dean Richmond lode to complete entry by payment of the purchase money.

October 4, 1880, C. M. K. Paulison, then register at Florence Ariz., was, by order of the President, suspended from office.

October 5, 1880, Acting Commissioner Holcomb addressed the following letter of instructions to Charles E. Dailey, the receiver:

I have this day transmitted to C. M. K. Paulison the order of the President suspending him from the office of register of the land office at Florence, Ariz.

My letter to Mr. Paulison covering said order of suspension has been inclosed to Wilson T. Smith, special agent now in Florence, with directions to deliver the same to the register in person, and see that it is obeyed.

The register is directed to immediately on receipt of said order surrender his office and all his records and papers to you. You are directed to take immediate possession of the same, to refuse the register any access to the office or records, and you will be held responsible for the safe care and custody thereof until relieved by further orders.

Under the authority of this letter Dailey took possession of the register's office, and, you informed me—

Continued to transact the public business of the land office. Among other acts he received applications for patent for mining claims, and ordered publication of notices of such applications in the proper newspapers. He continued to so act until November 15, 1880, when my predecessor, by telegraph, directed him to receive no further filings or entries.

November 16, 1880, your office, by letter, advised said receiver, as follows:

Where you have admitted entries since Mr. Paulison's suspension, you will at once notify the parties that such entries are defective, and that new applications must be made to cure the defect. The affidavits already filed in these cases may be deemed sufficient if in other respects correct. The parties attempting to make the entries erroneously accepted by you will be allowed the preference right to make the new entries required, and the money previously received by you will be applied on such entries.

The application for patent for the Dean Richmond lode was filed in the local office October 30, 1880, and C. F. Dailey, receiver of public moneys, and acting as register *ad interim*, designated the *Tombstone Epitaph* as the paper in which publication should be made. Notice was accordingly published in the daily issue of said paper for the full period prescribed by law, to wit, from November 9, 1880, to January 13, 1881. No adverse claim was filed during the period of publication.

October 29, 1880, W. J. Osborne, attorney for the Bronknow claimant, filed with the acting register applications for patents for the Bronknow

and first easterly extension of the Bronknow lode. Such applications were received, but were not accompanied by any proof that the plat and notice had been posted upon the claim as required by section 2325, Rev. Stat. The want of such proof was not discovered at the time the applications were received, nor until the order for publication was about to be issued.

Such applications, without such proof, had no standing, and were no bar to the reception of the application for the Dean Richmond lode. As the record stood, therefore, the Dean Richmond lode had the preference right, and that right should have been maintained under the order of your predecessor of November 16, 1880, and the act of Register Cousin of May 18, 1881, and subsequently, a giving preference to the Bronknow claimants, was in violation of that order, and the Dean Richmond claimants could lose no rights by neglecting to take an appeal from the decision of the register in favor of the publication of the notices of the Bronknow applications, if such appeal would have been proper, nor by disregarding the acts of the register done in violation of that order.

During the period of the publication of notice of the Bronknow notices, an adverse claim was filed by the Dean Richmond claimants, and suit was brought and is now pending thereon. The fact that this act was compelled by the erroneous act of the register in directing such publication cannot, as is correctly stated by you, be construed as a waiver of any rights of the Richmond claimants.

The main question to be considered in the case, however, is as to the legality of the acts done by Receiver Dailey while acting as register after the suspension of Paulison.

The general doctrine that the acts of an officer *de facto* are valid, whether such acts be judicial or ministerial, in so far as they affect the rights of the public or of third persons, is elementary and too well settled to admit of discussion or to require the citation of authorities. It is a doctrine founded in necessity and upon principles of public policy. The difficulty is in the application of the doctrine to the facts of the particular case under consideration.

It does not follow that because a person is in possession of an office that his acts are necessarily legal. He may be a mere intruder or usurper; and if so, third persons are bound to take notice of that fact, and can acquire no rights from his acts. The test is, whether the person is in possession of the office under color (*colore officii*) of right or authority to exercise its functions?

A receiver as such has no right to perform the duties of a register; and the question in this case is, did the authority contained in the letter of October 5, 1880, give under the rule the necessary color of right?

The order was from a superior officer. It informed the receiver that the register had been directed to immediately "surrender his office and all his records and papers" to him, and he was ordered "to take imme-

diate possession of the same." I think this order contained the necessary color of authority. The receiver believed from its terms that the business of the office, which he was directed to take charge of, was to be continued by him. He was rightfully in possession of the place of business and of the books and papers, and clothed by authority with all the insignia of the office. He believed that he had the right to transact the business done by him, and his acts were within the scope of his duties as register. Both parties claimant believed that he was rightfully in the position of register, and they in good faith, and in common with other third persons, transacted with him the usual business of the office.

Section 1768 of the Revised Statutes does not contemplate a vacancy in office by the suspension of an officer, but authorizes the President "to designate some suitable person, subject to be removed, in his discretion, by the designation of another, to perform the duties of such suspended officer."

In this case the information respecting the suspension of Mr. Paulison was conveyed from the President to Mr. Dailey through the order of the Acting Commissioner, and he was not advised of any other designation, nor was there any other. He was himself designated by the Acting Commissioner to take possession of "his office and all his records and papers."

He might reasonably have supposed that the term "office" included the function as well as the rooms of the register, and that the designation was authorized by the President. It is not necessary to the legality of his acts that the person who directed him to take charge of the office should have had the authority to make the appointment (9 Op., 432).

I am of the opinion that Mr. Dailey was *de facto* register during the period the acts aforesaid were done, and that such acts as to said third persons were valid. I therefore affirm your decision, and direct that the applicants for the Dean Richmond lode be allowed to complete entry by payment of the purchase money.

MINING CLAIM—POSTING NOTICE—"CONSPICUOUS PLACE."

LOUISVILLE LODE CASE.

After entry the presumption is in favor of the recognition of the requisite antecedent facts, and the regularity of the proceedings.

A plat and notice posted in an open shaft-house, where no obstruction is shown, and where in a particular locality it is customary to so post, considered such "conspicuous place" as required by law.

Secretary Teller to Commissioner McFarland, August 4, 1882.

On March 30 last you rendered a decision in the matter of the protest against the issue of patent to Albert J. Johnson and William M. Clayton for the Louisville lode, being mineral entry No. 238, Leadville, Colo., which protest you dismissed for reasons stated; and on April 30 you denied to the locators of the Tucson, Ruby, and Idaho mines the right

of appeal from said decision, for the reason that they were protestants only.

The record is now transmitted to me for consideration under practice rule 83.

It is claimed by the protestants, 1st, that the location of the Louisville lode was not based upon the discovery of a vein or lode of mineral-bearing ore; 2d, that the plat and notice were not posted in "a conspicuous place" during the period of publication; and 3d, that the publication and posted notices suppressed mention of claims adjoining the Louisville lode.

In respect of the first objection, I have examined the testimony and concur with you in the opinion that the location of the Louisville lode *was* based upon the discovery of a vein or lode of mineral-bearing ore. This sufficiently appears from the statements of credible witnesses. The rule is well settled that when testimony is introduced on both sides of the case, and the jury find in favor of one, from a preponderance of the testimony, the court will not, for that reason, grant a new trial. The same rule prevails in this Department, and the presumption is also, after entry, in favor of the recognition of the requisite antecedent facts and the regularity of the proceedings. In such case, except upon strong showing, the entry will not be disturbed.

I am also of the opinion that the publication was regular, and that the notice in the inside of the shaft house was posted in such conspicuous place, "as required by law." This was an open shaft house, and no obstruction or difficulty in obtaining a view of the notice has been shown. In that locality it is common for notices to be so posted, and miners are accustomed to look in such places for the desired information.

As the record does not show that the publication and notices suppressed mention of any facts required by law, or that any one was misled by any omission therein, or that there was any fraudulent omission, with intent to deceive, in said notices, and no undue haste was made to enter the tract after publication; and as the protest was not filed until after the entry, and the protestants do not appear to have been deprived of any right by the action of the Louisville locators, I find nothing in the case requiring the intervention of this Department, and return the papers accordingly.

MINING CLAIM—PLACER—LODE—PATENT.

WAR DANCE *v.* CHURCH PLACER.

Where the existence of a vein or lode in a placer claim is not known at the date of the application, then "the patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

Secretary Teller to Commissioner McFarland, February 2, 1883.

I have considered the case of the War Dance claimants *v.* the Church Placer claimants, Russell mining district, Gilpin County, Colorado, on

appeal from your decision holding that the lode claimants are not entitled to lode or surface ground lying within the limits of the placer.

The War Dance lode was located some fifteen months subsequently to the entry of the Church Placer.

A question of fact is presented as to whether the lode (survey No. 585) was known to exist within the boundaries of the placer claim at the time of the application for a patent for the placer claim.

This question as to the knowledge of the existence of lode arises upon the first official survey made by Deputy Locke in 1876. A lode seemed to be indicated upon that plat. It was asserted subsequently by the deputy surveyor, Rank, that what seemed to be a lode upon the plat of such survey, "running through the northeasterly part of the placer, appeared to be only a porphyry dike, which had never been surveyed or claimed by anybody."

On the other hand, it was claimed that the so-called porphyry dike and the War Dance lode was identical.

Such being the state of the question, November 22, 1881, you directed the surveyor-general "to make the proper examination and necessary inquiries to determine the question of identity."

The result of such examination, contained in the report and plat made to the surveyor-general February 24, 1882, by Benjamin H. Smith, examiner, establishes the fact that such formation designated as a porphyry dike is distinct from the War Dance lode, and is evidently, as stated in such report, to be what seemed "the lode mentioned in the original survey of the Church Placer."

As the proof stands, I think it is established that the lode claim known as the War Dance was not known until more than fifteen months subsequently to the date of the entry of the Church Placer claim.

But, however the foregoing assertion of fact may be found, it is insisted by the War Dance claimants as the law of the case, that if the existence of that lode becomes known at any time before patent is issued for the placer claim, then the lode and the surface ground pertaining thereto must be excluded from the patent.

In the late case of *Becker et al. v. Sears*, I considered the construction which I thought ought to be given to section 2333 U. S. Rev. Stats., and held that such section "carves out from a patent to a placer claim all known lodes found therein *at date of application*, together with twenty-five feet of surface ground on both sides as incident thereto."

The converse of that proposition necessarily follows, viz: That where the existence of a vein or lode in a placer claim is not known at the date of the application, then "the patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

Your decision, therefore, to the effect that, "as the War Dance claim was not known until long after the date of entry of the placer claim, the lode claimant is entitled to neither lode nor surface ground within the placer limits," is affirmed.

26 L D 573 MINING CLAIM—SURFACE GROUND—PLACER.

27 676

SHONBAR LODGE.*

The claim exceeds twenty-five feet in width on each side of the vein. The application has been allowed, publication regularly had, and entry made. In fact said claimants had completed their proofs, and the same were matter of record in the office for several months prior to the issuance of the placer patents, and no adverse claim was filed. It would not be practicable, therefore, at this stage of the cause, to remit these claimants to the performance, *de novo*, of such preliminary requirements. In the absence of an adverse claim they are entitled to take their lode and twenty-five feet on either side.

The only question remaining is whether or not the excess over that width of surface ground can be allowed. This cannot be done. The lode claimants, in order to protect their right to the full extent of their claim, should have filed adversely to the placer application within the statutory period, but having failed so to do, they are expressly restricted by the statute to their lode "and twenty-five feet of surface on each side thereof."

Secretary Teller to Commissioner McFarland, March 26, 1883.

I have considered the appeal of Anthony H. Barret *et al.* applicants for patent for the Shonbar Lode, from your decisions of March 28 and June 3, 1882, the former holding their Helena, Mont., mineral entry No. 611 of the premises for cancellation, and the latter declining to recall the former.

You held the entry for cancellation because the ground covered thereby had been previously patented as placer claims upon mineral entries numbered 575 and 553, per patents issued April 15 and May 16, 1881, respectively.

It appears that said applicants located their claim May 5, 1879, filed application for patent November 2, 1880, notice whereof was regularly published from November 5 to January 6, 1881, whereupon they made mineral entry No. 611, January 14, 1881. Their application calls for "1497 linear feet of the Shonbar vein, lode, or deposit, bearing silver and other metals, together with surface ground varying from 464 to 538 feet in width, being situated in the Summit Valley mining district, county of Deer Lodge, Territory of Montana." Such claim is designated as "lot No. 175," containing an area of 17.19 acres, and is so delineated by the official survey thereof made by United States Deputy Mineral Surveyor Baker, June 26, 1880, plat whereof was approved by United States Surveyor-General Mason, September 3d, ensuing. These applicants claim to have acquired title "by purchase from original locators."

It further appears that, under date of May 29, 1882, the applicants' attorney filed in their behalf the affidavits of certain persons resident in said district, alleging that the Shonbar Lode is a well-defined vein, rich in minerals; and that its existence was known at and long anterior to the date of said placer application.

*See 3 L. D., 388.

Wherefore said attorney requested that your former decision be recalled and that patent issue for the Shonbar Lode claim; but by your decision of June 3, 1882, you declined to recall your former decision, holding the matter to be beyond the jurisdiction of your office.

This case, so far as relates to the question of the existence of a known lode, is within the rule established by this Department under date of the 19th instant, in the matter of the Mammoth Quartz Mine, wherein it was ordered that the lode claimants be permitted to proceed pursuant to statutory provisions by application for patent upon the lode claim, by regular publication, subject to the filing of an adverse claim and the institution of suit in a court of competent jurisdiction.

But the present claim exceeds twenty-five feet in width on each side of the vein. The application has been allowed, publications regularly had, and the entry made. In fact, said claimants had completed their proofs, and the same were matter of record in your office for several months prior to the issuance of the placer patents, and no adverse claim was filed. It would not be practicable, therefore, at this stage of the cause to remit these claimants to the performance, *de novo*, of such preliminary requirements. In the absence of an adverse claim they are entitled to take their lode and twenty-five feet on either side.

The only question remaining is whether or not the excess over that width of surface ground can be allowed.

I think this cannot be done. The lode claimants in order to protect their right to the full extent of their claim, should have filed adversely to the placer application within the statutory period, but having failed so to do, they are expressly restricted by the statute to their lode "and twenty-five feet of surface on each side thereof."

Your decision is accordingly reversed; and if on examination the proofs are found regular and sufficient, you will require a corrected plat, properly defining the restricted surface ground, upon which patent will issue.

44-581

570-579

 MINERAL LAND—MILITARY RESERVATION.

FORT MAGINNIS.

Mineral lands may be included in reservations for military purposes, and they are not subject to appropriation by mineral claimants while such reservation exists. But where mining claims were legally located and held prior to such reservation, the miners' rights cannot be divested by taking the land for military purposes.

Attorney General MacVeagh to the Secretary of War, October 21, 1881

By your letter of the 30th of August, 1881, and the inclosures received therewith, relating to the military reservation of Fort Maginnis in Montana Territory, it appears that this reservation was set apart by an Executive order dated the 8th of April last; that certain miners of Parker, Meagher County, Montana, now allege that mineral was dis-

covered and a mining camp established by them on land included in the reservation several months previous to the location of the post by the military authorities; and that inquiry is made by them whether they can "hold the mines and the surface ground connected therewith, though they be on the reservation," and whether mineral land can "be located and patented on a military reservation after the establishment of the reservation."

Agreeably to a suggestion of the Secretary of the Interior contained in his letter of the 16th of August, 1881 (one of the inclosures above mentioned), you request an opinion upon the following questions:

1. Whether or not mineral lands reserved from sale under section 2318, Rev. Stat. of the United States, can be reserved for military purposes by order of the President?

2. Where mineral lands are included within the limits of a military reservation, are such lands open to exploration and purchase under section 2319, Rev. Stat.?

3. Where an inchoate title to mineral lands has been acquired as shown in the letter of the Secretary of the Interior and the accompanying report of the Commissioner of the General Land Office, and such lands have subsequently been included within a military reservation, can the title to said mineral lands be perfected by the private owner?

For convenience, the first and second questions will be considered together.

In an opinion heretofore given by this Department, addressed to you on the 15th of July last, wherein the subject of the authority of the President to reserve lands for public purposes came under consideration, it was observed that the power of the President to set apart, for those purposes, such portions of the public domain as are required by the exigencies of the public service to be thus appropriated, is too well established to admit of doubt; citing in this connection the case of *Grisar v. McDowell* (6 Wall., 381), in which the supreme court remarks:

From an early period in the history of the government it has been the practice of the President to order from time to time, as the 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 authority of the President in this respect is recognized in numerous acts of Congress.

This power is in the above-mentioned opinion regarded as extending to any lands which belong to the public domain, and capable of being exercised with respect to such lands so long as they remain unappropriated. As thus defined, the power is broad enough to include mineral lands belonging to the public domain, at least whilst they remain unaffected by any private right acquired under the laws relating thereto. I am satisfied with that view of the subject, and accordingly the first question is answered in the affirmative. This necessarily involves a negative answer to the second question; since, after the lands have once been lawfully reserved by the President for public uses, the lands

so appropriated become severed from the public domain, and are thenceforth not subject to occupation and purchase under the general law.

The answer to the third question depends upon whether land covered by a mining claim, where the locator of the claim has taken no steps to obtain a patent, and the premises still constitute a part of the public domain, may be lawfully reserved and set apart by the President for public uses. Under the laws providing for the exploration, occupation, and disposal of the mineral lands, the locator, so long as he complies with the conditions imposed by those laws, is clothed with a possessory right which entitles him to "the exclusive right of possession and enjoyment of all the surface included within the lines of his location." (See sections 2320, 2322, 2324, Rev. Stats.) The object of those laws is to promote the development of our mining resources, rather than the sale of the mineral lands, and to that end, "Congress has, by statute and by tacit consent," as is remarked by the supreme court, in *Forbes v. Gracey* (94 U. S., 762), "permitted the individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the government, without exacting or receiving any compensation for these ores, and *without requiring the miner to buy or pay for the land.* It has gone further," added the court, "and *recognized the possessory rights* of these miners as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining claims." The rights thus recognized by Congress are property of great value. Very large amounts are invested in mines, the ownership of which rests solely upon the possessory rights referred to.

It seems to me that where such rights have attached to mineral land in favor of the locator of a mining claim, the land during the continuance of the claim (*i. e.*, so long as it is maintained in accordance with law) becomes, by force of the mining laws, appropriated to a specific purpose, namely, the development and working of the mine located; and, unless *Congress* otherwise provides, it cannot, while that right exists, notwithstanding the title thereto remains in the government, be set apart by the Executive for public uses.

If, then, the possessory right of the miners, in the case under consideration, was full and complete previous to the establishment of the military reservation at Fort Maginnis, I am of opinion that the inclusion of their claim within the limits of the reservation was without authority of law, and could not legally divest them of such right; or of the further right (on compliance with the requirements of the statute concerning the issue of patents for mining claims) to acquire title to the land.

36 LD 144 MINING CLAIM—MILL-SITE—ADVERSE RIGHT.

WARREN MILL-SITE *v.* COPPER PRINCE.

A mill-site claim partly or wholly embraced in an application for patent for a mine can be protected only by an adverse claim filed in the usual manner and time.

Secretary Teller to Commissioner McFarland, May 16, 1882.

I have considered the matter of the protest of P. Corbin *et al.* against the issuance of patent to the Copper Prince Mine for lot No. 38, upon mineral entry No. 80, Tucson district, Arizona.

The record shows that the claim was originally located November 29, 1880, by one E. T. Hardy, who conveyed his interest therein by deed dated December 14, ensuing, to John R. James and Frederick A. Tritle the present applicants; that publication was duly made in the Tombstone Epitaph newspaper, daily, from August 15 to October 17, 1881, the prescribed period of sixty days.

On October 28, 1881, no adverse claim having been filed, the applicants tendered the purchase money for the premises to the register and receiver, who accepted the same and allowed the entry in question.

On January 16, 1882, the owners of the Warren Mill Site, by their attorney resident in this city, filed in your office certain affidavits, with accompanying papers, including the protest in question.

These protestants allege that a portion of the premises embraced within the Copper Prince claim was previously located as a mill-site by Corbin *et al.*, and they cite a recent decision of the United States supreme court in the case of Belk *v.* Meagher *et al.* (No. 69, October term, 1881), as sustaining the proposition that the alleged subsequent location of the Copper Prince was, *pro tanto*, void.

The case cited is irrelevant, in that it involves the concomitant questions as to the relative rights of possession by virtue of a location and relocation; whereas, the case at bar involves the sole question of failure on the part of these protestants to file an adverse claim against the Copper Prince, and to institute suit, as provided by statute, within the prescribed period.

No failure on the part of the mineral applicants to comply with statutory requirements is suggested by the protestants, but they simply claim a paramount right by reason of an alleged prior location. They do not attempt to interpose objections based upon the applicants' record, but they ask to be allowed to introduce evidence, *aliunde* such record, touching their alleged superior right in the premises.

This is matter for judicial adjudication of which the Department cannot take cognizance. A court of competent jurisdiction is the proper forum in which contests between conflicting claimants can be heard, as the facts alleged might have been presented in such court upon an adverse claim duly filed. (Bodie Tunnel, 8 C. L. O., 173.)

Where an applicant for a mineral patent gives the prescribed notice, any other claimant of an unpatented location objecting to the issuance of patent to such applicant on account of extent, or form, or by reason of an asserted prior location, must interpose his objection within the prescribed period, otherwise he will thereafter be precluded from raising such objection. "The silence of the prior locator in such a case is, under the statute, a waiver of his priority." (The Eureka case, 4 Sawyer, 302.)

As the record shows the procedure upon the application for patent to be in all respects regular and in compliance with statutory requirements, and as it discloses failure on the part of the protestants to file an adverse claim against such application, it follows that the statutory bar is presumably interposed, and it must be assumed that no such claim exists, and that the applicants are entitled to a patent.

Your decision of March 7, 1882, dismissing the protest in question, and that of the 30th of the same month dismissing protestants' appeal from such action, are therefore affirmed.

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MINING CLAIM—TOWN SITE—BURDEN OF PROOF.

Modified, 44-199
5 L D 256. RICO TOWN-SITE.

The burden of proof rests with the protestants. They should show location, title, and compliance with law as regards both lode and mill site, as required in a court of justice to establish such claim.

Town sites may be located on mineral land. The question of the relative legal rights of the town site and the mineral claimant as to occupation or possessory title to the surface must be left to courts of competent jurisdiction to settle.

The practice of the Department of inserting in town-site and mineral-land patents mutual clauses of reservation adhered to.

Secretary Teller to Commissioner McFarland, July 6, 1882.

I have considered the case of the Gulch, the Independent, and the Maid of Athens Mill-Sites *v.* The Town Site of Rico, in the Lake City land district, Colorado, on appeal by the latter from your decision of March 4, 1882, holding its entry for cancellation.

The mill sites are separate and independent claims; but since all the protests filed by mill-site claimants against issuance of patent for the town site involve the same questions, they are considered as one case. They were located, respectively, in April, May, and July, 1879, and the petition for incorporation of the town site was filed in September following.

Your decision held that the land was non-mineral; that the mill sites were duly located and recorded in connection with lode claims by the proprietors thereof, whereby the land was legally appropriated; and hence that their prior location precluded location of the town site.

I think this was erroneous.

Mill sites are recognized by section 2337, Rev. Stats., where the land is non-mineral, and is used by the proprietor of a vein or lode, and may be included in an application for patent for such vein or lode, and be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; and, second, the owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in the section.

The present applications are by virtue of the first provision, under which there *can be no mill site unless there is a lode or vein to which it may attach*. The mill-site claimants have not applied for a patent, and there is no evidence of a lode, vein, or claimants therefor, except as appears in the protest of the mill-site claimants against issue of patent to the town site.

The protestants, seeking to have the mill sites excluded from the entry of the town site, must first establish a title to the mill sites. To do this they must show that it is non-mineral in character. I do not think this is done. On the contrary, it appears to be conclusively proven that such is not the character of the supposed mill sites. It is within a mineral belt, and not less than sixteen lode claims are marked on the map of the town. The proof is uncontradicted that mineral had been found within the town site and on some portions of the mill site. I do not think it worth while to discuss at length the character of the testimony on that point. The town-site entry had been made. The protestants said that it was in fraud of their rights. The burden of proof was then clearly on them, and they failed to show that the land was of such character as authorized the location of it for mill-site purposes. But in addition to having failed to show that the land might have been taken as a mill site, they failed to show that they did so take in accordance with the law governing such location. It is true that the statute is silent as to the location of mill sites; but it is not unreasonable to suppose such location must be made substantially as that of a mining claim. Such mill site location must be made by the owner or proprietor of a lode or a quartz mill or reduction works. The letter of the statute would seem to require that such mill site ought to be used in connection with such lode for mining or milling purposes, before a legal location can be made; it is not, however, necessary to determine that question in this case, for there is no proof that the protestants were the proprietors of any vein or lode. The protestants did introduce location certificates of lodes, and, in connection with such lodes, the mill-site locations; but there is no evidence that the lodes were taken in accordance with law; it does not appear that the locator complied with the local laws or the United States statutes concerning such location and the development of such lodes. Proof of location and compliance with law concerning such appropriation ought to be the same that would be required in a court of justice to establish a title to

such lode claim and mill site; in this the protestants have signally failed. Much has been said with regard to the good faith of the protestants as to the location of the mill sites, and it is charged that such location was not made for mill-site purposes, but to secure the same for town-site purposes. This I think is quite apparent from the evidence. Still, if there had been a strict compliance with the law in such location, I should not feel justified to reject the evidence of legal location on this ground alone. But such lack of faith may well be considered in determining whether the protestants ought to be further heard in support of their title. I think, as full opportunity was given to establish the title, there ought to be no further delay in this matter, and the patent for the town-site ought to issue to the proper authorities, if their proceedings have been regular.

It has been urged that if this town site is on mineral land, the entry ought to be canceled. That a town site may be located on mineral land cannot now be questioned. What are the rights of lot owners and mineral claimants within the boundaries of such town site, after entry, is a somewhat difficult question. Section 2386 provides as follows:

Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States.

This section, taken in connection with section 2392—which is as follows: “No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws”—must protect the mineral claimant in his possession of the vein or lode, together with the surface as recognized by law. Such lots are declared to be taken burdened with the mineral claimant's rights. Now, what are the rights of the mineral claimant to the surface of the ground held in connection with his lode or mine? Section 2322 of the Revised Statutes contains the following:

The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs or assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.

It has been claimed that by virtue of this section the town-lot claimant, holding under a patent issued to the town, takes no title to the

surface of a lode; but we must take all the provisions of the statute together. It is provided in section 2386 that the title to town lots to be acquired shall be subject to such recognized possession and the *necessary use thereof*. Now, what is the necessary use of such recognized possession? The town-site claimant takes it for building purposes; the mineral claimant for mining purposes. The mineral claimant may desire to use the ground for the purpose of sinking a shaft to his lode. He may want it for the erection of the buildings required in carrying on his mining enterprise, for reduction works, or for a mill site; if he does, the town-lot claimant's rights are subordinated to his. The *quasi* title of the lot owner must give way to the title of the mineral claimant in all such cases; that is the "necessary use thereof" for mining purposes.

Whether the lot owner does take his lot subject to the rights of the mineral claimant as to surface, must depend on priority of occupation. If a portion of the public lands have been settled upon and occupied by a town site, such occupation is a lawful one. (Chapter 8, Revised Statutes of the United States.) It is not to be supposed that the recognized right of such lot owner is to be destroyed by the subsequent discovery of a mineral vein that may have its course through such lot. Large and flourishing towns have been built on the mineral lands of the United States, valuable buildings erected on such town lots, long before the entry of such town sites. The rights of the occupants are fully recognized by the custom and usages of the country as well as by the statute, and provision is made for the completion of the title by patent to the corporation authorities or to the county judge in trust for such lot owners. There ought to be no conflict between the lot owner and the mineral claimant whose vein enters a town site; and the respective rights are clearly defined both by law and custom. If the mineral claimant is in possession of a mineral vein, his possession is recognized as a valid one to the full extent of his *possession* and the necessary use thereof. If at the time of taking of the town lots the mineral claimant's rights exist, the lot owner will take it, subject to the rights of such mineral claimant, as before stated; and although the lot owner may hold his title under the corporation authorities or county judge, having received such patent, still the title of the mineral claimant is not different from what it was before the issue of such patent, and the question must still be determined whether his title was acquired subsequently or previously to the inception of the lot-owner's claim.

All such questions must be left to courts of competent jurisdiction to settle. This Department cannot, in the nature of things, be called on to adjudicate such conflicting claims. Questions of priority of occupancy, as well as the question, what is the necessary use of such surface by the mineral claimant, ought to be submitted to a jury of the neighborhood where such controversies arise; and such appears to have been the legislative intent with reference to all conflicting claims concerning mineral and town site rights. It has been the custom in the Department

to insert in the town-site patents a clause reserving all the mineral and mineral rights to the government, or to the legal occupant thereof, as the case might be; and to insert in the mineral claimant's patent a reservation reserving all town-site rights. Whether the language employed heretofore is the most exact that might have been employed, I do not consider of any importance, for the legal effect of the patent is the same with or without the reservation.

The statute defines and determines the rights of the different claimants; and if the patent contains a reservation broader than that of the statute, it is a nullity, so far as it exceeds the statutory restriction; and if it contains a reservation not authorized by law, such reservation is a nullity. (See *Stark v. Starrs*, 6 Wallace, 402.) The custom of inserting such reservation in the patent has the sanction of long practice, as well as the approval of the courts, and is in the interest of peace and good order, and ought not now to be departed from; therefore, the patent in this, and all other cases of like character, will be issued with the usual reservation; and should the owners of the mineral veins within the town site make application for patent to such mineral veins, they will receive patents therefor, with the proper and usual reservation as to the rights of the lot owners within such town site. (9 C. L. O., 90.)

For these reasons your decision is reversed, and the entry of the town site will remain intact.

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25 " 238
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MINING CLAIM—MINERAL LANDS.

W. H. HOOPER.

Gypsum and limestone are held to be minerals.

Whatever is recognized as mineral by the standard authorities where the same occurs in quantity and quality to render the land in question more valuable on its account than for agricultural purposes, is mineral within the meaning of the mining laws.

Secretary Kirkwood to Commissioner McFarland, October 8, 1881.

I have considered the appeal of William H. Hooper and others from your decision of January 25, 1881, in the matter of mineral entry No. 433, upon the Juab Gypsum Placer, Salt Lake City, Utah, wherein you held their entry for cancellation, because lands containing deposits of gypsum are not subject to disposal under the mining laws.

Section 2318, Rev. Stats., provides that "in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."

Section 2319 provides that

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, . . . under regulations prescribed by law.

Section 2328 provides that

Mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits . . . shall be governed . . . by the customs, regulations, and laws in force at the date of their location.

Under all authorities gypsum is a mineral, but your decision holds that it is of a similar formation to limestone, and that section 2318 only embraces such lands as contain metals or other substances which give the land greater special value than that of land containing limestone in any of its forms. Your office has, however, held (2 C. L. O., 66), in the case of Rolfe, that public lands more valuable on account of deposits of limestone and marble than for agriculture, may be patented under the mining laws; and in its circular of July 15, 1873, it held "that whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated as coming within the purview of the mining act of May 10, 1872," and as being "a valuable mineral deposit." I concur in these views.

The proceedings of the appellants appear to be regular, and there is no adverse claimant. They allege that the tract embraces a deposit of almost pure gypsum, and is not a mere limestone bed; and that they use the same as an article of commerce, and not for agriculture. I find, however, no proof as to the comparative value of the land for mineral or agricultural purposes.

I therefore direct that you cause an investigation to be made in this respect. Should it be found that it has greater value for the former than for the latter purpose, a patent should issue as applied for.

Your decision is modified accordingly.

✓ 17233

MINERAL LANDS—VALUABLE DEPOSITS.

Regulations governing the entry of lands containing borax and alkaline earths, sulphur, alum and asphalt.

Secretary Teller to Commissioner McFarland, January 30, 1883.

My attention is called to the fact that these deposits, although valuable, are not of sufficient value to permit their being entered under the mining laws, if the recent circular approved by me September 22, 1882, and its amendment of December 9, 1882, is applicable to entries of lands containing borax and other similar valuable deposits. It was early determined by the Department that the act of May 10, 1872, which describes certain lands containing valuable mineral deposits, was applicable to lands containing deposits of borax, carbonate and nitrate of soda, sulphur, alum, and asphalt; and I believe that from the passage of the law until the present time the definition of the term "valuable mineral deposits" has been such as to include the minerals and alkaline sub-

stances named. I understand that entries of borate lands have been allowed under the provisions of the act of 1872, and the regulations made in accordance therewith.

It is the desire of the persons interested that the regulations which were in existence, having special reference to the application for patent for placer claims—namely, the circular of October 31, 1881—should be continued in force so far as they relate to deposits of borax, etc., as mentioned above.

Believing that practical effect should be given to the mining laws of the United States, I am of the opinion that to apply the new regulations to such entries would result in excluding such lands from sale, and depriving the people of the benefit of the use of these natural deposits. I therefore direct you to permit the entry of public lands containing valuable deposits of borax, the carbonate and nitrate of soda, sulphur, alum, and asphalt in the States of California and Nevada and the Territories of Arizona, Utah, and Wyoming—in which section of country I am informed the deposits are present—under the regulations of October 31, 1881.

In addition, however, an applicant for patent for public lands containing deposits of borax, etc., as above, must affirmatively show that the lands entered are not valuable for any other purpose than the one for which application is made.

It will therefore follow that the circulars of September 22 and December 9, 1882, are not applicable to entries of the lands thus described and excepted.

49-505

SALINE LANDS—MINERAL SPRINGS

PAGOSA SPRINGS.

Secretary Teller, in the Pagosa Springs case, under date of December 4, 1882, says:

Many springs and many waters are impregnated with minerals held in solution; but it does not follow that the lands bearing such waters are mineral lands, and can be patented as such. Lands of a saline character are an exception, and are expressly provided for in the laws relating to the disposition of the public lands. Lands containing mineral springs not of a saline character are subject to sale under the general laws, and not under the acts relating to the sale of mineral lands.—(See 9 C. L. O., 230.)

MINING CLAIM—APPLICATION—PRECEDENCE.

BIG FLAT GRAVEL MG. CO. v. BIG FLAT GOLD MG. CO.

Applications for patent should be received at the local office in order of time—not according as surveys are approved by the surveyor-general.

Secretary Teller to Commissioner McFarland, May 11, 1882.

I considered the appeal of the Big Flat Gravel Mining Company from your decision of December 10, 1880, directing the register of the land

office at Humboldt, Cal., to reject the application for patent filed by said company on the 24th of April, 1880, and to receive and order publication of notice in favor of the conflicting applications of the Big Flat Gold Mining Company and Mountaineer Mining Company, offered for filing on the 26th of the same month.

A preliminary question affecting the surveys in this case was before my predecessor, Mr. Secretary Schurz, and was decided by the Acting Secretary August 18, 1880, declining to interpose in any manner to affect matters resting solely upon the diligence of competing parties in placing their applications on file in a proceeding to obtain patent for mining claims (Copp, vol. 7, 101). "First in time first in right," was held to be the only rule of precedence, whether it should result in placing one or the other party in the affirmative position of applicant, or in relegating him to the less enviable status of an adverse claimant upon whom is thrown the burden of taking the affirmative in the courts.

It is true that by a subsequent decision direction was given to allow priority in all stages of the proceeding, including delivery of the plats, to the first applicant for a survey in the office of the surveyor-general; but this could not affect the surveys now in question, and only had relation to a rule of procedure upon subsequent applications for survey. As to priority of applications for patent, it was distinctly held that the first survey presented should be accepted, and publication ordered. (*Ivanpah v. Lizzie Bullock Claims*, 7 Copp, 163.)

The ground of refusal to allow the applicant to proceed is the allegation that the plats were defective in not showing conflicts with the surveys subsequently filed, but alleged to have been first ordered by the surveyor general, and first approved and delivered.

It was shown in the case, when here, that the Big Flat Gravel Mining Company had succeeded in making the first survey and placing the field notes of the deputy before the surveyor-general for approval; that he held them suspended to await the subsequent return of the conflicting surveys; that in consequence they were all before him at the same moment; that he announced his intention to approve and deliver them simultaneously; but, on order from your office, approved and first delivered on the same day the plats of the Big Flat Gold and the Mountaineer Mining Companies.

It is admitted in the present case that by reason of less work in making the surveys, the Big Flat Gravel Mining Company did succeed, as stated above, in first executing their field work. I, therefore, fail to see why the omission of conflicting surveys afterwards made, even although first approved, should under such circumstances invalidate the plat, so as to compel its rejection, "on its face," and preclude the register from ordering publication on an application otherwise acknowledged to be *prima facie* complete. It appears that this was done on account of a protest from a messenger of the other companies, who urged his complaint before the register, claiming that after great diligence he had

been unable to anticipate the other party and file his own application, and demanding that the pending application should be rejected, to allow him to gain further time in presenting his.

It is sufficient to say that this was not good reason. The parties acknowledge that they have sufficient notice of the conflict in the claims, and only desire to force the other company into the position of adverse claimants, assuming that it was the intention of your office to use its instructions to effectuate that purpose. But, as before stated, there can be no propriety in the assumption by this Department of any authority whatever for the purpose of aiding or hindering the presentation of a lawful claim, in opposition to any other such claim depending for its consideration on the sole question of priority. The private rights of parties are to be adjudicated upon the cases when presented, and not admitted by privilege depending on any preconceived opinion as to the superiority of right in either.

The Department is open to the first applicant for the consideration of all questions here determined, and the courts are also open in mining cases for the adjudication of adverse claims affecting the right of possession. It is entirely immaterial to the government which party makes the application. Patent is by law made to follow the judgment of the court.

I think it was error in this instance to reject the application first offered, and the decision of your office is accordingly reversed.

MINING CLAIM—KNOWN LODE WITHIN PLACER.

ROBINSON *v.* ROYDOR.

Patent for placer claim in January, 1876. Robinson applied for patent for his lode claim within the limits of the placer claim, August 30, 1880, alleging that said lode was known to exist at date of application for placer patent.

Robinson's application should have been received, and thereafter adverse claim might be filed and the question in controversy settled in the courts.

Secretary Teller to Commissioner McFarland, March 19, 1883.

I have considered the case of William T. Robinson, claimant of the Mammoth Quartz Mine, *v.* Joseph D. Roydor, patentee of the N. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and S. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 5, T. 5, R. 12 E., placer location, Sacramento, Cal.

Your office having denied Robinson's right to appeal, the record in the case is brought to this Department by *certiorari* allowed upon the petition made in behalf of the owner of the Mammoth Quartz mine.

Roydor made application for a patent on his placer claim October 23, 1874, and patent was issued to him therefor January 14, 1876.

The record shows that on the 30th day of August, 1880, Robinson made application for patent for said Mammoth lode. The register and

receiver refused to entertain the application, because it conflicted with the patented Roydor placer aforesaid.

September 30, 1880, Robinson made affidavit that Roydor knew at the time when he applied for his patent of the existence of the quartz vein located by affiant, and with his affidavit filed two affidavits of third parties in support of the allegation.

December 6, same year, your office ordered a hearing to determine "whether a vein was known to exist at the date of the issuance of said placer patent." Hearing was accordingly had. The register and receiver found from the testimony that "at the time of the issuance of the patent to Roydor, January 14, 1876, there was no known ledge or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits." And upon appeal to your office you reviewed the testimony and affirmed the finding of the local officers.

Although your office directed the inquiry to be made as to whether the lode was known to exist at the date of the issuance of the placer patent, Robinson's affidavit averred that Roydor knew of its existence at the time that he made application for his said patent.

The averments in the affidavit, therefore, brought the case within the rule established by this Department in the late case of *Becker v. Sears*, and *War Dance v. Church Placer* (9 C. L. O., 212) in which it was held that the lode must be known to exist at the "date of the application."

I am of the opinion that the register and receiver should not have rejected Robinson's application because of its conflict with the patented Roydor placer. I therefore direct that all proceedings subsequent to said Robinson's application for a patent for the Mammoth lode be dismissed without prejudice, and that Robinson be permitted to proceed in compliance with the statute.

The adverse claim can then be made and the controversy settled by the court in the manner directed by the statute.

23 LD 529
25 " 233
CERTIORARI; EXISTING HOMESTEAD; NON-METALLIFEROUS DEPOSITS.

33 " 30
34 " 115
THE DOBBS PLACER MINE.

