# DECISIONS

OF

# THE DEPARTMENT OF THE INTERIOR

AND

# GENERAL LAND OFFICE

IN

# CASES RELATING TO THE PUBLIC LANDS

FROM JUNE 30, 1890, TO DECEMBER 31, 1890.

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# DECISIONS

RELATING TO

# THE PUBLIC LANDS.

---

RAILROAD GRANT—PRE-EMPTION FILING—INDEMNITY SELECTION.

NORTHERN PACIFIC R. R. CO. ET AL. *v.* JOHN O. MILLER.

A prima facie valid pre-emption filing of record at the date when a railroad grant takes effect excludes the land covered thereby from the operation of the grant.

The right to select a particular tract as indemnity can not be recognized if the loss for which indemnity is claimed is not specifically designated.

*Secretary Noble to the Commissioner of the General Land Office, July* 1, 1890.

The SE. ¼ of NE. ¼ and the NE. ¼ of SE. ¼ of section 19, T. 131 N., R. 40 W., Fergus Falls, Minnesota, are within the granted limits of the St. Paul, Minneapolis and Manitoba Railway company and also within the indemnity limits of the Northern Pacific Railroad company.

The rights of the former company (as stated by your office) attached December 19, 1871, and a withdrawal for the benefit of the latter was ordered by your office letter of December 26, 1871, received at the local office January 6, 1872.

On November 24, 1871, Jens Anderson filed pre-emption declaratory statement alleging settlement the same day upon the land described.

On January 30, 1884, the Northern Pacific Railroad applied to select the said land. Its application was rejected at the local office and the said company appealed.

On April 8, 1884, John O. Miller, alleging that the filing of Anderson had excepted the land from the grant to St. Paul, Minneapolis and Manitoba Ry., made homestead application for the same.

Thereupon a hearing, at which the applicant and the company last named were represented by counsel, was had at the local office on May 15, 1884.

On the same day the local officers found from the testimony that Anderson had made settlement, built a house, and resided upon the land

and that his claim being "capable of being perfected at the time the railroad grant took effect" excepted the land therefrom.

From this ruling an appeal was taken by the attorney for the company.

On September 16, 1885, your office held that Anderson's filing excepted the land from the grant to the St. Paul, Minneapolis and Manitoba Co., and also that the same "is not subject to selection as indemnity by the Northern Pacific Company because one company cannot go into the granted limits of another for indemnity lands."

From the foregoing both of the said companies have appealed.

At the date when as stated, the rights of the St. Paul, Minneapolis and Manitoba company attached, Anderson's filing was of record and *prima facie* valid. It, therefore, operated to except the tract from the grant to that company. Malone *v.* Union Pacific Railway Company (7 L. D., 13); Northern Pacific Railroad company *v.* Stovenour, decided June 7, 1890, (10 L. D., 645).

The claim of the Northern Pacific Railroad company to a right to select the tract involved is based upon the third section of its granting act (July 2, 1864, 13 Stats., 365), which provides that whenever prior to the definite location of its line of road

> any of said (granted) sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected in lieu thereof under the direction of the Secretary of the Interior in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said (granted) alternate sections.

The loss to its grant in the manner prescribed of a tract or tracts of land corresponding to those which it claims as indemnity is, under the stated provisions of its grant, an essential to the right of the company to so select.

That such losses should first be shown to the satisfaction of the land department, is obvious, for otherwise the indemnity claimed therefor could not properly be selected under the "direction of the Secretary of the Interior" or in other words, in accordance with the act of 1864, *supra*.

By circular approved August 4, 1885, (4 L. D., 90), the various local officers were instructed as follows:

> Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed specifying the particular deficiencies for which indemnity is claimed and in cases where indemnity selections have heretofore been made without specification of losses you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed.

The particular loss in lieu of which the Northern Pacific Railroad company seeks to select the land in question is not shown by the record before me and I am advised by your office that it has failed to designate the same.

The said application of the Northern Pacific Railroad is accordingly denied.

The homestead application of Miller, if in other respects regular, will therefore be allowed.

The action of your office in rejecting the respective claims of the said companies to the land described, is for the reasons stated hereby affirmed.

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### FINAL PROOF PROCEEDINGS—TRANSFEREE.

### JOHN HILDEN ET AL.

Where no cause is shown for failure to submit final proof on the day fixed therefor, but such proof is accepted by the local office, the defect may be cured by reference to the board of equitable adjudication.

A transferee in good faith may be accorded an opportunity to show the qualification of the pre-emptor.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July* 1, 1890.

I have considered the appeal of Daniel F. Law, transferee, from your office decision of October 9, 1888, holding the pre-emption entry of John Hilden for cancellation.

The record shows that on the 5th day of August, 1881, John Hilden filed his declaratory statement for the E. ½ SE. ¼, of Sec. 12, T. 8 S., R. 41 E., and lots 3 and 4, Sec. 7, T. 8 S., 42 E., B. M., in the local land office at Oxford, Idaho, alleging settlement on the 26th day of July, 1881.

July 21, 1882, notice was given that claimant would make his final proof before the deputy clerk of the United States court at Soda Springs, on the 25th day of August, 1882. Said proof bears date August 28, 1882, and shows the claimant to be a single man twenty-nine years of age and naturalized; that settlement was made on the land July 26, 1881, and that he built a house and corral thereon. Value of the improvements $200. It also shows that actual residence was established on the land in August, 1881, and was continuous thereafter to date of proof. No description of the house is given.

As to the quantity of land broken and cultivated, he answered "seventy-five acres," and says it was used for cutting hay. His witnesses say that the land was used for "pasturage and for cutting hay."

His proof was approved by the local office and the usual certificate of purchase given.

On the 8th of March, 1884, your office suspended the entry and required him to submit supplementary proof of "record evidence" showing him to be a naturalized citizen, or to have declared his intention to become such.

June 11, 1884, the local office reported to your office that he had been notified that he was required to furnish the record evidence required and notice returned "Hilden left the country," that his attorney was

also notified and stated in reply that Hilden had "left for parts unknown."

July 27, 1885, your office requested of the local office an immediate report showing what action had been taken by the local office and claimant.

August 3, 1885, the local office reported to your office that "neither John Hilden nor the present claimant to the land by purchase—Daniel F. Law—have taken any action in compliance with said requirement." With said report the local office also transmitted two letters of David D. Wright, written to the local office. In one of said letters, bearing date July 13, 1884, he states that "Daniel F. Law, the present occupant and owner (by purchase from Hilden) of said tract was by me duly notified as per request in your letter." Said report of the local office further shows that "said David D. Wright, as deputy clerk United States court, was the officer before whom John Hilden had made final proof in the case."

March 31, 1887, your office suspended the entry for the reason that the proof was not made in accordance with the published notice which fixed the time for making final proof for August 25, and proof was made August 28, 1882, and required claimant to make "new publication and new proof," and to furnish the record evidence of naturalization or declaration of his intention to become a citizen of the United States.

He was allowed ninety days to comply with or appeal from your said decision.

August 1, 1887, the local office reported to your office that notice of the requirements of your letter of March 31, 1887, was mailed by registered letter to the claimant and his receipt therefor, bearing date April 21, 1887, was returned to your office, and reported "no action has been taken, ninety-five days having expired from date of mailing."

By your office decision of October 9, 1888, you held the entry for cancellation giving sixty days for appeal.

November 21, 1888, the local office reported notice addressed to claimant returned "unclaimed" and also that the local officers had been informed that Hilden is, and has been confined, in the asylum for the insane.

March 6, 1889, your office directed the local office to notify Daniel F. Law, present owner, of your decision of October 9, 1888, holding said entry for cancellation and allowing him sixty days for appeal to the Hon. Secretary.

Daniel F. Law appeals from your office decision of October 9, 1888.