A petition to the Secretary of the Interior for *certiorari* under rule 84 of the rules of practice, must fully set forth the facts relating to the antecedent proceedings in the case, but a specific assignment of errors is not required.

Certiorari does not lie from a decision of the Commissioner as a matter of right, but as a matter of Executive discretion, and where the petition shows on its face that substantial justice has been done, the application will be denied.

A mineral entry is not invalid because at the time it was made the land was covered by a homestead entry.

Deposits of fine clay or kaolin being non-metalliferous in character, are properly subject to entry as placers, and not as lode claims.

Secretary Teller to Commissioner McFarland, May 10, 1883.

In the case of L. E. Montague, protestant, *v. Stephen E. Dobbs*, mineral entry No. 2, on lands in Sec. 14, T. 6, R. 9, Huntsville, Ala., I have examined the motion made by defendant to dismiss the application of

protestants for *certiorari* under Rules 83 and 84 of the rules of practice.

The motion is based on two grounds, viz :

First. That the petition shows upon its face that the protestant, Montague, has no lawful right to the land covered by the defendant's mineral entry.

Secondly. That there is no specific ground of complaint or assignment of errors.

I do not think the motion upon the last ground can prevail.

No assignment of errors is necessary on common law *certiorari*. (Hilliard on New Trials, 638, and cases there cited.) "A petition for *certiorari* should state facts, and not the opinions or conclusions of the petitioner." (*Ib.*, 696.)

Rule 84 seems to have been framed upon the well-established practice in such cases. It is as follows, viz : "Applications to the Secretary under the preceding rule shall be made in writing, under oath, and shall fully and specifically set forth the grounds upon which the application is made."

I think the "grounds" mentioned in the rule refer to the proceedings which are to be fully set forth in the application, and not to assignments of error.

Certiorari is not, however, a writ of right; but whether it shall issue lies in the judicial discretion of the tribunal to which the petition is addressed," and the writ will not be granted if substantial justice has been done, though the record may show the proceedings to have been defective and informal." (*Ib.*, 689.)

The facts in this petition, which constitute "the grounds upon which the application is made," are, I think, set out sufficiently full and specific, and the question presented is whether they disclose a proper case for granting an order directing the proceedings to be certified to this Department.

The petition discloses in substance the following facts, viz :

In January, 1870, James W. Bell made homestead entry for the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 14. In August, 1875, Minerva J. Howard made homestead entry for the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ aforesaid.

Bell having died, his heirs, May 25, 1881, executed a relinquishment of his said entry to the United States, and by an instrument of even date attempted to sell to William C. Kean all their interest, and to authorize him to obtain title under the act of June 15, 1880. May 26, 1881, the petitioner went upon said tract for the purpose of locating a mining claim, and May 27 duly posted notice of such location on said claim, and duly made and published a proper notice that he "had located 1,495 linear feet on the Allen Spring lode, vein, or deposit of fire-clay or kaolin." Attached to said notice was an affidavit sustaining the averments of the notice, and setting forth that the land was more valuable for mineral deposits than for agricultural purposes. May 27, the same day that the petitioner posted notice of location, said Kean

applied, and was permitted by the local officers, to make cash entry of said land under the said act of June, 1880. Upon filing said notice of location the petitioner was informed by the register that the location would not be allowed, because of said Kean's cash entry, and it was accordingly rejected. From that decision no appeal appears to have been taken, and it therefore became final. June 6 the petitioner filed a protest in your office against said Kean's cash entry. October 31 petitioner filed in your office affidavits showing that the land entered by Kean was mineral in character, and as such was being worked by the petitioner, and asking that a hearing might be had to ascertain the true character of the land before any action was taken on said entry, and also to ascertain the circumstances under which Kean obtained his entry. July 21, 1881, said Minerva J. Howard gave notice of a mining claim upon certain land on the tract for which she had made the homestead entry aforesaid, said mining claim being described as "on the lode, vein, or deposit of fire-clay or kaolin in the Allen Spring lode," and the notice being accompanied with the affidavits of William C. Kean and Stephen E. Dobbs, averring that the land embraced within the boundaries of the claim was much more valuable for mineral than for agricultural purposes. December 10 Edwin A. Crandall, Sterling S. Lanier, Stephen E. Dobbs, W. M. Dobbs, Minerva J. Howard, and William C. Kean gave notice of location by them of the W. $\frac{1}{2}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said Sec. 14 as a placer claim. June 15, 1882, the receiver at Huntsville aforesaid issued to Stephen E. Dobbs (his collocators having conveyed their interest to him) duplicate receipt mineral entry No. 2 for \$300 in payment for the lands last above described, known as the Dobbs Placer Claim. This receipt was filed in your office June 17. June 28 attorneys for petitioner and D. P. Montague entered an appearance in your office in opposition to the issuance of a patent on the placer entry. July 28, 1882, Kean appeared in your office and consented to the cancellation of his said cash entry as "void *ab initio*." On said July 28 petitioner filed in writing in your office a further protest against issuance of a patent for said mineral entry No. 2, and called attention to the former application for a hearing to determine the mineral character of the land. This protest was accompanied by affidavits showing work done on petitioner's claim, and that the deposit of mineral lay in a well defined lode or vein, and that it should be entered only as a lode claim. November 23, 1882, your office canceled Kean's said cash entry, for the reason that the land was mineral, and because the entry was void *ab initio*, and Kean had requested its cancellation; and on the same day you canceled the Howard homestead entry, dismissed the protest of the petitioner against the issuance of a patent for the Dobbs placer, and rendered a decision awarding the land to Dobbs and denying the petitioner's claim to his said location. December 11, 1882, petitioner took an appeal to this Department from said decision of November 23, with assignments of error. December 19, 1882, you denied

the right of appeal, and dismissed it, presumably upon the ground that a protestant, not being properly a party in interest, has no right to appeal.

It is claimed by the defendant that all the material facts have not been set forth in the petition; but I think those set forth are sufficient to enable me to dispose of the question whether the order prayed for should be made.

It appears from the facts disclosed that the defendant made application for patent in proper form, gave the requisite notice by posting and publication and made due proof thereof; and that during the period of publication, no adverse claim was filed by Montague.

The protestant, however, claims that a patent should not be issued to the defendant, because, under the facts stated, the Commissioner should have first ordered a hearing and determined the question whether the character of the land was mineral, and whether it was more valuable for mineral than for agricultural purposes.

It seems to be conceded that the lands were returned as agricultural by the surveyor-general, and were therefore *prima facie* of that character.

Both parties to this contest, however, have alleged and proved that the lands are in fact mineral, and are more valuable for mineral than agricultural purposes; and both have made claim to the land, or parts of it, as mineral, and sought to obtain title thereto under the laws providing for the mode of obtaining titles to mineral lands.

The protestant cannot, therefore, now be heard to deny the mineral character of the land, and in that way prevent a patent from being issued to the defendant.

The particular complaint, however, which the protestant makes is, that you refused to order a hearing, as requested by him, for the purpose of determining the character of the land and clearing the record of the homestead entries appearing thereon. He had, however, asserted the mineral character of the land, and made a mineral location thereon, before such request was made.

It the lands were in truth mineral, I think the fact "that they had been previously borne on the official records as agricultural lands" was immaterial (*Scogin v. Culver*, 7 C. L. O., 23).

After such mineral locations were made, the agricultural entries were canceled, and therefore present no obstacle to the issue of mineral patents. I do not think, under the facts of this case as they appear on the record, that your refusal or neglect to direct a hearing to ascertain the character of the land was such an error or maladministration of the laws as would entitle the petitioner to the order asked for in the petition.

It will be observed that when his mineral location was rejected on account of Kean's cash entry, he took no appeal, nor did he file any

adverse claim during the publication of the notice of defendant's location.

The petitioner further claims that the Commissioner erred in holding that the lands were valuable only as containing placer deposits, and not veins or lodes.

I do not think that the deposit which both parties allege exists in the lands in controversy is of the character described as existing "in veins or lodes of quartz or other rock in place" in section 2320, Rev. Stats. Upon an examination of the authorities in the Federal and State courts referred to by counsel and in your decision, I think it was correctly held by you that fire-clay or kaolin, in the manner in which it exists as a deposit, is properly the subject of a placer location, and not a vein or lode. (*North Noonday v. Orient*, 6 Sawyer, 308; *Stevens v. Williams*, 1 McCrary, 486; *Moxon v. Wilkinson*, 2 Montana, 424; *The Eureka Case*, 4 Sawyer, 310; *Jupiter v. Bodie*, 7 Sawyer, 97.)

I am of the opinion that substantial justice has been done, and that the order prayed for in the petition should be denied, and the motion to dismiss the application be granted.

PRACTICE—CERTIORARI—SUPERVISORY AUTHORITY.

CLONTARF CLAIM.

Under rule 83 the matter subject to supervision must be so presented that a reasonable presumption is raised in the eye of the law that there has been error or oversight, or at least there must be such showing in the application as will convince the Department that a proper administration of the public business requires its intervention in order to prevent undue haste, or, possibly, injury to important and valuable interests.

Secretary Kirkwood to Commissioner McFarland, February 14, 1882.

I forward herewith an application, dated the 12th ultimo, by A. W. Rucker, attorney in behalf of S. G. Wright *et al.*, protestants against the issue of patent to the Saint Bernard Mining Company of certain premises in Colorado known as the Clontarf claim, asking that the papers be ordered before me for examination under rule 83 of practice.

The paper (verified by oath) briefly recites that on the 29th of October last said parties filed in the Leadville office a protest against issue of patent; that you on the 7th of January dismissed said protest, and on the 13th of January denied their right of appeal to this Department.

Inasmuch as the oath bears date on the 12th of January, and the insertion of the date of January "thirteenth" in the body of the affidavit is apparently in a different handwriting, it is manifest that the same was prematurely made, and when so sworn to no such denial of appeal had been made by you; nor is there filed any copy of any such denial, or of

any ruling, order, or decision at any time made by you in the case, as a basis for specifications of error on the part of the protestants.

The general charge of error is made upon allegation that every cause assigned in said protest against the issue of patent is true, and especially the facts therein alleged.

This general assignment of error is followed by a showing of nine consecutive statements of alleged fact; of the first seven of which it is only necessary to say that they do not, in my judgment, individually or collectively, show a *prima facie* case of illegality in the presentation of the application for patent, and therefore I am not called upon to interfere with your ruling or to look into other facts not specifically recited to see whether or not such *prima facie* case might not possibly be shown by the papers themselves. The eighth head presents the general allegation "that a discovery of a vein, lode, or well-defined or other crevice of mineral was never made within the limits of said Clontarf claim as originally or since located;" and the ninth recital asserts "that the same was never staked according to the pretended relocation.

These are the only allegations that go to statutory matter, or to compliance with local customs, and contain nothing beyond the general statement claimed to have been submitted to you originally.

There is no recital of any facts showing how far or in what manner you examined the same, nor is there any special assignment by way of exception to your alleged ruling.

The rules of practice were never intended to compel this Department to review your final decisions in every case where a stranger to the record may by general charge allege error or oversight on your part.

The matter subject to supervision must be so presented that a reasonable presumption is raised in the eye of the law that there has been such error or oversight, or at least there must be such showing in the application as will convince the Department that a proper administration of the public business requires its intervention in order to prevent undue haste, or, possibly, injury to important and valuable interests.

I do not regard this petition as within the rule, and the application for an order to certify the papers is accordingly denied.

PRACTICE—PUBLICATION—RULE 83—RIGHT OF APPEAL.

TOMAY ET AL. v. STEWART.

The register may exercise his official judgment as to whether publication in the paper nearest the claim will effect the object of it; if not, he may designate another. The purpose of rule 83 is the correction of material errors in the Commissioner's decision which affect the merits of the case.

Secretary Kirkwood to Commissioner McFarland, March 22, 1882.

I have considered the protest of John Tomay *et al.* against the issuance of patent to Oscar C. Stewart, for the Roscoe Conkling and James G. Blaine mining claims, respectively, embracing mineral entries Nos.

1744 and 1745, Central City, Colo., transmitted by you to this Department, under practice rule 83. This protest is based on an alleged non-compliance with that provision of section 2325, Rev. Stats., which requires the register of the land office in which the premises are located to publish, for the period of sixty days, notice of an application for patent, "in a newspaper to be by him designated as published nearest to such claim." The notice in this case was published the required time (from July 14 to September 15, 1881) in the Georgetown Courier, a weekly newspaper published about three miles from the land applied for; whereas it is claimed such notice should have been published in the Silver Plume Mining News newspaper, published about one mile from said claim.

The latter paper was established June 3, 1881, and having reached a circulation of about ninety-five copies weekly, expired October 21 following, after a precarious struggle for existence of about four months.

The purpose of the required publication is to notify persons holding adverse claims of the application for patent, and thus give them opportunity to protect their interests. The register may, therefore, exercise his official judgment as to whether or not a certain publication is such newspaper within the meaning of the law; and if it is not, he may designate another which will effect the object of publication.

But an arbitrary order, manifestly in violation of the statute and showing an unreasonable departure from its requirement, would not be tolerated.

In this case the register designated the Georgetown Courier for publication of the notice, as the "newspaper" "nearest" the claim; and the record shows that all of the protestants herein took notice of said publication, filed adverse claims, and commenced suits in pursuance thereof; but not having commenced the same within the statutory period, were held to have waived their adverse claims. Hence, they lost no rights by reason of the publication in said newspaper; but, if any, by reason of their failure to commence suits within the required time.

The purpose of rule 83 was not the correction of errors resulting from the party's laches, nor for technical defects in the proceedings, but for material errors in your decisions which affect the merits of a case; and as no wrong has resulted to the protestants from said publication (which your decision holds a compliance with the requirement of the statute), there is no matter in said protest which requires, in my judgment, the intervention of this Department.

MINING CLAIM—PUBLICATION—COMPUTATION OF TIME—ADVERSE CLAIM.

TILDEN ET AL. v. INTERVENOR MINING COMPANY.

It is necessary that the notice of application for patent should be posted in the land office during the whole period of sixty days.

Where, during the period of publication and posting, the land office is closed for a brief time for the purpose of removal to another locality, such time should not be computed as a part of the sixty days within which an adverse claim must be filed. The peculiar circumstances take the case out of the general rule prescribed by the statute.

Secretary Kirkwood to Commissioner McFarland, April 11, 1882.

I have considered the matter of the application of the Intervenor Mining Company for issuance of patent upon its mineral entry, No. 62, of lot No. 67, Tucson district, Arizona, on appeal from your decision of August 25, 1881, holding said entry for cancellation.

It appears from the record that the application of said company was filed in the local office at Florence May 4, 1881, and notice thereof was duly published in the Tombstone Epitaph newspaper, daily, from May 10 to July 9 ensuing, the prescribed period of sixty days. The local office was, however, removed from Florence June 30, 1881, and opened at Tucson July 12, 1881.

On July 8, 1881, Ridgely Tilden *et al.*, claimants of the Last Decision mine, mailed at Tombstone, Ariz. (per registered letter), an adverse claim, addressed to the land office at Tucson, which letter was received at that post-office at 7 o'clock p. m., Saturday, July 9, 1881, and delivered to the register on Monday evening, at 9 o'clock a. m. Next day, July 12, 1881, one S. E. Barren, as agent of the Benares Mining Company, also filed an adverse claim upon the Benares lode. July 13, 1881, the register rejected the adverse claim of Tilden and others, because it was not filed during the period of publication, as prescribed by section 2325, Rev. Stats. Next day the register certified to the receiver that the applicants for patent were entitled, and should be allowed, to pay for and enter the land. The receiver disagreed with the register, but nevertheless recived the purchase money, whereupon the register issued his final certificate of entry.

July 18, 1881, John Noble *et al.* filed an adverse claim upon the Atlantic lode.

On the 4th of August ensuing, the said Ridgely Tilden filed a protest in behalf of himself and A. Ames, as co-owners in the Assurance mine, alleging certain irregularities in the proceedings for patent in the Intervenor claim.

An appeal having been taken from the action of the register and receiver, you expressed the opinion that the adverse claims were presented in due season, and held the entry of the Intervenor mining claim for

cancellation, at the same time suspending the proceedings for patent until the controversy raised by the presentation of said adverse claims could be adjudicated by a court of competent jurisdiction.

The adverse claimants of the Last Decision mine allege location of their claim January 27, 1881, and admit a prior location of the Intervenor mine, but charge that the latter is located *across* the vein or lode upon which discovery was made and location based; that the land applied for by the Intervenor does not conform to the lines of its original location; and that neither the Intervenor company, nor its grantors, nor any person acting for or claiming under it, performed any work or expended any money for improvements upon said claim during the year 1880, nor up to the date of the Last Decision location. Such allegation, if proven to be true, would doubtless show the Last Decision claimants to have the better right to the land in question, provided, of course, that the latter show strict compliance with statutory requirements. But these contestants having been relegated to a competent tribunal, pursuant to statutory provisions, for the adjudication of their respective rights in the premises, it is not competent for this Department to take cognizance of any of the questions raised by the aforesaid allegations. Pending such adjudication it is competent, however, for this Department to consider and determine the question as to the sufficiency of the compliance, on the part of these alleged adverse claimants, with the express statutory requirements.

The primal question, therefore, to be considered in the determination of this case is: Did these alleged adverse claimants file their claims within the prescribed period of sixty days, as contemplated by the statute? In other words, shall they be regarded as such claimants, or as mere protestants?

The statutes provide numerous guards against the evasion of their provisions by parties seeking a mining patent, and afford an opportunity to persons in the neighborhood of the claim to come forward and present any objections they may have to the granting of the patent desired. By sections 6 and 7 of the act of May 10, 1872, which constitute sections 2325 and 2326 of the Revised Statutes, the procedure which a party seeking a patent, whether an individual or an association or a corporation, must follow is prescribed. (*Smelting and Refining Company v. Kemp et al.*, 104 U. S., 636.)

The former of said sections prescribes that:

The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. . . . If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, . . . and that no adverse claim exists.

It should be observed that the statute prescribes three concurrent methods or complementary details of publication, to wit: (1.) Posting

by the mineral claimant of a copy of the plat of his claim, together with a notice of his intended application, in a conspicuous place on the land embraced therein, at the same time filing the requisite affidavit and copy of notice in the land office. (2.) Publication by the register of the proper local office of notice of such application, for the period of sixty-days, in a newspaper designated by him as published nearest such claim. (3.) Posting by the register of such notice in his office for the same period.

It is, therefore, just as incumbent upon the register to post such notice in his office during the whole period of publication, in order to comply literally with the express requirements of the statute, as it is for him to publish a notice of the mineral claimant's application, or for such claimant to post a copy of the plat of his claim and a notice of his intended application on his claim in the manner prescribed. Now, it is not quite manifest, in the light of the foregoing state of facts, how such minute requirements could possibly be complied with, for if the local office was closed at and removed from Florence, June 30, 1881, to Tucson, where it was not opened for the transaction of business until July 12 ensuing, how could the register post the notice in question during the nine days of such interim, *i. e.*, from June 30 to July 9, 1881, when the sixty days of publication would have expired had the office not been closed upon the former date? Although the question under consideration is not directly raised by the appeal, it is nevertheless important that such question be determined in order that I may be enabled to determine the primary question aforesaid. Although the provisions of section 2325 operate as a statute of limitations against the filing of adverse mineral claims, and although there is no authority, either judicial or executive, to extend or abridge the period fixed by law within which such claims may be properly filed, nevertheless the law should never be so construed as to require impossibilities. Said section is intended to determine, control, and protect the property rights not only of mineral claimants, but of adverse claimants as well, allowing the latter class the full statutory period of sixty days within which they may prefer their claims as a condition precedent to the exercise of the privilege of adjudication, just as much as it requires the continuous publication during such period of the claim of the former class.

The peculiar circumstances of this case are such as to take it out of the general rule governing mineral cases, and bring it within the category of exceptions thereto. The general rule of practice applied by you appears to meet the exceptional case, and in so far I affirm your decision, and direct that the applicant be required to await the issue of the judicial proceedings.

Instead of cancelling the entry, however, you will hold the same suspended, subject to cancellation in the event of an adverse decision by the courts, but entitled to equitable confirmation in case he is declared by such courts entitled to have his patent.

MINING CLAIM—PUBLICATION OF NOTICE—IRREGULARITY.

BECKER ET AL. v. SEARS.

The publication was made for nine weeks under the practice in force prior to the Streeter decision, and protestant failed to file an adverse claim.

As it is not shown that injury has been done to the rights of others by the irregularity in publication, and as the error was one of the government, and not of the applicant, the proceedings will not be declared void.

Secretary Teller to Commissioner McFarland, January 11, 1883.

I return herewith the papers submitted by your letter of 28th of January, 1882, under my predecessor's direction of 11th of that month, in the matter of the protest of Theodore H. Becker *et al.* against the allowance of patent upon the placer claim of J. P. Sears, Central City, survey No. 302, Ohio and Grass Valley mining district, Clear Creek County, Colorado.

The application of Sears for patent was filed in 1873, and was, after contest in the courts as to a portion, and in the district office under your orders as to other portions, finally allowed, subject to a claim set up by Becker to the effect that a known lode called the Soda Lode existed within the placer, which had been regularly located and belonged to said Becker.

Other matters appeared in the affidavits submitted by Becker asking the hearing, his own affidavit, however, being limited to an assertion of his right to said Soda vein, and a general suggestion of possible ownership in other parties not named, to certain houses, grounds, etc., not specially described.

In filing these affidavits, the attorney of Becker suggested to your office the fact that the original application of Sears was not published for the full period of sixty days, according to a decision of this Department rendered in a similar case. Becker did not rely upon or set up this alleged fact, but stated under oath that his only reason for failure to file an adverse claim against the original application, pending its publication, was a misapprehension with regard to the inclusion of said Soda Lode within such placer claim.

These affidavits were filed in June and July, 1880, and on the 13th of August your office ordered the hearing asked, limiting the inquiry specifically to the matters connected with the allegation of the claimant Becker as to the existence and location of the Soda Lode, requiring it to be defined by an accurate survey, etc.

On the 30th of April previously, while the application was pending *ex parte*, and before any suggestion of right in Becker, your predecessor had waived all objection to the alleged insufficient publication and directed the district officers to notify Sears to come forward and complete his entry within thirty days, subject to a declaration of abandonment in case of default.

I do not find any protest or objection to the limitations fixed by the order for hearing, nor any attempt to obtain an enlarging order; and the parties accepted notice and went to trial upon the issues defined by your office.

The record was completed on the case thus made up, and the decision of the district officers was in favor of Becker. One of the conditions of the order was to the effect that if Sears should abandon the Soda Lode ground no hearing should be had, but his right to a patent for the residue should be admitted. After hearing and before action on his appeal from the decision of the district officers, Sears filed notice of such relinquishment. This, of course, closed the case, Becker having no appeal pending, and his rights in the controversy being limited to the issues involved at the outset. Having obtained these, there was nothing for you to decide, and the only proceeding was the issuing of the proper instructions for carrying the settlement into effect.

This you proceeded to do by the letter of November 21, 1881, the conclusions of which are now objected to, ostensibly in the name of Becker, together with several other parties, who have since the hearing filed affidavits setting up the existence of still other lodes within the placer, but not asserting that the same were known prior to the application of Sears for patent.

These you decline to recognize, and also decline further to consider the matters set up prior to the hearing adjudicated, as you conclude, by the action of your predecessor, and no longer factors in the case.

There are certain irregularities apparent in these preliminary proceedings which you do not assume to pass upon, deeming them already settled, or at least not liable to attack by a stranger to them at their date, and it is the exercise of your discretion in this regard that I am asked to direct by supervisory action under rules 83 and 84 of practice.

Recognizing the difficulties disclosed by the whole record, and in view of what has been done, considering the time that has elapsed since the filing of the application in 1873, and that every opportunity has been presented to show any injury to others by such irregularity as appears, and also of the fact that if error was committed in the matter of the publication it was the error of the government, and not of the applicant, the register being designated by law as the person who shall publish the notice, I do not feel called upon to declare the whole proceeding void, unless it be shown that interests and rights then vested in third persons absolutely demand for their protection the avoidance of the same.

This I do not find. I accordingly decline to set aside your instructions, simply calling your attention to an alleged mistake in the survey defining the relinquished Soda Lode, and directing its proper examination in connection with the usual examination of the final surveys and papers, which should of course be made to conform to the accepted rulings and practice.

MINING CLAIM—SURVEY—SURFACE GROUND—PATENT.

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BECKER ET AL. v. SEARS—REVIEW.

Section 2333, Rev. Stat., clearly carves out from a patent to a placer claim all known lodes found therein at date of application, together with twenty-five feet of surface ground on each side as an incident thereto. As this was a known lode, however insignificant in value, and was not legally claimed by Sears and is now at his request excluded from his final plat of survey, it necessarily forms no part of his claim.

Secretary Teller to Commissioner McFarland, January 22, 1883.

On the 11th instant I dismissed the protest of Becker *et al.* v. J. P. Sears, respecting the issue of patent to the latter for his placer claim on Central City mineral entry No. 1790, survey lot No. 302, Grass Valley and Ohio mining district, Colorado.

In so doing I directed your attention to an alleged mistake in the survey, with respect to the relinquished Soda Lode claimed by Becker, and instructed you to give it proper examination in passing upon the completeness of the final entry, before the issue of patent.

At the outset Becker claimed this lode by virtue of an alleged location in 1861, defining it as twenty-five feet in width on each side of said vein or lode. By your order for hearing, dated August 13, 1880, you required a certified copy of the location and a diagram or plat showing the boundaries and extent, and its position relative to the survey of the placer claim.

Instead of fairly complying with this, Becker filed a copy of what purported to be a copy of said original location made June 4, 1861, and recorded September 22, 1873, calling for twenty-five feet of surface ground on each side, together with an alleged relocation made September 16, 1880, more than thirty days after your order, claiming by new lines and enlarging the surface ground to seventy-five feet on each side; and filed a diagram of the relocation only, without showing the boundaries of the original claim.

The testimony of the deputy-surveyor shows that he did not follow the original location boundaries and monuments, but resurveyed the vein according to his own notions of what would be a proper location; and fixed no permanent monuments or bounds to his survey on the ground, but merely set temporary stakes at the north end "to indicate the points for Mr. Becker to establish permanent monuments hereafter."

Sears objected to this attempted relocation and demanded that the showing be confined and responsive to the order made by your office in the case calling for the true limits of the claim originally located. After the hearing, and before your decision, he relinquished the Soda Lode claim, referring in his relinquishment to the survey No. 361, which number was given to the diagram filed by Becker, but which does not appear to have been approved by the surveyor-general as a survey of a

claim. This number, however, appears to have properly belonged to the original survey made in 1873, filed as an adverse claim in the case of the Montague placer claim with which the Soda Lode location conflicted, said survey being but fifty feet in width, and which the present diagram as already shown fails to show.

Sears claims that it was this proper original survey of the Soda Lode location which he intended to describe in his relinquishment; and you find upon the examination that as the relocation was entirely illegal the exclusion of twenty-five feet only on each side of the vein or lode can be insisted upon.

The attorneys for Becker ask, by letter of the 17th instant, that your decision of 13th instant to this effect be submitted to me for final determination; but instead of basing any claim upon the relinquishment, they take issue with all the antecedent adjudications, and flatly deny the right of Sears to any portion of the placer claims. On the 18th you submitted the papers accordingly.

On the 18th they also filed notice of their intention to ask for a review of my action of 11th instant dismissing the protest, and on the 20th, instead of filing such motion, they ask that the case be referred to the Attorney-General on certain interrogatories assumed by them to be vital, but which were held by me to be beyond the necessity for consideration with reference to the case as it now stands.

The relinquishment was in terms made by the attorney of Sears, October 21, 1881, "to the end that the applicant for patent may be no longer delayed in securing title." It has never been accepted by Becker, who has persisted in opposing the whole claim up to the present time, and now, in support of his suggestion for a correction, fails to adduce any argument in support of his understanding of the instrument; but, on the contrary, renews his efforts to obtain a reopening of the whole matter.

Appearing as a mere protestant, he has not, in my opinion, such standing as will entitle him to claim anything in the case, and cannot rely upon mere technicalities; nor can he insist upon the enforcement of a relinquishment offered upon such conditions even though it clearly covered, as in my judgment it does not, the spurious and unauthorized survey and relocation. He is estopped by his own failure to observe them.

But the law, section 2333 Rev. Stats., clearly, in my opinion, carves out from a patent to a placer claim all known lodes found therein at date of application, together with 25 feet of surface ground on each side as an incident thereto. As this was a known lode, however insignificant in value, and was not claimed by Sears in the manner provided by law, and is now at his request excluded from his final plat of survey, it necessarily forms no part of his claim. The residue under your decision may properly be patented to him, and I decline further to consider the objections raised by the protestants in the case.

PRACTICE—RIGHT OF APPEAL—PARTIES IN INTEREST.

SANTA RITA MINES.

The right of appeal to the Secretary is allowed to parties who are shown to have some interest in a cause or matter properly pending, and in which a decision has been made.

A claim cannot be set up by mere assertion. A person who has not shown some evidence of a claim can have no standing as a party to a case before this office.

If any other rule were adopted, a stranger could at any time, by the bare allegation of a claim to a tract of land, appear and demand all the rights and privileges of a party to any suit which might be pending involving the title to such land.

Commissioner McFarland to Messrs. Ford & Brainard, Washington, D. C., February 13, 1883.

I am in receipt of your letter of the 6th instant, in the form of notice of an appeal from my action in reference to the matter of certain mining claims, touching which you were advised of the position of this office by letters, dated, respectively, January 20 and 31, 1883.

The letter of the 20th ultimo was called forth by the filing of certain papers in this office, said to be copies of papers formerly filed and rejected, and filed again, with the surveyor-general, of New Mexico, alleging the existence of a claim of title derived from the Spanish or Mexican government to the Santa Rita mines in New Mexico.

You were advised that said papers appeared to be duplicates of papers previously presented to the surveyor-general and which that officer had found not to contain any evidence of grant or title from either the Spanish or Mexican government to the land or mines in question. There was, therefore, nothing before this office upon which any action could be taken in respect to such alleged claim.

You were also informed that as the land appeared to be subject to entry under the mining laws of the United States, and as no legal objections were found to the pending mineral entries, the same would proceed to patent in usual course.

The letter of the 31st ultimo was in reply to a request from you that the papers which had been filed in this office should be reported to Congress under the eighth section of the act of July 22, 1854.

As the papers referred to contained nothing which had not already been considered by the surveyor-general, and nothing that could be construed into the basis of a claim under the treaty provisions, there being no evidence of the existence of any claim of right or title in the alleged grantor of your client, there was nothing to be sent to Congress, and your request was accordingly declined.

You now desire to appeal to the Hon. Secretary of the Interior, and you lay before me certain propositions as specifications of error, to wit:

1st. Alleged error in assuming jurisdiction in this case, contrary to the provisions of the act of Congress of July 22, 1854.

2d. Alleged error in refusing to lay before Congress the decision of the surveyor-general of Mexico, dated July 6, 1882, in regard to said private land claim, as required by said act.

3d. Alleged error in refusing to reserve from sale or disposal the lands embraced by said private land claim until final action thereon, as provided by said act.

4th. Alleged error in holding that there is no Santa Rita del Cobre private land claim before this office which could be sent to Congress under section 8 of the act named, "inasmuch as Congress alone has power to determine this question."

You are advised that the question before this office, and of which I have assumed jurisdiction, is the question of the rights of certain mineral claimants under the mining laws of the United States.

No adverse claim was filed in those cases during the period of publication, and no reason has since been shown to me why the usual course of mineral adjudication should be suspended or delayed, and I have so informed you.

The right of appeal to the Secretary is allowed to parties who are shown to have some interest in a cause or matter properly pending, and in which a decision has been made.

A claim cannot be set up by mere assertion. A person who has not shown some evidence of a claim can have no standing as a party to a case before this office.

If any other rule were adopted, a stranger could at any time, by the bare allegation of a claim to a tract of land, appear and demand all the rights and privileges of a party to any suit which might be pending involving the title to such land.

For the same reasons, it is provided by rule 83 of the rules of practice that an order can be applied for, to have proceedings certified up to the Secretary, only by a party to a case.

Your client, Mr. Hays, has not made himself a party to the case now pending in this office involving the Santa Rita mineral entries.

The previous correspondence addressed to you by this office, and to which exception is now taken by you, consisted merely of letters of advice, informing you, as a matter of official courtesy, of the status of the mineral entries. Information so given does not constitute an appealable decision. Mr. Hays is not before this office as an appellant, showing an affirmative right in his own behalf, nor as a protestant, alleging failure of the mineral claimant to comply with the law.

It may be proper for me here to say for your information that the adoption of any different rule, upon the assumption that such course is required or authorized in carrying out the provisions of the eighth section of the act of 1854, would be in my judgment to impute to that statute an intention that the whole public domain within the Territories of New Mexico and Arizona may be placed in reservation at the will or instance of any person or persons who might choose to assert a claim

by mere allegation, unsupported by evidence of grant or muniment of title from former sovereignties—a result repugnant to public policy and destructive of public and private rights. I do not think the act of 1854 susceptible of such interpretation.

Congress unquestionably has the power, and the sole power, to determine the validity or invalidity of claims arising under treaty stipulations with Mexico; and all claims, whether adjudged by the surveyor-general to be valid or invalid, must be presented to Congress for final action; but such submission, with its accompaniment of a statutory reservation of the land claimed, is restricted by the terms of the act to claims cognizable under the laws, customs, and usages of Spain and Mexico. It can hardly be supposed that imaginary claims, not so cognizable, or claims unsupported by some evidence of grant or title from the former governments, can possess sufficient dignity to authorize their submission to Congress, or to work a legal reservation of public lands of the United States.

MINING CLAIM—APPLICATION FOR SURVEY.

PHILIP DEPHANGER.

Application for a mining survey must be declined where the location was not properly marked and recorded. Bearings and distances must be given in a survey from the respective survey corners to the location corners, and the same must be shown on the plat.

Commissioner McFarland to U. S. surveyor-general, Virginia City, Nevada, January 26, 1882.

Further proof as to the identity of the claim of Philip Dephanger *et al.* upon the Eagle lode as located, and the same as surveyed, is desired. The notice of location filed with the papers is regarded as insufficient to determine this satisfactorily. You will call upon the applicant to furnish a certificate of identity signed by any disinterested party. In this connection I desire to call your attention to the necessity of furnishing for the benefit of this office more reliable information upon this point than the entry papers generally afford.

The act of Congress of May 10, 1872, expressly provides that “the location must be distinctly marked upon the ground so that its boundaries can be readily traced,” and “that all records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument, as will identify the claim.”

These provisions of the law must be strictly complied with in each case to entitle the claimant to a survey and patent, and therefore should a claimant under a location made *subsequent* to the passage of the act of May 10, 1872, who has not complied with said requirements in regard to

marking the location upon the ground and recording the same, apply for a survey you will decline to make it. (Circular N, November 20, 1873.)

If the Eagle lode was located in accordance with the requirements of the statute, it was marked upon the ground. If the survey was properly executed, it was made within the limits thus marked. There is, however, nothing in the entry or survey papers to show that this was done, save the bare statement that the survey was made in accordance with the notice of location; as the location notice is exceedingly blind, this statement can hardly be considered satisfactory.

To enable this office to determine satisfactorily, and at a glance, that the provisions of the law and its instructions are obeyed, you will in future require in the field notes a particular reference to all the data upon which a survey is based, to wit: From each established corner of the survey a bearing and distance must be given to the corresponding corner of the location.

Upon the plat the lines of the location as found upon the ground must be laid down in such a manner as to contrast and show their relation to the lines of the survey.

If the location and survey are identical, this fact should be clearly and distinctly stated in the field notes.

After a reasonable time has elapsed in which to notify your deputies of the foregoing, no survey not complying with these requirements will be allowed to go to patent.

MINES—ADVERSE CLAIM—REGULATIONS—WAIVER.

J. S. WALLACE.

When it is impossible to procure the survey of the adverse claim, the adverse claimant may show the nature, extent, and boundaries of the claim as nearly as practicable from information in his reach, and present under oath the reasons for not following the official regulations. If the facts justify such action the regulations may be waived.

Secretary Kirkwood to Commissioner McFarland, February 21, 1882.

I have examined your report of December 1, 1881, upon letter of J. S. Wallace, of Hailey, Idaho Territory, dated November 11, 1881, and referred to your office by this Department under date of November 19 last.

Mr. Wallace represents in effect that there are mines located high up in the Sawtooth Mountains, in new districts near the headwaters of Wood River in the said Territory, and that, in case parties should make applications for patents of such mines during the period from about December to April, it would be impossible, in a majority of instances, if not in all, for adverse claimants to procure surveys in accordance with present regulations within the period of publication, on account of the severity of the climate, deep snows, etc., in that locality.

In view of these facts, Mr. Wallace, who is acting as superintendent of mining property located in said mountains, suggests that the rights of all parties owning claims in the above-mentioned districts would be most effectually preserved and protected if the surveyor-general of the Territory were instructed to postpone the granting of any order for advertisement of applications for patents until the country is open in the spring, when adverse claimants can procure their surveys.

Mr. Wallace doubtless meant that the local land officers should be instructed to postpone publication of notices of applications for patents. But it is evident that under existing law such instruction would be improper.

You suggest that your office might issue instructions waiving the present requirements as to surveys of adverse claims, in cases in which the adverse claimants shall show under oath that such surveys cannot be executed and platted within the period of publication on account of climatic or other temporary difficulties, and allowing adverse claimants to file such plats of surveys within a reasonable time after the obstacle to making surveys shall have been removed.

I do not agree with this suggestion. Adverse claimants should be held to reasonable diligence under the law in taking necessary steps to protect their interests. If there is danger or likelihood of applications for patents being presented during a season in which surveys cannot be made, the parties might anticipate such proceedings by securing surveys of their claims during the season in which no obstacles to making the same are present.

But, if application for patent in any case should be made at a time when it is impossible to secure a survey of a claim adverse thereto, then, as the law does not require impossibilities, the adverse claimant might show the nature, extent, and boundaries of his claim as nearly as practicable from information within his reach, and present under oath his reasons for not following more clearly the regulations of your office, and submit whether, under all the circumstances, he had not properly presented an adverse claim. This would give opportunity to waive the regulation requirement in a given case when the facts were presented justifying such action, and would be preferable to a general waiver of the rule in anticipation of a case calling for any such waiver.

To waive the requirement as to surveys of adverse claims in advance of the presentation of reasons therefor would tend to encourage carelessness and indifference on the part of adverse claimants respecting such requirement, and would, I think, be equivalent to an invitation to adverse claimants to present excuses for laches, whereas they should exercise all reasonable diligence in their efforts to comply with the regulations.

Mr. Wallace's letter is herewith returned for the files of your office, and you will advise him of the action thereon.

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BODIE TUNNEL & MG. CO. v. BECHTEL CONSOLIDATED MG. CO.
ET AL.

A tunnel location under the United States mining laws is a mining claim, and can be an adverse claim.

Having failed to file an adverse claim and commence suit as provided by statute, the tunnel company must be held to occupy the position of protestant.

The jurisdiction assumed by the courts prior to legislation granting such jurisdiction to determine conflicting rights as between adverse mining claimants recognized and continued in force by the mining statute.

The case of Corning Tunnel Company v. Pell (4 Colorado, 507) does not support the position that there may be adverse mining rights under tunnel locations that cannot be adjudicated in the courts.

While the Department has no jurisdiction to determine controversies as between adverse mining claimants where sufficient allegations have been made to indicate, if true, that the applicant for patent has not complied with law, or is not entitled to a patent, an investigation should be held as in agricultural cases.

Secretary Kirkwood to Commissioner McFarland, December 12, 1881.

I have examined the papers forwarded with your letter of the 29th October last, in the matter of the protest of the Bodie Tunnel and Mining Company against the several applications of the Tioga Consolidated Mining Company and the Bechtel Consolidated Mining Company, for patents for certain mining claims in Bodie land district, California.

On the first day of July, 1880, the Tioga Company filed several applications for the following-named mining claims: The Red Lyon, the Midsummer, the Lady Locke, the Central, the Northern Extension Standard, the Sutro, the Clipper, the Tioga South, and the December, and entered the same October 8, 1880.

The Bechtel Company filed like applications, July 1, 1880, for the Sitting Bull, the Central, the Argentine, the San Francisco, the Pennsylvania and the Ohio mining claims, and entered the same October 15, 1880.