On January 20, 1890, you transmitted to this Department an application of appellant for modification of your decision holding the entry for cancellation, in so far as the requirement to furnish new proof is concerned, but proposing to transmit a copy of the naturalization papers of Hilden. The reason assigned for the non-compliance with the requirements of your office is that Hilden had been confined in the Insane Asylum of Idaho for some eighteen months prior to December 16, 1889,

when he was discharged as shown by the affidavit of the medical superintendent of the asylum.

One of the questions arising upon the record in this case is upon your requirement of October 9, 1888, requiring new notice and new proof for the reason the proof on file was taken three days subsequent to the time designated in the published notice. Where the officers of the local office have accepted the proof, and where no cause is shown for the delay, as in this case, then the defect may be cured by reference to the board of equitable adjudication, under section nine of final proof rules, dated July 17, 1889 (9 L. D., 123).

See Elias Rosenthal (10 L. D., 596).

The other question in the case relates to the right of appellant to furnish the necessary proof as to citizenship of the entryman and while I am not willing to sanction the laches as shown on the part of the appellant, yet in view of the insanity of the pre-emptor as shown, and all the facts and circumstances in the case, I am of the opinion that the appellant should have an opportunity to furnish the proof required by law as to citizenship of the pre-emptor; and under the circumstances, the appellant should show by affidavit the facts and circumstances connected with his purchase of the lands.

You will, therefore, direct that the transferee, or claimant be required to furnish supplemental proof within sixty days from notice hereof, showing compliance with the requirements of the pre-emption law as to the citizenship of the entryman, and also the facts and circumstances connected with the purchase by, and transfer of the lands to appellant Daniel F. Law.

You will readjudicate the case upon the receipt of such new evidence. In case of a failure to comply herewith in the time named, the entry will be canceled.

Your said office decision is accordingly modified.

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### CONTEST—COMPLIANCE WITH LAW PRIOR TO NOTICE.

### ANDERSON *v.* BULLOCK.

If the entryman prior to service of notice in good faith cures his default, the contest must be dismissed.

Actual knowledge of an impending contest will not prejudice the claimant if his subsequent compliance with law is in pursuance of a previous bona fide intent.

No preference right can be acquired under a contest begun and prosecuted for other purposes than in good faith to acquire title to the land.

*Secretary Noble to the Commissioner of the General Land Office, July 1, 1890.*

This Department, by decision of June 11, 1888, affirmed the decision of your office in the case of Lee W. Anderson *v.* Percy Bullock, holding for cancellation the latter's timber culture entry No. 8268, for the

NW. ¼ of Sec. 15, T. 110, R. 65, Huron district, Dakota. After notice of said decision, Bullock duly filed a motion for review and rehearing.

The entry was made April 1, 1882, and Anderson initiated a contest April 2, 1883, the day after the expiration of the first year of the entry. The ground of the contest was, that Bullock had failed "to break or cause to be broken five acres within a year from making said entry."

Notice was not issued on this contest until August 28, 1883, and service thereof was made on Bullock October 18, of that year.

Leaving the question of the bona fides of the entryman out of the consideration of this case, I think this motion for review must be sustained, for the reason that it seems that the fact relative to the claimant curing his laches after the time of the contest, and before notice thereof was served upon him, has been entirely overlooked in the former adjudications in this case. It is conceded that, while the contest was initiated April 2, 1883, notice thereof was not served on Bullock until October 18, 1883, long after the default set up in the contest had been cured. In the case of Scott *v.* King (9 L. D., 299), it is held that—

> The fact of compliance with law after affidavit of contest is filed and before *legal notice* thereof, goes to the weight, and not to the admissibility, of the testimony,
>
> and
>
> actual knowledge of an impending contest will not prejudice the claimant, if his subsequent compliance with the law is in pursuance of a previous bona fide intent.

It does not appear that claimant had knowledge of the contest the latter part of April, 1883, when Anderson completed the breaking. It is the uniform ruling of the Department that where the entryman, prior to service of notice of contest upon him in good faith cures his laches, that the contest must be dismissed. (Stayton *v.* Carroll, 7 L.D., 198; Hunter *v.* Haynes, ib., 8; St. John *v.* Raff, 8 L.D., 552.)

In consideration, however, of the fact that Anderson, as successful contestant, has been permitted, since the departmental decision, to make timber culture entry of the land, you are instructed, in order that he may have an opportunity to show cause why said entry should not be canceled, to direct the local officers to order a hearing to be had thirty days after notice thereof is served upon the parties. At this hearing any further testimony that can be had relating to the validity of Bullock's entry and particularly to the charge set up in the affidavit of contest may be submitted, and, also, testimony bearing upon the charges contained in a corroborated affidavit filed by Bullock with his motion for review, to the effect that Anderson offered on several occasions to dismiss his contest for a pecuniary consideration, and also proposed that, if Bullock would give up his claim, he (Anderson) would sell the land and divide the proceeds with him. If these charges are true, the contest of Anderson would appear to have been begun and prosecuted for other purposes than in good faith to acquire title to this tract. In either case, Anderson could acquire no preference right of entry by his contest. (Dayton *v.* Dayton, 8 L. D., 248.)

### PRE-EMPTION ENTRY—TIMBER LANDS.

GEORGE H. HEGEMAN.

The acquisition of title under the pre-emption law to lands chiefly valuable for timber, can only be permitted when the good faith of the claimant is clearly manifest.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 2, 1890.*

This is an appeal by George H. Hegeman from your office decision of March 13, 1889, rejecting his proof for the SE. ¼ Sec. 22, T. 16 N., R. 4 W., Vancouver, Washington, made in support of his pre-emption declaratory statement filed June 11, 1888, alleging settlement the 8th upon the tract named.

His declaratory statement was filed simultaneously with the like filings of George Ellis, William L. Horner and Louis F. Toellner, who also alleged settlement June 8, 1888, upon the NE. ¼, the SW. ¼ and the NW. ¼ of said section 22, respectively.

Proofs under said filings were made by Toellner and Ellis, December 14, 1888, and by Horner and the claimant (Hegeman) on the following day before the clerk of the district court for Chehalis county, and in each instance two of the parties named testified as witnesses to the proof submitted.

These proofs were as shown by the register's endorsement rejected at the local office September 20, 1888, for failure to show sufficient residence, cultivation and improvement.

The appeals of the several parties named were forwarded with a letter dated February 5, 1889, wherein the local officers set out that the said section was "densely timbered and more valuable now for its timber than for any other purpose," that the said filings had been made "upon the strength" of a telegram asking if said section was vacant, sent the local office by "J. C. Ellis of Olympia, a wealthy logger," the day preceding the date of said settlements (June 8, 1888), that the same were made under the supervision of Geo. C. Israel, a close friend and legal adviser of J. C. Ellis, a person who had been "reported guilty of unprofessional conduct relating to public lands."

Hegeman's proof set out that he was a single man twenty-eight years of age, that he made actual settlement on the land June 16, 1888, when he built a house and cleared one and a half acres, that his residence, established the same day, had been continuous, that his improvements valued at $320 comprised a log house twelve by sixteen feet with shake roof and board floor, woodshed, road, and one and a half acres prepared for crop and that the tract contains about one million feet of fir timber.

Along with his appeal, the appellant Hegeman files an affidavit made by J. C. Ellis, April 4, 1890, setting out that he had as an act of friendship sent said telegram at the request of his nephew George Ellis, then

in his employ and that he "was not at that or at any other time interested directly or indirectly in above said land."

The record shows the tract involved to be chiefly valuable for timber. This being so, the good faith of the claimant should be clearly shown before he can be allowed to acquire the same under the pre-emption law. Daniel R. McIntosh (8 L. D., 641); State of California *v.* Sevoy (9 L. D., 139).