During the period of publication of said applications, to wit, on August 31, 1880, the said tunnel company filed with the register of the Bodie land office a written instrument in the nature of a protest, styled by the company as follows: "Sworn statement and petition of the Bodie Tunnel and Mining Company." The paper was sworn to by Thomas Buckley, superintendent of said Tunnel and Mining Company, and set forth that, on the 28th day of September, 1877, F. Tagliabue, a citizen of the United States above the age of twenty-one years, duly located a tunnel claim under section 2323, Rev. Stats., on the west side of Bodie Bluff, in the Bodie mining district, Mono County, California.

The description of the claim contained in a certified copy of the tunnel notice, attached to the said petition or protest, is as follows:

This claim commences at this notice, being 10 feet westerly from the mouth of the Old Bodie tunnel, and about 1,000 feet, more or less, in a

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northerly direction from the Blasdel tunnel, and runs in an easterly direction 3,000 feet; and I hereby claim 750 feet on each side of said tunnel, and each blind and undiscovered ledge struck by said tunnel.

This notice was filed for record in the office of the county recorder of Mono County, September 29, 1877.

The claim was surveyed November 14, and the field notes and plat thereof filed for record in the office of said county recorder, November 15, 1877, as appears from copy of said plat and field notes attached to said petition or protest, from which it would also appear that the line of the tunnel and the exterior boundaries of the surface claimed were marked by posts; but whether so marked before survey does not appear. The surface ground claimed is in the form of a rectangular parallelogram, 3,000 by 1,500 feet.

The petition or protest further sets forth that work upon said tunnel has been continuously and diligently prosecuted ever since the date of said location; that said tunnel and mining company is the owner of said claim by purchase; that of all the above named mining claims of the said Tioga and Bechtel companies lie across the central course of said tunnel; that the work on the tunnel has not progressed far enough to discover veins or lodes within or under the surface ground of the several claims applied for by the Tioga and Bechtel companies; and that the affiant is informed and believes that several of the locations thereof are mere surface locations, in which no vein or lode has ever been found at all, and the locations of which were made subsequently to the tunnel location. The names of the claims alleged to have been thus located are not given, but reference is made to the abstracts of title accompanying the applications for patents for ascertaining what claims of the said Tioga and Bechtel companies were located subsequently to the location of the tunnel claim.

From a statement in your decision of August 24, 1881, it appears that the Midsummer, Lady Locke, Central, North Extension Standard, Clipper, and December, of the Tioga company's claims, and the Sitting Bull, Argentine, San Francisco, Ohio, and Pennsylvania, of the Bechtel company's claims, were located subsequently to September 28, 1877.

The said tunnel company declared that it claimed all veins, lodes, or ledges which it may discover in extending its said tunnel, which cannot be traced upward to the surface; in other words, veins, lodes, or ledges which were not known to exist prior to the tunnel location.

The tunnel company did not in terms protest against the issue of patents to the Tioga and Bechtel companies; but after the recital of facts and allegations upon which it relied, closed the petition with two prayers to the following effect:

First. That in the event of patents being issued upon any of said applications they should contain words making the grant subject to the lawful rights and claims of the Bodie Tunnel and Mining Company.

Second. That in the event of such patents being granted for any of said claims, the location of which was subsequent to the date of the tunnel location, a clause be inserted therein, excepting and excluding from the grant any and all veins, lodes, ledges, or mineral deposits that may be cut, intersected, or discovered by said tunnel company in running and excavating said tunnel, which had not been discovered and located prior to September 28, 1877.

Upon this paper the company rested, and did not institute proceedings in court as provided by section 2326, Rev. Stats.

Upon the argument of the matter the counsel for the Bodie Tunnel and Mining Company raised objections to the validity of some of said applications not alleged in the petition or protest, one of which was that the Red Lyon location was invalid in this, that the location was 489 feet in width, while the mining laws or rules and customs of miners in that district limited the width of lode claims to 100 feet, and it was contended that patent to said claim could not issue for more than 100 feet in width.

In your decision of August 24, 1881, you held substantially as follows:

First. That it was necessary for the rights of the tunnel company that suit should have been brought in court as provided by section 2326, Rev. Stats., and that, as said company failed to institute such proceedings, its adverse claim was waived, and that it cannot be adjudicated by this Department.

Second. That the Bodie Tunnel and Mining Company having failed to establish any claim, or right, or interest, present or prospective, to or in the tracts applied for by the Tioga and Bechtel companies, it is not competent to insert any clauses of reservation in the patents to be issued upon said applications.

Third. That the Red Lyon location was not limited to 100 feet in width, because it appears that after the year 1869 the Bodie mining camp was abandoned, and for many years the laws, rules, and customs thereof were disused; that during this period the act of 1872, allowing 600 feet in length to a lode claim, was passed; and that before any local law or regulation was thereafter adopted by miners in the district in which said claims are situated, limiting the width of claim to less than the statute allows, the Red Lyon was located, and hence that at the time of its location it was lawful to locate to the extent of 1,500 feet in length and 600 feet in width in that district.

Fourth. That as the Midsummer, Lady Locke, Central, North Extension Standard, Sutro, Clipper, and a portion of the Tioga South, are within the limits of the Red Lyon, and subsequent in location, the entries thereof are invalid, and were held by you for cancellation.

Fifth. Without deciding that the other claims should pass to patent, you decided that they should be regularly disposed of, and dismissed the petition or protest.

From all your rulings and decisions in this matter the tunnel company filed an appeal, which you dismissed by decision of October 5, 1881, upon the ground that the said tunnel company held the position of protestant merely, and was not entitled to appeal under the rule laid down in *McGarrahan v. Boston Mine* (S. M. D., 330); *Boston H. Mining Company v. Eagle Copper Company* (*Id.*, 320), and *Lombard v. Mount Pleasant Mining Company* (*Id.*, 279). Thereupon the matter was brought here under Practice Rule 83.

Without intending to question or infringe the rule above stated as to appeals, I deem it proper, in view of the importance of some of the questions raised and of the earnestness and ability of the arguments presented by counsel on both sides, to briefly review your decision, by virtue of my supervisory powers, and not in my appellate capacity. In doing this, I do not consider it necessary to set out the specific points of exception noted in the appeal. It will be sufficient to take up the several points decided by you as above set forth, they, in my opinion, covering the whole case, and being altogether excepted to.

As to the first point, it is evident to me that the claim of the said tunnel and mining company must of necessity be a *mining claim*. It is a claim under the mining laws of the United States, if it is any claim at all. It follows that if this claim conflicted with the claims of the Tioga and Bechtel claims, which are mining claims, it was an *adverse claim*. Due publication of notice of the applications of the Tioga and Bechtel companies was had. This is not questioned. Section 2325, Rev. Stats., provides that—

If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of \$5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

It is not claimed that the paper filed by the tunnel company was intended as an adverse claim under sections 2325 and 2326 Rev. Stats.; but if it had been, the tunnel company would be in no better position than if no adverse claim had been filed; because section 2326, Rev. Stats. provides 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 as to 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.

It is therefore evident that the tunnel company must be held as occupying one of two positions. It either filed no adverse claim at all, and the Land Department must assume that none exists, or else, having filed one, it waived it by failure to institute proceedings in court,

and hence it must be assumed that none exists. As affecting the matter under consideration, it is immaterial which position it is held to occupy, as the result is the same in either event. This Department has not otherwise construed these two sections as regards adverse claims, and Mr. Justice Field in the Eureka case said: "The silence of the first locator is, under the statute, a waiver of his priority." (See opinion of court in 4th Sawyer, at page 318.) This judgment was affirmed by the supreme court. (See 13 Otto, 839.)

But it is urged by counsel for the tunnel company that it has not such a claim as can stand in court; that the rights claimed cannot be protected in a court of competent jurisdiction, &c.

To say this, is to say that the tunnel company has no rights at all. But counsel insist that it has rights granted by statute. If that be so, then clearly they can be protected in court against any conflicting mining right or claim. In the view I take of the mining law, there is not a right that can be acquired thereunder which cannot be fully protected in court as against any other conflicting right or claim arising under the same laws, except that of the United States. This is the very foundation of the system of the mining laws. Prior to Congressional enactment of mining laws, miners had their local laws, rules, and regulations, by which they were governed, regarding their mining claims, and all their rights thereunder when in dispute or conflict were adjudicated by the courts. Courts, of course, did not undertake, any more than now, to dispose of the title of the government, over which they had no jurisdiction. But as regarded the rights of miners, not as against the United States, but as against each other, courts took jurisdiction, and that jurisdiction was recognized and continued by Congress when it framed and enacted the mining laws. The United States mining laws are in a sense supplemental to the system that had already grown up in the absence of Congressional enactment. They in no sense wiped out, destroyed, or essentially changed that system, but continued it in vogue. (*Broder v. Water Co.*, 11 Otto, 274.) So far as the actual operations of mining were or are concerned, that system was and is all-sufficient. Congress made certain definitions as to what should be deemed mining claims, as regards location, etc., and enacted the manner of making locations, amount of labor and money to be expended, etc.; but the prominent feature of the mining system, of asserting rights in courts under the local rules of miners and the laws of the States and Territories, was not changed, but especially authorized by section 2324, 2325, and 2326, Rev. Stats.

I know of no case wherein the courts have refused to recognize rights under tunnel locations. The attorney for the tunnel company at San Francisco cites the case of the *Corning Tunnel Company v. Pell et al.* (4 Colorado, 507), to support the position that there may be adverse mining rights or claims under tunnel locations that cannot be adjudi-

cated by the courts; but as I understand that case, it gives no support to that position. Section 2323, Rev. Stats., provides that where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel *on the line thereof*, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface, and that locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel and while the same is being prosecuted with reasonable diligence, *shall be invalid*.

Now, in the case of *Corning Company v. Pell et al.*, the court defined what is meant in the law by the words, "on the line of such tunnel." It was insisted in that case, as is claimed here by the protest or petition, that the line of the tunnel means 1,500 by 3,000 feet, as surveyed and staked as the tunnel claim; and that a location within such limits was invalid.

But the court construed the line of a tunnel, as intended by the act, as designating "a width marked by the exterior lines or sides of the tunnel." The evidence showed that the slide lode, which was claimed by the tunnel company, was 55 feet from the center line of the tunnel; and the court, therefore, under its construction of the law, held that the location of said lode "was not on the line of appellant's tunnel." The court then stated as follows: "What the appellant's rights would have been had this fact been otherwise, it is not necessary to determine."

The tunnel company in that case was defeated in court, because it showed no right or claim to the slide location, under the court's construction of the law; and the case was not defeated upon the ground that there are no rights under tunnel locations that courts can maintain or preserve.

But counsel for the tunnel company insist that this Department should hold all of the locations of the Tioga and Bechtel companies which are made subsequently to the tunnel location to be invalid, because the law provides that such location shall be invalid. From what has been said it is clear that this Department cannot pronounce any such judgment, because it has no jurisdiction to inquire into the facts upon which the demand is founded. It is said that the fact that these locations are on the line of the tunnel is one that appears of record in the Department, and that I am bound to take notice thereof; but it is only necessary to call attention to the fact that there is no record of mining locations in the land department. They are recorded with a mining recorder, under local rules of miners, or in the county records of the county in which the claims lie, and the facts relative to mining locations can be shown in the land department and the courts only by evidence *dehors* the proper records of such Department or the courts. It is a matter of proof that does not appear from our records.

It may be made to appear as an item of evidence in the record of a case, but not from the records of the Department of which I am bound to take notice. That fact might have been presented in court, but it cannot be made to appear here in the case as it now stands.

From the view, therefore, which I take of the mining law, the only place in which the controversies between conflicting mining claimants or adverse claimants can be heard, is a court of competent jurisdiction.

What has already been said disposes of the second point decided by you. It is not competent to insert clauses of reservation of rights fully waived. In saying this I do not intend to hold that patents ought to issue to the Bechtel and Tioga companies, that question not being before me.

As to the third point, your holding as to the Red Lyon location seems to be in accordance with prior rulings of your office, this Department, and the courts, as per your citation. (General Land Office letter to this Department, September 2, 1878, and concurrence therein by my predecessor Sept. 28, 1878, to Attorney-General; and *Jupiter Mining Company v. Bodie Mining Company*, 8 C. L. O., 60.)

On the fourth point, as no appeal has been taken from your decision holding the entries of the Midsummer, Lady Locke, Central, North Extension Standard, Sutro, Clipper, and Tioga South for cancellation, so far as they conflict with the Red Lyon entry, it must stand.

Finding no error in your conclusions as above set forth, I must of necessity also find that there was no error in your decision of October 5, 1881, dismissing the appeal, and the same is affirmed.

I desire to say that while I am of opinion that controversies between adverse mining claimants cannot be heard and determined before this Department, I am nevertheless of the opinion that where, under the last clause of section 2325, third parties present evidence by affidavits, etc., to show that an applicant has failed to comply with the mining statutes, if the evidence is of such character as to entitle it to credit, and if the allegations are such as, if proven in regular proceedings, would show that the law has not been complied with, that patent under the law ought not to be issued, or that you have no jurisdiction to issue the patent, then it is your duty to order an investigation as between the government and the applicant, as in similar cases of agricultural entries.

With this rule in view, I submit for your consideration the allegations contained in the affidavit accompanying the application of the tunnel company under Practice Rule 83.

MINING CLAIM—ADVERSE LOCATION—WAIVER.

GUSTAVUS HAGLAND.

Under Section 2325 Revised Statutes, if no adverse claim is filed during the required period of publication, it is assumed that the applicant is entitled to patent, and no agreement of parties can control this statutory provision.

If either party claims a non-fulfillment of such agreement by the other, the remedy must be found in the courts, and not before the Department.

When one is seeking a patent for his mining location, and gives notice of the fact as there prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections and present them, or he will afterwards be precluded from objecting to the issue of the patent.

The silence of the first locator is, under the statute, a waiver of his right.

Secretary Kirkwood to Commissioner McFarland, March 8, 1882.

I have considered the application of Gustavus Hagland for patent on the Metropolitan Lode No. 2 (mineral entry No. 1192, lot No. 797, Idaho mining district, Central City, Colorado), and the protest of Theodore H. Lowe as owner of the Kangaroo Lode No. 2, (survey No. 281), against the same, on appeal by Hagland from your decision of July 6, 1881, holding said entry, No. 1192, for cancellation.

It appears that the Metropolitan Lode was located prior to March 3, 1873, and recorded as of that date; that on November 9, 1873, the locators thereof filed a protest against the issuance of a patent to the claimant of the Kangaroo Lode No. 2, for the reason that the ground was part of that claimed and located by themselves; that the Metropolitan Lode was re-located July 12, 1878, by Hagland, the grantee of the original locators, for the purpose of embracing all the land allowed by the mining laws, and that an additional re-location was made by Hagland June 5, 1879, the more accurately to describe the re-location of July 12, 1878.

It also appears that an application for a survey of the Metropolitan Lode was made and rejected by the surveyor-general because its location was not sufficiently definite to fix the *locus* of the claim, and that on the filing of an amended certificate of location July 18, 1878, the surveyor-general directed survey thereof by one Peregrine, a U. S. deputy mineral surveyor, whose survey was rejected because the discovery shaft of the Metropolitan Lode was located within the side lines of said Kangaroo Lode; that, on June 19, 1879, by direction of Peregrine, a further amendment of the Metropolitan claim was made, in which its discovery shaft was made to appear outside the side lines of the Kangaroo Lode, whereas, in fact, no such discovery shaft existed. Affidavits having been filed to the effect that Peregrine knowingly and falsely located said shaft outside the lines of the Kangaroo Lode, and had so

admitted, you instructed the surveyor-general, January 7, 1881, to make personal examination in the field touching the truth of said allegations, who reported the same as true.

The entry No. 1192 was based on said false survey, but there is no evidence tending to show that Hagland, or any person associated with him, had part in or was cognizant of said falsity.

Patent for the Kangaroo Lode, No. 2, issued August 25, 1874, and said claim appears to have been located upon grounds which belonged to the applicant for the Metropolitan Lode by prior location.

The applicants for the Metropolitan Lode did not file an adverse claim during the period of publication, for the ground sought to be patented by the owner of the Kangaroo Lode, by reason of (as appears) an agreement between the parties under which the applicants for the Metropolitan Lode relinquished all right to protest against the issuance of patent to the owners of the Kangaroo Lode, for a valuable consideration to be made them under certain contingencies. The purposes or effect of this agreement are, however, immaterial, because under section 2325 Revised Statutes, if no adverse claim is filed during the required period of publication it is assumed that the applicant is entitled to patent, and no agreement of parties can control this statutory provision. If either party claims a non-fulfillment of such agreement by the other, the remedy must be found in the courts, and not before your office or this Department.

Mr. Justice Field said, in the Eureka case (4 Sawyer 302), that under the act of 1872, when one is seeking a patent for his mining location, and gives notice of the fact as there prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections and present them, or he will afterward be precluded from objecting to the issue of patent. . . . The silence of the first locator is, under the statute, a waiver of his priority.

As the discovery of the Metropolitan Lode appears to be within the side lines of the patented Kangaroo claim, and as said patent passed the government's title to the land, so that all control of the executive department over the title has ceased, and as the applicants for the Metropolitan Lode failed to file an adverse claim to the applicant for patent by the owners of the Kangaroo Lode, I affirm your decision.

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SAME, ON REVIEW.

The development and possession of a lode, so far as it runs on public lands, is not interfered with in any way by the waiver of a portion, even though the original discovery shaft was included in the portion disposed of.

Section 2326 of the Revised Statutes recognized portions of claims as entitled to patent, and the issue of separate patents on such portions as adverse parties may rightfully possess. But no patent can issue for any portion of a lode lying within the patented surface ground, nor for any surface ground appurtenant thereto.

No part of an entry can stand under the proceedings based upon a false survey and publication.

Secretary Teller to Commissioner McFarland, April 11, 1882.

From the papers and the oral argument before me, the following facts appear:

That on the 3d day of March, 1873, the grantors of Hagland filed for record the original notice of location of the Metropolitan No. 2, covering fifteen hundred feet in length and twenty-five feet on each side of the vein in width, said location having been made in January previous.

That on the 20th of the same month the location of Kangaroo tunnel lode No. 2 was made, covering one thousand feet in length and twenty-five feet on each side in width. It also appears that the order obtained from the surveyor-general for the survey of said claim was dated February 25, and the plat and field notes on which patent afterward issued were approved March 18, 1873, prior to the date of alleged location.

For upward of seven hundred and fifty feet on the easterly end of the Metropolitan, and embracing the point claimed as the discovery shaft and a portion of the tunnel, the surface ground of these two original locations appears to be nearly, if not exactly, identical, which would necessitate the presumption that but one lode was made the basis for both if accurately located, although it is claimed by the applicant for the Metropolitan that the true Kangaroo vein runs diagonally across the westerly end of the said common surface ground, and leaves the Metropolitan vein more than forty feet distant at the nearest point, leaving also the surface ground a few feet from the westerly end; and that the only vein within such common surface ground, except the short diagonal portion, is the Metropolitan vein No. 2.

On the 8th of May, 1873, patent was applied for on the Kangaroo No. 2, and was issued thereon August 25, 1874. The entry was made October 9, 1873, no adverse claim being filed by the owners of the Metropolitan.

This adverse claim was not filed because of a stipulation and bond to the effect that if the Kangaroo lode should be found not to be identical with any one of Metropolitan lodes 1, 2 and 3, a good and sufficient deed of said lodes should be made by the owners and patentees of the said Kangaroo claim, or if identical with one, then the others should be so deeded.

About 700 feet of the Metropolitan lode on the westerly end do not lie within any other survey.

July 12, 1878, Hagland relocated the Metropolitan claim, embracing in its side lines 75 feet on either side, instead of 25 feet as originally located, and on the 5th of June, 1879, he again relocated the claim, for the purpose, as alleged, of making a correction of the recorded description in the notice of 1878.

It appears that the 50 feet additional surface ground on each side was claimed in the new location so as to take the full quantity allowed by the amended local law, the claim at the date of original location being limited to 25 feet.

Upon the amended relocation, Hagland procured a plat and posted it on the ground July 21, 1879, and filed his application at the district office July 23, 1879, whereupon publication was had for sixty days—no adverse claim being filed—and entry was admitted November 19, 1879.

In 1880 it was alleged that the survey and plat were incorrect, and upon full investigation it was shown that the relative position of the various conflicting surveys and locations was by deliberate design of the deputy surveyor falsely returned in the field notes, and the discovery shaft and middle line of the lode were represented upon public land north of the patented Kangaroo claim, instead of running along or near its center line where a true survey would have shown it to be.

A subsequent plat, approved by the surveyor-general April 3, 1881, is conceded to show the correct location. By the first and published survey all the surface ground claimed east of the original discovery shaft lies on the north side of the patented claim. By the amended survey nearly one-half the additional ground is thrown upon the south side of said claim. As before stated, upward of 700 feet of the lode, commencing a few feet west of the discovery shaft and running to the westerly end line, are not in conflict with the Kangaroo.

It is claimed and shown that shafts have been sunk and work done along the vein at intervals of considerable distance on both sides of the discovery shaft, and six of these shafts and a portion of the tunnel itself are situated on the public land outside the patented ground.

Three questions present themselves in connection with the facts recited :

1. Did the waiver of the discovery shaft and the portion of the lode within the Kangaroo survey, by failure to file an adverse claim, have the effect to vitiate the entire Metropolitan location and bar an application for any part of the same ?

2. If not, how far may the original location be held good, and for what portion may a patent lawfully issue ?

3. Can any part of the entry stand under the proceedings had upon a false survey and publication ?

On the first point I am of the opinion that the development and possession of the lode so far as it runs upon public land was not interfered

with in any manner by the waiver of a portion, even though the original discovery shaft was included in the portion disposed of.

The continued possession and working of such outside portion under the original ownership and location ought not to be held as forfeited while the good faith of the owner toward the United States is not impaired; and opportunity should not be given to a stranger to appropriate under United States laws the property and improvements which he has acquired and made upon a good and sufficient location properly asserted at the time of his original discovery.

Section 2326 of the Statutes recognizes portions of claims as entitled to patent, and the issue of separate patents on such portions as adverse parties may rightfully possess. Assignment of any interest whatever in these mining possessions has been declared valid by the supreme court, even by a parol transfer without a written instrument.

If the existence of the lode be shown beyond the lines of the conflicting survey, and application be made for patent, it would seem to work a complete abrogation of a property and statutory right to deny a patent thereon because of a sale or surrender of some other portion of the lode originally embraced in the discovery and location.

Upon the second point I am of the opinion that no patent can issue for any portion of the lode lying within the patented surface ground, appurtenant thereto. The attempt to relocate the claim in 1878 and attach the additional surface as an extension was long subsequently to the issue of patent and at a time when the applicant had surrendered the claim to the lode, his only right thereto resting in the bond and agreement of the private owner. He had manifestly in 1878 no discovery of mineral within the limits of this extension, so far as the lode at that time lay within the patented Kangaroo claim. Nor is it alleged that any mineral has been discovered within such lines, outside the patented ground, on which an independent location could be made. To the westward of the surveys in conflict, I see no objection to the new location so as to embrace the full width of surface allowed by law.

Upon the third point I am of the opinion that the claimant must commence anew, and proceed by a proper publication upon a correct plat, in order to entitle him to a patent. The alleged amendment of 1879 was notoriously incorrect, while the location of 1878 is shown by comparison with the corrected plat now exhibited to have been substantially correct. When he made this location he appears to have known all about the position of the mine and the claim attempted to be located. It is said that having failed to obtain an approval of a correct plat, he procured a false one, and upon that proceeded to publish his application. Inspection of the published notice, as well of the plat, shows that it was false in description, and the plat was also false in area of non-conflicting surface. He attempts to deny his responsibility for these falsifications, and charges them upon the United States deputy surveyor. But he adopted them, signed them, published them, and pur-

sued his application upon them. He is the only party who could apparently obtain any benefit from them, and they were grossly misleading in point of fact, as descriptive of the position of the claims represented. The law requires a certificate from the surveyor-general "that the plat is correct." The incorrect plat and notice should not be permitted to stand as sufficient while a fair opportunity remains for a satisfactory compliance with law by a new publication.

I therefore conclude that the order for cancellation should stand without prejudice to the right of the applicant to proceed *de novo* in accordance with the views herein expressed; and to that extent I modify my decision of 8th ultimo.

TIMBER TRESPASS—PUBLIC LANDS.

WILLIAM RENINGER.

Accretions formed by washing or recession become part of the lands they adjoin. Removing timber from accretions that are public lands, except for improvement of the same or other domestic use, is trespass upon such lands, and liable to punishment as such.

Commissioner McFarland to William Reninger, Jackson, Nebraska, October 4, 1881.

Yours of 10th ultimo, addressed to the honorable Secretary of the Interior, has been referred to this office for action and reply.

In relation to the matter therein stated, you are informed that where land is formed by accretion, either by the washing up of the soil or by the recession of the waters, and adjoins land owned by private parties, it becomes a part of same; and the owners of said adjoining lands are entitled to exercise any and all acts of ownership over the same that they may deem proper.

Where accretions form upon or adjoin any portion of the public domain, they become a part of it in like manner, and title rests in the government. Islands and all accretions thereto, formed in the channels of all navigable and meandered streams, or new formations therein (that are not a private property), are a part of the public domain, and are not to be trespassed upon.

You are also informed that any parties claiming the right to cut and remove any timber from any accretion lands that are a part of the public domain, or from any homestead or pre-emption entry other than for the actual improvement of the same, or for other domestic use, are guilty of trespass, and liable to punishment therefor. The cutting and removing of timber from such lands or entries for the purpose of speculation or private gain is prohibited, and will not be permitted until such time as final proof is made and final papers issue thereon.

ACT JUNE 3, 1878.—TIMBER FOR DOMESTIC USE, MINES, QUARTZ MILLS,
24 L D / 67 ETC.

FRANK P. HARDIN ET AL.

As contemplated by the timber-cutting act of June 3, 1878, any use to which timber can be put within the State or Territory, for the comfort or convenience of its people, is a domestic use—but such timber cannot be transported beyond the State or Territory but may be bought and sold within their limits.

The same act contemplates the cutting of timber for use in timbering mines or in connection with quartz mills or reduction works.

Secretary Teller to Commissioner McFarland, May 25, 1882.

My attention has been called to a number of cases reported by Special Agent Harlan, of so-called trespasses in cutting timber on mineral lands in the Territory of Dakota—notably the cases of Frank P. Hardin, who is charged with cutting seventy-two cords of wood; Peter T. Bye, charged with cutting twenty-five cords; Henry Bressert, with cutting sixty cords; J. H. Damon, a like amount; and Albert Holtman, one hundred cords.

All this wood appears to have been cut off of the mineral lands of the United States. It also appears by the report of the special agent that the persons charged with the trespass have, in cutting this wood, conformed to the rules of the Department as to the size of the timber to be cut, etc., and it is now proposed to compromise with these persons by allowing them to pay for the wood cut, at the rate of fifty cents per cord.

I do not think on the statement of facts made by Special Agent Harlan, in the case of Peter T. Bye, that he has been guilty of trespass in cutting such wood. I understand the facts are substantially the same in all the cases mentioned. The act of Congress approved June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada, and the Territories, to fell and remove timber from the public domain for mining and domestic purposes," clearly authorizes the cutting of timber on the mineral lands of the United States for domestic use. It does not appear that Peter Bye or any other of the parties complained of cut the wood for transportation from the Territory, and if cut to be used in Dakota it is clearly for domestic use. It has been alleged that the act of June 3, 1878, does not apply to persons cutting timber on the mineral lands for sale, and that to enable any person to have the benefit of that act, he must cut the timber for his *personal* use, and not for sale. Such a construction defeats the very intent of the act, which was to allow the settler on the mineral lands to have the benefit of the timber thereon growing for use within the Territory or State where it grew. It cannot be supposed that Congress intended to say by that act to the inhabitants of the mineral regions, that while they might go on the lands of the United States and cut timber for their own use, yet they could not em-

ploy others to cut timber for them, or purchase it of those who had cut and prepared it for use.

Large and prosperous communities had settled on the mineral lands of United States by and with the consent of Congress. Statutes had been passed declaring such occupation lawful, and provisions were made for securing title to mines that should be discovered and improved on such lands. Yet no provisions had been made by which title could be made to the timber growing on such land until a mine had been discovered thereon. To have restricted the inhabitants to the use of such timber as should be found on the mineral claims alone would have been folly, for in many instances the mineral claims are destitute of timber. Whole mining districts are frequently compelled to procure their supply outside of their districts either because the timber in such districts had been cut off and used, or because the district was without timber when first settled. The area of territory occupied by actually located mineral claims is entirely too small to supply the communities with timber from such claims alone; and so it became a necessity to appropriate the timber on government lands, in the absence of law authorizing the purchase of either the timber or the land on which it grew. From the first settlement of the mineral regions to 1878, such had been the custom of miners in all the mineral regions. Cities and towns with churches and school houses had been built with the timber so taken from the public lands. Appeals had been made to Congress from time to time to provide by law for securing the title to the timber on the mineral lands. Congress, with the wise policy of keeping the mineral lands of the United States open to further exploration and occupation, had declined to pass any law by which the timber on such lands could be monopolized by speculators and capitalists. Woodchoppers and lumbermen had, from the first settlement of the mineral regions, cut from the mineral lands wood, mining-timbers, lumber for building, and sold the same to those who could not or did not wish to cut such timber for their own use. It was practically impossible for the mill-men, the miners, and other inhabitants of the country to go out and fell the trees that were to be used to build their mills, timber their mines, or supply their families with fuel. About the time of the passage of the act of 1878 it was alleged that such cutting was in violation of law, and ought not to be allowed. To have prevented such cutting would have compelled the abandonment of nearly if not quite all the mineral regions of the States and Territories named in the act. The act was passed to establish by positive enactment a right claimed and exercised without interference on the part of the government for a period of about thirty years, and the construction heretofore given to it by this Department has defeated the purpose of the act, and has not been of advantage either to the government or the people residing on such mineral lands. In most of the regions included in the act referred to, the timber is of little value for use outside of the neighborhood in

which it grows. Comparatively a small amount of it would bear transportation out of the State or Territory, and it cannot be used more advantageously to the people and the government than in the production of the precious metals. If the timber is cut having reference to the rules established by the Department as to size, etc., no complaint ought to be made. It has been suggested that the use of wood in quartz mills and reduction works in the mineral regions is not a use for mining purposes. I do not think there is anything in that suggestion. Quartz mills and reduction works are indispensable to a mining community, and such use is clearly within the provisions of the law, and the consumer as fully protected by it as if he consumed it in his dwelling. You will therefore instruct the special agents now in the States and Territories named in the act of June 3, 1878, to conform to the suggestions herein. The great object of the governmental supervision of the cutting of timber in those States and Territories ought not to be to compel payment for timber so cut, but to prevent unnecessary waste, the cutting of the small trees under the size prescribed by the Department, and to prevent waste by fires and other means.

TIMBER CUTTING—HOMESTEAD CLAIMANTS.

The decision of the Secretary of May 25, 1882, relates only to the public mineral lands; not to public lands in Missouri.

A homestead claimant may cut and remove timber upon the land he is preparing to cultivate; and if more is found than is necessary for building and other improvements, the surplus may be sold. But cutting and removing it from any other portion of the tract than that being cleared for cultivation is prohibited, etc.

Commissioner McFarland to E. H. Benham, Star, Missouri, June 22, 1882.

Your favor of 10th instant duly received. You ask for information relative to the recent decision of the honorable Secretary of the Interior regarding the cutting and removing of timber from the public lands of the United States (Frank P. Hardin *et al.*); also as to the propriety of citizens in your vicinity going onto the public lands to cut timber for the improvement of their farms.

In reply, I have to state that the recent decision of the Secretary of the Interior, and to which you refer, relates only to the public mineral lands of the United States within the States and Territories embraced by the act of June 3, 1878; copy herewith.

The decision of the Secretary does not refer to any of the public lands within the State of Missouri, as the act of Congress approved May 5, 1876, withdrew all public lands in said State from the operations of the act of May 10, 1872, and declared that all lands in said State should be subject to disposal as agricultural lands.

In regard to persons going upon the public lands to cut and remove timber therefrom for the purpose of improving their farms or for any

other purpose, except for the actual cultivation and improvement of the land from which the same is cut or removed, you are informed that such act would be regarded as a violation of law, and the parties so offending are liable to punishment under section 2461, Rev. Stat.

In order that you may be fully advised, I will state that the law permits homestead claimants to cut and remove the timber growing or being upon the actual tract they are preparing to cultivate.

If, however, in clearing said piece or parcel of land there is found more timber than is required for building or otherwise improving said entry, then it is permitted that such surplus may be sold. But the cutting or removing for sale of any timber from any other portion of his said claim than the particular tract being cleared for cultivation, is prohibited until such time as the claimant by a full compliance with the homestead laws obtains title to the land so claimed.

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TIMBER CUTTING ON PUBLIC LAND—ACTS OF JUNE 3, 1878.

24 L D 16)

INSTRUCTIONS.

The object of the act (Chapter 150) was to enable the inhabitants of the States and Territories referred to, to cut and remove timber from the class of public lands withheld from the operation of the pre-emption and homestead laws.

If mineral districts are found outside of the States named, they are also included in the provisions of the act.

The land to be sold in California, Nevada, and Washington Territory, under Chapter 151, is non-mineral land. The mineral lands are excluded. The object was to enable the inhabitants to purchase certain timber lands, and to prevent waste upon the public lands, the miner and agriculturist being permitted to cut timber in clearing for tillage and improving mines, as prescribed in the act.

Secretary Teller to Commissioner McFarland, August 7, 1882.

I have yours of August 1st instant, in which you ask instructions as to chapters 150 and 151 of the acts of 1878 (20 Stat., 88-89).

First. The meaning of the words "all other mineral districts of the United States," found in the first section of chapter 150. The object of this chapter is so very evident that I do not think there can be any difficulty in determining the meaning of these words. The object of the act was to enable the inhabitants of said States and Territories to fell and remove the timber from that class of public lands withheld from the operations of the pre-emption and homestead laws, which by existing laws they were not allowed to do.

The act, after specifying the States and Territories, contains the following: "All other mineral districts of the United States." If mineral districts are found outside of the States and Territories named in the act, such districts are included within the provisions of the act as fully as if the States containing such mineral districts had been specifically named in the act. The mineral districts of California were thus in-

cluded in the act, and all privileges granted to inhabitants of mineral districts of the States and Territories named in that act were granted to the inhabitants of such mineral districts of California, subject, of course, to the restrictions of the act also; and the rules applied to the mineral districts of States and Territories named in chapter 150 must apply to such districts in California.

If you confine the second question to mineral land, you have the answer in the answer to the first question. As chapter 150 does not authorize the cutting of timber, except on mineral land, I do not see the object of extending your inquiry to any other than mineral land.

As to question three, I do not understand that it is at all material, under any provisions of chapter 150, whether the transportation from one part of the State or Territory named in the act to any other part be by railroad, steamboat, or otherwise. All the act provides that bears on the question of transportation is that it shall not be exported. Section 4 of chapter 151 applies to the States and Territories named in that chapter, and not those named in chapter 150, except as to Nevada, named in both acts.

The land to be sold in California, Nevada, and Washington Territory under chapter 151 is non-mineral land, or land not known to contain valuable deposits of gold, silver, cinnabar, copper, or coal. By the express provision of section 2 the mineral lands in the broadest sense of that term are excluded from the provisions of said chapter. It must be borne in mind that there were two main objects to be accomplished in chapter 151: One was to enable the inhabitants of Nevada, California, and Washington Territory to purchase certain timber lands; and, secondly, to prevent the committing of waste on the public lands of the States and Territories named in the act, and to punish the persons committing the same. But it was not the purpose to interfere with the agriculturist and miner who might, without committing any *actual* waste, cut timber from the public lands; therefore it was provided in section 4 as follows:

“ Provided, That nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim or preparing his farm for tillage or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States.”

The miner is allowed to cut the timber in the ordinary working of his mining claim, and the agriculturist in preparing his land for tillage. In both these cases the reference is to land claimed by such miner or agriculturist. If a mineral claim it is a piece of land not exceeding 1,500 feet in length by 600 in width; if an agricultural claim, not exceeding 160 acres. If the rights saved to the miner and agriculturist by the proviso of section 4 were intended to apply only to such land as they claimed, the words “or from taking timber necessary to support his improvements” are useless. The words were not happily chosen,

and it may be somewhat difficult to say what is intended by the words "to support his improvements." If applied to a miner it must, I think, be intended to mean all the timber he might need to make the working of his mine possible, and if a farmer or agriculturist, all the timber he might need for the use of such farm.

If the timber he uses is only such as he needs "to support his improvements," I consider it immaterial whether he cuts it himself or whether he purchases it of one who cuts it for that purpose, and if it becomes necessary for a miner or agriculturist to have timber "to support his improvements," and his neighbor cuts it for him, I think such neighbor is as fully protected by the proviso as if he had cut it for the purpose of supplying his *own* improvements.

TIMBER CUTTING ON MINERAL LAND.

Timber may be taken from mineral lands to be applied solely to the purposes specified in the act of June 3, 1878, *i. e.*, mining and domestic purposes; but none less than 8 inches in diameter may be cut.

Timber may be taken from near mineral public lands by miners and agriculturists, for improvement of their mines and farms, when their respective claims do not furnish the necessary quantity; but not for their private gain or commercial purposes.

It is unlawful for mill men or others to cut timber on the public lands for sale or for exportation.

Commissioner McFarland to J. L. Mills, Milton, W. T., March 3, 1883.

This office has received, by reference from the Hon. Secretary of the Interior, your communication of the 29th January last, in which inquiry is made "if a man who runs a saw-mill doing a strictly local or neighborhood business is liable to prosecution for selling timber on public lands."

In reply thereto you are informed that the cutting and removing of timber from the public lands of the United States is permitted, if taken from *mineral* lands and applied *solely* for the uses and purposes specified in the act of Congress approved June 3, 1878 (copy herewith), entitled "An act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber from the public domain for mining and domestic purposes."

You are advised, however, that the cutting of timber less than 8 inches in diameter is strictly prohibited, as well as the destruction of timber or the committing of any wanton waste. (See circular of September 21, inclosed herewith.)

In addition to the advantages allowed citizens and residents under the act above referred to, the miner and agriculturist, under section 4 of the act of June 3, 1878, "for the sale of timber land in the States of California, Nevada, Oregon, and in Washington Territory," are permitted to take from non-mineral public lands such timber as they may require in the improvement of their farms or mines, there not being sufficient timber on their respective claims for the uses and purposes specified;

but the right to enter upon non-mineral lands is restricted to the cutting and removing of such timber only as may be actually required for the development of their particular claims and farms, or they may employ others to procure such timber for them, provided that such persons engaged or employed in supplying such timber to the parties lawfully authorized to use the same for the purposes indicated, shall not, under color of such employment, engage in cutting or removing any timber from the public lands for their own private gain or commercial speculation.

The cutting and removing of timber from the public non-mineral lands being confined by section 4, chapter 151, of the act of June 3, 1878, to the resident miner and agriculturist or for the use of the United States, it is therefore unlawful for mill men or others to cut or cause to be cut and removed from such public non-mineral lands any timber to be sold in the general market or for exportation, or to be used for any purposes other than those specified. Any violation of the statute renders the parties offending liable to prosecution and punishment therefor, as provided in said section 4, chapter 151.

MINING CLAIM—ADVERSE PROCEEDING.

REED *v.* HOYT.

Secretary Teller to Commissioner McFarland, December 11, 1882.

January 20, 1882, the adverse claim of Silas Reed against an application for a mine in Utah was rejected by Commissioner McFarland because sworn to in Boston, Mass.

The Secretary says: 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.

I therefore modify your decision and allow the adverse claim to stand.

TIMBER ON PUBLIC LAND—SETTLER.

CHARLES CONNER.

Where timber has been cut upon a tract afterwards entered as homestead, and is going to waste, the entryman may use so much thereof as is needful for clearing the portion he wishes to cultivate, for building, fencing, etc., and in case of an excess may sell the same; but may not sell from other portions of the tract.

Commissioner McFarland to Charles Conner, St. Ignace, Michigan, January 27, 1882.

I have received by reference from the honorable Secretary of the Interior your letter of the 30th ultimo, in which you make the following statement and inquiry:

“A” locates a homestead. Previously to the location by “A” a large amount of valuable timber had been cut and is now going to waste.