That the claimant's good faith is not clearly shown is, I think, manifest. His proof showing meager improvements was made within about the briefest permissible period following the initiation of his claim, and when considered with the surrounding circumstances, in the light of which his good faith must be determined, fails to satisfactorily show that he went on the land for the purpose of rendering a *bona fide* compliance with the pre-emption law.

The decision appealed from is accordingly affirmed.

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MINING CLAIM—STATUTORY EXPENDITURE—ADVERSE RIGHTS—REVIEW.

NICHOLS ET AL. *v.* BECKER.

Failure to prosecute an adverse claim, or in other manner assert a right against a known pending application is conclusive as against the existence of such right.

The individual rights of an applicant are not waived by his executing, as president of a mining company, an agreement wherein certain interests adverse to said company are recognized.

The action of the Department, on an application for a mineral patent, can not be controlled by judicial proceedings instituted outside of the authority of section 2326 of the Revised Statutes.

Where several claims are embraced within one application, the annual work required by statute may be done on one of such claims for the common benefit of the claims included within said application.

Specifications of error, on motion for review, must be definite, and clearly set forth the particular facts or issues on which a ruling is desired.

*Secretary Noble to the Commissioner of the General Land Office, July 2, 1890.*

This is a motion by William H. Nichols, Joseph M. Marshall and John Truan for review of a decision of this Department, rendered February 28, 1889, in the case of William H. Nichols *et al. v.* Theodore H. Becker, involving the latter's application for patent under the mining laws, for certain claims on what is known as the "Bates lode," situated in Gregory mining district, Gilpin county, Colorado.

The decision complained of is a formal affirmance by the Department of a decision rendered by your office December 7, 1887, adverse to Nichols, *et al.* upon an appeal by them from a decision of the local officers, also adverse to them, in the matter of their protest against the issue of patent to Becker for the premises in question.

An intelligent consideration of the present motion, in view of the numerous errors assigned, seems to require that a full history of the case be given from the outset.

It appears that, on October 3, 1868, Theodore H. Becker filed in the local office at Central City, Colorado, his application (No. 73) for patent under the mining act of July 26, 1866 (14 Stat., 251), for three hundred linear feet of the Bates lode, known and described as claims Nos. 3, 4 and 5 on said lode, accompanied by a diagram and notice of his claim, and by his statement that he had "occupied and improved the said lode according to the local customs and rules of miners" in that district, and had "expended in actual labor and improvements thereon an amount not less than one thousand dollars." The required notice of his claim was posted and published for the full period of ninety days.

On October 28, 1868, one Lewis E. Johnson filed an adverse claim to the property in question.

On January 6, 1869, one O. J. Goldrick filed an adverse claim for the same property, but withdrew it on May 29, following.

On June 3, 1869, the Rocky Mountain Gold Mining Company, by G. E. Randolph, its attorney, filed certain papers purporting to be an adverse claim to said property; but because of insufficiency in the matter of certain departmental requirements, no record was ever made of the same.

On January 2, 1880, the adverse claim of Lewis E. Johnson was withdrawn by his attorney, and on the same day Becker submitted proofs in support of his application, whereupon the register issued his certificate to the surveyor-general to the effect that Becker was entitled to a survey of his claim. The surveyor-general, on January 8, 1880, granted the application, and designated the survey as No. 579.

On February 17, 1880, the local officers received from the surveyor-general an approved plat of mineral survey No. 556, for two hundred and twenty-three linear feet on the Bates lode, from which it appeared that the applicants therefor were William H. Nichols, John Truan and Joseph M. Marshall. The next day, Becker presented a protest against the filing of any application by Nichols and others for the premises described in such survey, setting forth the pendency of his own application, and alleging a conflict between his claim and such survey, and that no application by Nichols and others could be legally filed while his previous application is pending and undetermined.

On February 20, 1880, Nichols and others presented an application for patent for the claim covered by said survey No. 556, and asked that the same be filed. The local officers rejected the application on the day of its presentation because of the pendency of Becker's application covering the same premises.

Nichols and others, on February 24, 1880, filed an appeal. On the same day they presented and filed certain affidavits in the nature of a protest against the application of Becker, charging that no work had

been done or improvements made on his claim by any of the former owners thereof, or by anybody, for the period of "at least five years last past", and that the same had been forfeited and wholly and totally abandoned.

On March 19, 1880, your office having previously received from the local officers the appeal and affidavits aforesaid, instructed them to suspend further action on Becker's application, and to transmit all the papers relating to the case in order that it might be determined whether a hearing should be had on the question of abandonment as raised by said affidavits. The surveyor-general was also instructed to withhold his approval of the final survey of Becker's claim until further orders. The papers thus called for were transmitted March 26, 1880.

On July 8, 1880, your predecessor, Commissioner Williamson, having considered the case on appeal, affirmed the action of the local officers in rejecting the application of Nichols and others, and held that, inasmuch as their claim was not asserted during the period of publication of notice of Becker's application, it "was invalid and of no avail," could not in any sense be considered an adverse claim, and could not therefore have the effect to suspend proceedings under Becker's claim. The appeal was thereupon dismissed. Upon consideration of the affidavits transmitted with the appeal, however, the Commissioner, by virtue of the supervisory powers in him vested, ordered that a hearing be had to determine the question of Becker's alleged abandonment. From this decision, which passed upon and denied the validity of the claim of Nichols and others, no appeal was taken.

The hearing thus ordered took place before the local officers. It was commenced in August, 1880. Various continuances were had by stipulation of the parties, and the hearing was not completed until January, 1886, after your office had, by letter of October 16, 1885, specially instructed the local officers that the same must be proceeded with to a speedy conclusion. This long delay occurred apparently without objection from either party.

On January 28, 1886, the local officers made their finding in the case. It is as follows:

> Having carefully examined and considered all the testimony taken before this office, and all the evidence submitted and filed in this case, it is our joint opinion, that, said Nichols, *et al.* have failed to prove, as alleged by them, that the premises in controversy 'have been long abandoned, and no work done thereon by said applicant', but on the contrary, said applicant has shown that he has never failed to perform his annual assessment work on said claims embraced in his application for patent No. 73, filed in this office October 3, 1868.

From this finding Nichols and others filed an appeal February 20, 1886, and on June 1, following, their attorney forwarded to the Commissioner of the General Land Office a lengthy statement in writing, signed by Nichols, Truan and Marshall, and sworn to by Marshall, which is in the nature of a protest against the application of Becker, accompanied by a motion that the same be dismissed. On June 17, 1886, the Com-

missioner acknowledged receipt of said protest, stating that it would be taken up and considered when the case was reached in its regular order, for action on the appeal from the finding of the local officers. The matters alleged in said protest need not be here stated. While the appeal was pending, additional documentary evidence was filed by both parties, presumably under rule 72 of Practice.

On December 7, 1887, your office, after an elaborate discussion of the evidence in the case, affirmed the finding of the local officers, and rel ative to the motion to dismiss, based upon the protest aforesaid, it was stated that inasmuch as said motion "involves the same points raised by the appeal considered herein, it is therefore denied."

This is the decision, which on further appeal by Nichols and others, was formally affirmed by the decision now complained of.

Numerous errors (seventeen in all) are alleged in the motion for review, which upon examination are found to involve considerable repetition of substantially the same subject matter of complaint. Stripped of such repetition, and of unnecessary verbiage, the allegations are, in effect, that the Department erred in sustaining the decision of your office in the following particulars, viz:

I. In finding that Becker's title is traceable by a regular chain of conveyances from the original locators, who located claim No. three in 1859, and claims four and five in February, 1860.

II. In finding that Becker, at any time, had title to the premises in dispute, either by location, conveyance, possession, or otherwise.