Can "A" remove and dispose of this timber, which is cut and wasting, or must he wait until he has acquired title to the land? In reply, you are informed that if a person locates a homestead with the honest intent of actually residing upon and cultivating the same, he may remove and dispose of so much of the timber thereon as is needful for clearing the portion he wishes to cultivate, and for building, fencing, and otherwise improving the land entered.

Furthermore, if, upon the portion to be cleared and cultivated, there should be more timber than would be required for improvements upon the land in the way of building, fencing, etc., the homesteader would be permitted to sell that excess of timber; and, if there be such an excess, he has no right to cut, or cause to be cut, the timber, or to sell any timber standing or fallen that may be found elsewhere upon the lands entered, until he shall have obtained final proof papers. If he does so cut, cause to be cut, or sells the timber found anywhere else than upon the portion to be cleared—provided there be upon that portion a sufficiency of timber for all the purposes of improvement and cultivation—he will be held liable for timber trespass, and subject to the penalty therefor under the law, the same as if the lands had not been entered by him.

TIMBER TRESPASS—ENTRY—HOMESTEAD.

No estate in land embraced in a homestead entry vests in the claimant until the entry is perfected and patent issued.

Trespass upon a tract covered by an unperfected homestead entry is trespass upon property of the United States; not upon that of the homestead claimant.

*Commissioner McFarland to U. S. District Attorney Charles C. Waters,
Little Rock, Ark., February 24, 1882.*

I am in receipt of your letter of the 9th ultimo, relative to the case of the United States *v.* Creed Wiley, who was convicted on November 9, 1881, in the United States district court for the eastern district of Arkansas, for unlawfully cutting pine logs from land embraced in the homestead entry of Sebastian Leinhardt. You state that defendant moved for new trial upon the ground of error in the refusal of the court to grant the instructions to the jury asked for by defendant, a copy of which you inclose. The instructions asked for were in substance that the homestead land was the private property of the homestead party; the theory of the defense being that a homestead entry is an "estate with a condition subsequent." You ask for some suggestions from this office on that head.

The distinctions between conditions precedent and conditions subsequent are well defined. The authority referred to by you is adequate upon this point.

“A precedent condition is one that must take place before the estate can vest. (Kent's Commentaries, 4, 125.)”

No estate in land embraced in a homestead entry vests in the homestead party until the entry is perfected and patent issues.

The homestead entry vested no title in the defendant, but it gave to him, under the law, a right of possession which he might perfect by continued occupancy and improvement. If he failed to so perfect it what right he had reverted to the United States. (Flint and Pere Marquette Railroad Company v. Gordon, Michigan Supreme Court, October term, 1879.)

This reversion occurs at any period of time, by change of residence, or upon abandonment for more than six months. No judicial decree or legislative declaration of forfeiture is necessary to extinguish the homestead claim. Any individual can assail a homestead entry, and contests of this character are numerous under the operations of the homestead laws, and are recognized by current legislation. Section 2 of the act of May 14, 1880 (21 Stat., 141), makes certain provisions for securing the preference right of entry to persons who contest and procure the cancellation of homestead and certain other entries. If the conditions of a homestead entry were conditions subsequent nobody but the grantor could take advantage of their failure, and his right could only be enforced by judicial proceedings or by legislative declaration of forfeiture. (Schulenberg v. Harriman, 21 Wall, 44.)

The universal practice of the Land Department of the government, which has never been called in question by the courts, is the summary cancellation of homestead claims for failure of conditions. Were these conditions of a subsequent nature this could not be done.

What is called an original or preliminary homestead entry, that is to say, the initiated but unperfected homestead claim, is in fact a homestead application only, and is so described in the papers subscribed by the party and which constitute the notice and basis of his claim. He may acquire an estate by compliance with the requirements of law for a certain period, but until this is done he has no property in the land itself that is recognized by law or that can be protected by the courts. The transfer by him of any improvements he may place upon the land is recognized under local laws as the conveyance of personal property, but he can make no conveyance whatever of the land under the laws of the United States, nor can any contract made by him create a lien upon it, neither is it taxable by the local authority. There is nothing in the unconsummated homestead entry that partakes of the nature of private property in the land.

It is probably unnecessary to pursue this subject further. The refusal of the court to grant the instructions asked for was of course correct.

TIMBER CUTTING—HOMESTEAD ENTRY.

PATRICK BRADY.

On homestead entry made in good faith, for purposes of residence and cultivation, timber on the land to be cleared may be disposed of by the party to enable him to continue improvements upon the land.

Commissioner McFarland to George W. Bell, Cheboygan, Michigan, May 31, 1882.

Your letter of April 8th last, inclosing certain affidavits in relation to the sale made by Patrick Brady of timber from his homestead entry, viz, S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 11, T. 36 N., R. 3 W., Michigan, has been received.

The evidence since derived from the report of the special agent of this office investigating the case tends to corroborate the facts set forth in your letter and the affidavits therewith, to the effect that Mr. Brady made said entry in good faith for the purpose of actual residence and cultivation, and that the timber in question stood upon the portion of said land to be cleared and cultivated.

I am satisfied, therefore, that Mr. Brady should not be disturbed in the right which he has to dispose of said timber, and become thereby enabled to continue the improvements upon the land embraced in his said homestead entry.

TIMBER SALE BY PRE-EMPTOR—ENTRY UNPERFECTED.

A pre-emptor acquires no title and no right to secure title under the pre-emption law until all the provisions, including proof and payment, are performed.

Trespass upon the land before patent is trespass upon the property of the United States.

The pre-emptor cannot make sale or disposal of timber upon the tract other than that cut upon land cleared for cultivation and not necessary for building, fencing, etc., upon the tract.

Commissioner McFarland to C. M. Babcock, Republic, Michigan, November 22, 1882.

In reply to your letter of the 10th instant requesting to be referred to the law against timber cutting on the public lands of the United States, I have to advise you that the act of Congress approved March 2, 1831, sec. 2461 U. S. Rev. Stat., makes it an offense, punishable by fine and imprisonment, to cut timber upon any of the public lands of the United States except for naval purposes.

You present the following case, viz :

“S. pre-empted land and before perfecting title cut and sold timber to H. The United States district attorney arrested H. for trespass.”

And you state that you are unable to find any law that gives the right.

With reference thereto you are advised that a pre-emptor acquires no title to land claimed under the pre-emption law, and no right to secure title until all the provisions of law, including proof and payment, are fully complied with. The legal title remains in the United States until patent issues. (*F. and P. M. R. R. Co. v. Gordon*, Michigan Supreme Court, October term, 1879.)

Trespass upon lands claimed under the pre-emption law before the claim is perfected and patent issues is trespass upon the property of the United States. (See 8 C. L. O., 24; *A. G. Ladda v. C. B. Hawley*, Supreme Court California, January term, 1881.)

The right of a pre-emptor is the right to acquire title by due compliance with law; but the title must be acquired before he is authorized to treat it as his property.

The regulations of this office restrict the pre-emptor (and homesteader) to the cutting of timber from such portion of his claim as may require clearing for the purposes of cultivation, occupation, and improvement, and any surplus of timber so felled, which is not required for fencing, building, or other improvements, he may sell or dispose of, but he cannot make sale or disposal of any other timber upon his claim.

You further ask, "If the suit for trespass is discontinued, where is the law allowing them to sue for value of timber"?

In reply I have to state that the United States, as proprietor of the timber unlawfully cut from the public lands, may sue for the value thereof. (See *Bly v. The United States*, 4 Dillon, p. 465.)

TIMBER TRESPASS—BOXING TREES FOR TURPENTINE.

36 LD 302

P. G. CROMARTIE.

Boxing trees for turpentine is injurious, killing them if continued; and as title to the land remains in the United States until the law as to tillage, etc., has been fully complied with, any act by the entryman, in the mean time, that would injure or destroy the timber would constitute a trespass, and render him liable to prosecution and punishment.

Commissioner McFarland to P. G. Cromartie, Castleberry, Alabama, November 25, 1882.

Your letter of 26th ultimo, addressed to the honorable Secretary of the Interior, and referred by him to this office for reply, has been received. You state that—

Some months ago I paid the entry fee and entered a homestead of 160 acres pine land. I propose to cultivate a portion and gather turpentine from the trees not felled. I desire to know if I am allowed to cultivate the forest in turpentine.

In reply you are informed that the boxing of trees for turpentine is held by this office to be injurious to the tree, ultimately killing it if con-

tinued for a series of years. As the title to the land entered by you remains in the United States until acquired by you by a strict compliance with the law as to tillage, improvement, and residence, any act in the mean time committed, authorized, or permitted by you, or by any other person with your knowledge or consent, that would in any way injure or destroy the timber or trees thereon would constitute a trespass, and render you liable to prosecution and punishment.

INDIAN RESERVATION—ALLOTTEE—OWNERSHIP.

By the treaty setting apart the reservation the lands were to be allotted and patented, to one class in fee and to the other with conditions as to sale, etc., and until the character of the title is determined by the patent, the allottee can exercise no right of ownership over the land or timber thereon.

In preparing the land for cultivation, he may, to that extent, cut such timber as may be necessary, and sell any surplus not necessary for improvements.

Commissioner McFarland to Special Timber Agent John H. Welch, Ionia, Michigan, March 22, 1881.

In reply to your letter of January 23 last, asking to be informed if the applicant for lands in the Indian reservation, Isabella County, Michigan, can sell or dispose of the timber from such lands before receiving his patent, you are advised that the Commissioner of Indian Affairs states with reference thereto as follows:

The treaty with the Chippewas of October 18, 1864 (14 Stat., 657), by which the Isabella reservation was set apart, provides for the separation of the Indians entitled to make selections under the treaty into two classes, viz, competent and those not so competent. It also defines the interpretation to be put upon these terms, and provides for the issue of patents as follows, viz:

“To those belonging to the class denominated *competents*, patents shall be issued in fee simple, but to those belonging to the class of *those not so competent* the patent shall contain a provision that the land shall never be sold or alienated to any person or persons whomsoever, without the consent of the Secretary of the Interior for the time being.”

From the wording of the treaty I am of opinion that until the character of the title is determined, and evidence by the patent, the Indian allottee can exercise no absolute right of ownership over the land or timber thereon. He may, the allotment being duly approved by the Department, prepare his tract for cultivation and improvement, and to that extent may cut such timber as may be necessary, and sell any surplus thereof which may not be required for use on the premises, but he cannot at this stage cut timber for sale or speculation.

After patent issued—as to those holding title in fee simple there is, of course, no question as to their power to dispose of the timber if they see fit to do so—but as to those whose patent is restricted, following the course adopted by the Department in the recent case of the Chippewas of Wisconsin (La Pointe Indians), they will only be allowed to cut and sell the standing timber under authority of the Department and subject to such limitations as it may see proper to impose.

In view, therefore, of the foregoing opinion of the Commissioner of Indian Affairs you will be particular to investigate and report upon all cases coming to your knowledge of unlawful timber cutting upon unpatented lands in the Indian reservation, Isabella County.

TIMBER FOR CONSTRUCTING RAILROAD—SCHOOL LAND.

Neither railroad companies nor settlers have a right to take timber from school lands for any purpose whatever.

Commissioner McFarland to Special Agent William F. Prosser, Seattle, W. T., November 16, 1881.

I have received your letter of July 30, 1881, desiring to be instructed concerning certain questions. * * *

You also ask:

“Are railroad companies permitted to take timber for purposes of construction from school lands?”

Neither railroad companies nor settlers have a right to take timber from school lands for any purpose whatever. Such lands are reserved, and are not to be considered as included in the license to take timber from the public lands, or to settle upon the public lands.

TIMBER USED IN THE CONSTRUCTION OF RAILROAD.

NEW MEXICO & SOUTHERN PAC. R. R. CO.

The right of a railroad company to take material from the public lands for construction purposes ceases upon the day when such road completes the laying of its tracks between terminal points.

Commissioner McFarland to W. S. Fletcher, Santa Fe, New Mexico, February 20, 1882.

You are informed that this office holds that under the act granting the right of way to railroad companies through the public lands, approved March 3, 1875, the right therein conferred to take material from the public lands for construction purposes ceases upon the day when such road completes the laying of its track between terminal points.

As to whether such road has been turned over from “the hands of its construction department” or not, is a matter which can have no weight with this office in determining the period when said road was actually a constructed road within the meaning of the law.

* * * * *

*TIMBER CUTTING—"ADJACENT PUBLIC LANDS"—AGENT—TRESPASS.***GEORGETOWN, BRECKENRIDGE AND LEADVILLE R. R. CO.**

Material to construct a right-of-way railroad may be taken from any of the public lands within the neighborhood. Such lands need not adjoin or be near the road. The agent of such railroad company may hire men to cut ties or contract at a certain price per tie. But such company cannot sell the ties so obtained to other parties or railroad companies.

Secretary Teller to Commissioner McFarland, February 7, 1883.

I have your letter of the 1st instant concerning the cutting of railroad ties by A. J. Chaffee, in Clear Creek County, Colorado, as agent of the Georgetown, Breckenridge and Leadville Railroad Company.

It appears that Mr. Chaffee is the agent of the said railroad company for the purpose of securing ties for that road; but it is alleged that he cuts ties by men not borne on the rolls of the company, and buys ties of men who have cut the same on the public land. The railroad company comes within the provisions of the act of March 3, 1875, and is entitled to take timber from the adjacent public lands for the purpose of the construction of its road. I do not understand the word "adjacent" to mean that the lands from which the timber is taken must adjoin the line of the road. The word "adjacent" may mean "adjoining," and it may mean "in the vicinity of."

The act of March 3, 1875, was passed for the benefit of railroad companies, and now to restrict the word "adjacent," and make it synonymous with the word "adjoining," is not justified by any canon of interpretation. Webster defines "adjacent" as "lying near or close adjoining; contiguous; neighboring, etc." So it appears that timber growing within the neighborhood of a railroad that comes within the provisions of the act of March 3, 1875, may be cut for ties to be used in the construction of the road, although the land may not be contiguous. What is meant by "within the neighborhood" must be determined by the circumstances of the case. If the initial point is in a section destitute of timber, and no timber grows on the land along the side of such road for a considerable distance, it is consistent with the spirit of the act that the company be allowed to cut timber at or even beyond the terminus of the road, if timber otherwise could not be obtained; and it is not a fair construction to put on the word "adjacent" to say that timber must grow opposite the line of the road and within the terminal points of the road. The right is given to cut timber, and it is immaterial to the government whether it is within 1 mile of the road or 50 miles distant. The spirit of the act is, that from the country having the benefit of the railroad the timber must come. The country beyond and away from the terminus of the road may receive equal and perhaps greater benefits than the country within the terminal points. The railroad company should be allowed to cut timber at any point within the

neighborhood of the line of road so being constructed. If it is found necessary to take earth and stone for such construction, such material must be taken where it is found most practicable for the company to take it. If the adjoining land is of such a character that no stone can be had on it, the company must be allowed to go away from the line of the road where it can be obtained. Any other construction will defeat the intent of the act. In all cases where the timber can be obtained in the immediate vicinity and along the line of the road, it should be so taken; but the company must not be deprived of the benefit of the act because the timber may not be found on the land adjoining the line of its road, and within the terminal points thereof.

I do not see any objection to allowing the agent of the company to employ men not borne on the company's roll to cut ties, and it is immaterial whether they cut such ties by the day or for a certain price per tie. In either case the company is liable if they go beyond the authority conferred on the company by the act of March 3, 1875.

If the Georgetown, Breckenridge and Leadville Railroad Company cut ties on the public land and sell the same to the Union Pacific Railroad Company, such cutting becomes a trespass, for the right given is not to cut timber to sell, but to use; and the government may proceed against such company for such cutting, and will doubtless also have its remedy against the Union Pacific Railroad Company for the value of the ties so cut, if it choose to secure its damages from that company instead of the original trespasser.

Mr. Chaffee will be allowed to remove the ties cut, and if used in the construction of the Georgetown, Breckenridge and Leadville Railroad, or in the construction of an extension of the Colorado Central Railroad, neither he nor said companies can be charged with any violation of the law. If other disposition is made of such ties you will determine the right of the matter in the light of the circular of July 15, 1881, and this letter.

TIMBER CUTTINGS ON UNEARNED LANDS WITHIN GRANTED LIMITS.

There can be no propriety in the United States prosecuting cases of trespass on *odd* sections within railroads limits, whether earned or unearned.

There is no legal reason why a railroad company, when its grant is a present one, cannot institute proceedings for trespass on its lands.

Secretary Teller to Commissioner McFarland, February 26, 1883.

I have received yours of the 13th instant, transmitting report of Special Agent T. F. Shoemaker, dated the 6th ultimo, in relation to timber trespass alleged against one Thomas Jenkins, of Wasco County, Oregon, in cutting 1,000 cords of fir wood from the NE. $\frac{1}{4}$ of Sec. 1, T. 2 N., R. 8 E., W. M., in said State. In your letter you say:

The described land is within the limits granted to the Northern Pacific Railroad Company; but the same being yet unearned by the said company, the legal title thereto is in the United States, according to a decision rendered in the United States district court, Oregon, in the case

of the United States *v. William Childers*, wherein suit was brought by the government for timber trespass upon the same section, township, and range as in the trespass under consideration.

I think that, under the decision of the supreme court in the case of *Schulenberg v. Harriman* (21 Wall., 44), there can be no propriety in the United States prosecuting cases of trespass on *odd* sections of lands within railroad limits, whether earned or unearned. In the case of *Jenkins*—report whereof is transmitted by you—the timber is alleged to have been cut and removed from an *odd* section. I return the agent's report for the files of your office.

For the same reason I return herewith the agent's report in the case of *Richard L. Nicholson*, transmitted by you on the 10th instant, in which timber trespass is alleged upon the NW. $\frac{1}{4}$ of Sec. 1, T. 2 N., R. 8 E., W. M., Oregon; also the agent's reports transmitted to me by you the 23d ultimo, in which timber trespass is alleged against *William Grant, John H. Stone, Henry E. Davis, Arthur C. Phelps, George Broughton, Thomas Borthwick, and Walter Train*, all upon Secs. 17, 20, 21, and 29, T. 3 N., R. 8 E., W. M., the same being within the limits of the grant to the Northern Pacific Railroad Company.

You are directed to submit these and other cases in which trespass is alleged, including only the timber cut from *even* sections within railroad limits, omitting therefrom the timber cut from *odd* sections.

You are also directed to give instructions to the special timber agents who may be called upon to report cases of trespass upon lands within the limits of railroad grants, not to include cases of alleged trespass upon *odd* sections.

There is no legal reason why any railroad company, when its grant of lands by Congress is a present one, cannot institute proceedings against a trespasser on its lands, since no valid objection could be raised on the trial of such case on account of want of title in the company, inasmuch as title to the company can be questioned only by the United States, as is fully set forth in *Schulenberg v. Harriman* (*supra*).

TIMBER CUT FROM PUBLIC LAND—RAILROAD LUMBER.

When rejected lumber is left on the hands of the mill owner or contractor, if it was taken from mineral lands, it may be disposed of by him to the miners, settlers, and others, *bona fide* residents of Colorado, for the purposes specified in the act of June 3, 1878, but if taken from non-mineral land, it is subject to stumpage valuation.

Export from the State is not allowed, except, etc.; nor is an agent permitted to settle and receive money on account of trespass, etc.

Commissioner McFarland to Special Timber Agent William M. Clark, Durango, Colorado, March 17, 1883.

Your communication of February 24th, presenting therein your observation in Gunnison County, Colorado, has been received.

In reference to the timber furnished by *B. J. Wolf and Eckerly & Co.*, under contract to the Denver and Rio Grande Railroad Company,

to aid in the construction of the said road, you are informed that under the Secretary's ruling of February 7th (copy of circular in relation thereto herewith inclosed), railroad companies are allowed to go outside the terminal limits of their line of road to procure material for its construction, provided the same is not to be obtained within the terminal points thereof. This rule is doubtlessly applicable to the case mentioned, but you will ascertain, however, if the timber used by said railroad company is procured strictly in accordance with the rules and regulations of circular herein referred to.

In reference to mill men supplying railroad companies with material for construction purposes as permitted by the act of March 3, 1875, . . . the same must be done under contract or the direct orders of the duly appointed timber agent of such road or roads. When, after inspection by the company's officer, there are cull ties or rejected lumber left on the hands of the mill owner or contractor, you will ascertain if the timber was taken originally from mineral or non-mineral lands. If it was taken from mineral lands, then the culled or rejected lumber may be disposed of by the mill men or contractors to the miners, settlers, and other *bona fide* residents of the State of Colorado, for the uses and purposes specified in the act of June 3, 1878, "authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes." Should, however, the timber, from which the lumber or ties has been manufactured, have been taken from non-mineral lands, then all culled or rejected lumber on hand is subject to stumpage valuation.

You will, therefore, closely observe the operations of mill men in relation to the matter above referred to, and report to this office in accordance therewith.

You are further advised that in no case is it permitted to ship or export lumber so manufactured from Colorado, except the same may be required by railroad companies, and then only upon the conditions as hereinbefore stated. You are also advised that in no case is an agent permitted to settle with or receive any money on account of trespass, or infringement of the laws or rules and regulations made thereunder. All cases must be reported to this office for settlement, and instructions received from it in relation to the manner and basis of settlement.

* * * * *

TIMBER CUTTING FOR GOVERNMENT PURPOSE.

ISAAC OPPENHEIMER.

Cutting timber to supply a military post in fulfillment of a contract for wood, is not such a depredation as is contemplated by law, unless waste is alleged.

Secretary Teller to Commissioner McFarland, September 26, 1882.

I received yours of the 23d instant, inclosing report of Special Agent William F. Prosser, dated Seattle, Washington Territory, the 25th

ultimo, in relation to certain timber cut from public lands by one Isaac Oppenheimer, of Idaho Territory, "for the use of the" military "post at Fort Cœur d'Alene, and for the benefit of Oppenheimer in fulfilling the contract awarded to him to supply said post with 2,000 cords of wood."

Agent Crosser, in his report, says that he considers such cutting "a violation of the law, demoralizing in the community, and destructive of the timber, because of the wasteful habits which it promotes in choppers and contractors." Therefore he recommends civil and criminal suits against Oppenheimer.

It is but reasonable to presume that the War Department has a right to procure timber for its own use from the public lands. If such timber is procured by contract given to the lowest bidder, it is presumable that, from the competition among bidders, the contracts will be let on terms so low as to pay for little more than the expenses of cutting and hauling; in other words, to pay for the *work*, rather than the *wood*. It is certainly for the interest of the contractors to obtain timber for such use from government lands, and so long as they commit no waste, the government is the gainer by furnishing itself from its own timber—providing, as before suggested, it does not pay for the timber, but only for the cutting and hauling. If wanton waste and destruction of timber were alleged and proven, there would be sufficient cause for prosecution; but in the absence of such allegation I must decline to recommend further proceedings in the case of the said Oppenheimer.

MILL SITE—CUTTING AND USE OF TIMBER THEREON.

A. B. PAGE.

If such claim be timbered, claimant may cut for construction of mill, but not for sale for private gain.

Commissioner McFarland to A. B. Page, Jasper, Colorado, March 22, 1883.

Yours of 5th instant received and contents noted. In reply thereto you are advised that any miner holding the possessory right to a vein or lode, or any owner of a quartz mill or reduction works, and not owning a mine in connection therewith, may make location of a mill site as provided by section 2337, Rev. Stats., and upon complying with the conditions specified therein may obtain patent therefor. The quantity of land embraced in each mill-site claim cannot exceed five acres, and must be non-mineral in character. If the mill-site claim is timbered there would seem to be no good reason why the lawful claimant should not be permitted to cut and remove the timber thereon for the purpose of constructing a mill, reduction works, tramways, or other accessory required in the development of his mining interests. In permitting the removal of the timber from such mill-site or tract of non-mineral land prior to the issuance of patent therefor, it is strictly forbidden to make such

timber an article of sale for private gain or speculation, but the same must be used and applied to the actual development of the mining interests of the individual claimant.

MINING CLAIM—TRESPASS ON—LOCATOR'S RIGHT.

LEWIS SMITH, J. S. JONES, ET AL.

Locators of mining claims, so long as they comply with the law governing their possession, are invested by Congress with "the exclusive right of possession and enjoyment of all the surface included within the lines of their location."

This amounts to a property capable of being employed or transferred, subject to all the ordinary rules governing the employment of other property, entirely separable and separate from the fee of the land.

It is the duty of the possessor to care for his own if trespass be attempted by a stranger.

The government cannot be made a party in a suit for trespass on said location.

Secretary Teller to Commissioner McFarland, September 30, 1882.

I am in receipt of your letter of the 23d instant, inclosing copies of communications from Lewis Smith, J. S. Jones, and others, respecting the right of mill owners and residents upon the mineral lands of the United States to cut wood and timber from such lands within the lines of mining claims regularly located and possessed under the local laws and customs and the laws of the United States governing the location of such lands.

You express the opinion that—

The locator upon such lands is unable to protect himself in the courts, or otherwise, as he has only a possessory right to said land, subject to certain subsequent conditions, before he can obtain patent, and although the title to the land is still in the United States, the government cannot protect him, as the act of June 3, 1878, and the rules and regulations prescribed thereunder, now in force, authorize the settlers and residents in mineral districts to cut and remove timber from the mineral lands for any purpose except for export, or under a prescribed size.

In view of the provision of the act that the right confirmed thereby shall be "subject to such rules and regulations as the Secretary of the Interior may prescribe for the production of the timber and of the undergrowth growing upon such lands, and for other purposes," you indicate the further opinion that reservation may be made by departmental regulation in favor of mining locators, of the timber growing upon their claims, and that trespassers may be punished for a violation of such regulations under the general provisions of the law against the cutting of timber on the public domain; and you request instructions accordingly.

I do not concur in your view of the law. Locators of mining claims, so long as they comply with the law governing their possession, are in-

vested by Congress with "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations." This amounts to a property capable of being employed or transferred, subject to all the ordinary rules governing the enjoyment of other property—entirely separable and separate from the fee of the land.

It may consequently be protected in the courts; and it is the duty of the possessor to care for his own, if trespass be attempted by a stranger. If he neglects to protect himself and his possession, the law does not assume that the United States is injured by the cutting and use of the timber on such claim; nor does it impose upon the government the duty of intervening to save to the individual occupant what has been declared to be his private property by virtue of his location. Having armed the locator with a complete grant of the possession, he alone is concerned for its protection, and may undoubtedly maintain suit to that end; but he can no longer, after availing himself of the exclusive right, ask the government to bring action for what is no trespass except against such individual right of possession.

You will so advise the parties presenting their requests for action by this Department.

TIMBER CUTTING ON MINERAL AND NON-MINERAL LAND.

"All other mineral districts," etc., act of June 3, 1878, include the mineral district of California, and all privileges, under chapter 150, to fell timber for mining, agricultural, and domestic purposes, attach to citizens and residents of those districts.

And by chapter 151 these are permitted to go upon *non-mineral* public lands to procure timber for the purposes above (when it is not found upon their respective claims), but not for sale, etc., and trees of less diameter than eight inches must not be cut.

Commissioner McFarland to register, Susanville, California, November 10, 1882.

Your communication of July 11 last has been received and the subject matter thereof duly considered. In reply to your inquiry as to just what extent it is your duty to prevent the cutting of timber on government lands in an agricultural community, and also to your wish to be informed as to the construction to be placed upon the words found in the first section of the act of June 3, 1878, "authorizing the citizens of Colorado, Nevada, and " the Territories "to fell and remove timber from the public domain for mining and domestic purposes," viz, "all other mineral districts of the United States," and their relation to timber trespass upon mineral lands in your district, I inclose herewith copy of letter of the honorable Secretary, received by this office in reply to my letter of August 1 last, asking instructions as to chapters 150 and 151 of the act of 1878, which information was desired by me in order to

definitely answer the inquiries made by you in your said letter of July 11 last.

You will find from the inclosed letter that the words "all other mineral districts of the United States" are construed therein to include the mineral districts of California, and that all the rights and privileges granted under chapter 150 to citizens of Colorado, etc., to fell and remove timber for mining, agricultural, and other domestic purposes from the public *mineral* lands, attach to the citizens and residents of the mineral districts of California.

In addition to the privileges conferred on citizens and residents under chapter 150, the miner and agriculturist within the *mineral districts* of California are permitted, under section 4, of chapter 151, to go upon the *non-mineral* public lands to procure such timber as they may respectively need for use in the development of their mining claims or for the improvement of their farms, should there not be upon their respective claims or farms a sufficient amount of timber for the uses and purposes specified.

In the procurement of such timber from the *non-mineral* lands they are restricted to the cutting and removing of such timber only as may be actually required for the development and improvement of their particular claims and farms, or they may employ others to procure such timber for them, provided such persons engaged or employed in supplying such timber to the parties lawfully authorized to use the same for the purposes indicated shall not, under color of such employment, engage in cutting or removing any timber from the public lands for their own private gain or for commercial speculation. You are advised, however, that in the procurement of all timber from the public lands the rule prohibiting the cutting of trees less than 8 inches in diameter or the committing of any wanton waste or destruction of timber will be strictly enforced; also, that all parties who may enter upon any of the public lands to procure timber must strictly comply with the conditions of Department circular dated September 21 last. A failure to do so will subject the party to prosecution, as therein provided.

One of the most important points to be determined in connection with timber trespass upon the public lands is the establishing of the mineral or non-mineral character of the land trespassed upon. Inclosed herewith find circular letter of this office, together with form of affidavit, containing the essential facts that witnesses should be called upon to state regarding same and their personal knowledge of the character of the land in question.

The cutting and removing of timber from the public non-mineral lands being confined, by section 4, chapter 151, to the resident miner and agriculturist, or for the use of the United States, it is, therefore, unlawful for mill men or others to cut or cause to be cut and removed from such public non-mineral lands any timber to be sold in the general market or for exportation, or to be used for any purposes other than those

specified. Any violation of the statute renders the parties offending liable to prosecution and punishment therefor, as provided in said chapter 151.

REMOVAL OF TIMBER ALREADY CUT—USES, ETC., FOR WHICH ALLOWED.

P. D. HURLBUT.

Removal from mineral lands only permitted for mining, domestic, and agricultural purposes; and from non-mineral lands only for the development of the mine or farm of the party procuring the removal.

Persons removing it from non-mineral lands for sale are liable to punishment as trespassers.

Commissioner McFarland to P. D. Hurlbut, Merrillville, California, November 13, 1882.

This office is in receipt of a communication from you, dated 24th ultimo, in relation to certain timber cut from public lands, requesting permission to remove the same to your mill.

You are advised that the cutting or removing of timber from mineral lands is permitted for the following purposes, viz, mining, agricultural, and domestic purposes, but not for exportation from the State or Territory where cut; also that the cutting and removing of timber from non-mineral public lands is only allowed when the material is used in the actual development or improvement of the mine or farm of the particular person for whom the cutting or removing is done. *Mill* men and all others who enter upon the public *non*-mineral lands for the purpose of cutting and removing timber therefrom to sell and dispose of the same in the general market, and not for the specified purposes named herein, are liable to prosecution and punishment as trespassers under section 4 of chapter 151, act of 1878.

The cutting of any timber upon *any* of the public lands less than 8 inches in diameter, the wanton waste or destruction of any timber, or a failure to comply with the terms of general circular of September 21, 1882 (inclosed herewith), renders the party offending liable to prosecution and punishment.

This office cannot therefore permit the removal of the logs in question until the character of the land upon which they were cut, and also the purposes to which said timber is to be applied, are established.

A copy of your communication will therefore be at once forwarded to Mr. Erastus Bond, a special timber agent of this office, with instructions to make a thorough examination of all the circumstances surrounding the case, and to report thereon to this office. Upon receipt of which report you will be advised in regard to what steps this office will take in the matter.

TRESPASSERS—CONTRACTORS—PURCHASERS—LIABILITY.

A party hiring hands by the day to cut and remove timber from the public lands is liable to civil and criminal prosecution.

Where one contracts with others to cut and remove, all parties to the contract are liable as above.

Where one cuts, removes, and sells to a mill owner or other party without previous understanding, the seller is liable as above, and the purchaser to civil prosecution for the full value of the timber.

Any one who cuts timber on the public lands, hires others to do so, or in any way encourages or promotes the same, is liable therefor.

Commissioner McFarland to receiver, Boise City, Idaho, February 15, 1882.

In reply to your communication of January 27 last, wherein you ask if mill owners who do not cut logs themselves, but "contract with persons for so many feet of lumber in the log at a stated price," should be called on to make affidavit in accordance with copy sent you in office letter of the 16th ult., which reads "we have cut or caused others to cut timber, etc.," you are informed that any person who contracts for or purchases timber, knowing or having reason to believe the same was cut from public lands, by so contracting or purchasing encourages and provokes such cutting, and is therefore indirectly the cause and responsible for the same. If mill men and others would refuse to purchase or saw timber cut from the public land, such trespassing would cease, as the cause would be removed.

Where a party hires hands by the day to cut and remove timber from the public lands, the party so hiring is liable to both civil and criminal prosecution, the same as though he himself actually cut the timber; where a party contracts with others to cut and remove timber from the public lands at a stipulated price per log or thousand feet, all parties to the contract are alike subject to both civil and criminal prosecution. Where a party cuts timber from the public land and then sells same to a mill firm, or other party, without any previous understanding or contract, the party so cutting and removing is liable to both civil and criminal prosecution, and the party purchasing, or sawing and disposing of, the same is liable to civil prosecution for the full value of the lumber.

Certain laws have been enacted for the purpose of saving the timber on the public lands from spoliation, and, in the view of this office, any person who cuts such timber, or who hires others to cut such timber, or who in any way encourages or provokes others to cut such timber, is a violator of said laws and should be punished accordingly.

TRESPASS—LANDS SOLD AND PATENTED.

Damage may be sustained against timber trespassers after the land in question has been sold to parties other than the trespassers.

Commissioner McFarland to Don A. Dodge, Special Timber Agent, Duluth Minn., February 9, 1883.

You desire to be informed if the government can claim damages for timber taken from the public lands where title to the lands has subsequently vested in parties other than the trespasser.

In reply thereto, you are advised that it is the opinion of this office that a claim for damages can be sustained on the part of the government in all cases for any trespass committed on the public timber lands prior to sale of same, except in cases of trespass which come under the provisions of the act of June 15, 1880. It may not, however, always be good policy to prosecute cases of this kind, particularly so where the trespasser has purchased and improved the land and made actual settlement. But where it can be shown that the party is an old offender, or that mill-owners or others have incited the trespass, or have been parties thereto, either before or after the act of trespass, an investigation should be had, and the facts and circumstances connected therewith reported to this office for its consideration and further action.

SCRIP LOCATION—TIMBER TRESPASS.

INSTRUCTIONS.

One who has placed scrip on unsurveyed public lands is not permitted to cut and remove timber from the location, except for actual and necessary improvements thereon and surplus on portion cleared, not needed for improvements, which may be sold.

The same rule applies to locations by such scrip on surveyed public lands.

Commissioner McFarland to Special Agent Dodge, Duluth, Minn., November 4, 1882.

This office is in receipt of your letter of 28th ultimo, in which you ask "if persons that have placed Sioux half-breed scrip upon portions of unsurveyed public lands have a right to cut and remove timber therefrom."

In reply you are informed that such locators are not permitted to cut or remove any timber from locations so made, except it be for the actual and necessary improvements thereon; or should there be a surplus of timber over and above that needed for such improvements growing or being upon the particular tract cleared for cultivation, then the locator, if an actual settler and resident thereon, may sell and dispose of such *surplus*.

Any person infringing the above rule, when reported to this office with proper and necessary evidence to base legal proceedings upon, will be promptly recommended for prosecution, both criminal and civil.

For your further information you are advised that the cutting or removing of timber from any of the surveyed public lands of the United States under color of title derived from the mere location of such scrip thereon, will not be permitted, except such cutting and removal be for the purposes and in the manner hereinbefore stated. In short, title to the lands located must have absolutely passed from the United States before any right attaches to the timber thereon.

TIMBER CUTTING ON PRIVATE CLAIM.

Lands claimed under private grant are lands of the United States until the claims have been confirmed, and, mean time, the laws against cutting timber on government land will be enforced as to these lands, except, the claim being made in good faith, the timber is taken for the use of the claimant in the improvement of the land.

Commissioner McFarland to Messrs. Conway, Risque & Childers, Albuquerque, New Mexico, July 25, 1881.

Referring to your letter of the 5th instant, wherein you state that a gentleman who is engaged in saw-mill business in the vicinity of Albuquerque, N. Mex., desires to cut timber from government land without violating the law, if it is possible to so, and wishes to know if arrangements can be made with the government, and on what terms; also that he wishes to know how the Department treats lands in said Territory actually occupied and claimed by Mexicans from a period antedating the treaty of Guadalupe Hidalgo, both under unconfirmed grants from Spanish and Mexican governments and without such grants.

In reply, you are advised: First, that the cutting of timber from public lands of the United States situate in the Territory of New Mexico is made an offense by section 2461 of the Revised Statutes, punishable with fine and imprisonment, except in such cases as come within the provisions of the act of Congress approved June 3, 1878; and I know of no law under which arrangements can be made with the government which would afford protection to the person cutting the timber from the penalties imposed by the above-named section of the Revised Statutes. Second, all lands claimed under unconfirmed Mexican grants are lands of the United States until such claims have been confirmed, and as it cannot be known in advance of confirmation what claims will be confirmed and what claims will be rejected, the law against cutting timber on government lands will be enforced as to lands which are so claimed, as well as to lands which are not claimed except when, in the judgment of this office, the claim is made in good faith and timber is taken for the actual use of the claimant and for the improvement of

the land, and for no other purpose. If timber is taken for market or other speculative purposes, such claimant will be prosecuted the same as other trespassers. Claims which, in the judgment of this office, are not made in good faith will afford no protection.

TIMBER CUTTING—PRIVATE CLAIM—RAILROAD.

CIENEGUILLA GRANT.

Claimant has the same right as a homestead party to cut and remove timber for the purpose of improving the land; but no more right to do so for sale until his title is perfected.

The land is in reservation, and railroads have no right to enter upon and take timber therefrom for purposes of construction.

Commissioner McFarland to Secretary Teller, July 15, 1882.

I have the honor to acknowledge receipt by reference from the Department under date of 28th ultimo, for report thereon, of letter addressed to you by C. H. Gildersleeve, esq., dated 26th ultimo, together with inclosures therein.

Mr. Gildersleeve says:

I inclose you herewith communication of Elias Brevoort, one of the owners of the Cieneguilla grant in New Mexico, as also memorandum of Spanish and Mexican decrees referring to power the owners of land grants could exercise under the granting power; complaining that W. S. Fletcher, one of the timber agents of your Department, is warning owners of private land grants in New Mexico, that he has orders from your Department to stop the cutting of timber from off these grants.

In reply, I respectfully submit the following statement relative thereto:

The records of this office show that there are two private land grants in New Mexico having the name of Cieneguilla; one made to Francisco Anaya Almazan, dated September 2, 1693, approved by the surveyor-general for New Mexico, March 17, 1879, and reported to Congress through the honorable Secretary of the Interior May 17, 1880; the other to José Sanchez, *et al.*, dated February 12, 1795, approved by the surveyor-general for New Mexico, June 13, 1872, and transmitted to Congress December 20, 1872.

As confirmation of title in both of said cases is still pending before Congress, it is unnecessary to raise the question as to which of said grants Mr. Gildersleeve or Mr. Brevoort refers.

It only remains to pass upon the general proposition submitted by them in regard to the rights of owners or claimants of such private land grants to cut and remove the timber growing or being thereon prior to such time as the grant shall be confirmed by Congress, and the final adjustment by this office of area and location of same. Mr. Gildersleeve holds that upon the approval of said claims by the surveyor-

general, and their survey and segregation from the public domain, the owner or claimants thereof have the right to cut and remove the timber thereon, and exercise other acts of ownership, and that such rights have never, to his knowledge, been questioned.

Mr. Gildersleeve also holds that if the owners or claimants have not the right to sell and dispose of the timber upon their claims or grants on the ground that they are a part of public domain, that railroad companies under the act of March 3, 1875, would therefore have the right to go upon the same and take the timber for construction purposes free of charge, which he thinks would be an expense to the United States, and an annoyance to the grant owners.