III. In failing to consider the conveyance made in 1864 by Leighton and Starbuck to the Rocky Mountain Gold Mining Company, and other evidence showing that company's ownership, exclusive possession and occupation of the property in dispute, and of its extensive improvements thereon.

IV. In finding that the annual work required by statute was done on the property for the year 1878.

V. In failing to find that the property in dispute had been, by all former claimants of the same, or of any portion thereof, wholly abandoned prior to the year 1878, and that work had not been resumed thereon prior to the relocation by Nichols and others in 1879.

VI. In failing to consider as evidence in the case a judgment rendered in 1885 by a court of competent jurisdiction, to the effect that the possessory title to the property in dispute was not in Becker, and in refusing to recognize that judgment as binding against Becker.

VII. In not holding that upon the admitted facts Becker's claim does not fall "within the statute under which it was wrongfully asserted."

VIII. In failing to recognize the agreement in writing, made in 1871, between the Rocky Mountain Gold Mining Company and the Union Gold Mining Company, to which Becker was a party, as conclusive against him; and in considering testimony taken after the execution of said agreement, for the purpose of contradicting its terms.

IX. "In failing to consider material facts established by the evidence, and to decide material issues involved in the record, fairly presented by the evidence and the record."

In view of the fact that the hearing ordered in this case was for the sole purpose of determining the single question of abandonment, raised by the affidavits theretofore filed by Nichols and others, it must be apparent that the alleged errors as above set forth relate in great measure to matters not involved in said hearing, and which are wholly irrelevant to the issue therein presented. And in view of the further fact that no appeal was ever taken by Nichols and others from your office decision of July 8, 1880, which rejected their claim as invalid, and expressly recognized the validity and regularity of Becker's claim in all respects, except only as to the charge of abandonment, it is not seen how, upon any reasonable claim of right or justice, matters which are not pertinent to the issue joined upon that charge, can now be urged upon the attention of the Department, with avail to the present protestants against Becker's claim.

Inasmuch, however, as all the various complaints set forth in the motion for review, herein substantially stated as aforesaid, have been insisted upon with the greatest persistency by counsel for Nichols and others, accompanied by the charge, made with apparent freeness, that the case has never been heretofore properly considered, it has been determined, for these reasons alone, and not because of any recognized right in the parties complaining to demand it, to review the case upon all such matters, whether deemed pertinent to the issue tried at the hearing or not.

The abstract of title and title papers filed by Becker, show that by deed from Richard Sopris and William M. Slaughter, partners as Sopris and Slaughter, successors to Allen, Slaughter and Company, dated December 21, 1860, there was conveyed to Becker "Two claims (one hundred feet each) and a fraction of sixty feet on the Bates lode, being the whole of number one (1) and two (2) and a fraction of number three southwest of the discovery;" that by two several deeds dated, respectively, July 11, and July 12, 1867, said William M. Slaughter and Richard Sopris conveyed to Becker their respective interests in the remaining forty feet of said claim No. 3; that on February 25, 1860, Blenney and Clay placed of record, under the local rules and regulations then existing in said mining district, their preemption, covering one hundred and eighty feet of said Bates lode, being part of claims 4 and 5, and on November 3, 1861, conveyed the same to one C. R. Bissell; that said Bissell had a miner's pre-emption covering claimNo. 5 of said Bates lode, which appears to have been placed on record November 26, 1862; that by deed dated July 26, 1862, Bissell conveyed to Wesley Bowling two hundred feet of said Bates lode (being claims 4 and 5); that by deed dated March 13, 1863, Bowling conveyed the same to Joseph Kenyon; and that by deed dated October 1, 1868, Kenyon conveyed the same to Theodore H. Becker.

It is thus seen that Becker's title papers cover the whole of claims three, four and five; that a portion of claim three was conveyed to him in 1860, and the remainder in 1867, and that claims four and five were conveyed to him in October, 1868, just two days prior to filing his application for patent.