Both the points raised by Mr. Gildersleeve have been decided by this office. I find that under date of January 7, 1880, Acting Commissioner Armstrong, in a letter to Agent Fletcher relative to the very points raised by Mr. Gildersleeve, decided that until such claims or grants had been confirmed by Congress, neither the owners nor claimants thereof had a right to cut and remove the timber thereon. Also, under date of March 19, 1880, Commissioner Williamson, by letter to Mr. Fletcher, took the same ground, not only referring therein to the illegality of the owners or claimants cutting or removing the timber, but also refusing to recognize the right of railroad companies to enter upon said grants for the procurement of timber for construction purposes. Commissioner Williamson says, after quoting the 8th section of the act of Congress approved July 22, 1854 (10 Stat., 308):

Therefore a grant which has been examined and reported on favorably by the surveyor-general in accordance with the above requirements, although not a complete title, is so far perfected as would in my judgment justify a court in restraining railroad companies or other parties from removing the timber from the lands covered by such grants; but until such grants are perfected by Congressional action, as provided in the 8th section of the act of Congress above referred to, and the lands covered by such grants are segregated from the public domain, the executive branch of the government cannot recognize in the reputed owner thereof the right to remove, or to give permission to others to remove, the timber therefrom.

Under this act of 1854, all lands embraced within Mexican grants are reserved from sale or other disposal by the government, as provided in said act, and are excepted from the operations of the law granting to railroad companies the right of way through the public domain, with authority to use material taken from the public lands in the construction of their roads; and it devolves upon the government to afford the same protection to lands covered by grants, before the same are confirmed and located, as to the reserved public lands of the United States, and to secure such protection against all trespassers.

I see no good reason to change the ruling of my predecessor in relation to the control of this Department over lands embraced within the claimed limits of said grants, being of the opinion that while the claimants may have an equitable title pending adjudication, the legal title remains in the United States until relinquished.

The claimant may have a similar right to that of a homestead party to fell and remove timber for the purpose of improving the land, but no more right to cut and remove timber for sale, than has the homestead claimant, until such time as he shall have received the legal title thereto. Neither has a railroad company the right to enter upon any of such lands and take therefrom timber for construction, or for any other purpose, as said lands are in state of reservation, as heretofore stated. The act of March 3, 1875, referred to by Mr. Gildersleeve, grants the right to take timber from "public lands" only, which terms, as used in the public land laws of Congress, and construed by the courts, do not refer to lands that are reserved.

TIMBER TRESPASS—STUMPAGE—HOMESTEAD.

CHAUNCEY HARRIS.

Public lands entered under homestead law belong to United States until patented to claimant.

Therefore stumpage for timber cut on such claim belongs to the government, and there is no legal way in which it may be paid to the homestead claimant.

Commissioner McFarland to Chauncey Harris, Kindred, Minn., February 23, 1882.

In reply to your letter of the 6th instant, inquiring if you can collect of the United States Land Department stumpage for timber taken from your homestead claim in the NW. $\frac{1}{4}$ of Section 2, T. 138, R. 34, Minnesota, before you entered said land, you are informed that public lands entered under the homestead law belong to the United States until patent therefor has issued to the homestead claimant, and all timber thereon is property of the United States until the title to the lands has passed by such patent from the United States. Therefore stumpage for timber cut on your homestead claim belongs to the government, and there is no legal way by which it may be paid to you.

TIMBER AGENTS—TRESPASS—COMPROMISE.

The special timber agents in New Mexico and Colorado are authorized to investigate and report on cases of depredation, but not to receive money on account of the same.

There are no regular stumpage rates established by the Department upon public timber unlawfully cut since June 17, 1879. All persons who unlawfully cut and remove such timber are liable to the legal penalties therefor.

Process of compromise, where the same is advisable.

Commissioner McFarland to Henry Sturges, Trinidad, Colorado, May 2, 1882.

I have received, by reference from Honorable James B. Belford, your letter of the 10th ultimo, in which you inquire whether government timber agents have been sent to New Mexico and Colorado "to make

demand for stumpage" and what are the "government demands for stumpage."

In reply I have to advise you that the Department has special timber agents in the localities named, whose duty it is to investigate and report to this office upon any cases they find where parties are unlawfully felling and removing the public timber for purposes of trade and gain, but they are not authorized to *receive* any money on account of such depredations.

There are no regular stumpage rates established by the Department upon public timber unlawfully cut since June 17, 1879. Railroad tie cutters, saw-mill owners, and all persons who unlawfully fell and remove the public timber, are liable to the penalties of the law therefor. Sometimes trespassing has been found to have been committed under such circumstances as would seem to justify the Department in granting the trespassers an opportunity to offer compromise therefor. When the offers submitted have been found worthy of acceptance, the timber agents have been instructed to notify the trespassers of the acceptance of compromise, and to direct that payment be made, not to the agent but to the receiver of public moneys in the land district where the trespass is committed.

TIMBER FOR CONSTRUCTING TELEGRAPH LINE.

INSTRUCTIONS.

A telegraph company, duly organized by the laws of any State, and having complied with all legal requirements, may take material for construction from the public lands.

Otherwise in case of a line to be constructed by an individual, or individuals unincorporated, etc., as above, such would be liable to prosecution for trespass for taking public timber, etc.

Commissioner McFarland to Special Timber Agent Harlan, Deadwood, Dakota, July 29, 1882.

Yours of 6th inst. received. You ask for information in cases of trespass "where parties have taken timber from mineral lands, and made merchandise of it." Your attention is called to circular of June 30 last, forwarded to you under date of 11th inst.

You desire to know how you shall proceed in relation to taking of timber from the public lands to construct a telegraph line from Rapid City to Sheridan. If said telegraph line was constructed by a company duly organized under the laws of any *State*, and if, as such, they have otherwise duly complied with all the requirements of law (see secs. 4263 to 69 inclusive, Rev. Stat.), such company would have a right to take material for the purpose specified, and under the late ruling of the honorable Secretary of the Interior would be entitled to take the same from public mineral lands.

Should, however, the telegraph line to which you refer have been constructed by an individual or by an association of individuals not duly incorporated under the laws of any State, and the requirements of law have not otherwise been complied with, the said individual or association of individuals would be liable to prosecution for trespass upon the public lands, whether the same were mineral or non-mineral in character, in which event, you will proceed to obtain all the facts in relation thereto and forward same to this office as in any other case of trespass.

TIMBER CULTURE CONTEST—PREFERENCE RIGHT.

WEUM v. MICKELSON.

Without a right of contest under the timber culture laws, there can be no preference right under the act of May 14, 1880.

Secretary Teller to Commissioner McFarland, November 18, 1882.

I have considered the case of Emma J. Weum *v.* Englebreit Mickelson, involving the latter's timber culture entry, made July 28, 1876, on the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of Sec. 6, Tp. 124, R. 40 W., Benson, Minnesota, on appeal by Weum from your decision of November 23, 1881, holding the entry intact.

It does not appear from the record of the case that Weum has applied to enter the tract either under the homestead or the timber culture laws, and hence, as held by this Department on the 14th inst. in the like case of Frank Bundy, which involved a construction of section three of the act of June 14, 1878, relative to contests against timber culture entries, she is not authorized to contest Mickelson's entry; and having no right in this respect, she could acquire no preference right under the second section of the act of May 14, 1880, which awards such preference right to one who has contested, paid the land office fees, and procured the cancellation of a pre-emption or timber culture entry. The latter right is conferred only on one who may contest and prosecute to cancellation a former entry. Without the right of contest, there can be therefore no preference right; and as Weum has neither, her appeal must be dismissed.

Your decision is affirmed.

RAILROAD GRANT—JOINT RESOLUTION OF JUNE 28, 1870.

SOUTHERN PAC. R. R. CO. v. MCCARTHY.

Although a grant was made by the act of 1863, the lands upon which it would operate were not identified until the adoption of said joint resolution, and the rights of all parties who were actual settlers at that time were saved thereby.

Acting Secretary Joslyn to Commissioner McFarland, October 31, 1882.

I have considered the case of the Southern Pacific Railroad Company *v.* John McCarthy, involving the SW. $\frac{1}{4}$ of section 21, township 10 S.,

range 10 E., M. D. M., Stockton, California, on appeal from your decision of November 14, 1881.

The facts appear as follows: The land is within the indemnity limits of the grant of July 27, 1866, to said company. Withdrawal was made for the benefit of the company May 7, 1867. McCarthy on the 9th of June, 1881, applied at the local office to make pre-emption filing for the tract in question, alleging settlement September 15, 1869. His application was rejected upon the ground that the tract was a part of an odd-numbered section within the limits of the withdrawal for the Southern Pacific Railroad Company. On appeal to your office you decided in favor of allowing the filing, and from that decision the company appeals. The proofs show that McCarthy was a naturalized citizen of the United States, and a qualified pre-emptor; that he settled on the land September 15, 1869; that he has resided thereon continuously to the present time, and has made valuable improvements, having, in addition to the erection of a dwelling house and other buildings, broken and cultivated the entire tract. This tract has not been selected by the company, and therefore it can have no specific claim thereto.

The land being within the indemnity limits, the principle laid down by the supreme court of the United States, in the case of *Ryan v. the Central Pacific Railroad Company* (9 Otto, 382), is applicable, since the grants to the Central Pacific and the Southern Pacific Railroad Companies, respectively, are similar so far as the rights to indemnity are concerned.

In the decision cited the doctrine is, that the right to indemnity or "lieu lands" is only a float, and attaches to no specific tracts until actual selection.

The withdrawal of May 7, 1867, was based upon map filed in the department May 3, 1867.

Congress by joint resolution of June 28, 1870 (16 Stat., 382), authorized the Southern Pacific Railroad Company to construct its road upon the line of route designated upon said map "expressly saving and reserving all the rights of actual settlers," etc. In the construction of the joint resolution the department has held (see case of *Tome et al. v. Southern Pacific Railroad Company*, 5 C. L. O., 85), that although a grant of lands was made to the company by the act of July 27, 1866, the lands upon which it would operate were not identified until the date of the passage of said joint resolution, and that the rights of all parties who were actual settlers at that date were saved.

The decision which, I may add, embodied the opinion of the Attorney-General, clearly covers the case under consideration, and saves the rights of appellee as a settler. I see no good reason for holding a different view.

Your decision is accordingly affirmed, and you will permit McCarthy to make his filing for the land in question.

No valid adverse right having attached since settlement, the fact that application to file was not made within the period prescribed by the

statute is, as you suggest, a matter between Mr. McCarthy and the government, and calls for no consideration in this connection. That will be considered when final proof is offered, pursuant to publication, as required by the act of March 3, 1879.

MINING CLAIM—APPEAL—CERTIORARI.

24 LD 244

CEDAR HILL MG. CO.

A protestant, or party without interest, in a mining case cannot appeal as a matter of right, but where the right of appeal is for such reason denied the case should be transmitted to the Department after dismissal by the General Land Office. Rules 83 and 84 of practice have their origin in this requirement.

Acting Secretary Bell to Commissioner Williamson, June 8, 1881.

On the 17th ultimo, the Cedar Hill Mining Company filed an application for an order directing the Commissioner of the General Land Office to certify the proceedings in the matter of application of the Jacob Little Consolidated Mining Company for a patent for the Samson lode, Carson City district, Nevada, under rules 83 and 84, Rules of Practice, in order to have your decisions therein of January 26, 1881, in favor of the applicant for patent, and of April 30, 1881, dismissing the appeal of the Cedar Hill Company from said decision of January 26, 1881, reviewed by the Department.

This application is opposed by the Gold Lead Gold and Silver Mining Company, whose attorneys have filed a motion to dismiss the same, stating their grounds therefor as follows:

“First. Because same (Cedar Hill Company’s application) does not correctly state all the facts, nor the controlling facts upon which the Commissioner’s decision was based.

“Second. Because the facts as stated therein do not disclose any sufficient grounds for the action prayed by said company.

“Third. Because said company are mere protestants, and hence are not entitled to bring the case before you (Secretary of the Interior), by appeal or otherwise.”

The point stated under the third paragraph above is not well taken. It is true that a protestant or party without interest in a mining case, cannot appeal as a matter of right; but in cases in which a party is held by your office to be a mere protestant, without interest and right of appeal, and whose appeal is therefore denied, the rule has been for years such as to require the case to be forwarded to this Department after dismissal of appeal in your office. Boston Quicksilver Mine (S. M. D., 330), Boston Hydraulic Mining Company (id. 320).

Indeed, rules 83 and 84 grew out of the above decisions and the decision in the case of *Bell et al. v. Aitkin et al.* (4 C. L. O., 66). In the latter case the proceedings by which the case was brought before my pred-

ecessor were almost precisely like those required by said rules, except perhaps that the application to have the case forwarded to this Department was not sworn to, nor copy served on opposing counsel. Upon examination my predecessor found that Bell and Murray were parties in interest and entitled to appeal, and upon the merits of the case reversed the decision of your office.

It is not the rule, therefore, that parties whom your office holds to be mere protestants in mining cases cannot have any standing under said rules 83 and 84. But I am of the opinion that the points stated in paragraphs 1 and 2 are well taken. Rule 84 requires the application to be in writing, under oath, and to "fully and specifically set forth the grounds upon which the application is made."

The application sets forth three reasons why it should be allowed. The first one is, "because said Cedar Hill Company are in fact parties in interest, and entitled to the right of appeal."

This is a mere general allegation, and is not supported by a single specific allegation or recital. Enough appears in the application to show that the Jacob Little Company did, at some time, file an application for patent; but when this was done is not shown. This would seem to put the Jacob Little Company all right on the record, for there is not an allegation from first to last in the application of the Cedar Hill Company that the applicant for patent has not complied with statutory requirements relative to its application for patent, or to show that the Cedar Hill Company filed an adverse claim within the statutory period.

The Cedar Hill Company sets forth that on September 30, 1880, the register and receiver transmitted to your office papers in the matter of Jacob Little Mining Company's application, and asking instructions whether entry should be allowed by the Gold Lead Gold and Silver Mining Co., assignees of the Jacob Little Mining Co.: that in due time the Cedar Hill Co., "claiming adversely," filed argument against the application for entry; that your office, on the 26th of January, 1881, decided in favor of the Jacob Little Company, and adversely to the Cedar Hill Company; that on the 26th of March last, the latter company filed specifications of error and argument on appeal from said decision; and that the appeal was dismissed on the 28th of April, "upon the ground that said Cedar Hill Mining Company did not enter suit against the applicant within the statutory period, therefore stood as protestants in the eye of the law, and are not entitled to appeal."

There is not an allegation in the application under consideration, except the general one above quoted, tending to show that the findings of the Commissioner were not strictly true.

It is true that, under the second paragraph stating reasons why the case should be reviewed by this Department, it is alleged "that it had already been once determined and adjudged, May 20, 1880, by the court, that said Cedar Hill Company is entitled to all its said claims, and every portion thereof, and that the Jacob Little and their assigns, the

Gold Lead, is not entitled to the possession of any portion thereof," and that this judgment remains in full force.

But it is not shown when said suit was commenced, nor that it was entered in pursuance of any adverse claim filed against the Jacob Little Company's application, or within the period as required by law. Now, if the Cedar Hill Company has any such judgment against the Jacob Little Company, as is contemplated by section 2326 of the Revised Statutes, its case is without difficulty, and it would be the easiest matter in the world to make the fact appear and secure all its rights in the premises. That section 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, together with the certificate of the surveyor-general, that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and patent shall issue thereon for the claim, or so much thereof as the applicant shall appear, from the decision of the court, to rightly possess."

It is not alleged that the foregoing requirements have been complied with, or that any attempt has been made to comply with them. It is not shown or alleged in any manner that there has been injustice done the Cedar Hill Company by your decisions, nor has the company alleged such facts as to present probable grounds for believing that any error has been committed or injustice done in the premises.

This Department will not throw obstacles in the way of claimants who desire the directory or supervisory power of the Secretary to be exercised; but, within the established rules, that power will not be extended or exercised unless there be some ground, some reason appealing to executive discretion presented, calling for its exercise.

I see no reason from the papers before me for interfering with the action of your office in this matter, and therefore dismiss the application of said Cedar Hill Mining Company.

SCHOOL LAND IN COLORADO—PRE-EMPTION.

CHARLES W. LOWE.

A settler on a school section, prior to survey, claiming as a pre-emptor, must assert his claim within the statutory period, or the right of the State will take effect as of the date of survey.

Acting Commissioner Armstrong to register and receiver, Leadville, Colorado, December 27, 1879.

I have considered the matter of the claim of Charles W. Lowe, to the S. E. $\frac{1}{4}$, 16, 10 S., R. 77 W., who filed D. S. No. 58, May 24, 1877, alleg-

ing settlement June 1, 1866, and transmuted the same May 6, 1878, to homestead entry No. 118.

The subdivision lines of said township were surveyed between October 26 and November 2, 1868, and plat filed in the local office January 22, 1869.

By section 14 of the act of February 28, 1861 (12 Stat., 176), "to provide a temporary government for the Territory of Colorado," sections sixteen and thirty-six in each township were reserved for the purpose of public schools in the States thereafter to be erected out of the same.

By act of June 2, 1862 (12 Stat., 413), providing for the establishment of a land office in said Territory, the provisions of the pre-emption act of September 4, 1841, were extended thereto with the proviso "that when unsurveyed lands are claimed by pre-emption, notice of the specific tracts claimed shall be filed within six months after the survey has been made in the field, and on failure to file such notice, or to pay for the tract claimed within twelve months from the filing of such notice, the parties claiming such lands shall forfeit all right thereto, provided said notices may be filed with the surveyor-general, to be noted by him on the township plats."

Under this provision of law, which was not repealed until the passage of the act of July 14, 1870 (16 Stat., 279), Lowe should have filed his declaratory statement on or prior to May 2, 1869, but it does not appear from the plat of said township on file in this office, nor is it shown that he did so file his notice with the surveyor-general, nor did he file it in the local office, although the plat was filed there in January, 1869, over five months prior to the expiration of the time allowed him within which to file.

In the case of *Mette v. State of California*, decided October 18, 1878, and affirmed by the Honorable Secretary of the Interior May 27, 1879 (5 C. L. O., 164), this office, construing the 6th section of the act of March 3, 1853, granting pre-emption rights in California, which provided that when unsurveyed lands are claimed by pre-emption, the usual notice of said claim shall be filed within three months after the return of the plats of survey to the land office, and proof and payment shall be made prior to the day appointed . . . for the commencement of the sale including such lands, "held that there was an abandonment by the settler where there was a failure to assert his claim by filing the usual notice thereof, or the failure to make payment as provided in said section, as one of the conditions upon which the right of pre-emption was granted, and in the case of *Water & Mining Co. v. Bugbey* (6 Otto, 165) the supreme court of the United States held that where the settler on a school section, being under no obligation to assert his claim, abandoned it, the right of the State became absolute as of the date the surveys were completed.

These decisions apply as well to Colorado as to the State of California; the same grant of sections sixteen and thirty-six for school pur-

poses was made to her as to the latter State, subject to be defeated as to portions of the particular sections granted by the claims of settlers before survey which were duly prosecuted to completion in conformity with law.

Viewed in the light of those decisions, it is evident that whatever rights Lowe acquired by his settlement in 1866, were lost by his failure to give the notice required by law, and thereafter to make proof and payment within the periods limited; and upon this failure to comply with law or abandonment of his claim, the right of the State to the land settled upon immediately vested as of the date the survey was completed.

Under these circumstances, Lowe's said homestead entry was unauthorized and illegal, and has, therefore, been held for cancellation.

Note.—The foregoing decision was affirmed by Secretary Schurz, June 22, 1880.

SCHOOL LANDS IN UTAH—PRE-EMPTION.

JANE HODGERT.

The territory has no vested interest in sections sixteen and thirty-six. The law creates merely a reservation for a prescribed use, but the legal title remains in the United States.

The reservation does not attach if, at date of survey, a settlement with a view to pre-emption had been made on said section, even though the settler fails to file his declaratory statement within the time prescribed by law.

Secretary Schurz to Commissioner Williamson, November 16, 1880.

I have considered the appeal of Jane Hodgert from your decision of April 19, 1880, holding for cancellation her cash entry, No. 1830, of the N. $\frac{1}{2}$, N. W. $\frac{1}{4}$ section 36, town. 6 S., range 2 E., Salt Lake City district, Utah Territory.

The record shows that the township plat was filed in the local office, March 15, 1869; that Mrs. Hodgert filed declaratory statement 5517, April 8, 1876, alleging settlement in 1855, and that she proved up her claim and entered the land April 5, 1878. Certain affidavits filed with the appeal show that appellant is the widow of one Robert Hodgert, who settled upon the tract in question in the year 1855, where he died in May, 1867; and that his widow has since continuously resided thereon.

You held that Mrs. Hodgert, by reason of failure to make known her claim in the manner prescribed by law within three months from the date of filing the township plat in the local office, and to make proof and payment within thirty three months from that date, forfeited all right acquired by virtue of settlement prior to survey, as upon her failure to comply with the requirements of the law, the right to the tract in question vested in the Territory of Utah, as of the date of survey, and cited the cases of *Mette v. State of California*, (5 C. L. O., 164,) and *Natoma W. & M. Co. v. Bugbey*, (6 Otto, 165,) as authority therefor.

In this I think you erred; because there has been no grant of "school lands" to Utah, consequently the territory has no vested interest in the 16th and 36th sections.

Section 15 of the act of September 9, 1850, (9 Stat., 457,) provides as follows:

"That when the lands in the 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 said Territory and in the States and Territories hereafter to be erected out of the same."

The foregoing section is substantially embodied in section 1946, Revised Statutes; but before the latter became operative and before the land in question was surveyed, the section quoted above was limited by the act of February 26, 1859, (11 Stat., 385, now sections 2275-76, Revised Statutes,) in the following terms, to wit: "That where settlements *with a view* to pre-emption have been made before the survey of the lands in the fields which shall be found to have been made on sections sixteen and thirty-six, said sections shall be subject to the pre-emption claim of such settler, and if they, or either of them, shall have been or shall be reserved or pledged for the use of schools or colleges in the States or Territory in which the lands lie, other lands of like quantity are hereby appropriated in lieu of such as may be patented by pre-emptors. . . ."

This creates merely a reservation of the sections in question for a prescribed use, but the legal title thereto remains in the United States.

Just here the question arises, has Mrs. Hodgert a pre-emption claim to which the land is subject, in contemplation of the act of 1859, and said section 2275?

I think she has.

The case under consideration does not fall within the rule laid down by either of the cases cited by you, but it falls within the *exception* provided for in the acts cited as aforesaid, and the reservation thereby created did not attach as of the date of survey.

In the cases cited by you there was an adverse claim, and the tracts, which were the subject of controversy, were included in a specific grant of lands to the State of California, by virtue of which she acquired title thereto, and the right to control and dispose of the lands so granted, for the purposes specified, upon the failure of the settler to record his claim; in other words, to take advantage of a failure to comply with the legal requirement of filing his claim within the prescribed time.

In the case under consideration, however, the Territory of Utah has no such right or title, and the matter in controversy is virtually between the United States and the appellant, and the former alone can take advantage of the latter's failure to comply with the letter of the law in

point of filing her declaratory statement, and proving up and making payment within the prescribed period. The case should, therefore, be treated in all respects as between the United States and the appellant alone. This case, therefore, comes within the rule laid down in the cases of *Johnson v. Towsley*, (13 Wallace, 72,) *Lansdale v. Daniels*, (10 Otto, 113,) *Walker v. Walker*, (1 C. L. L., 293,) and *Erastus Kimball*, (*Ibid.*, 295;) and the same reason for the United States to decline to take advantage of the appellant's failure to file and enter the tract in question within the prescribed period exists in this case as in those last cited.

By admitting the appellant's claim, the quantity of lands pledged by the United States to Utah for school purposes is not diminished; because provision is made by the statute for selection by said Territory, when erected as a State, of lands in lieu thereof for the purposes intended.

Your decision is accordingly reversed.

PRICE OF LAND—PRIVATE ENTRY.

Modified,
4 L. D. 152.

SIPCHEN *v.* ROSS.*

Land once offered at \$2.50 per acre, but reduced in price to \$125, is not subject to private entry until re-offered at the reduced rate.

Acting Secretary Joslyn to Commissioner McFarland, October 30, 1882.

I have considered the case of *John J. Sipchen v. John D. Ross*, involving the NW. $\frac{1}{4}$ of Sec. 26, T. 43 N., R. 35 W., Marquette district, Michigan, on appeal by Ross from your decision of November 9, 1881, holding his entry for cancellation and allowing the claim of Sipchen.

The record shows that Sipchen filed declaratory statement June 7, alleging settlement June 1, 1877; that Ross made private cash entry November 22, 1870; and that the land was offered July 16, 1860, at \$2.50 per acre, being within the limits of a railroad grant.

There is a further and conclusive objection to the entry of Ross. It is admitted by the counsel for both parties that the tract lies within the limits of the grant of June 3, 1856, to the State of Michigan, in aid of the Marquette and State Line Railroad, and also within the common granted limits of that road and the State Line and Ontonagon Railroad—neither of which roads, nor any part thereof, has been constructed; that the State Line route was abandoned by the State, and under the joint resolution of Congress of July 5, 1862 (12 Stat., 620), a new route was adopted, and, as required, the lands within the six-mile limits were relinquished to the United States; and that by the fourth section of this

* See *Weimar et al. v. Ross*, 3 L. D. 129; *id.* 441; *Pecard v. Camens*, 4 *id.* 152.

resolution, the even sections of public lands, reserved to the United States by the act of June 3, 1856, along the originally located route of the Marquette and State Line Railroad, became subject to sale at \$1.25 per acre. It is also admitted that the tract in question falls within this class—being on an even-numbered section, reserved to the United States by the act of 1856.

It does not appear from the records of your office that since the joint resolution of 1862 [changing route of railroad] the land in question has been re-offered at public sale at the reduced rate of \$1 25 per acre. It has therefore been unoffered land since that date, and hence, under the ruling of the supreme court in the case of *Eldred v. Sexton*, 19 Wallace 189 (from which I quote at length because it so clearly settles the law of the present and like cases), the entry of Ross was unauthorized. The court says:

“It is a fundamental principle underlying the land system of this country that private entries are never permitted until after the lands have been exposed at public auction at the price for which they are afterwards subject to entry. . . . There is an obvious reason for requiring a public sale before leaving the lands open to private entry. It is to secure to all persons a fair and equal opportunity of purchasing them, and to obtain for the government the benefit of competition in case the lands should be worth more than the price fixed by Congress. . . . Since 1820 “the great body of the public domain has been brought into market, after proper notice, at this reduced price (of \$1.25 per acre), and, unless Congress by special act ordered otherwise, private entries have never been allowed unless the land applied for had been previously offered at public sale to the highest bidder at the same price. . . . The inquiry arises whether Congress intended to change this system, in the new policy adopted by it to aid states by grants of land to build railroads. . . . There is nothing that we are aware of in any of the various acts on the subject, which tend to show that it was the purpose of Congress, in its land-grant legislation, to alter the *manner* in which the public lands have been brought into market, and made subject to private entry. It is true the minimum price of the lands within certain prescribed limits was doubled, on the supposition that the construction of the contemplated roads would enhance the value of the lands to such an extent that the government would be enabled to realize as much for them as if the grants had not been made, but in all other respects the general system for the disposition of public lands was preserved. It is difficult, therefore, to see how the plaintiff can succeed, unless the legislation on which he rests his title was designed to be exceptional, which we think was not the case. The grant was an ordinary one to build a road in Wisconsin, for which a change of route was desirable after the line had been located. This change was authorized by Congress, but before the line was re-located, the lands in question, being within the six-mile limits, had been, at a public land sale,

offered for sale at \$2.50 per acre, and not being sold, were subject to entry at that price, but not at any less sum. The location of the new route left them outside of the required distance, and legislation was necessary to take them out of the condition of lands affected by the construction of a railroad, and to restore them to the general body of the unsold lands, so that they could be sold in the same manner and at the same price that the public domain is usually subject to sale. This object was accomplished by the joint resolution of April 25, 1862, which declares that 'these lands should hereafter be sold at \$1.25 per acre.'

"It is true the lands in question were once offered at public sale at \$2.50 per acre, but the reason of the rule required that they should be again offered to the highest bidder, because their condition as to price had been changed, and there had been no opportunity for competition at the reduced price. Congress meant nothing more than to fix \$1.25 as their minimum price, and to place them in the same category with other public lands not affected by land grant legislation. When they were withdrawn from the operation of this legislation, and their exceptional status terminated, the general provisions of the land system attached to them, and they could not, therefore, be sold at private entry, until all persons had the opportunity of bidding for them at public auction. It follows that the plaintiff's entries were invalid and rightly canceled, because they were made before the lands had been proclaimed for sale at the minimum price of \$1.25 per acre."

Like reasons apply to the case of Ross, and the tract not having been re-offered under its reduced price, his entry must be canceled.

22 LD 511
 32 " 650
 35 " 573
 43 " 77

HOMESTEAD ENTRY—DECEASED CLAIMANT.

STEWART v. JACOBS.

The heir or devisee of a deceased entryman is not required to reside on the tract entered, but must cultivate the same for the statutory period.

Secretary Schurz to Commissioner Williamson, May 14, 1878.

I have considered the appeal from your decision of December 31, 1877, dismissing the contest initiated by Joseph C. Stewart against the heirs and administrators of the estate of Henry R. Jacobs, deceased, for abandonment of his entry of March 24, 1874, upon the S. E. $\frac{1}{4}$ Sec. 25, T. 7, R. 5 W., Concordia, Kansas. The contest was held Nov. 7, 1877, notice thereof was personally served on the administrator, and also published in a newspaper, as required by law. The heirs are non-residents of the State of Kansas. Neither the administrator nor the heirs appeared at the hearing.

The affidavit initiating the contest, and the testimony at the hearing, November 10, 1877, show that Jacobs died June 25, 1874, not having

entered upon or cultivated the land, and that neither his heirs nor administrators have since resided upon or cultivated it.

You dismissed the contest for the reason that a homestead entry cannot be contested for an abandonment subsequent to the death of the party making the entry, but must remain subject to final proof, within the time prescribed by law, unless relinquished at an earlier day by the legal representatives of the deceased as held in the case of *Dorame v. Towers*, decided by my predecessor December 4, 1875 (2 C. L. O., 131).

In that case, Towers died eleven days after making his homestead entry, without entering on the land; and six months thereafter a contest was initiated for abandonment of the land, entered under section 2297 Revised Statutes, and the question presented was whether the failure of the heirs or devisees to take up a residence on the land within six months from the date of entry, rendered it liable to such proceedings. In his discussion of Sections 2290, 2291, and 2297, Revised Statutes, my predecessor held that Section 2291 does not require the heir or devisee to reside in person upon the land, but that its provisions are substantially complied with by continued cultivation of the tract, for the prescribed period—in other words, that, while in such a case, residence on the land is not necessary, cultivation *is* necessary; and decided that the entry of Towers could not be vacated within the statutory period of five years, except by direct relinquishment of the party or parties succeeding to his interest, he having died without changing his residence or abandoning the land.

I concur in the views expressed in said decision upon the state of facts upon which it was made; but the heirs or devisees, though not required to reside upon, must, nevertheless, show continued cultivation of the land, otherwise the death of the party, the day after his entry, may withhold the land from further entry for five years, without either residence or cultivation, without subjection to a charge of abandonment.

Applying this decision in *Dorame v. Towers*, as thus modified, to the case under consideration, the testimony showing that, from the date of entry, March 24, 1874, to the date of hearing, Nov. 10, 1877, there had been neither residence upon nor cultivation of the land by any party in interest, I think the charge of abandonment sustained, and, therefore, reverse your decision, and hold the entry of Jacobs for cancellation.

CIRCULARS AND INSTRUCTIONS.

DELIVERY OF PATENTS.

INSTRUCTIONS.

Acting Commissioner Harrison to registers and receivers, October 25, 1882.

In order to insure the prompt delivery of patents, and to preserve in the proper local offices a complete record of the issue and delivery thereof, you will, upon the receipt of any patent forwarded to you by this office for delivery, at once notify the patentee by mail (or otherwise as the case may be) of the receipt of the patent and how it may be obtained, and you will make due record of such notice.

You will, in each case of the receipt of a patent for delivery, also note in your tract books, opposite the entry or location, the name of the patentee, the date of the patent, and the volume and page of the record thereof in this office.

When any patent is delivered you will further note upon the tract books, in the appropriate place, the date of delivery and the name and post-office address of the party to whom delivered.

Upon receipt of official notice of delivery of a patent by this office you will make note on your tract books accordingly in the manner above indicated.

TIMBER-CULTURE ENTRY.

CIRCULAR.

Commissioner McFarland to registers and receivers, February 1, 1882.

Your attention is called to the following regarding timber-culture entries under the several acts of Congress and the manner in which final proof may be made :

The act of March 3, 1873, (17 Stats., 605), entitled "An act to encourage the growth of timber on the western prairies," provided that any person might make an entry under that act on any quarter-section of the public lands.

Entries under that act were not restricted to heads of families, persons twenty-one years of age, citizens, or those who had declared their intention of becoming citizens of the United States.

Persons making entries under said act were required to plant, protect, and keep in a healthy growing condition for ten (10) years forty acres of timber on the quarter-section entered. The trees were to be not more than twelve (12) feet apart each way. Only one quarter of any section could be entered. Entries were to be made for the cultivation of timber. Final proof could be made at the expiration of ten (10) years from the date of entry or at any time within three (3) years thereafter.

In making final entry under this act the party, or, if he be dead, his heirs or legal representatives, must "prove by two credible witnesses that he, she, or they have planted, and for not less than ten years have cultivated and protected," the quantity and character of timber above mentioned.

The act of March 13, 1874 (18 Stats., 21), was an act amendatory of, and, from said March 13, 1874, a substitute for, the act of March 3, 1873. All timber-culture entries made between March 13, 1874, and June 14, 1878, were made under the act of 1874. This act provided that citizens of the United States, or persons who had declared their intention of becoming citizens, and who were heads of families or had arrived at the age of twenty-one years, could make such entries.

Entries were to be made for the cultivation of timber.

Forty acres of timber on a quarter-section, and the like proportion of timber on less than a quarter-section, were required to be planted, protected and kept in a healthy growing condition for eight (8) years. The trees were to be not more than twelve (12) feet apart each way.

Only one quarter-section, or its equivalent, could be entered by any one person under this act.

The party making an entry of one-quarter section was required to break ten (10) acres of the land the first year, ten (10) acres the second year, and twenty (20) acres the third year after the date of the entry; and to plant ten (10) acres of timber the second year, ten (10) acres the third year, and twenty (20) acres the fourth year after the date of the entry, and in the same proportion when the entry was for a less area than one-quarter section. Final proof could be made at the expiration of eight (8) years from the date of entry or at any time within five (5) years thereafter.

In making final entry under this act the party, or, if he be dead, his heirs or legal representatives, must "prove by two credible witnesses that he, she, or they have planted, and for not less than eight years have cultivated and protected," the quantity and character of timber mentioned in this act.

In case of the death of a person who had complied with the provisions of the act for three (3) years the heirs or legal representatives had the option to continue the compliance for the remainder of the eight years and to receive patent accordingly, or to receive patent for forty (40) acres outright by relinquishing all claim to the remainder.

Entries made under the act of March 3, 1873, can be completed, and final proof made under the act of March 13, 1874, upon compliance with the provisions of the latter act.

By the act of May 20, 1876 (19 Stats., 54), amendatory of the act of 1874, it was provided that whenever a party holding a claim or making final proof under said act should prove, by two credible witnesses, that the trees planted and growing on said claim were destroyed by grasshoppers during any one or more years, the time allowed in which to plant the trees and make final proof should be extended the same number of years as the trees planted were so destroyed.

It was also provided that the planting of seeds, nuts, and cuttings should be considered a compliance with the timber-culture act, when such seeds, nuts, and cuttings should be properly and well planted, and the ground properly prepared and cultivated.

It is not necessary under this act that the planting shall be done in one body, "provided the several bodies, not exceeding four in number, planted by measurement, aggregate the amount required and in the time required by the original and amended act."

It was provided that in case the seeds, nuts, or cuttings should not germinate and grow, or should be destroyed by the depredations of grasshoppers, or from other inevitable accident, the ground should be replanted, or the vacancies filled within one year from the first planting. Parties claiming the benefit of this provision were to prove, by two good and credible witnesses, that the ground was properly prepared and planted, and that the destruction of the seeds, nuts, or cuttings was caused by inevitable accident.

The act of June 14, 1878 (20 Stats., 113), is an act amendatory of, and, as to all entries made since June 14, 1878, is a substitute for, the act of March 13, 1874.

The persons authorized to make entries under the act of 1878 are heads of families or single persons who have attained the age of twenty-one years, and who are citizens of the United States or have declared their intention to become citizens, and who have made no previous entry under the timber-culture laws.

Entries are restricted to not more than one quarter-section, and one entry only can be made by any one person.

Only tracts embraced in sections which are prairie lands, or other lands devoid of timber, are subject to entry under this act.

The entry must be made for the cultivation of timber, and for the exclusive use and benefit of the person making the entry. It must be made in good faith, and not for speculation, nor for the benefit of another.

Five (5) acres on a quarter-section are required to be broken or plowed the first year, and five (5) acres the second year. The second year the first five acres must be cultivated to crop or otherwise. The third year the second five acres must be cultivated to crop or otherwise, and the

first five acres must be planted in timber, seeds, or cuttings. The fourth year the second five acres must be planted in timber, seeds, or cuttings. Ten (10) acres are thus to be plowed, planted, and cultivated on a quarter-section, and the same proportion when less than a quarter-section is entered. The whole ten (10) acres, or the due proportion thereof, must be prepared and planted within four years from the date of the entry, five (5) acres being prepared the first and second years and planted the third year, and (5) acres being prepared the second and third years and planted the fourth year.

If the trees, seeds, or cuttings are destroyed by grasshoppers or by extreme and unusual droughts, the time of planting may be extended one year for every year of such destruction, upon the filing in the local office of an affidavit by the entryman, corroborated by two witnesses, setting forth the destruction and asking the extension of time provided for by the act.

Final proof can be made at the expiration of eight (8) years from the date of entry, or at any time within five years thereafter.

The requirements in making final proof under this act are as follows :

1st. It must be shown that not less than twenty-seven hundred (2,700) trees of the proper character were planted on each acre of the ten acres required to be planted.

2d. It must be shown that the quantity and character of trees as aforesaid have been cultivated and protected for not less than eight years preceding the time of making proof.

3d. It must be shown that at the time of making proof there are growing at least six hundred and seventy-five (675) living and thrifty trees to each acre of the ten acres planted.

All entries made since June 14, 1878, are made under this act. Parties who made entries under either of the former acts are permitted to complete the same and to make final proof under the act of 1878, upon full compliance therewith.

Section 7 of the act defines the meaning of the term "full compliance" as used in that section. It is, that the parties shall show that they have had under cultivation, as required by the act, an amount of timber sufficient to make the number of acres required therein; that at the time of making full entry the required number of living and thrifty trees are growing on the land.

It is not requisite, in making proof under the act of 1878, that the manner of planting as prescribed by that act should be shown to have been followed by persons who made entries under the acts of 1873 and 1874.

The planting in such cases may have been done in the manner prescribed by the acts of 1873 or 1874, or in the manner prescribed by the act of 1878.

The character of the trees should be such as are recognized in the neighborhood as of value for timber, or for commercial purposes, or for

firewood and domestic use. The enumeration of species on page 27 of the General Circular of October 1, 1880, is only intended as a general guide, and is not to be construed to exclude any trees falling within the foregoing characterization.

In computing the period of cultivation the time runs from the date of entry, if the necessary acts of cultivation were performed within the proper time. The preparation of the land and the planting of trees are acts of cultivation, and the time authorized to be so employed, and actually so employed, is to be computed as a part of the eight years of cultivation required by the statute.

If there have not been eight (8) years of cultivation, or if there are not the requisite number of living and thrifty trees growing on the land at the expiration of eight years from the date of entry, then final proof cannot be made until these requisites shall have been complied with.

The proof required in final entry will be the affidavit and testimony of the party, corroborated by the testimony of two witnesses, setting forth, specifically and in detail, all the facts of the case, showing when cultivation was commenced, the acts performed, amount of land plowed, cultivated, and planted, what was done in each year, the total number of trees planted, the total number growing, and their size and condition at date of proof, and any other facts or circumstances material to the case.

In making final proof the timber-culture claimant must appear in person with his witnesses, at the district land office of the district in which the land is situated, and there make the necessary proofs; or the affidavit of the party may be made, and his testimony, and the testimony of his witnesses, given before a judge or clerk of a court of record in such land district.

The officer administering the oath or taking the testimony must certify to the indentity and credibility of the party appearing before him.

In every case, when final proof is offered or submitted, the register and receiver will carefully examine the evidence, and if found sufficient as showing that the claimant has fully complied with the law (and on payment of the final commissions allowed by law), they will proceed to issue the final certificate and receipt in the same manner as in final homestead cases.

The payments required by law on a timber-culture entry are as follows:

ORIGINAL ENTRIES.

For more than 80 acres, a fee of \$10, to be paid at date of entry, and \$4 commissions; total, \$14.

For 80 acres or less, fee \$5, commissions \$4; total, \$9.

FINAL ENTRIES.

The total payment required in each case of final entry is \$4, payable when final proof is made.

No additional or other fee, charge, gratuity, or reward is permitted to be paid or received for any services rendered at district land offices in connection with such entries.

Annexed will be found forms A, B, C, D, and E.

Approved February 2, 1882.

S. J. KIRKWOOD,

Secretary.

A.

FINAL AFFIDAVIT.—TIMBER-CULTURE ENTRY.

Acts of March 3, 1873, March 13, 1874, and June 14, 1878.

I, ———, having on the — day of —, 18—, made a timber-culture entry No. —, of the — of section —, in township — of range —, subject to entry at —, —, under the timber-culture laws of the United States, do hereby apply to perfect my claim thereto by virtue of the seventh section of the act of June 14 1878, entitled "An act to amend an act entitled 'An act to encourage the growth of timber on the western prairies,'" and for that purpose do solemnly — that my aforesaid entry was made in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever; that I have not heretofore made any other entry under the timber-culture laws of the United States; and I do further — that the section of land specified in my aforesaid entry is composed exclusively of prairie lands or other lands devoid of timber; that said entry was made for the cultivation of timber, and that I have planted on said land, cultivated, protected, and kept in a healthy, growing condition for and during the period of eight (8) years last past, — acres of (*here describe the kinds of timber*) timber; that not less than — trees were planted on each acre, and that there are now at least (*here state the number of trees*) living and thrifty trees to and upon each acre, aggregating in total the number of — trees.

(Signature of claimant.)

Sworn to and subscribed before me this — day of —, 18—.

B.

TIMBER-CULTURE PROOF—TESTIMONY OF CLAIMANT.

(Acts of March 3, 1873, March 13, 1873, and June 14, 1878.)

———, being called as a witness in — own behalf in support of — timber-culture entry No. — for — section —, township —, of range —, in the district of lands subject to entry at —, —, testifies as follows:

Question 1. What is your name written in full and correctly spelled, your age, and post-office address?

Answer. ———.

Question 2. Describe your timber-culture entry, giving the date thereof and the number of acres embraced therein.

Answer. ———.

Question 3. What number of acres of said land was broken by you during the first year, what number broken during the second year, and what number broken during

the third year, respectively, after the date of your entry? Give the day, month, and year as nearly as practicable in each instance, when the several breakings were done; describe the method of breaking, and in what way your measurements were made.

Answer. ———.

Question 4. Describe the way in which the ground was prepared, and state how many acres of said tract were planted to trees during the *second* year of your entry, giving the day, month, and year, as nearly as practicable, when the planting was done, the kind or kinds of trees planted; and state how you know the area or number of acres so prepared and planted during said *second* year.

Answer. ———.

Question 5. Describe the way in which the ground was prepared, and state how many acres of said tract were planted to trees during the *third* year of your entry, giving the day, month, and year, as nearly as practicable, when the planting was done, the kind or kinds of trees planted; and state how you know the area or number of acres so planted during said *third* year.

Answer. ———.

Question 6. Describe the way in which the ground was prepared, and state how many acres of said tract were planted to trees during the *fourth* year of your entry, giving the day, month, and year, as nearly as practicable, when the planting was done, the kind or kinds of trees planted; and state how you know the area or number of acres so planted during said *fourth* year.

Answer. ———.

Question 7. If you have received an extension of time for planting on account of the destruction of your trees, seeds, or cuttings, by grasshoppers or by extreme and unusual drought, state the year or years in which extension was had and give all the particulars. How did you proceed to obtain such extension?

Answer. ———.

Question 8. How many acres of timber have you planted, cultivated, protected, and kept in a healthy growing condition for the period of eight (8) years last preceding on the tracts embraced in your entry?

Answer. ———.

Question 9. Describe the condition of the trees now growing on said tract, giving their average diameter and height as near as you can, the kind or kinds of trees, the number of trees per acre now growing thereon; and state how you know the facts to which you testify.

Answer. ———.

Question 10. Have you ever heretofore made any other timber-culture entry? If so, describe such entry or entries and state all the particulars.

Answer. ———.

Question 11. Is the section specified in your entry composed of prairie land, or was it devoid of timber at the date of your entry?

Answer. ———.

Question 12. State anything further within your personal knowledge which you have to offer regarding your aforesaid entry.

Answer. ———.

(Signature of claimant.)

I hereby certify that each question and answer in the foregoing testimony was read to the claimant before _____ signed _____ name thereto, and that the same was subscribed and sworn to before me this _____ day of _____, 18—.

NOTE.—The officer before whom the testimony is taken should call the attention of the witness to the following act of Congress, which is made by statute specifically ap-

plicable to all oaths, affirmations, and affidavits required or authorized under the timber-culture acts:

Act of March 3, 1857 (11 Statutes, p. 250).

"SEC. 5. *And be it further enacted*, That in all cases where any oath, affirmation, or affidavit shall be made or taken before any register or receiver, or either or both of them, of any local land-office in the United States or any Territory thereof, or where any oath, affirmation, or affidavit shall be made or taken before any person authorized by the laws of any State or Territory of the United States to administer oaths or affirmations, or take affidavits, and such oaths, affirmations, or affidavits are made, used, or filed in any of said local land-offices or in the General Land Office, as well in cases arising under any or either of the orders, regulations, or instructions concerning any of the public lands of the United States, issued by the Commissioner of the General Land Office or other proper officer of the Government of the United States, as under the laws of the United States, in any wise relating to or affecting any right, claim, or title, or any contest therefor, to any of the public lands of the United States, and any person or persons shall, taking such oath, affirmation, or affidavit, knowingly, willfully, or corruptly swear or affirm falsely, the same shall be deemed and taken to be perjury, and the person or persons guilty thereof shall, upon conviction, be liable to the punishment prescribed for that offense by the laws of the United States."

(See also section 5392 United States Revised Statutes.)

C.

(The testimony of two witnesses in this form, taken separately, required in each case.)

TIMBER-CULTURE PROOF.—TESTIMONY OF WITNESS.

(Acts of March 3, 1873, March 13, 1874, and June 14, 1878.)

—, being called as a witness in support of the timber-culture entry of —, No. —, for the — of section —, township —, range —, in the district of lands subject to entry at —, testified as follows:

Question 1. What is your name, age, occupation, and residence?

Answer. —.

Question 2. Are you well acquainted with —, the claimant; and, if so, since what time have you known him?

Answer. —.

Question 3. If you have personal knowledge regarding claimant's timber-culture entry, give the date when said entry was made, describe the tract or tracts, and state the number of acres embraced therein.

Answer. —.

Question 4. How far do you reside from the land described, and have you had continuous personal knowledge of said land and the improvements thereon during the last eight (8) years?

Answer. —.

Question 5. Was the section embracing the entry of the claimant composed of prairie lands or other lands devoid of timber? Describe the land embraced in said section, whether undulating or otherwise, and if any natural timber was growing on the tract named at the date of entry, state the kind or kinds of trees so growing, and their number, situation, and size.

Answer. —.

Question 6. How many acres of the land embraced in claimant's entry were broken by him during the first year, how many during the second year, how many during

the third year, respectively, after the date of entry? Give the day, month, and year in each instance, as near as practicable, when the several breakings were done, describe the method of breaking, and in what way your measurements were made, or how you know the area, or number of acres broken.

Answer. _____.

Question 7. Describe the way in which the ground was prepared, and state how many acres of said tract were planted to trees during the *second* year of said entry, giving the day, month, and year, as near as practicable, when the planting was done, the kind or kinds of trees planted, and state how you know the area or number of acres so prepared and planted during said second year.

Answer. _____.

Question 8. Describe the way in which the ground was prepared, and state how many acres of said tract were planted to trees during the *third* year of said entry, giving the day, month, and year, as near as practicable, when the planting was done, the kind or kinds of trees planted, and state how you know the area or number of acres so prepared and planted during said third year.

Answer. _____.

Question 9. Describe the way in which the ground was prepared, and state how many acres of said tract were planted to trees during the *fourth* year of said entry, giving the day, month, and year, as near as practicable, when the planting was done, the kind or kinds of trees planted, and state how you know the area or number of acres so prepared and planted during said fourth year.

Answer. _____.

Question 10. Has the claimant ever had the trees, seeds, or cuttings on the tract embraced in his timber culture entry destroyed by grasshoppers or by extreme and unusual drought? If so, state the year or years in which the destruction took place, and give all the facts within your personal knowledge.

Answer. _____.

Question 11. How many acres of timber on the tract described has the claimant planted, cultivated, protected, and kept in a healthy growing condition for the period of eight (8) years last preceding, and from what source is your knowledge upon this point obtained?

Answer. _____.

Question 12. Describe the condition of the trees now growing on said tract, give their average diameter and height as near as you can, the kind or kinds of trees, the number of trees to the acre, and state how you know the facts to which you testify.

Answer. _____.

Question 13. Has the claimant, to your knowledge, ever made any other timber-culture entry?

Answer. _____.

Question 14. Have you any interest, direct or indirect, in this claim?

Answer. _____.

Question 15. State any further facts which you may know of your own personal knowledge regarding the aforesaid timber-culture entry.

Answer. _____.

(Signature of witness.) _____.

I hereby certify that the above-named _____ personally appeared before me, and that he is a credible witness; that the foregoing testimony was read to him before being subscribed, and was sworn to by him before me this _____ day of _____, 18—.

_____,
_____.

NOTE.—The officer before whom the testimony is taken should call the attention of the witness to the following act of Congress, which is made by statute specifically

applicable to all oaths, affirmations, and affidavits required or authorized under the timber-culture acts :

Act of March 3, 1857 (11 Statutes, p. 250).

"SEC. 5. *And be it further enacted*, That in all cases where any oath, affirmation, or affidavit shall be made or taken before any register or receiver, or either, or both of them, of any local land-office in the United States, or any Territory thereof, or where any oath, affirmation, or affidavit shall be made or taken before any person authorized by the laws of any State or Territory of the United States to administer oaths or affirmations, or take affidavits, and such oaths, affirmations, or affidavits are made, used, or filed in any of said local land-offices, or in the General Land Office, as well in cases arising under any or either of the orders, regulations, or instructions, concerning any of the public lands of the United States, issued by the Commissioner of the General Land Office, or other proper officer of the Government of the United States, as under the laws of the United States, in anywise relating to or affecting any right, claim, or title, or any contest therefor, to any of the public lands of the United States, and any person or persons shall, taking such oath, a firmation, or affidavit, knowingly, wilfully, or corruptly swear or affirm falsely, the same shall be deemed and taken to be perjury, and the person or persons guilty thereof shall, upon conviction, be liable to the punishment prescribed for that offense by the laws of the United States."

(See also section 5392 United States Revised Statutes.)

D.

TIMBER CULTURE.

(Acts of March 3, 1873, March 13, 1874, and June 14, 1878.)

RECEIVER'S FINAL RECEIPT, }
No. —. }

{ APPLICATION,
No. —.

(Date.)

RECEIVER'S OFFICE,
—, 18—.

Received from —, of —, the sum of — dollars, being the balance of payment required by law for the timber-culture entry of the — of section —, in township —, of range —, containing — acres, under the acts of March 3, 1873, and March 13, 1874, and the act of June 14, 1878, amendatory thereof, entitled "An act to amend the act entitled 'An act to encourage the growth of timber on the western prairies.'"

—, Receiver.

\$—.

E.

FINAL CERTIFICATE, }
No. —. }

{ APPLICATION,
No. —.

TIMBER CULTURE.

(Acts of March 3, 1873, March 14, 1874, and June 14, 1878.)

(Date.)

LAND OFFICE AT —,
— day of —, 18—.

It is hereby certified that, in pursuance of the provisions contained in the acts of Congress of March 3, 1873, and March 13, 1874, and the act amendatory thereof of

June 14, 1878, entitled "An act to amend the act entitled 'An act to encourage the growth of timber on the western prairies,' _____, of _____, has made payment in full for _____, of section number —, in township —, of range number —, containing _____ acres.

Now, therefore, be it known, that on presentation of this certificate to the Commissioner of the General Land Office the said _____ shall be entitled to a patent for the tract of land above described.

_____,
Register.

1878 528
33 " 331

SOLDIERS' HOMESTEAD DECLARATORY STATEMENTS.

CIRCULAR.

Commissioner McFarland to registers and receivers, December 15, 1882.

In view of extensive frauds in the matter of declaratory statements of homestead applicants under Sections 2304 and 2309 of the Revised Statutes, the privilege conferred by the filing of such claims having been made the occasion of barter and sale, without attempt on the part of the soldier to comply with the statute by making formal entry at the district office, and commencement of settlement upon the land within the prescribed period of six months, the following regulations are prescribed for the admission of such filings:

1. Proof of qualification as an honorably discharged soldier must be furnished in accordance with existing regulations in case of entry by soldiers who make direct homestead application without availing themselves of the preliminary filing. Oath of the soldier, setting forth his residence and post-office address, must accompany the filing, to the effect that the claim is made for his exclusive use and benefit, for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and it must also be shown by such oath that he has not theretofore either made a homestead entry or filed a declaratory statement under the homestead law.

2. Where the declaratory statement is offered for filing by an agent under Section 2309, the oath must further declare the name and authority of such agent, giving the date of the power of attorney or other instrument creating the agency, and also aver that the name was inserted therein before execution. It will be observed that with the filing of the declaratory statement the power of the agent, under the law, is at an end. He has thereafter no right or control with respect to the matter nor over the land selected, and has no authority to relinquish the claim or do any other act in the premises. The further declaration of the statute is express, that "such claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfill all the requirements of law." Nevertheless, the oath of the soldier and the power of attorney should show that such is the understanding of the matter, and he should

swear in terms that such agent has no right or interest direct or indirect in the filing of such declaratory statement.

3. In addition to the proper power of attorney in such cases, the agent must file his own oath to the effect that he has no interest either present or prospective, direct or indirect, in the claim; that the same is filed for the sole benefit of the soldier, and that no arrangement has been made whereby said agent has been empowered at any future time to sell or relinquish such claim either as agent or by filing an original relinquishment of the claimant.

4. As above implied by the requirement of the oath, a soldier will be held to have exhausted his homestead right by the filing of his declaratory statement; it being manifest that the right to file is a privilege granted to soldiers in addition to the ordinary privilege only in the matter of giving them power to hold their claims for six months after selection; but it is not a license to abandon such selection with the right thereafter to make a regular homestead entry independently of such filing. This is clear from the statutory language. Section 2304 provides that "the settler shall be allowed six months, after locating his homestead and filing his declaratory statement, within which to make his entry and commence his settlement and improvement;" and section 2309 requires him "in person" to "make his actual entry, commence settlements and improvements on the same, and thereafter fulfill all the requirements of law." These must be done "on the same" land selected and "located" by the filing.

5. The foregoing ruling will not be so construed as to require the rejection of an application to enter the tract filed upon, after the lapse of six months, where climatic reasons are shown which will justify an allowance of one year under the act of March 3, 1880 (21 Stat., 511); nor in cases where the failure results from sickness, misfortune, or any insurmountable cause, which shall be properly alleged and satisfactorily shown, and where no adverse right has intervened. Where such cause has prevented entry and an adverse right has been admitted, it will be held proper within the discretion of this office to allow an entry upon another tract: *Provided*, That it shall be shown to the full satisfaction of the Commissioner that the default was practically beyond the power of the claimant to avoid. This was formerly the rule, as prescribed by circular of May 17, 1873; but later practice and instruction have extended it far beyond its original scope, and allowed entry to be made upon simple default without showing of cause for non-compliance with law.

6. Following the accepted practice in pre-emption cases, the filing of a declaratory statement will not be held to bar the admission of other filings and entries; but any person making entry or claim during the period allowed by law for entry of the soldier will do so subject to his right, and his application when offered within such time will be allowed as a matter of right and operate to exclude the intervening claim.

7. Where you have cause to believe that any "filing" off record is not presented in good faith, you will note such cause upon the same, and if it be sufficient to warrant rejection, such as a want of proper authentication or any palpable defect, you will reject the same, and allow an appeal from your ruling according to the regular practice. Where such cause is not sufficient to warrant an authoritative ruling you will admit the filing subject to investigation, and immediately proceed to make proper inquiry into the matter, reporting your action at once to this office.

Forms of affidavit are hereto appended, and blanks will be furnished as soon as they can be prepared.

You will please give the date of the receipt of this circular.

Approved:

H. M. TELLER,
Secretary.

(FORM A.)

SOLDIER'S DECLARATORY STATEMENT.

I _____, of _____ County and State or Territory of _____, do solemnly swear that I served for a period of _____ in the Army of the United States during the war of the rebellion, and was honorably discharged therefrom, as shown by a statement of such service herewith, and that I have remained loyal to the government; that I have never made homestead entry or filed a declaratory statement under Sections 2290 and 2304 of the Revised Statutes; that I have located as a homestead under said statute the [describe land], and hereby give notice of my intention to claim and enter said tract; that this location is made for my exclusive use and benefit, for the purpose of my actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person. My present post-office address is [give P. O.]

Sworn and subscribed before me this _____ day of _____, 188 .

[SEAL.]

NOTE.—This form may be used where the soldier files his own declaratory statement.

(FORM B.)

SOLDIER'S DECLARATORY STATEMENT.

I _____, of _____ County and State or Territory of _____, do solemnly swear that I served for a period of _____ in the Army of the United States during the war of the rebellion, and was honorably discharged therefrom, as shown by a statement of such service herewith, and that I have remained loyal to the Government; that I have never made homestead entry or filed a declaratory statement under Sections 2290, 2304, or 2309 of the Revised Statutes; that I have appointed, by power of attorney duly executed on the _____ day of _____, (or I do hereby appoint) _____, of _____ County and State of _____, my true and lawful agent, under Section 2309 aforesaid, to select for me and in my name, and file my declaratory statement for a homestead right under the aforesaid sections; and I hereby give notice of my intention to claim and enter said tract under said statute; that the location herein authorized is made for my exclusive use and benefit, for the purpose of my actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; that my said attorney has no interest, present or prospective, in the prem-

ises, and that I have made no arrangement or agreement with him or any other person for any sale or attempted sale or relinquishment of my claim in any manner or for any consideration whatever, and that I have not signed this declaration in blank.

Sworn and subscribed before me this _____ day of _____, 188 , and I certify that the foregoing declaration was fully filled out before being subscribed or attested.

[SEAL.]

By virtue of the foregoing, and of a certain power of attorney therein named, duly executed on the _____ day of _____, and filed herewith, I hereby select the _____ as the homestead claim of _____, the aforesaid, and do solemnly swear that the same is filed in good faith for the purposes therein specified, and that I have no interest or authority in the matter, present or prospective, beyond the filing of the same as the true and lawful agent of the said _____, as provided by Section 2309 of the Revised Statutes of the United States.

_____,
Agent.

Sworn and subscribed before me this _____ day of _____, 188

[SEAL.]

NOTE.—This form may be used where the declaratory statement is filed by an agent under Section 2309, Revised Statute—

TIMBER-CULTURE CONTESTS.

CIRCULAR.

Commissioner McFarland to registers and receivers December 20, 1882.

Your attention is called to section 3, of the timber-culture act of June 14, 1878, which provides :

That if at any time after the filing of said affidavit, and prior to the issuing of the patent for said land, the claimant shall fail to comply with any of the requirements of this act, then and in that event such land shall be subject to entry under the homestead laws, or by some other person under the provisions of this act: *Provided*, That the party making claim to said land, either as a homestead settler or under this act, shall give, at the time of filing his application, such notice to the original claimant as shall be prescribed by the rules established by the Commissioner of the General Land Office, and the rights of the parties shall be determined as in other contested cases.

On the 14th ultimo the honorable Secretary of the Interior held, in Frank Bundy's appeal, Oberlin, Kans., that this statute restricts contests against a prior timber-culture entry to one who seeks to enter the land covered thereby under the homestead or timber-culture laws, and that in the absence of such application there is no right of contest, nor does a preference right attach under section 2 of the act of May 14, 1880. You are therefore directed to dismiss all contest suits now pending in your office against timber-culture entries coming within the purview of said decision. The filing of the application aforesaid is a condition precedent to the right of contest under said statute, and the party so applying must be qualified to make an entry.

These instructions are not to apply to entries contested on the ground of illegality at inception. (See case of Wallace Benedict *v.* Frank D. Boyer, decided by the honorable Secretary of the Interior, November 22, 1882, in *The Reporter*, December number, 1882.)

Approved :

H. M. TELLER,
Secretary.

TIMBER-CULTURE CONTESTS.

CIRCULAR.

Commissioner McFarland to registers and receivers, February 13, 1883.

By circular letter of this office dated December 20, 1882, your attention was called to the provisions of section 3 of the timber-culture act of June 14, 1878, and it was therein announced that on the 14th of November, 1882, the honorable Secretary of the Interior held, in Frank Bundy's appeal—Oberlin, Kans.—that said statute restricts contests against a prior timber-culture entry to one who seeks to enter the land covered thereby under the homestead or timber-culture laws, and that in the absence of such application to make entry there is no right of contest, nor does a preference right attach under section 2 of the act of May 14, 1880. You were therefore directed to dismiss all contest suits then pending in your respective offices against timber-culture entries coming within the purview of said decision, and informed that the filing of the application aforesaid is a condition precedent to the right of contest under said section 3 of said act of June 14, 1878, and that the party so applying must be qualified to make an entry.

On the 2d instant the honorable Secretary of the Interior, in the case of Albert L. Bartlett *v.* Edwin Dudley—Visalia, Cal.—among other things, held as follows :

Further consideration confirms me in the opinion that the decision in the case of Bundy was a correct interpretation of the third section of the act of 1878, as respects a contestant, and that it is not inharmonious with the second section of the act of 1880. In order, however, that a contestant whose contest has been or hereafter may be dismissed, for failure to file an application to enter the contested tract at the date of initiating his contest, may yet have opportunity for entering it, under a valid proceeding, I know of no objection to his initiation of a new contest with an application to enter the tract ; or that, in such case, in order to the saving of expense and delay, the parties may stipulate, in writing, that the testimony formerly taken may be used in the new contest, with such other testimony as they may see fit to submit. The new contest will, of course, be subject to any intervening right initiated prior thereto and, in view of the time which has elapsed since the initiation of the former contest, should receive your early consideration.

You will post a copy of this circular in some conspicuous place in your respective offices, and, in cases arising, be governed in accordance with the above provisions.

Approved :

H. M. TELLER,
Secretary.

TIMBER CULTURE.

FORMS IN CASES OF CONTEST.

Many defects and considerable irregularity having heretofore prevailed in the matter of notices served and affidavits filed in contests against timber-culture entries, the following forms have been adopted and are the only ones now in use in contests against this class of entries:

[4-346.]

NOTICE.—TIMBER CULTURE.

U. S. LAND OFFICE, {
 _____, 188- }

Complaint having been entered at this office by _____ against _____ for failure to comply with law as to timber-culture entry No. _____, dated _____, 18—, upon the _____, section _____, township _____, range _____, in _____ county, _____, with a view to the cancellation of said entry; contestant alleging that _____, the said parties are hereby summoned to appear at this office on the _____ day of _____, 188—, at _____ o'clock _____ m., to respond and furnish testimony concerning said alleged failure.

NOTE.—The fact and date of service upon the timber-culture claimant should be indorsed on this notice, and publication must be resorted to where personal service cannot be had, and that fact is established by an affidavit that, after using due diligence, it has been found impossible to make personal service upon the claimant.

[4-090.]

AFFIDAVITS TO BE FILED BEFORE CONTEST OF TIMBER-CULTURE ENTRY.

U. S. LAND OFFICE, {
 _____, 188- }

Personally appeared before me, _____ of the land office, _____ of _____ county, State of _____, who upon his oath says: That he is well acquainted with the tract of land embraced in the timber-culture entry of _____ No. _____, made _____, 18—, and knows the present condition of the same; also that the said _____,* and this the contestant is ready to prove at such time and place as may be named by the register and receiver for a hearing in said case; and he therefore asks to be allowed to prove said allegations, and that said timber-culture entry, No. _____, may be declared canceled and forfeited to the United States—he, the said contestant, paying the expenses of such hearing.

Sworn to and subscribed the day and year above written before _____

Also appeared at the same time and place _____ and _____, who, being duly sworn, depose and say: That they are acquainted with the tract described in the within affidavit of _____, and know from personal observation that the statements therein made are true.

Sworn to and subscribed before me this _____ day of _____, 188—.

* Here state that the claimant did not perform certain acts required by law to be done during the year or years in which the failure is alleged to have occurred, specifying said requirements in full. Thus, if the tract be 160 acres and failure during the first year after entry be alleged, the affidavit should state that the claimant failed to break, or cause to be broken, five acres of the tract claimed, and in a similar manner should specify any failure alleged to have occurred in subsequent years.

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REVISED REGULATIONS RELATIVE TO SOLDIERS' AND SAILORS' ADDITIONAL HOMESTEAD ENTRIES.

27 565
29 273

Commissioner McFarland to registers and receivers, February 13, 1883.

Section 2306 of the Revised Statutes of the United States, provides that any person entitled to make a homestead entry under section 2304 (providing for the benefit of soldiers and sailors of the late war), who had, prior to June 22, 1874, made a homestead entry of less than 160 acres, may enter an additional quantity of land sufficient to make, with the previous entry, 160 acres.

The right granted by this section, and extended by section 2305 to the widow, if unmarried, or otherwise to the minor orphan children by proper guardian, is a *personal* one and is not transferable, nor subject to assignment or lien, nor can it be exercised by another. It can lawfully be exercised only by the soldier or sailor, or by the widow or guardian, as the case may be, in his or her own proper person.

The practice which has hitherto prevailed of certifying the additional right as information from the records of this office and permitting the entry to be made by an agent or attorney is hereby discontinued.

The following regulations will hereafter be strictly observed:

1. The party desiring to make an additional entry, and being entitled thereto, must present himself at the land office of the district in which the land he wishes to enter is situated, and make his application in the same manner as in case of an original entry. (Form No. 4-008.)

2. In addition to the usual homestead affidavit the claimant must make a special affidavit showing—

First. His identity as the soldier he represents himself to be, reciting his military service, and stating his present residence and post-office address.

Second. The facts, in detail, respecting his right to make the additional entry, and that he has fully complied with the provisions of the homestead laws in the matter of residence upon, and cultivation and improvement of his original entry, and whether or not he has proved up his claim and received a patent for the land.

Third. That he has not in any manner previously exercised his additional right either by entry or application, or by sale, transfer, or power of attorney, but that the same remains in him unimpaired.

3. The foregoing affidavits must be sworn to *and subscribed* in the presence of the register or receiver. This rule must be strictly adhered to in order to avoid false personation; and applications and affidavits presented to the register and receiver with signatures attached *will not be received*. Department circulars of May 17, 1877, and September 1, 1879, are modified accordingly.

4. These rules will not be deemed to apply to cases where the additional right has heretofore been certified by this office, nor to cases now pending, or which may be filed in this office prior to March 16, 1883.

Approved.

H. M. TELLER,
Secretary.

LANDS IN ALABAMA—COAL AND IRON.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 9, 1883.

GENTLEMEN: The act of March 3, 1883 (copy herewith), enacts that all public lands within the State of Alabama, whether mineral or otherwise, shall be subject to disposal *only as agricultural lands*; provided, that all lands which have heretofore been reported as containing coal and iron shall first be offered at public sale, and, further, that any *bona fide* entry under the provisions of the homestead law of lands within said State *heretofore made* may be patented without reference to the act of May 10, 1872, in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto.

In order to carry out the provisions of said act, it will be necessary to prepare a list of all public lands heretofore reported as mineral that have not been entered, and have them offered by President's proclamation. In the mean time you will be careful not to allow an entry to be made for any lands, lists of which were transmitted to your office October 23, 1879, nor of other tracts that have been since investigated and reported as valuable for minerals, a list of which I inclose herewith.

All existing *bona fide* entries, under the homestead laws, may be perfected regardless of the mineral character of the land, in accordance with rules and regulations governing the same.

Any contest pending before you where the *only* allegation is the mineral character of the land must be dismissed.

The law requires the offering to embrace all lands heretofore reported as containing coal or iron which remain undisposed of by entry or sale.

Entries, whether by cash or location, already allowed and reported to this office will be examined and disposed of upon their merits without reference to the question of mineral.

Very respectfully,

N. C. MCFARLAND,
Commissioner.

To DISTRICT LAND OFFICERS,
Montgomery and Huntsville, Ala.

Approved.

H. M. TELLER,
Secretary.

AN ACT to exclude public lands in Alabama from the operation of the laws relating to mineral lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: *Provided, however,* That all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale: *And provided further,* That any *bona fide* entry under the provisions of the homestead law of lands within said State heretofore made may be patented without reference to an act approved May tenth, eighteen hundred and seventy-two, entitled "An act to promote the development of the mining resources of the United States," in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto.

Approved March 3, 1883.

CIRCULAR INSTRUCTIONS RELATIVE TO ENTRIES UNDER THE HOMESTEAD, PRE-EMPTION, AND TIMBER CULTURE LAWS.

Commissioner McFarland to registers and receivers, March 20, 1883.

You are instructed to deliver to applicants for land under the homestead, pre-emption, or timber culture acts, a copy of this circular, and to especially call the attention of the applicant to the requirements of the law under which the application is made.

RESIDENCE OF APPLICANT.

1. The applicant *must in every case* state in his application his place of *actual residence*, and the *post-office address* to which notices of contest or other proceedings relative to his entry shall be sent.

SECOND FILINGS AND ENTRIES.

2. A party making a legal filing or entry under any one of the foregoing acts exhausts his right under that act and cannot thereafter make another filing or entry under said act.

ALTERATIONS IN APPLICATIONS.

3. Applications to amend filings or entries should be filed with the register and receiver and by them transmitted for the consideration of this office. Registers and receivers will not change an entry or filing so as to describe another tract or change a date after the same has been recorded.

RELINQUISHMENTS.

4. Entries and filings made for the purpose of holding the land for speculation and the sale of relinquishments are illegal and fraudulent, and every effort in the power of the government will be exerted to prevent such frauds and to detect and punish the perpetrators.

5. The first section of the act of May 14, 1880, provides that when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office.

6. This act refers to *bona fide* relinquishments of *bona fide* entries. An entry fraudulent in its inception is not an entry capable of being relinquished. It is an entry to be canceled upon a proper showing of the facts and circumstances of the case, whereupon the land will become subject to proper entry by the first legal applicant.

7. Purchasers of relinquishments of fraudulent filings or entries should understand that they purchase at their own risk, so far as the United States is concerned, and must seek their own remedies under local laws against those who, by imposing such relinquishments upon them have obtained their money without valuable consideration.

SETTLERS ON UNSURVEYED LANDS.

8. Homestead and pre-emption settlers on unsurveyed lands are allowed three months after the filing of the township plat of survey within which to put their claims on record. Accordingly no party will be permitted to make *final proof* in any case until after the expiration of said three months.

THE HOMESTEAD LAWS.

9. Homestead entries can be made for not more than one-quarter section, or 160 acres of land.

10. The land-office fees and commissions, *payable when application is made*, are as follows:

In Alabama, Arkansas, Dakota, Florida, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, and Wisconsin—

<i>Land at \$2.50 per acre.</i>		<i>Land at \$1.25 per acre.</i>	
For 160 acres	\$18 00	For 160 acres.....	\$14 00
For 80 acres.....	9 00	For 80 acres.....	7 00
For 40 acres.....	7 00	For 40 acres.....	6 00

In Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming—

<i>Land at \$2.50 per acre.</i>		<i>Land at \$1.25 per acre.</i>	
For 160 acres.....	\$22 00	For 160 acres.....	\$16 00
For 80 acres.....	11 00	For 80 acres.....	8 00
For 40 acres.....	8 00	For 40 acres.....	6 50

11. When a person desires to enter a tract of land upon which he has *not established a residence and made improvements*, he must appear personally at the district land office and present his application, and must make the required affidavits before the register or receiver.

12. He must then establish his actual residence (in a house) upon the land within six months from date of entry, and must reside upon the land continuously for the period prescribed by law.

13. In the case of a single person the actual residence must be established within the same time, and must be continuously and actually maintained for the same period.

14. The homestead affidavit can be made before the clerk of the county court only in cases where the family of the applicant, or some members thereof, is *actually residing* on the land which he desires to enter, and on which he has made *bona fide* improvement and settlement, and when he is prevented by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office.

15. In such cases the applicant must state in a supplemental affidavit the facts of such settlements, improvement, and residence; what acts of settlement have been performed, and when made; the nature, extent, and value of the improvements; what member or members of his family are residing on the land, and the length of time such residence has been maintained, and the cause, specifically, why the applicant cannot appear at the local office.

16. A false oath taken before a clerk of a court is perjury, the same as if taken before the register or receiver.

17. The period of actual inhabitancy, improvement, and cultivation required under the homestead law is five years.

18. In case of the death of a homestead party, before making final proof, the widow succeeds to the homestead right.

19. In case of the death of both father and mother the right and fee inure to the minor children, if any.

20. A homestead right cannot be devised away from the widow or minor children.

SOLDIERS' HOMESTEADS.

21. A union soldier or sailor of the late war is entitled to a deduction from the five years of the length of time (not exceeding four years) of his military service. But the soldier (or his widow, as the case may be), must actually reside on the land at least one year before final proof can be made.

22. In case of the death of a soldier, and the death or remarriage of the widow, the minor children of the soldier, by a duly appointed guardian, are entitled to the privileges of the father.

23. Neither the guardian nor the minor children are required to reside upon the land, but the same must be cultivated and improved for the period of time during which the father would have been required to reside upon the tract.

24. The soldier may file a declaratory statement for a tract of land which he intends to enter under the homestead laws. The fee is \$2, except in the Pacific States and Territories, where the fee is \$3.

25. This statement may be filed either personally or by an agent, and the soldier is thereafter allowed six months within which to make his entry and commence his settlement and improvement.

26. The entry can be made only by the soldier in person at the local land office, and he must commence his settlement on the land within six months after his filing, and must continue to reside on the land and cultivate it for such period as, added to his military service, will make five years. But he must actually reside upon the land at least one year whatever may have been the period of his military service.

27. *Entries* cannot be made for a soldier by an agent or attorney.

28. After a declaratory statement has once been filed, whether by an agent or otherwise, the soldier cannot file again. His rights are exhausted by the first filing, and if he does not within six months make his personal entry at the land office and commence his settlement as required by law he obtains no right to the land.

29. A soldier's homestead declaratory statement for a tract of land does not prevent anybody else from making an entry of the same land, subject to such right as the soldier may acquire by virtue of an actual residence on the land and full compliance with law. If the soldier does not establish his residence on the tract as required the next comer may take the land.

30. Soldiers are not entitled to land, nor to bounty land warrants, for their military service in the late war, nor can title to land be obtained for them by agents or attorneys. All representations to the contrary are false, and soldiers and sailors are warned against imposition by parties who offer to locate land for them, or to sell their rights.

FINAL PROOF.

31. A settler desiring to make final proof must file with the register of the proper land office a written notice, in the prescribed form, of his intention to do so, which notice will be published by the register in a newspaper to be by him designated as nearest the land, once a week for six weeks, at the applicant's expense.

32. Applicants should commence to make their proofs in sufficient time so that the same may be completed and filed in the local office within the statutory period of seven years from date of entry.

33. The final affidavits and proof should be made before the register or receiver, but may be made before the judge, or in his absence before the clerk, of a court of record in the county and State, district, or Territory, in which the land is situated. If in an unorganized county the proof may be made in a similar manner in any adjacent county in the same State or Territory.

34. When proof is made before the county officers mentioned the same must be transmitted by the judge or clerk of the court to the register and receiver, together with the same fees and commissions that the land officers would have been entitled to receive if the proof had

been made before them and the testimony reduced to writing by them.

35. The land office commissions, *payable at time of making final proof*, are as follows:

In Alabama, Arkansas, Dakota, Florida, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, and Wisconsin—

<i>Land at \$2.50 per acre.</i>		<i>Land at \$1.25 per acre.</i>	
For 160 acres	\$8 00	For 160 acres.....	\$4 00
For 80 acres	4 00	For 80 acres.....	2 00
For 40 acres.....	2 00	For 40 acres.....	1 00

In Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming—

<i>Land at \$2.50 per acre.</i>		<i>Land at \$1.25 per acre.</i>	
For 160 acres.....	\$12 00	For 160 acres.....	\$6 00
For 80 acres.....	6 00	For 80 acres.....	3 00
For 40 acres.....	3 00	For 40 acres.....	1 50

36. The fees for reducing testimony to writing in making final proof are, in the former States, 15 cents, and in the latter States and Territories, 22½ cents for each 100 words. No other land office fees than those stated in this circular are payable or allowable in homestead cases.

COMMUTED HOMESTEADS.

37. Homestead entries can be commuted to cash only after actual inhabitancy of the land by the homestead party, and his improvement and cultivation of it for a period of not less than six months.

38. A person who commutes a homestead entry cannot move from the tract and settle upon other public land in the same State or Territory as a pre-emptor.

39. Proof of settlement and cultivation for the prescribed period is to be made in the same manner as in pre-emption cases.

40. A person commuting a homestead entry when he has not actually resided upon the land and improved and cultivated it as required by law, *forfeits all right to the land and to the purchase money paid*, and in addition thereto renders himself liable to criminal prosecution.

THE PRE-EMPTION LAW.

41. The qualifications required of a pre-emptor are that he (or she) shall be a citizen of the United States (or have declared an intention to become such); over 21 years of age or the head of a family; an actual inhabitant of the tract claimed; and not be the proprietor of 320 acres of land in any State or Territory.

42. A person who has removed from land of his own to reside on public land in the same State or Territory, or who has previously exercised his pre-emption right, is not a qualified pre-emptor.

43. Lands included in any reservation, or within the limits of an incorporated town, or selected as the site of a city or town, or actually settled and occupied for purposes of trade and business and not for agriculture, or on which there are any known salines or minerals, are not subject to pre-emption.

44. If the land is surveyed, but has not been "offered," the declaratory statement must be filed within three months from date of settlement. If upon "offered" land, the filing must be made within thirty days.

45. If the land is unsurveyed at the time of settlement, the declaratory statement must be filed within three months after the date of filing the township plat in the local office.

46. Failure to file a declaratory statement within the time prescribed makes the land liable to the claim of an adverse settler who does file notice of his intention at the proper time.

47. The land office fee for filing a declaratory statement is \$2 except in the Pacific States and Territories, where the fee is \$3.

48. A pre-emption filing can be made only by an actual settler on the land. A filing without settlement is illegal, and no rights are acquired thereby.

49. The existence of a pre-emption filing on a tract of land does not prevent another filing to be made of the same land, subject to any valid rights acquired by virtue of the former filing and actual settlement, if any.

50. On *offered* lands proof and payment must be made within twelve months from date of settlement.

51. If the land is *unoffered*, proof and payment may be made within thirty-three months from date of settlement.

52. A failure to make proof and payment as prescribed by law, renders the land subject to appropriation by the first legal applicant.

53. The requirements of actual inhabitancy and improvement must be observed as strictly under the pre-emption law as under the homestead law.

54. Failure to inhabit and improve the land in good faith, as required by law, renders the claim subject to contest and the entry to investigation and cancellation.

55. Final proof in pre-emption cases must be made to the satisfaction of the register and receiver, whose decision, as in other cases, is subject to examination and review by this office.

56. Publication of notice to make proof is required as in homestead cases.

57. The final affidavit must be made before the register or receiver, or before the clerk of a court of record in the county and State or Territory where the land is situated. If in an unorganized county the proof may be made in a similar manner in any adjacent county in the same State or Territory.

58. The pre-emptor is required to make oath that he has not previously exercised his pre-emption right; that he is not the owner of 320 acres of land; that he has not settled upon and improved the land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; that he has not made any contract or agreement, directly or indirectly, in any way or manner, with any person whomsoever, by which the title he may acquire from the United States shall inure in whole or in part to the benefit of any person except himself.

59. Any person swearing falsely *forfeits all right to the land and to the purchase money paid*, besides being liable to prosecution under the criminal laws of the United States.

THE TIMBER CULTURE ACT.

60. A timber culture applicant is required to make oath that his entry is made for the cultivation of timber and for his own exclusive use and benefit; that he makes the application in good faith and not for the purpose of speculation, nor directly or indirectly for the use or benefit of any other person or persons whomsoever; and that he intends to hold and cultivate the land and to wholly comply with the provisions of the act.

61. Claimants under the timber culture act will be held to a strict compliance with the terms and conditions of the law.

62. Not more than one-quarter of any section can be entered under this act.

63. Where 160 acres are taken, at least five acres must be plowed within one year from date of entry. The following, or second year, said five acres must be actually cultivated to crop or otherwise, and another five acres must be plowed. The third year the first five acres must be planted to trees, tree seeds, or cuttings, and the second five acres actually cultivated to crop or otherwise. The fourth year the second five acres must be planted to trees, tree seeds, or cuttings, making, at the end of the fourth year, ten acres thus planted to trees.

64. Perfect good faith must at all times be shown by claimants. Trees must not only be planted, but they must be protected and cultivated in such manner as to promote their growth.

65. Final proof may be made at the expiration of eight years from date of entry. It must be shown that for the said eight years the trees have been planted, protected, and cultivated as aforesaid; that not less than 2,700 trees were planted on each of the ten acres, and that at the time of making proof there are growing at least six hundred and seventy-five (675) living thrifty trees to each acre.

66. Where less than one quarter section of land is entered, the same proportionate amount of plowing, planting, and cultivating of trees must be done as required in entries of 160 acres.

67. If the trees, seeds, or cuttings are destroyed in any one year they must be replanted. A party will not be released from a continued at-

tempt to promote the actual growth of timber or forest trees. A failure in this respect will subject the entry to cancellation.

68. Only an applicant for the land under the timber culture or homestead laws can institute a contest under the third section of the act of 1878.

69. Contestants have a preference right of thirty days after cancellation in which to make entry of the land.

70. The government will at any period, upon proper application to contest, or upon its own information, investigate alleged fraudulent or illegal timber culture entries, or alleged failure to comply with the law after entry, and such entries will be canceled upon sufficient proof either of illegality or failure to comply with the law.

71. The land office fee for an entry of more than 80 acres is \$14; for 80 acres or less, \$9.

CAUTION TO APPLICANTS.

Persons making filings or entries under the homestead, pre-emption, or timber culture acts are cautioned that the laws authorize entries to be made only for the use and benefit of the party making the same, and that entries or filings are not allowed by law to be made for the benefit of others nor for speculation, but all entries must be made in good faith and the requirements of law must be honestly and faithfully complied with.

Approved.

H. M. TELLER,
Secretary.

[Revised Statutes of the United States.]

SEC. 2246. The register or receiver is authorized, and it shall be their duty to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands; but he shall not charge or receive, directly or indirectly, any compensation for administering such oath.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed.

SEC. 5393. Every person who procures another to commit any perjury is guilty of subornation of perjury, and punishable as in the preceding section prescribed.

SEC. 5440. If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to affect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand

dollars and not more than ten thousand dollars, and to imprisonment not more than two years.

SEC. 5479. If any person shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, guarantee, security, official bond, *public record, affidavit, or other writing* for the purpose of defrauding the United States, or shall utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered or counterfeited bond, bid, proposal, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited, *or shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, the office of any officer of the United States* any such false, forged, altered, or counterfeited bond, bid, proposal, guarantee, security, official bond, public record, *affidavit, or other writing*, knowing the same to be false, forged, altered or counterfeited for the purpose of defrauding the United States, shall be punishable by a fine of not more than one thousand dollars, or by imprisonment at hard labor for not more than ten years, or by both such punishments.

UNITED STATES LAND OFFICES.

ALABAMA : Huntsville. Montgomery.	DAK. TER.—Cont'd: Watertown. Fargo. Yankton. Bismarck. Deadwood. Aberdeen. Grand Forks. Huron. Creelsburgh.	MICHIGAN : Detroit. East Saginaw. Reed City. Marquette.	NEBRASKA—Cont'd: Valentine. McCook.
ARKANSAS : Little Rock. Camden. Harrison. Dardanelle.	FLORIDA : Gainesville.	MINNESOTA : Taylor's Falls. Saint Cloud. Duluth. Fergus Falls. Worthington. Tracy. Benson. Crockston. Redwood Falls.	NEVADA : Carson City. Eureka.
ARIZONA TER. : Prescott. Tucson.	IDAHO TER. : Boise City. Lewiston. Oxford. Hailey.	MISSISSIPPI : Jackson.	NEW MEXICO TER. : Santa Fé. Las Cruces.
CALIFORNIA : San Francisco. Marysville. Humboldt. Stockton. Visalia. Sacramento. Los Angeles. Shasta. Susanville. Bodie.	IOWA : Des Moines.	MISSOURI : Boonville. Ironton. Springfield.	OREGON : Oregon City. Roseburg. Le Grand. Lakeview. The Dalles.
COLORADO : Denver City. Leadville. Central City. Pueblo. Del Norte. Lake City. Gunnison. Durango.	KANSAS : Topeka. Saline. Independence. Wichita. Kirwin. Concordia. Larned. Wa-Keeny. Oberlin. Garden City.	MONTANA TER. : Miles City. Helena. Bozeman.	UTAH TER. : Salt Lake City.
DAKOTA TER. : Mitchell.	LOUISIANA : New Orleans. Natchitoches.	NEBRASKA : Neligh. Beatrice. Lincoln. Niobrara. Grand Island. North Platte. Bloomington.	WASHINGTON TER. : Olympia. Vancouver. Walla Walla. Spokane Falls. Yakima.
			WISCONSIN : Menasha. Falls of St. Croix. Wausau. La Crosse. Bayfield. Eau Claire.
			WYOMING TER. : Cheyenne. Evanston.

NOTE.—By act of July 31, 1876, the land offices in Ohio, Indiana, and Illinois were abolished; and by act of March 3, 1877, the vacant tracts of public land in Ohio, Indiana, and Illinois are made subject to entry and location at the General Land Office, Washington, D. C.

DEPOSIT FOR SURVEYS.

CIRCULAR.

Commissioner McFarland to surveyors-general, September 5, 1881.

In order to prevent as far as possible the perpetration of frauds and fraudulent surveys, which have already assumed alarming proportions under the system of deposits by individuals, it is hereby ordered :

I. The surveyors-general shall exercise the most searching scrutiny into the statements of applicants for survey, to satisfy themselves of the truth thereof, and unless found to be *bona fide* in every respect they shall not accept such applications nor furnish the estimates requested.

II. Believing that in a great many instances applications for survey, particularly in sections of country unfit for settlement, have been procured or invited at the instance of deputy surveyors seeking contracts, you are instructed that such proceedings on the part of deputy surveyors are unlawful, and that contracts thus unlawfully procured will not be recognized as valid. The surveyor-general must minutely examine into all applications for surveys under the deposit system. If he is satisfied that the deputy has acted in the manner described, the commission of such deputy shall be forthwith revoked, and the surveyor-general shall report all the facts, with his findings in the case, to this office. Upon approval thereof such deputy shall be deemed unfit to exercise the functions of a deputy surveyor, and the approval of a finding against a deputy will be communicated by this office to each surveyor-general for his information and guidance; and any surveyor-general who shall fail to report such deputy, or who shall employ any deputy so barred, will be open to charges to be preferred by the Commissioner of the General Land Office to the Secretary of the Interior.

III. Surveyors-general are required to exercise the utmost care and vigilance to prevent frauds and irregularities of any kind regarding surveys under the system of deposits by individuals, as also of surveys made under any other appropriation of moneys by Congress, whether general or special, and they will report each and every fact that may come to their knowledge of any attempted fraud, by whomsoever made, with all obtainable particulars, to this office for consideration and action.

IV. The plates and field-notes of surveys under the system of deposits by individuals, as returned to this office, do not usually show the settlements and improvements of the settlers at whose instance the surveys are ostensibly made. In a majority of instances the location of the settler, whether *bona fide* or otherwise, is entirely omitted, while the improvements, if any, are never noted. In order, therefore, to still further check the abuses and dishonest practices to which this system of surveys has become subject, the attention of surveyors-general and deputy surveyors is specially directed to the requirements of pages 18 and 19

of the Manual of Surveys, and pages 43 and 44 of the Instructions of the Commissioner of the General Land Office, dated May 3, 1881. The requirements therein contained must be strictly adhered to, and surveyors-general are required and enjoined to see to it that their deputies comply therewith.

V. Surveyors-general are directed to instruct their deputies that they must designate in the field-notes and plats of their surveys the location of each and every settlement within a township surveyed under the deposit system, whether it be permanent in character or not together with the names of such settlers and their improvements, if any. Cattle corrals are not considered as constituting improvements.

VI. When no settlers are found within a township surveyed under the system of individual deposits, the field notes of survey must *distinctly and unequivocally state that fact*, and any omission so to describe and designate the settlements and their surrounding improvements, or the *absence* of one or both in the field-notes and plat, will be deemed a sufficient cause to infer fraud, and the accounts of the deputy will be suspended until such omission shall have been supplied to both plat and field-notes. A suspension of the commission of the deputy will in the mean time take place, and all the facts will be reported to this office for consideration and action.

VII. Surveyors-general are directed to make known to their several deputies the provisions and nature of this order, and will be held strictly accountable for its faithful execution. Ignorance of the terms of this order will not be held an excuse for failure to comply therewith by deputies.

VIII. This order will be observed by deputies now in the field, and surveyors-general are directed to so inform them with the least practicable delay.

IX. Surveyors-general are reminded of the important trust confided to them, and are instructed to exercise their whole authority to secure correct and honest surveys and returns by their deputies.

X. This order will take effect from and after the receipt of the same, and its receipt will be immediately acknowledged by each surveyor-general.

XI. In every case of a contract heretofore approved which the surveyor-general has reason to believe was fraudulently procured, such contract and the accounts thereunder must be immediately suspended and the facts reported to this office.

Approved :

A. BELL,

Acting Secretary.

FORM OF APPLICATION FOR SURVEYS ON DEPOSIT.

INSTRUCTIONS TO SURVEYORS-GENERALS REGARDING. WITH BLANK FORMS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 20, 1882.

TO UNITED STATES SURVEYORS-GENERAL:

Owing to the great diversity in forms of application used in the several surveying districts by applicants for surveys under the system of special deposits, from the date of receipt hereof by you the following blank form will be used exclusively, and the several requirements therein contained will be insisted upon before furnishing estimates of moneys to be deposited, as contemplated by sections 2401 and 2402, Revised Statutes.

Any failure to comply strictly with the foregoing will subject the application to rejection by this office.

N. C. MCFARLAND,
Commissioner.

Approved:

S. J. KIRKWOOD,
Secretary.

JANUARY 28, 1882.

APPLICATION FOR SURVEY.

TO THE UNITED STATES SURVEYOR-GENERAL ———:

I, the undersigned settler upon unsurveyed land, believed to be in township —, range —, — principal meridian, State or Territory of ———, a citizen of the United States and entitled to enter land under the laws thereof, do hereby apply for an estimate of the cost of field and office work in the survey of the above-named township, or so much thereof as can by law be surveyed under the provisions of section 2401 of the Revised Statutes of the United States, and in compliance with the regulations established and prescribed by the Hon. Commissioner of the General Land Office. And I do solemnly swear (or affirm) that I am an *actual* and *bona fide* settler upon said unsurveyed land of the United States, which, as near as I can ascertain, will be township —, range —, — principal meridian; that I make this application in good faith, and intend to make the deposit required for survey, as provided in sections 2401, 2402, 2403, of the Revised Statutes of the United States, and to perfect the title under the * ——— laws to my claim, situated in approximate section No. — of the above-named unsurveyed township; that I know the greater portion of said township is not known to be mineral, but is agricultural (timber or grazing land), and so far as I know is not reserved by the government.

* Here insert the character of claim, whether pre-emption, homestead, or other.

And I further swear (or affirm) that my improvements consist of _____, and that I estimate their money value at \$_____, and that I settled on said land in good faith _____, 18—.

_____,
Signature of Applicant.

_____ Post-Office.
_____ County.
_____ State or Territory.

STATE OR TERRITORY OF _____,
County of _____, ss:

Subscribed by the above-named person, and sworn to before me this _____ day of _____, 18—.

[SEAL.]

_____,
** Notary Public.*

AFFIDAVIT OF WITNESSES.

e, _____ and _____, of _____ County, State or Territory of _____, do solemnly swear (or affirm) that we are well acquainted with _____, who signed the above application for the survey of township _____, range _____, principal meridian, and know the statements therein made to be true; and further that we are not interested in said application or survey.

Signatures of witnesses:

_____ Post-Office.
_____ County.
_____ State or Territory.

STATE OR TERRITORY OF _____,
County of _____, ss:

Subscribed by the above-named persons, competent witnesses, and sworn to before me this _____ day of _____, 18—.

[SEAL.]

_____,
** Notary Public.*

[On the back.]

Application of _____, township _____, range _____, _____ P. M.
Settler's application for survey under Sec. 2401, Revised Statutes of the United States.

Filed _____ day of _____, 18—.

Approved the _____ day of _____, 18—.

_____,
Surveyor-General.

for _____.

Deposit required:

For survey..... \$ _____
Office work and expenses..... _____

Certificates of deposit Nos. _____, dated _____ day of _____, 18—.

Included in contract No. _____, dated _____ day of _____, 18—.

_____,
U. S. Deputy Surveyor.

*Or other official having a seal.

BONDS OF UNITED STATES DEPUTY SURVEYORS.

INSTRUCTIONS TO SURVEYORS-GENERAL, FORM, ETC.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 16, 1882.

United States Surveyor-General, ——— :

SIR: Inclosed herewith please find one blank copy of United States deputy surveyor's bond, six copies of instructions for properly executing the accompanying bond, and four copies of blank form of affidavit of sureties, for your information and government in the future when forwarding bonds of United States deputy surveyors and United States deputy mineral surveyors for the approval of this office.

The *eighth* paragraph is not applicable to deputy surveyors' bonds, inasmuch as section 2230, United States Revised Statutes, controls, and your present practice in this respect will continue.

Said section 2230, Revised Statutes, also provides that the sufficiency of the sureties to the bonds shall be approved and certified by the proper surveyor-general, and hence the *twelfth* paragraph will *not* control you.

In all other respects said instructions must be carefully complied with, and any omission or departure therefrom will subject the bonds to rejection by this office.

Contracts made under bonds heretofore accepted by this office, the amount of which is largely in excess of contracts already approved, if otherwise regular, will be approved under such bond.

New bonds will be made out in accordance with the accompanying instructions and directions.

Please acknowledge the receipt of this letter and the accompanying documents.

Very respectfully,

N. C. MCFARLAND,
Commissioner.

INSTRUCTIONS REFERRED TO IN ABOVE CIRCULAR FOR PROPERLY EXECUTING THE
ACCOMPANYING BOND.

First. The bond and oath of office must be dated.

Second. There must be not less than two sureties.

Third. The full name of the principal and each of his sureties should be written in the body of the bond and so signed to the bond. Where principal or surety has more than one Christian name, the one by which he is generally known will be sufficient. The place of residence of each surety must be designated in the body of the instrument.

Fourth. There must be a seal of wax or wafer, or other adhesive substance, attached to each signature. The printed word "seal" or a scroll is not sufficient.

Fifth. The signature of the principal and of each of the sureties must be made in the presence of two persons, who must sign their names as witnesses, stating their present residence; and it must appear for whom each witness signs.

Sixth. Each surety must make and sign an affidavit in accordance with the accompanying form.

Seventh. It is required that the sureties shall state under oath the nature of the property which they offer as security, that is, whether real or personal, describing each class of property specifically as indicated in the form of affidavit inclosed. It must be made to appear that the property offered is available upon execution or the bond will be rejected.

Eighth. The several sums in which the sureties justify must aggregate at least double the penalty of the bond.

Ninth. The acknowledgments and oaths called for may be made before any officer duly qualified by the local laws of the place where the bond is executed. An affirmation in judicial form will be accepted instead of an oath.

Tenth. Whenever the officer before whom any of the acknowledgments are made or oaths taken has an official seal he should use it. There should be a separate and distinct impression of the official seal for each acknowledgment or oath.

Eleventh. Whenever any acknowledgment is made or oath taken before any officer not a clerk of a court of record, the official character and standing of such officer, whether notary public, justice of the peace, United States commissioner, or other officer qualified to administer oaths, should be evidenced by the formal certificate of the clerk of the proper court of record or other competent authority.

Twelfth. The sufficiency of sureties must be certified by the United States district judge or attorney.

Thirteenth. Sureties must not be bonded officers of the United States.

Care should be taken that no erasures or mutilations of any kind be made, and, if made, all such must be stated and certified before signing.

CORRECTING DUPLICATE PLATS.

INSTRUCTIONS TO SURVEYORS-GENERAL—DIAGRAMS HOW TO BE MADE, ETC.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 19, 1883.

United States Surveyor-General, ———:

SIR: The practice of correcting the duplicate plats in this office from authenticated diagrams forwarded by surveyors-general has been discontinued, and in future all such diagrams will be attached to the township plats instead of being transferred thereon as has heretofore been done.

With a view to convenience in binding the diagrams of amendments with the plats, I have to direct that all such diagrams which may be found necessary, including those ordered by this office, be made upon substantial white paper of the size of the regular township plats.

Very respectfully,

N. C. McFARLAND,
Commissioner.

RESTORATION OF LOST CORNERS.

SYNOPSIS OF ACTS OF CONGRESS REGULATING SURVEYS.

RULES FOR THE RESTORATION OF LOST AND OBLITERATED CORNERS

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 13, 1883.

The increasing number of letters from county and local surveyors received at this office, making inquiry as to the proper method of restoring to their original position lost or obliterated corners marking the survey of the public lands of the United States, or such as have been willfully or accidentally moved from their original position, have rendered the preparation of the following general rules necessary, particularly as in a very large number of cases the immediate facts necessary to a thorough and intelligent understanding are omitted. Moreover, surveys having been made under the authority of different acts of Congress, different results have been obtained, and no special law has been enacted by that authority covering and regulating the subject of the above-named inquiries. Hence the general rules here given must be considered merely as an expression of the opinion of this office on the subject, based, however, upon the spirit of the several acts of Congress authorizing the surveys, as construed by this office. When cases arise which are not covered by these rules, and the advice of this office is desired, the letter of inquiry should always contain a description of the particular corner with reference to the township, range, and section of the public surveys, to enable this office to consult the record.

To restore extinct boundaries of the public lands correctly, the surveyor must have some knowledge of the manner in which townships were subdivided by the several methods authorized by Congress. Without this knowledge he may be greatly embarrassed in the field, and is liable to make mistakes invalidating his work, and leading eventually to serious litigation. It is believed that the following synopsis of the several acts of Congress regulating the surveys of the public lands will be of service to county surveyors and others, and will help to explain many of the difficulties encountered by them in the settlement of such questions.

The differences resulting from Congressional legislation at different periods resulted in *two* sets of corners being established on *township lines* at one time; at another time *three* sets of corners were established on *range lines*, while the system now in operation makes but *one* set of corners on *township boundaries*, except on standard lines, *i. e.*, base and correction lines, and in some exceptional cases.

The following brief explanation of the modes which have been prac-

ticed will be of service to all who may be called upon to restore obliterated boundaries of the public land surveys:

Where two sets of corners were established on township boundaries one set was planted at the time the exteriors were run, those on the north boundary belonging to the sections and quarter sections north of said line, and those on the west boundary belonging to the sections and quarter sections west of that line. The other set of corners was established when the township was subdivided. This method, as stated, resulted in the establishment of two sets of corners on all four sides of the townships.

Where three sets of corners were established on the range lines, the subdivisional surveys were made in the above manner, except that the east and west section lines, instead of being closed upon the corners previously established on the east boundary of the township, were run due east from the last interior section corner, and new corners were erected at the points of intersection with the range line.

The method now in practice requires section lines to be initiated from the corners on the south boundary of the township, and to close on existing corners on the east, north, and west boundaries of the township, except when the north boundary is a base line or standard parallel.

SYNOPSIS OF ACTS OF CONGRESS.

The first enactment in regard to the surveying of the public lands was an ordinance passed by the Congress of the Confederation, May 20, 1785, prescribing the mode for the survey of the "Western Territory," and which provided that said territory should be divided into "townships of six miles square, by lines running due north and south, and others crossing them at right angles" as near as might be.

It further provided that the first line running north and south should begin on the Ohio River, at a point due north from the western terminus of a line run as the south boundary of the State of Pennsylvania and the first line running east and west should begin at the same point and extend through the whole territory. In these initial surveys only the exterior lines of the townships were surveyed, but the plats were marked by subdivisions into sections of one mile square, numbered from 1 to 36, commencing with No. 1 in the southeast corner of the township, and running from south to north in each tier to No. 36 in the northwest corner of the township; mile corners were established on the township lines. The region embraced by the surveys under this law forms a part of the present State of Ohio, and is generally known as "the Seven Ranges."

The Federal Congress passed a law, approved May 18, 1796, in regard to surveying the public domain, and applied to "the territory northwest of the Ohio River, and above the mouth of the Kentucky River."

Ordinance of the Congress of the Confederation, of May 20, 1785. U. S. Land Laws, p. 349. Edition 1828.

Act of May 18, 1796, U. S. Statutes at Large, vol. p. 465. Section 2395, U. S. Revised Statutes.

Section 2, of said act, provided for dividing such lands as had not been already surveyed or disposed of, "by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of 6 miles square," etc. It also provided that "one-half of said townships, taking them alternately, should be subdivided into sections containing, as nearly as may be, 640 acres each, by running parallel lines through the same each way at the end of every two miles, and marking a corner on each of said lines at the end of every mile." The act also provided that "sections shall be numbered, respectively, beginning with the number one in the northeast section, and proceeding west and east alternately through the township, with progressive numbers till the thirty-sixth be completed." This method of numbering sections is still in use.

An act amendatory of the foregoing, approved May 10, 1800, required the "townships west of the Muskingum, which are directed to be sold in quarter townships, be subdivided into half sections of 320 acres each, as nearly as may be, by running parallel lines through the same from east to west, and from north to south, at the distance of one mile from each other, and marking corners, at the distance of each half mile on the lines running east and west, and at the distance of each mile on those running from south to north. And the interior lines of townships intersected by the Muskingum, and of all townships lying east of that river, which have not been heretofore actually subdivided into sections, shall also be run and marked. And in all cases where the exterior lines of the townships thus to be subdivided into sections or half sections shall exceed, or shall not extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the western or northern ranges of sections or half sections in such township, according as the error may be in running the lines from east to west or from south to north." Said act also provided that the northern and western tier of sections should be sold as containing only the quantity expressed on the plats, and all others as containing the complete legal quantity.

Act of May 10, 1800. U. S. Statutes at Large, vol. 2, p. 73. Section 2395, U. S. Revised Statutes.

The act approved June 1, 1796, "regulating the grants of land appropriated for military services," etc., provided for dividing the "Virginia Military Tract," in the State of Ohio, into townships 5 miles square, each to be subdivided into quarter townships containing 4,000 acres.

Act of June 1, 1796. U. S. Statutes at Large, vol. 1, p. 490.

Section 6 of the act approved March 1, 1800, amendatory of the foregoing act, enacted that the Secretary of the Treasury was authorized to subdivide the quarter townships into lots of 100 acres, bounded as nearly as practicable by parallel lines 160 perches in length by 100 perches in width. These subdivisions into lots, however, were made upon the plats in the office of the Secretary of the Treasury, and the actual survey was only made at a

Act of March 1, 1800. U. S. Statutes at Large, vol. 2, p. 14.

subsequent time when a sufficient number of such lots had been located to warrant the survey. It thus happened in some instances, that when the survey came to be made the plat and survey could not be made to agree, and that fractional lots on plats were entirely crowded out. A knowledge of this fact may explain some of the difficulties met with in the district thus subdivided.

The act of Congress approved February 11, 1805, directs the subdivision of the public lands into quarter quarter sections, and provides that all corners marked in the field shall be established as the proper corners of the sections or quarter sections which they were intended to designate, and that corners of half and quarter sections not marked shall be placed as nearly as possible "equidistant from those two corners which stand on the same line." This act further provides that "the boundary lines actually run and marked" (in the field) "shall be established as the proper boundary lines of the sections or subdivisions for which they were intended; and the length of such lines as returned by the surveyors shall be held and considered as the true length thereof, and the boundary lines which shall not have been actually run and marked as aforesaid shall be ascertained by running straight lines from the established corners to the opposite corresponding corners, but in those fractional townships where no such opposite or corresponding corners have been or can be fixed, the said boundary line shall be ascertained by running from the established corners due north and south, or east and west, as the case may be, to the external boundary of such fractional township."

The act of Congress approved April 24, 1820, provides for the sale of public lands in half quarter sections, and requires "that in every case of the division of a quarter section the line for the division thereof shall run north and south, and fractional sections, containing 160 acres and upwards, shall in like manner, as nearly as practicable, be subdivided into half quarter sections, under such rules and regulations as may be prescribed by the Secretary of the Treasury; but fractional sections, containing less than 160 acres, shall not be divided."

The act of Congress approved April 24, 1824, provides "that whenever, in the opinion of the President of the United States, a departure from the ordinary mode of surveying land on any river, lake, bayou, or water course would promote the public interest, he may direct the surveyor general in whose district such land is situated, and where the change is intended to be made, under rules and regulations as the President may prescribe, to cause the lands thus situated to be surveyed in tracts of two acres in width, fronting on any river, bayou, lake, or water course, and running back the depth of forty acres."

Act of February 11, 1805. U. S. Statutes at Large, vol. 2, p. 313. Section 2396, U. S. Revised Statutes.

Act of April 24, 1820. U. S. Statutes at Large, vol. 3, p. 566. Section 2397, U. S. Revised Statutes.

Act of May 24, 1824. U. S. Statutes at Large, vol. 4, p. 34.

The act of Congress approved April 5, 1832, directed the subdivision of the public lands into quarter quarters; that in every case of the division of a half quarter section the dividing line should run east and west, and that fractional sections should be subdivided, under rules and regulations prescribed by the Secretary of the Treasury. Under the latter provision the Secretary directed that fractional sections containing less than 160 acres, or the residuary portion of a fractional section, after the subdivision into as many quarter quarter sections as it is susceptible of, may be subdivided into lots, each containing the quantity of a quarter quarter section as nearly as practicable, by so laying down the line of subdivision that they shall be 20 chains wide, which distances are to be marked on the plat of subdivision, as are also the areas of the quarter quarters and residuary fractions.

Act of April
5, 1832. U. S.
Statutes at
Large, vol. 4, p.
563. Section
2397, U. S. Re-
vised Statutes.

These two acts last mentioned provided that the corners and contents of half quarters and quarter quarter sections should be ascertained as nearly as possible in the manner and on the principles prescribed in the act of Congress approved February 11, 1805.

From the foregoing synopsis of Congressional legislation it is evident—

1st. That the boundaries of the public lands established and returned by the duly appointed government surveyors, when approved by the surveyors general and accepted by the government, *are unchangeable.*

2d. That the original township, section, and quarter section corners established by the government surveyors must stand as the true corners which they were intended to represent, whether the corners be in place or not.

3d. That quarter quarter corners not established by the government surveyors must be planted equidistant and on line between the quarter section and section corner.

4th. That all subdivisional lines of a section must be straight lines, running from the proper corner in one exterior line to its opposite corresponding corner in the opposite exterior line.

5th. That in fractional sections where no opposite corresponding corner has been or can be established, any required subdivision line of such section must be run from the proper original corner in the boundary line due east and west, or north and south, as the case may be, to the water-course, Indian reservation, or other exterior boundary of such section.

From the foregoing it will be plain that extinct corners of the government surveys must be restored to their original locations, whenever it is possible to do so; and hence resort should always be first had to the marks of the survey in the field. The locus of the missing corner should be first identified on the ground by the aid of the mound, pits line trees, bearing trees, etc., described in the field notes of the original survey

The identification of mounds, pits, and witness trees, or other objects noted in the field notes of survey, afford the best means of relocating the missing corner in its original position. If this cannot be done, clear and unquestioned testimony as to the locality it originally occupied should be taken, if such can be at all obtained. In any event, whether the locus of the corner be fixed by the one means or the other, such locus should always be tested and proven by measurements to *known* corners. No definite rule can be laid down as to what shall be sufficient evidence in such cases, and much must be left to the skill, fidelity, and good judgment of the surveyor in the performance of his work.

Where retracements of lines have to be made for the purpose of either testing or relocation of a missing corner, or by direct measurement between known corners intersecting at the point sought to be re-established, it will almost invariably happen that a difference of measurement is developed between the original measurement, as stated in the field notes, and the new measurement made for the purpose of re-establishment or proof. When the differences occur, the surveyor must in all cases re-establish or prove his corners at intervals proportionate to those given in the field notes of the original survey. *From this rule there can be no departure*, since it is the basis upon which the whole operation depends for accuracy and truth.

TO RESTORE LOST OR OBLITERATED CORNERS.

1. *To restore corners on base and correction lines.*—Run a right line between the nearest existing corners on such line, whether base or correction line, which corners must, however, be fully identified, and at the point proportionate to the distance given in the field notes of the original survey, establish a new corner. This point should be verified by measurements to the nearest known corners north or south of the base or correction line, or both.

Where several corners are missing between the corners to be connected, as directed above, their location will be determined upon the same principle and in the same manner; that is to say, the original distance of the entire line between the recognized corners is to the entire distance remeasured between the same corners as the original distance of the first, second, third, etc., interval of the original survey is to the new distance to be laid off for the corresponding new interval. After having checked each new location by measurement to the nearest known corners north or south of the line, new corners will be established permanently, and new bearings and measurements taken to prominent objects, which should be of as permanent a character as possible, and the same recorded for future reference.

As has been observed, no existing original corner can be disturbed, and it will be plain that any excess or deficiency in measurements between existing corners cannot in any degree affect the distances beyond

said existing corners, but must be added or subtracted proportionately to or from the intervals embraced between the corners which are still standing.

2. *Re-establishment of township corners common to four townships.*—Inasmuch as township lines are sometimes run in a direction not true north and south, or east and west, a line should first be run connecting the nearest known corners on the north and south township lines and a temporary corner established at the proportionate distance. This will establish the location of the township corner only so far as its relative position north and south is concerned. The nearest known corners on the east and west township lines will then be connected in the same manner, independent of the temporary corner previously set, and the proportionate point determined in that direction; any difference east or west of the temporary corner which may be developed by the last operation, by intersection with the line previously run north and south, will then be laid off in the direction required from the temporary corner, and a permanent corner established at such point, marked and witnessed as in the foregoing case.

3. *Re-establishment of corners common to two townships.*—The two nearest known corners on the township line, the same not being a base or a correction line, will be connected as in case No. 1, by a right line, and the missing corner established by proportionate distance as directed in that case; the location thus found will be checked upon by measurements to nearest known section or quarter section corners north and south, or east and west, of the township line as the case may be.

4. *Re-establishment of closing corners.*—Measure from the quarter section, section or township corner east or west, as the case may be, to the next preceding or succeeding corner in the order of original establishment, and re-establish the missing closing corner by proportionate measurement. The line upon which the closing corner was originally established should always be remeasured, in order to check upon the correctness of the new location.

5. *Re-establishment of interior section corners.*—This class of corners should be re-established in the same manner as corners common to four townships. In such cases, when a number of corners are missing on all sides of the one sought to be re established, the entire distance must, of course, be remeasured between the nearest existing recognized corners both north and south and east and west, in accordance with the rule laid down, and the new corner re-established by proportionate measurement. The mere measurement in any one of the required directions will not suffice, since the direction of the several section lines running northwards through a township, or running east and west, are only in the most exceptional cases true prolongations of the alignment of the section lines initiated on the south boundary of the township; while the east and west lines running through the township, and theoretically supposed to be at right angles with the former, are seldom in that con-

dition, and the alignment of the closing lines on the east and west boundaries of the township, in connection with the interior section lines, even less seldom in accord. Moreover, the alignment of the section line itself from corner to corner, in point of fact, also very frequently diverges from a right line, although presumed to be so from the record contained in the field notes and so designated on the plats, and become either a broken or a curved line. This fact will be determined, in a timbered country, by the blazes which may be found upon trees on either side of the line, and although such blazed line will not strictly govern as to the absolute direction assumed by such line, it will assist very materially in determining its approximate direction and should never be neglected in retracements for the re-establishment of lost corners of any description. Sight trees described in the field notes, together with the recorded distances to same, when fully identified, will, it has been held, govern the line itself, even when not in a direct or straight line between established corners, which line is then necessarily a broken line by passing through said sight trees. Such trees, when in existence and properly identified beyond a question of doubt, will very materially assist in evidencing the correct relocation of a missing corner. It is greatly to be regretted that the earlier field notes of survey are so very meager in the notation of the topography found on the original line, which might in very many instances materially lessen a surveyor's labors in retracement of lines and re-establishment of the required missing corner. In the absence of such sight trees and other evidences regarding the line, as in an open country, or where such evidence has been destroyed by time, the elements, or the progress of improvement, the line connecting the known corners should be run straight from corner to corner.

6. *Re-establishment of quarter section corners on township boundaries.*— Only one set of quarter section corners are actually marked in the field on township lines, and they are established at the time when the township exteriors are run. When double section corners are found, the quarter section corners are considered generally as standing midway between the corners of their respective sections, and when required to be established or re-established, as the case may be, they should be generally so placed; but great care should be exercised not to mistake the corners of one section for those of another. After determining the proper section corners marking the line upon which the missing quarter section corner is to be re-established, and measuring said line, the missing quarter section corner will be re-established in accordance with the requirements of the original field notes of survey by proportionate measurement between the section corners marking the line.

Where there are double sets of section corners on township and range lines, and the quarter section corners for sections south of the township or east of the range lines are required to be established in the field, the said quarter section corners should be so placed as to suit the calcula-

tion of areas of the quarter sections adjoining the township boundaries as expressed upon the official township plat, adopting proportionate measurements when the present measurements of the north and west boundaries of the section differ from the original measurements.

7. *Re-establishment of quarter section corners on section lines closing upon the north and west township boundaries.*—This class of corners must be re-established according to the original measurement at forty chains from the last interior section corner. If the measurements do not agree with the original survey, the excess or deficiency must be divided proportionately between the two distances, as expressed in the field notes of original survey. The section corner started from and the corner closed upon should be connected by a right line, unless the retracement should develop the fact that the section line is either a broken or curved line, as is sometimes the case.

8. *Re-establishment of interior quarter section corners.*—In some of the older surveys these corners are placed at variable distances, in which case the field notes of the original survey must be consulted, and the quarter section corner re-established at proportionate distances between the corresponding section corners, in accordance therewith. The later surveys being more uniform and in stricter accordance with law, the missing quarter section corner must be re established equidistant between the section corners making the line, according to the field notes of the original survey. The remarks made under § 5, in relation to section lines, apply with full force here also; the caution there given not to neglect sight trees is equally applicable; since the proper re-establishment of the quarter section corner may in some instances very largely depend upon its observance, and avoid one of the many sources of litigation.

8. *Where double corners were originally established, one of which is standing, to re-establish the other.*—It being remembered that the corners established when the exterior township lines were run belong to the sections in the townships north and west of those lines, the surveyor must first determine beyond a doubt to which sections the existing corner belongs. This may be done by testing the courses and distances to witness trees of other objects noted in the original field notes of survey, and by remeasuring distances to known corners. Having determined to which township the existing corner belongs, the missing corner may be re-established in line north or south of the existing corner, as the case may be, at the distance stated in the field notes of the original survey, by proportionate measurement, and tested by remeasurement to the opposite corresponding corner of the section to which the missing section corner belongs. These double corners being generally not more than a few chains apart, the distance between them can be more accurately laid off, and it is considered preferable to first establish the missing corner as above, and check upon the corresponding interior

corner, than to reverse the proceeding; since the result obtained is every way more accurate and satisfactory.

9. *Where double corners were originally established, and both are missing, to re-establish the one established when the township line was run.*—The surveyor will connect the nearest known corners on the township line, by a right line, being careful to distinguish the section from the closing corners, and re-establish the missing corner at the point indicated by the field notes of the original survey, by proportionate measurement. The corner thus restored will be common to two sections either north or west of the township boundary, and the section north or west, as the case may be, should be carefully retraced; thus checking upon the re-established corner, and testing the accuracy of the result. It cannot be too much impressed upon the surveyor, that any measurements to objects on line noted in the original survey are means of determining and testing the correctness of the operation.

10. *Where double corners were originally established, and both are missing, to re-establish the one established when the township was subdivided.*—The corner to be re-established being common to two sections south or east of the township line, the section line closing on the missing section corner should be first retraced to an intersection with the township line, in the manner previously indicated, and a temporary corner established at the point of intersection. The township line will of course have been previously carefully retraced in accordance with the requirements of the original field notes of survey, and marked in such a manner as to be readily identified when reaching the same with the retraced section line. The location of the temporary corner planted at the point of intersection will then be carefully tested and verified by remeasurements to noted objects and known corners on the township line, as noted in the original field notes of survey, and the necessary corrections made in such relocation. A permanent corner will then be erected at the corrected location on the township line, properly marked and witnessed, and recorded for future requirements.

11. *Where triple corners were originally established on range lines, one or two of which have become obliterated, to re-establish either of them.*—It will be borne in mind that only two corners were established as actual corners of sections, those established on the range line not corresponding with the subdivisional survey east or west of said range line. The surveyor will, therefore, first proceed to identify the existing corner or corners, as the case may be, and then re-establish the missing corner or corners in line north or south, according to the distances stated in the original field notes of survey in the manner indicated for the re-establishment of double corners, and testing the accuracy of the result obtained, as hereinbefore directed in other cases. If, however, the distances between the triple corners are not stated in the original field notes of survey, as is frequently the case in the returns of older surveys, the range line should be first carefully retraced, and marked in a

manner sufficiently clear to admit of easy identification upon reaching same during the subsequent proceedings. The section lines closing upon the missing corners must then be retraced in accordance with the original field notes of survey, in the manner previously indicated and directed, and the corners re-established in the manner directed in the case of double corners. The surveyor cannot be too careful, in the matter of retracement, in following closely all the recorded indications of the original line, and nothing, however slight, should be neglected to insure the correctness of the retracement of the original line; since there is no other check upon the accuracy of the re-establishment of the missing corners, unless the entire corresponding section lines are remeasured by proportional measurement, and the result checked by a recalculation of the areas as originally returned, which, at best, is but a very poor check, because the areas expressed upon many plats of the older surveys are erroneously stated on the face of the plats, or have been carelessly calculated.

12. *Where triple corners were originally established on range lines, all of which are missing, to re-establish same.*—These corners should be re-established in accordance with the foregoing directions, commencing with the corner originally established, when the range line was run, establishing the same in accordance with previously given directions for restoring section and quarter section corners; that is to say by remeasuring between the nearest known corners on said township line, and re-establishing the same by proportionate measurement. The two remaining will then be re-established in conformity with the general rules for re-establishment of double corners.

13. *Re-establishment of meander corners and meanders.*—Before proceeding with the re-establishment of missing meander corners, the surveyor will carefully rechain at least three of the section lines between known corners of the township within which the lost corner is to be relocated, in order to establish the proportionate measurement to be used. This requirement of preliminary remeasurement of section lines must in no case be omitted; since it is the only data upon which the fractional section line can be remeasured proportionately, the corner marking the terminus, or the meander corner being missing, and which it is intended to re-establish. The missing meander corner will be re-established on the section or township line retraced in its original location, by the proportionate measurement found by the preceding operations, from the nearest known corner on such township or section line, in accordance with the requirements of the original field notes of survey. To retrace the original meander lines, between the meander corners re-established as above, is generally an operation of much greater difficulty, owing to the fact that the line connecting the meander corners is, in most instances, a broken line, and is, moreover, unmarked at each point of change in direction intermediate between the said meander corners, thus affording no check upon the work as it progresses through a section.

The several deflections of line comprising the meanders in any one section being originally run by compass, their retracement by compass at a later period offers too many opportunities for error; inasmuch as the variation of the needle, as noted in the original field notes of survey, may have undergone violent changes by removal of the cause, such as timber, etc., or increased attractions by exposure of minerals, thus giving no means of correction to be applied in that direction at the time of retracement. Moreover, the variation of the needle as noted is not to be implicitly depended upon, since the observations for variation are in many instances crude and rough, and at best afford but an approximation in such work. It is, therefore, deemed preferable, where such variation has been carefully noted in the original field notes of survey, and the lines have been run with a true meridian throughout, to retrace the meanders by the angles made by the several successive courses. For instance, supposing the first course of a meander in a section to be initiated from a north and south section line, and the course by compass to be $N. 30^{\circ} 15' E.$, true meridian, the surveyor will lay off the angle of $30^{\circ} 15'$ in the direction required; the second course being $N. 85^{\circ} 45' E.$, makes an angle with the preceding course of $55^{\circ} 30'$; the next course being $S. 23^{\circ} 30' E.$ makes an angle with the preceding course of $66^{\circ} 30'$, and so on through the section. The required distances on each course being carefully chained, the excess or deficiency of the aggregate distance should be proportionately distributed on each course between the meander corners from the data thus found; also any error that may develop itself in the angles will be proportionately distributed upon the several angles, and the entire meanders corrected in accordance therewith. Where no variation has been noted in the original field notes of survey, the meanders can only be retraced by trial lines, on the courses and distances originally given, and corrected by proportionate measurement of angle and distance as above. The surveyor will, of course, take cognizance of any information furnished by the original field notes of survey, as to objects on each course to which distances may be given or bearings taken, as well as at the meander stations themselves.

14. *Fractional section lines.*—County and local surveyors being sometimes called upon to restore fractional section lines closing upon Indian, military, or other reservations, private grants, etc., such lines should be restored upon the same principles as directed in the foregoing pages, and checked whenever possible, upon such corners or monuments as have been placed to mark such boundary lines.

In some instances corners have been moved from their original position, either by accident or design, and county surveyors are called upon to restore such corners to their original positions, but owing to the absence of any and all means of identification of such location, are unable to make the result of their work acceptable to the owners of the lands affected by such corner. In such cases the advice of this office has invariably been to the effect that the relocation of such corner must be

made in accordance with the orders of a court of competent jurisdiction, the United States having no longer any authority to order any changes where the lands affected by such corner have been disposed of.

The original evidences of the public land surveys in the following States, viz: Ohio, Indiana, Illinois, Michigan, Wisconsin, Iowa, Missouri, Arkansas, Mississippi, Alabama, and Kansas have been turned over under the provisions of sections 2218, 2219, and 2220, United States Revised Statutes, to the State authorities, to whom application should be made for such copies of the original plats and field notes as may be desired.

N. C. MCFARLAND,
Commissioner.

Approved.

H. M. TELLER,
Secretary.

UNLAWFUL INCLOSURES OF PUBLIC LANDS.

CIRCULAR.

*Commissioner McFarland to registers and receivers and special agents,
April 5, 1883.*

You are instructed to circulate the following notice in your district:

NOTICE RELATIVE TO UNLAWFUL INCLOSURES OF PUBLIC LANDS.

In view of the numerous complaints of the unlawful inclosures of public lands for stock range purposes, and consequent impediment to settlements, all persons are hereby notified as follows:

The public lands are open to settlement and occupation only under the public land laws of the United States, and any unauthorized appropriation of the same is trespass.

Such trespass is equally offensive to law and morals as if upon private property.

The fencing of large bodies of public land beyond that allowed by law is illegal, and against the right of others who desire to settle or graze their cattle on the inclosed tracts.

Until settlement is made, there is no objection to grazing cattle or cutting hay on government land, provided the lands are left open to all alike.

Graziers will not be allowed, on any pretext whatever, to fence the public lands and thus practically withdraw them from the operation of the settlement laws.

This Department will interpose no objections to the destruction of these fences by persons who desire to make *bona fide* settlement on the inclosed tracts, but are prevented by the fences, or by threats, or violence, from doing so.

The government will take proper proceedings against persons unlawfully inclosing tracts of public land whenever, after this notice, it shall appear that by such inclosures they prevent settlements on such lands by others who are entitled to make settlement under the public land laws of the United States.

Approved:

H. M. TELLER,
Secretary.

UNLAWFUL INCLOSURES OF PUBLIC LANDS.

CIRCULAR.

*Commissioner McFarland to registers and receivers, and special agents,
July 19, 1883.*

Your attention is called to Department Circular of April 5, 1883, relative to unlawful inclosures of public lands, in which the following paragraphs appear:

“The fencing of large bodies of public land beyond that allowed by law is illegal, and against the right of others who desire to settle or graze their cattle on the inclosed tracts.

“Graziers will not be allowed, on any pretext whatever, to fence the public lands and thus practically withdraw them from the operation of the settlement laws.

“This Department will interpose no objection to the destruction of these fences by persons who desire to make *bona fide* settlement on the inclosed tracts, but are prevented by the fences, or by threats of violence, from doing so.

“The government will take proper proceedings against persons unlawfully inclosing tracts of public land whenever, after this notice, it shall appear that by such inclosures they prevent settlements on such lands by others who are entitled to make settlement under the public land laws of the United States.”

In order that proper action may be taken to cause the removal of all such unlawful inclosures as may now exist, or may be hereafter erected, you are directed to promptly report the number and extent of all such inclosures now known to you, or which may be brought to your notice, with the necessary corroborating evidence, so that the cases may be promptly transmitted to the Department of Justice for proper action.

This Department has no authority to remove fences or prosecute trespassers, and when the cases have been referred to the Department of Justice for appropriate action the duty of this Department is performed and its jurisdiction ceases.

Approved:

H. M. TELLER,
Secretary.

MINING CLAIM—ADVERSE PROCEEDINGS.

344 L D 314

CIRCULAR.

Commissioner McFarland to registers and receivers, May 9, 1882.

Your attention is directed to the provisions of the following act of Congress, approved April 26, 1882:

AN ACT to amend section twenty-three hundred and twenty-six of the Revised Statutes, in regard to mineral lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney-in-fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.

SEC. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any State or Territory.

1. It will be observed that the act is not retroactive, and hence cannot affect proceedings had prior to its approval; where citizenship, however, has not been proven, it may be established as provided by section 2 of this act.

2. Where an agent or attorney-in-fact verifies the adverse claim, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.

3. The agent or attorney-in-fact must make the affidavit in verification of the adverse claim within the land district where the claim is situated.

Approved:

H. M. TELLER,
Secretary.

MINING CLAIM—PATENT FOR PLACER.

29 L D 188

CIRCULAR.

Commissioner McFarland to registers and receivers, and surveyors-general, September 22, 1882.

The following regulations are promulgated as amendatory of circular of October 31, 1881, entitled "United States Mining Laws and Regulations thereunder," and have special reference to applications for patents to placer claims. They are to be considered in connection with paragraphs 53 to 60 of regulations contained in said circular:

1. The first care in recognizing an application for patent upon a placer claim must be exercised in determining the exact classification of the lands. To this end the clearest evidence of which the case is capable

should be presented. If the claim be all placer ground that fact must be stated in the application and corroborated by accompanying proofs. If of mixed placers and lodes it should be so set out, with a description of all known lodes situated within the boundaries of the claim. A specific declaration, such as is required by section 2333 Rev. Stats., must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant, excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.

2. Section 2395, Rev. Stats. (subdivision 7), requires the surveyor to "note in his field-books the true situation of all mines, salt licks, salt springs, and mill seats which come to his knowledge"; also "all water courses over which the lines he runs may pass." It further requires him to "note the quality of the lands." These descriptive notes are required by subdivision 8 to be incorporated in the plat by the surveyor-general.

3. If these duties have been performed, the surveys will furnish a reasonable guide to the district officers and to claimants in prosecuting their applications. But experience has shown that great neglect has resulted from inattention to the law in this respect, and the regular plats are of very little value in the matter. It will, therefore, be required in the future that deputy surveyors shall, at the expense of the parties, make full examination of all placer claims, and duly note the facts as specified in the law, stating the quality and composition of the soil, the kind and amount of timber and other vegetation, the locus and size of streams, and such other matters as may appear upon the surface of the claims. This examination should include the character and extent of all surface and underground workings, whether placer or lode, for mining purposes.

4. In addition to these data, which the law requires to be shown in all cases, the deputy should report with reference to the proximity of centers of trade or residence; also of well-known systems of lode deposit or of individual lodes. He should also report as to the use or adaptability of the claim for placer mining; whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose; and finally, what works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

5. This examination should be reported by the deputy under oath to the surveyor-general, and duly corroborated; and a copy of the same should be furnished with the application for patent to the claim, constituting a part thereof, and included in the oath of the applicant.

6. In case of a proposed claim for lands not yet surveyed, the foregoing regulations will govern the application for survey.

7. In controversies hereafter to be determined respecting the mineral value of lands, their value for all purposes, whether agricultural or

municipal, or as seats for towns, will be considered, without reference to the decisions heretofore made in particular cases. No decision finally executed, however, will be reconsidered under this modification.

8. No application by an association of persons for patent to a placer claim will be allowed to embrace more than one hundred and sixty acres, nor will any application be entertained that embraces more than one location.

9. Applications awaiting entry, whether published or not, must be made to conform to these regulations, both with respect to amount of ground and examination as to the character of the land. Entries already made will be suspended for examination by the Commissioner, and such additional proofs as may be deemed necessary in each case will be demanded.

Approved:

H. M. TELLER,

Secretary.

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20 : 556

29 : 615

26 : 413

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33 : 417

SALES OF COAL LANDS—RULES AND REGULATIONS.

CIRCULAR.

Commissioner McFarland to registers and receivers, July 31, 1882.

The following sections of the Revised Statutes provide for the sale of coal lands of the United States :

TITLE XXXII, CHAPTER SIX.—*Mineral lands and mining resources.*

SEC. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

SEC. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

SEC. 2349. All claims under the preceding section must be presented to the register of the proper land-district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the

Entry of coal lands. 3 March, 1873, c. 279, s. 1, v, 17, p. 607.

Pre-emption of coal lands *Ibid.*, s. 2.

Pre-emption claims of coal land to be presented within sixty days, &c., *Ibid.*, s. 3.

improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

SEC. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights, and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

SEC. 2351. In case of conflicting claims upon coal lands where the improvements shall be commenced after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

SEC. 2352. Nothing in the five preceding sections shall be construed to destroy or Rights reserved. impair any rights which may have attached prior to the third day of *Ibid.*, s. 6. March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper.

RULES AND REGULATIONS.

Under the authority conferred by said section 2351 the following rules and regulations are issued for carrying into effect the provisions of said law:

1. Sale of coal lands is provided for—

By ordinary *private entry* under section 2347.

By granting a *preference-right* of purchase, based on priority of possession and improvement, under section 2348.

2. The land entered under either section must be *by legal subdivisions*, as made by the regular United States survey. Entry is confined to surveyed lands; to such as are vacant, not otherwise appropriated, reserved by competent authority, or containing valuable minerals other than coal.

3. Individuals and associations may purchase. If an individual, he must be twenty-one years of age, and a citizen of the United States, or have declared his intention to become such citizen.

4. If an association of persons, each person must be qualified as above.

5. A person is not disqualified by the ownership of any quantity of other land, nor by having removed from his own land in the same State or Territory.

6. Any individual may enter by legal subdivisions as aforesaid any area not exceeding 160 acres.

7. Any association may enter not to exceed 320 acres.

8. Any association of not less than four persons, duly qualified, who shall have expended not less than \$5,000 in working and improving any coal mine or mines, may enter under section 2348 not exceeding 640 acres, including such mining improvements.

9. One person can have the benefit of one entry or filing *only*. He is disqualified by having made such entry or filing alone, or as a member of an association. No entry can be allowed an association which has in it a single person thus disqualified, as the law prohibits the entry or holding of more than one claim either by an individual or an association.

10. Lands that are sufficiently valuable for gold, silver, or copper to prevent their entry as agricultural lands cannot be entered as coal-lands; and you will not allow any entry to be made under the above-named provisions of law of lands valuable for their deposits of said minerals.

11. The present rules relative to "hearings to establish the character of lands," contained in General Land Office regulations of October 31, 1881, issued under the mining laws, will, as far as applicable, govern your action in determining the character of lands sought to be entered as coal land.

12. The price per acre is \$10 where the land is situated *more* than fifteen miles from any completed railroad, and \$20 per acre where the land is *within* fifteen miles of such road. The price of the land, however, must be determined by its distance from a completed railroad at the date of payment and entry irrespective of the preference-right of entry.

13. When application is made to purchase coal land at the rate of \$10 per acre, you will in all cases require satisfactory proof that the land applied for is, at date of entry, situated more than fifteen miles from any completed railroad. This proof may consist of the affidavit of the applicant, or that of his duly authorized agent, corroborated by the affidavit of some disinterested credible party showing personal knowledge of the facts.

14. Where the land lies *partly within* fifteen miles of such road and *part outside* such limit, the *maximum* price must be paid for all legal subdivisions, the greater part of which lie within fifteen miles of such road.

15. The term "completed railroad" is held to mean one which is actually constructed on the face of the earth; and lands within fifteen miles

of any point of a railroad so constructed will be held and disposed of at \$20 per acre.

16. Any duly qualified person or association must be preferred as purchasers of those public lands on which they have opened and improved, or shall open and improve, any coal mine or mines, and which they shall have in actual possession.

17. Possession by agent is recognized as the possession of the principal. The clearest proof on the point of agency must, however, be required in every case, and a clearly-defined possession must be established.

18. The *opening and improving* of a coal mine, in order to confer a preference-right of purchase, must not be considered as a mere matter of form; the labor expended and improvements made must be such as to clearly indicate the good faith of the claimant.

19. These lands are intended to be sold, where there are adverse claimants therefor, to the party who, by substantial improvements, actual possession, and a reasonable industry, shows an intention to continue the development of the mines in preference to those who would purchase for speculative purposes only. With this view, you will require such proof of compliance with the law, when lands are applied for under section 2348 by adverse claimants, as the circumstances of each case may justify.

20. In conflicts, where improvements have been or shall hereafter be commenced, priority of possession and improvement shall govern the award when the law has been fully complied with by each party. A mere possession, however, without satisfactory improvements, will not secure the tract to the first occupant when a subsequent claimant shows his full compliance with the law.

21. After an entry has been allowed to one party, you will make no investigation concerning it at the instance of any person except on instructions from this office. You will, however, receive all affidavits concerning such case and forward the same to this office, accompanied by a statement of the facts as shown by your records.

22. Prior to entry, it is competent for you to order an investigation, on sufficient grounds set forth under oath of a party in interest and substantiated by the affidavits of disinterested and creditable witnesses.

MANNER OF OBTAINING TITLE.

23. When title is sought by *private entry* the party will himself make oath to the following application, which must be presented to the register:

I, _____, hereby apply, under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, to purchase the _____ quarter of section _____, in township _____ of range _____, in the district of lands subject to sale at the land office at _____, and containing _____ acres; and I solemnly swear that no portion of said tract is in the possession of any other party; that I am twenty-one years of age, a citizen of the United States (or have

declared my intention to become a citizen of the United States), and have never held nor purchased lands under said act, either as an individual or as a member of an association; and I do further swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains large deposits of coal and is chiefly valuable therefor; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

24. Thereupon the register, if the tract is vacant, will so certify to the receiver, stating the price, and the applicant or his duly authorized agent must then pay the amount of purchase money.

25. The receiver will then issue to the purchaser a duplicate receipt, and at the close of the month the register and receiver will make returns of the sale to the General Land Office, from whence, when the proceedings are found regular, a patent or complete title will be issued; and on surrender of the duplicate receipt such patent will be delivered, at the option of the patentee, by the Commissioner at Washington or by the register of the district land office.

26. This disposition at private entry will be subject to any valid prior adverse right which may have attached to the same land, and which is protected by section 2348.

27. *Second.* When the application to purchase is based on a priority of possession, etc., as provided for in section 2348, the claimant must, when the township plat is on file in your office, file his declaratory statement for the tract claimed sixty days from and after the first day of his actual possession and improvement. Sixty days, exclusive of the first day of possession, etc., must be allowed.

28. The declaratory statement must be substantially as follows, to wit:

I, ———, do solemnly swear that I am ——— years of age, and a citizen of the United States (or have declared my intention to become a citizen of the United States), that I never have, either as an individual or as a member of an association, held or purchased any coal lands under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, and I do hereby declare my intention to purchase, under the provisions aforesaid, the ——— quarter of section ———, in township ——— of range ———, of lands subject to sale at the district land office at ———, and that I came into possession of said tract on the ——— day of ———, A. D. 18—, and have ever since remained in actual possession continuously; that I have located and opened a valuable mine of coal thereon; and have expended in labor and improvements on said mine the sum of ——— dollars, the labor and improvements being as follows: (here describe the nature and character of the improvements); and I do furthermore solemnly swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

29. When the township plat is not on file at date of claimant's first possession the declaratory statement must be filed within sixty days from the filing of such plat in your office.

30. One year from and after the expiration of the period allowed for filing the declaratory statement is given within which to make proof and payment; but you will allow no party to make final proof and payment except on notice to all others who appear on your records as claimants to the same tract.

31. A party who otherwise complies with the law may enter *after* the expiration of said year, *provided* no valid adverse right shall have intervened. He postpones his entry beyond said year at his own risk, and the government cannot thereafter protect him against another who complies with the law, and the value of his improvements can have no weight in his favor.

32. Each claimant at the time of actual purchase must make affidavit as follows:

I, _____, claiming under the provisions of Revised Statutes of the United States relating to the sale of coal lands of the United States, the right of purchase to the _____ quarter of section _____, in township _____ of range _____, subject to sale at _____, do solemnly swear that I have never had the right of purchase under the aforesaid provisions of law either as an individual or as a member of an association, and that I have never held any other lands under its provisions; I further swear that I have expended in developing coal mines on said tract in labor and improvements the sum of _____ dollars, the nature of such improvements being as follows: _____; that I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that the same is chiefly valuable for coal; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

33. The application, declaratory statement, and the affidavit required at the time of actual purchase—the forms of which are given above under paragraphs 23, 28, and 32—may be sworn to before any officer authorized by law to administer oaths, but the authority of such officer must be properly shown.

34. Any party duly qualified under the law, *after* swearing to his application or declaratory statement, may, by a sufficient power of attorney, duly executed under the laws of the State or Territory in which such party may then be residing, empower an agent to file with the register of the proper land office the application, declaratory statement, or affidavit required at the time of actual purchase, and also authorize him to make payment for and entry of the land in the name of such qualified party; and when such power of attorney shall have been filed in your office you will permit such agent to act thereunder as above indicated.

35. Where a claimant shows by affidavit that he is not personally acquainted with the character of the land, his duly authorized agent who possesses such knowledge may make the required affidavit as to its character; but whether this affidavit is made by principal or agent, it must be corroborated by the affidavits of two disinterested and credible witnesses having knowledge of its character.

36. Nothing in these regulations shall be so construed as to prevent a party from proving his citizenship or age, or establishing the status of the lands sought to be entered in accordance with ordinary rules of evidence; and any proof regularly introduced for that purpose that would be competent in a court or before a commissioner charged with the ascertainment of facts may be considered.

167D4/37. 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.

38. The "Rules of Practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior," approved December 20, 1880, will, as far as applicable, govern all cases and proceedings arising under the sections of the Revised Statutes above quoted providing for the sale of coal lands of the United States.

39. You will report at the close of each month as "sales of coal lands" all filings and entries in separate abstracts, commencing with number *one*, and thereafter proceeding consecutively in the order of their reception. Where a series of numbers has already been commenced by sale of coal lands you will continue the same without change.

Approved :

H. M. TELLER,

Secretary.

SURVEY OF MINING CLAIMS.

INSTRUCTIONS.

Commissioner McFarland to U. S. surveyors-general, November 16, 1882.

The regulations of this office require that the plats and field-notes of surveys of mining claims shall disclose all conflicts between such surveys and prior surveys, giving the areas of conflicts.

The rule has not been properly observed in all cases. Your attention is invited to the following particulars which should be observed in the survey of every mining claim :

1. The exterior boundaries of the claim should be represented on the plat of survey and in the field-notes.

2. The intersection of the lines of survey with the lines of conflicting prior surveys should be noted in the field-notes and represented upon the plat.

3. Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

4. The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows:

	Acres.
Total area of claim	10.50
Area in conflict with survey No. 302	1.56
Area in conflict with survey No. 948	2.33
Area in conflict with Mountain Maid lode mining claim, unsurveyed	1.48

In a number of instances that have come to the attention of this office the total area in conflict has been given but not the area in conflict with *each* intersecting claim. The portion of the plat not in conflict has been colored and the remainder left uncolored. The language of the field-notes has been such as to convey the idea that the conflicting areas were excluded from the claim, whereas such was not the intention. It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys the areas of conflict are to be excluded. The field-notes and plat are made a part of the application for patent, and care should be taken that the description does not inadvertently exclude portions intended to be retained. It is better that the application for patent should state the portions to be excluded in express terms. A survey executed as in the example given will enable the applicant for patent to exclude such conflicts as may seem desirable. For instance, the conflict with survey No. 302 and with the Mountain Maid lode claim might be excluded and that with survey No. 948 included.

Your attention is also invited to another matter. The practice of coloring portions of surveys, leaving other portions uncolored, is open to the same objections that have been stated concerning the field-notes. In the future no coloring will be used.

PLACER CLAIM—AREA—EXPENDITURE.

INSTRUCTIONS.

*Commissioner McFurland to registers and receivers, and surveyors-general,
December 9, 1882.*

By direction, contained in letter dated the 7th instant, from the honorable Secretary of the Interior, paragraph No. 8 of the preceding circular of September 22, 1882, relating to placer mining claims, has been amended so as to read as follows:

8. No application by an association of persons for patent to a placer claim will be allowed to embrace more than 160 acres; and not less than \$500 worth of work must be shown to have been expended upon or for the benefit of each separate location embraced in such application. If an individual becomes the purchaser and possessor of several separate claims of twenty acres each or less, he may be permitted to include

in his application for patent any number of such claims contiguous to each other, not exceeding in the aggregate 160 acres; but upon or for the benefit of each original claim or location so embraced, he or his grantors must have expended the sum of \$500 in improvements.

You are instructed to observe this modification of my said circular of September 22, 1882.

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TIMBER TRESPASS—DAMAGES.

INSTRUCTIONS.

Commissioner McFarland to special timber agents, March 1, 1883.

Respecting the measure of damages to which the government is entitled in settlement for timber trespass upon the public domain, the United States supreme court has recently decided that—

1. Where the trespasser is a knowing and willful one, the full value of the property at the time and place of demand, with no deduction for labor and expense of the defendant, is the proper rule of damages.

2. Where the trespasser is an unintentional or mistaken one, or an innocent purchaser from such a trespasser, the value of the timber at the time when first taken by the trespasser, or if it has been converted into other material, its then value, less what the labor and expense of the trespasser and his vender have added to its value, is the proper rule of damages.

3. Where a person or corporation is a purchaser without notice of wrong from a willful trespasser, the value at the time of purchase should be the measure of damages.

You will, therefore, in cases where settlement is contemplated, state the facts and circumstances attending the cutting and the purchase of the timber in such clear and definite manner that the supreme court decision above referred to can be readily applied.

In cases where settlement with an innocent purchaser of timber cut unintentionally through inadvertence or mistake is contemplated, you are instructed to report as nearly as possible the damage to the government as measured by the value of the timber before cutting.

Approved.

H. M. TELLER,

Secretary.

TIMBER TRESPASS—MESQUITE—MINERAL LAND.

CIRCULAR.

Commissioner McFarland to registers and receivers, and special timber agents, October 12, 1882.

The rules and regulations heretofore prescribed in relation to the cutting and removing of mesquite growing and being upon any of the

public lands of the United States—mineral in character—are hereby modified as follows:

The cutting and removing of mesquite is restricted and confined to actual settlers and *bona fide* residents of the State or Territory, who are citizens of the United States.

The cutting and removal of mesquite from the public lands of the United States—said lands being mineral—is permitted for all building, agricultural, mining and domestic purposes needed in the development and improvement of the homes or mining interests of such actual settlers, residents, or miners.

It is further permitted that mesquite may be cut and removed from the public mineral lands for the purpose of selling the same to any actual settler or resident of the State or Territory, but only for the uses and purposes hereinbefore prescribed.

The cutting and removing of mesquite from any of the public mineral lands of the United States for export from the State or Territory, or by, or for sale to, any railroad company, as an article of fuel or repair is strictly prohibited, the person or persons so offending being liable to civil and criminal prosecution, as provided by Section 3 of the act approved June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes."

The cutting and removing of mesquite from any of the public lands of the United States—non-mineral in character—is strictly prohibited for any purpose, except the same is to be used in building, fencing, or otherwise improving and cultivating the land or claim from which the same is cut or removed.

Any person cutting and removing mesquite from non-mineral public lands of the United States except for the purposes and uses above stated, is liable to punishment therefor under Section 2461 Revised Statutes, both civilly and criminally.

The foregoing is hereby approved.

H. M. TELLER,
Secretary.

PROTECTION OF TIMBER ON PUBLIC LAND.

INSTRUCTIONS.

Commissioner McFarland to special timber agents, September 19, 1882.

The fact having been brought to the notice of this Department that extensive forest fires from time to time, in different sections of the country, are destroying vast amounts of timber upon the public lands, and no means have heretofore been provided by the government for the purpose of checking or preventing the same and preserving the public timber from such destruction, you are hereby informed that it will here-

after be a part of the duty of the special timber agents of the General Land Office to protect and preserve the public timber from this kind of waste and destruction, as well as from destruction by the woodsman, or from any other source.

You are, therefore, hereby instructed to keep yourself fully informed as to the condition of the timber upon the public land in your district, and to use your best endeavors to protect it from waste and destruction from any and all sources; and to this end—where there are State or Territorial laws for the preservation of timber—you are authorized and directed to co-operate with the State or Territorial authorities and to aid and assist them in enforcing said laws.

Should you at any time receive information of any forest fire being in progress in your district, you will at once proceed to the locality of the same and use all possible means to check its progress and to extinguish it.

Should it be necessary to employ assistance in such a case, and the emergency be such that it would be impossible to inform this office of that fact and to receive special instructions, you are hereby authorized to expend a reasonable sum for such purpose, but you will at once inform this office, by telegraph, of the number of persons so employed and the total probable expense.

One of the most dangerous elements to contend with in case of forest fires, and one of the principal auxiliaries to the spread of the same, is the dry tops of trees which parties leave upon the ground after having cut and removed the timber for saw logs and other purposes. When the tree tops can be profitably cut into wood, the person cutting such trees on public land—when such cutting is authorized by law—must cut the tops into wood, or at least cut up and pile the brush in such manner as to prevent the spread of fires.

A failure on the part of woodsmen to utilize all of the tree that can profitably be used, and to take reasonable precaution to prevent the spread of fires, will be regarded at this office as a wanton waste, and subject them to prosecution for wanton waste and destruction of public timber.

Approved:

H. M. TELLER,

Secretary.

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TIMBER TRESPASS—ACT OF JUNE 3, 1878.

CIRCULAR.

Commissioner McFarland to registers and receivers, and special timber agents, June 30, 1882.

The rules and regulations heretofore prescribed by this Department under act of Congress approved June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada, and the Territories to fell and

remove timber from the public domain for mining and domestic purposes," are hereby modified as follows :

All citizens and *bona fide* residents of the States and Territories mentioned therein are authorized to fell and remove, or employ others to fell and remove, or to purchase from others who fell and remove, any timber growing or being upon the public mineral lands in said States or Territories : *Provided*.

1. That the same is not for export from the State or Territory where cut.

2. That no timber less than eight (8) inches in diameter is cut or removed.

3. That it is not wantonly wasted or destroyed.

The above regulations apply also to right-of-way railroad companies procuring timber for construction purposes from the public lands under the act of March 3, 1875.

Every right-of-way railroad company, however, obtaining public timber under said act, whether from lands mineral or non-mineral in character, must in addition observe the following regulations :

1. The company must appoint some one or more persons as its agent or agents for the procurement of such material; such appointment must be in writing; a copy of the same must be filed in this office,* and such person or persons so appointed must be borne upon the pay-rolls as employed by the company, in order to be regarded by this office as the agent or agents of the company.

2. In the procurement of timber or other material for construction, each and every person employed by or under said company or its agents, must also be borne upon the monthly pay-rolls of the company, and be paid as other regular employés of the company.

3. No public timber is permitted to be taken or used in the *repair* or *improvement* of such road after the original construction of the same.

4. No public timber is permitted to be taken and used as *fuel* by any railroad.

As the rules and regulations in relation to the cutting and removing of timber from the public mineral lands are modified, as hereinbefore stated, all agents and officers of this Department are hereby instructed that in reporting cases of alleged trespass they will be governed in their report upon the mineral or non-mineral character of the land by the following general rule :

Where the lands are situated in districts of country that are mountainous, interspersed with gulches and narrow valleys, and minerals are known to exist at different points therein, such lands, in the absence of proof to the contrary, will be held to be mineral in character; but where there are extensive valleys, plains or mountain ranges, and no known minerals exist, the land may be considered and treated as non-mineral.

* The requirements specified in paragraphs numbered 1 and 2 are modified by paragraph numbered 5, of circular instructions issued by the General Land Office, March 3, and approved by the Secretary of the Interior, March 5, 1883.

Said agents and officers are further instructed that hereafter, in forwarding reports in cases of timber trespass, a simple statement to the effect that the lands in question are mineral or non-mineral in character will not be regarded by this office as sufficient proof; evidence establishing that fact, must in all cases accompany and form a part of said report.

In investigating cases of timber trespass in *mineral* districts said agents and officers will be careful hereafter to report only those cases in which there has been a violation of the rules and regulations above specified.

All rules and regulations heretofore prescribed by this Department in cases of timber trespass upon public lands *non-mineral* in character, remain in force.

All rules and regulations or instructions heretofore prescribed under said act of June 3, 1878, by this department, inconsistent with the provisions contained in this circular are hereby rescinded.

Approved:

H. M. TELLER,
Secretary.

28 LD 439 TIMBER LANDS—RAILROAD CONSTRUCTION.

CIRCULAR.

Commissioner McFarland to registers and receivers, and special timber agents, March 3, 1883.

The first section of the act of Congress, approved March 3, 1875 (18 Stat., p. 482), granting to railroads the right of way through the public lands of the United States, provides that any railroad company organized as therein described shall have "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."

In determining the rights of railroad companies under the foregoing provision you will be governed by the following instructions:

1. Said provision refers exclusively to contemplated or unconstructed roads. Companies have no right to take timber or other material under this act for *repairs*, fuel, or for the further improvement of roads *already constructed*.

2. The right granted to any railroad company under this act to take timber or other material from the public lands "adjacent to the line of said road" for construction purposes is construed to mean that, in procuring timber or other material for the purposes indicated in the act, the same must be obtained from the public lands in the neighborhood of the line of road being constructed, and within the terminal points of such road, if possible. If, however, it should be found that the material required in the construction of such road cannot be pro-

cured from the public lands in the neighborhood of, and within the terminal limits of, such road, then it is permitted that such company may obtain the material required outside the terminal limits of the road under construction; such material, however, to be taken from such points as are most accessible and nearest to the terminal limits thereof.

3. All duly organized railroad companies under this act, upon the filing acceptance of properly authenticated copy of their articles of incorporation and organization, and map of definite line of location, are entitled (as provided in paragraph numbered 2 of this circular) to take timber from any of the public lands not otherwise reserved or previously occupied according to law, whether the same be mineral or non-mineral in character.

4. In the procurement of timber or other material for construction purposes, such company must, before causing the cutting or removal thereof, appoint in writing one or more persons as their duly authorized agent, or agents, for that purpose. Copies of all such appointments must be filed in this office for its information, in order that such company may be held responsible for any violation of the rules and regulations, as herein prescribed, in relation to the cutting or removal of timber or other material from the public lands by such agent, or those employed by, or under him.

5. All such duly appointed agents have authority to employ others to procure from such public lands and deliver to them, for the use of such company, all material required for the purposes specified in the act. It is immaterial whether such persons are employed by the day or by the piece; but no authority can be given by such railroad company to the general public to cut timber from the public lands.

6. No railroad company organized according to the provisions of this act is entitled to procure, or cause to be procured, either by itself or through any of its agents, any timber or other material from the public lands for sale or other disposal either to other companies or to the general public.

7. The right to take timber from the public lands by such railroad company, or its agents, is confined to such timber or other material as is actually necessary in original construction of same, and ceases when such road is open to the public for general use.

8. In the procurement of such timber from the public lands, none less than eight inches in diameter is permitted to be cut or removed; no waste or destruction of timber is allowable, and the tops and laps of all trees must be cut and piled in order that the spread of forest fires may be checked thereby.

All rules and regulations or instructions heretofore prescribed under said act of March 3, 1875, by this Department, inconsistent with the provisions contained in this circular, are hereby rescinded.

Approved:

H. M. TELLER,

Secretary.

TIMBER TRESPASS—HOMESTEAD AND PRE-EMPTION.

INSTRUCTIONS.

Commissioner McFarland to Special Agent Prosser, October 24, 1881.

Yours of September 5, at hand and contents noted. From what you say in relation to the numerous saw mills in the section of country drained by the Palouse, Touchet, and Spokane Rivers, and the amount of timber driven from Idaho to the mills in Washington Territory, it is presumable that the public timber lands are being extensively depredated upon, not only by the mill men but by pretended homestead and pre-emption claimants, who file on timber lands for the sole purpose of removing the timber and abandoning their entry thereafter.

In relation to the Oregon Improvement Company (a State organization) and the mill men obtaining control of large quantities of timber land under the act of June 3, 1878, it would be well for you to make inquiries as to how it was done, as the said act provides that no person or association of persons shall be entitled to purchase more than 160 acres. If larger quantities have been obtained, fraud would seem to be manifest.

As a timber agent you, of course, are not expected to look up fraudulent land entries, but in connection with your duties you may at times be able to obtain information on the matters above referred to, which, hereafter, may be of service to this office in detecting frauds.

While it is desirable that the legitimate occupation of lumbering should not be interfered with, yet it is proper to see that the timber upon the public lands is protected and saved from wanton waste and destruction, by all the means lawfully at your command, and that parties engaged in the business of lumbering are not pursuing their occupation in an unlawful manner. * * *

Your position in regard to the liability of Messrs. Cannon and Warner (or any others in the same business) is correct. They cannot be permitted to purchase logs or timber coming from public lands of irresponsible parties, and escape their full share or even the entire responsibility for the trespass. They are as liable criminally and civilly as the original depredator, and will be proceeded against.

In relation to the school lands, or sections sixteen and thirty-six, it matters not if surveyed or not, so far as the act of cutting and removing the timber therefrom; it is an unlawful act and the person so depredating is a trespasser and must be dealt with accordingly. The title to this class of lands remains in the government until it is passed to the State. You will report all cases of trespass on said lands for prosecution.

RESERVATIONS.

MEMORANDUM OF DIFFERENT PROVISIONS BEARING UPON THE SUBJECT OF RESERVATIONS BY THE PRESIDENT.

1st. The Executive power is expressly vested in the President by the first section of the second article of the Constitution of the United States.

2d. By the fourth section of the act of Congress approved April 24, 1820, vol. 3, page 567, making further provision for the sale of the public lands, that is known as the law establishing the cash land system, authority is conferred on the President for offering the public lands for sale by proclamation "at such time or times as the President shall by his proclamation designate for the purpose," etc.

3d. Under this delegation of authority, proclamations from time to time have been issued and sales held, and in those proclamations terms were inserted to the effect—"lands appropriated by law for the use of schools, military, or other purposes be excluded from sale." These laws have in practice been regarded as designed to exclude all interests that had an inception under law or pursuant to law and as excluding from such sales reservations for military, naval, or other public uses.

4th. In the pre-emption law of 29th May, 1830, vol. 4, page 421, there is the following clause:

Nor shall the right of pre-emption, contemplated by this act, extend to any land which is reserved from sale by act of Congress, *or by order of the President*, or which may have been appropriated for any purpose whatsoever.

Here is an express exclusion used of the highest grade of interest under the law, from interference with lands reserved "by order of the President."

5th. By the tenth section the act of 4th September, 1841, vol. 5, page 456, the acquirement of pre-emption under that general and permanent prospective pre-emption is expressly excluded from "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."

6th. By the act of Congress approved March 3, 1853, vol. 10, page 246, it is declared that all public lands in California shall be subject to pre-emption, and to be offered at public sale with certain specified exceptions and with the general exception, viz, "reserved by competent authority." The stipulations in the aforesaid acts of 1830 and 1841 expressly indicate that that competent authority is by the President.

7th. Then in the twelfth section of said act of 3d March, 1853, there are excluded from disposal certain lands, viz, mineral, "or lands reserved for any public purpose whatsoever," vol. 10, page 248.

8th. By the act of 3d March, 1863, vol. 12, page 754, it is made the duty of the President to reserve town sites from the public lands, either surveyed or unsurveyed town sites on the shores of harbors, at the

juncture of rivers, important portages, or any natural or productive centers of population.

9th. Then there is the act of March 1, 1817, vol. 3, page 347, conferring authority on the Secretary of the Navy, under the direction of the President of the United States, to reserve live oak and red cedar lands, with penalty for cutting and destroying trees.

March 2, 1831, another act was passed extending the interdict against spoliation.

The supreme court in the case of *United States v. Briggs*, 9 Howard, considered this statute as authorizing the protection of all timber on public lands, and punished for trespass.

That the power resides in the Executive from an early period in the history of the country to make reservations has never been denied either legislatively or judicially, but on the contrary has been recognized. It constitutes in fact a part of the land office law, exists *ex necessitate rei*, as indispensable to the public weal, and in that light, by different laws enacted as herein indicated, has been referred to as an existing undisputed power too well settled ever to be disputed.

PROVISIONS OF LAW.

IN REFERENCE TO THE AUTHORITY OF THE PRESIDENT TO MAKE RESERVATIONS OF THE PUBLIC LANDS.

April 12, 1792.—Fort Washington for the accommodation of a garrison at the fort. Vol. 1, p. 252.

March 26, 1804, Sec. 6.—Salt Springs in Indiana Territory, with contiguous sections. Vol. 2, p. 280.

April 21, 1806, Sec. 11.—Public lands in the W. Territory of Orleans, may reserve from sale for schools, seminary, salt spring. U. S. Laws vol. 2, p. 394.

March 31, 1807, Sec. 5.—Lead mines in Indiana Territory, which were excepted in the President's proclamation of November 19, 1807, for the sale of public lands in Indiana Territory. U. S. Laws, vol. 2, p. 449.

February 10, 1811, Sec. 10.—In Territory of Louisiana, school, seminary, salt springs, lead mines. Vol. 2, p. 621.

March 3, 1811, Sec. 10.—In Territory of Louisiana, schools, seminary, salt springs, lead mines. Vol. 2, p. 665.

March 3, 1815, Sec. 5.—Part land south of the State Tennessee, for sale, except reservations for schools, etc. Vol. 3, p. 229.

March 5, 1816, Sec. 1.—In Indiana Territory, salt springs, lead mines, school sections. Vol. 3, p. 257.

May 29, 1830, Sec. 4.—No pre-emption attaches to any land which is reserved from sale by act of Congress or by order of the President, or which may have been appropriated for any purpose whatever. Vol. 4, p. 421.

June 28, 1832, Sec. 1.—Lots and building in Saint Augustine and Pensacola for public purposes. Vol. 4, p. 550.

June 26, 1834, Sec. 4.—Sale of public lands in Illinois, Missouri, and Wisconsin, except school and such other reservations as the President shall retain for military posts, any law of Congress heretofore existing to the contrary notwithstanding. Vol. 4, p. 687.

March 3, 1863, vol. 12, p. 754.—Town sites on the shores of harbors, at the junction of rivers, important portages, or any natural prospective centers of population.

March 3, 1863, vol. 12, p. 819.—Reservation for Indians.

April 8, 1864, vol. 13, p. 39.—Indian reservation in California.

October 21, 1869, vol. 18, p. 689.—President may reserve military posts and set aside permanent reservations.

(See *Grisar v. McDowell*, 6 Wallace Reports, p. 381, relative to rights of the President to reserve parcels of lands.)

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