It is stated in an affidavit of said Richard Sopris filed in the record that the Bates lode was discovered in 1859; that affiant and his associates, Slaughter and Allen, in May, 1859, located and staked off three hundred feet of said lode, being claims Nos. one, two and three south west of the discovery; that they commenced work thereon immediately and held peaceable possession thereof until they sold and conveyed the same to Becker in 1860 and 1867; that at the time of the discovery of the Bates lode and the location of said claims Nos. one, two and three, there were no local laws, rules or regulations in the Gregory mining district requiring a record to be made of such discovery and location; that in July, 1859, affiant presided at the first miners' meeting ever held in said district, at which meeting a resolution was passed (transcript of which is furnished) providing that "all claims may be recorded, if the owners see fit; but no claim which is being worked shall be obliged to be recorded;" that affiant knows William E. Blenney and H. M. Clay claimed Nos. four and five of said Bates lode, lying just west of and adjoining the claims of affiant and his associates. The statements of this affidavit stand uncontradicted. They show that No. three was worked and possession thereof held by its locators, Sopris, Slaughter and Allen, until they sold to Becker, whereby a record of their claim was made unnecessary under the local rules then prevailing. It has been already shown that Nos. four and five were covered by claims duly recorded. The resolution referred to providing that claims which were being worked need not be recorded, would seem to imply that, if recorded, sufficient notice thereof would thereby be given, under the law at that date, though not being worked.

But it is objected that the ownership of this property was in the Rocky Mountain Gold Mining Company, and a deed to that company from John Leighton and William M. Starbuck, dated March 19, 1864, purporting to convey two hundred and twenty-five feet of the Bates lode, "being the property originally pre-empted by Clay and Blenney," is filed in the record, and testimony is introduced tending to show possession and occupation of the property in dispute, by that company under said deed, and that the company erected extensive and valuable improvements thereon during the time of such possession.

As to said alleged deed of conveyance, it is sufficient to say that it was not made until after the property had been conveyed by Clay and Blenney to Bissell, and by Bissell to Bowling, and by Bowling to Kenyon, who subsequently conveyed to Becker, and it could not, therefore, operate to pass to the Rocky Mountain Company any title, so far as this record shows, as against, or superior to, that purchased by Becker. And all contention herein, based upon the alleged occupation and im-

provement of the property by the Rocky Mountain Company must be set at rest by the fact that said company, with full knowledge of Becker's application, never attempted to prosecute an adverse claim, or in any other manner to assert its right, if any it had or claimed, as against Becker. Its attorney filed a notice of claim in 1869, but without any proof, abandoned it and never afterwards moved in the premises. The inference clearly is that said company acknowledged Becker's superior claim, and was content not to assail it.

The first, second, and third specifications of error are thus disposed of. Passing the fourth and fifth for the present, notice will be next taken of the sixth. It is here complained that proper consideration has not been given to a judgment of the circuit court of the United States for the district of Colorado, rendered in 1885, in a certain ejectment suit then pending therein in the name of the Bates-Hunter Consolidated Mining Company against said Nichols and others, the object of which was to try the right of possession to the property in question. The judgment was based upon the verdict of a jury in favor of the defendants in said suit; and the plaintiff, being the assignee of Becker, it is contended that such judgment is binding upon him and conclusive against his claim to the property.

This contention, in my judgment, cannot be sustained. In the first place, the suit referred to was not a proceeding instituted in accordance with the provisions of section 2326 of the Revised Statutes, and therefore no judgment rendered therein, whatever it might be, could in any way bind the Land Department or control its action in this case. This case must be decided upon the record *here* presented. The verdict of the jury in that suit was based upon the evidence produced at the trial in court, a portion of which only is filed in this record.

But again, the judgment rendered upon the verdict was afterwards set aside under a special statute of Colorado (Rev. Stats., Colo., 1868, ch. 27, sec. 26), and a new trial ordered. Under this statute the defeated party was entitled to a new trial as a matter of right. (Vance *v.* Schuyler, 1 Gilm. 160). Before the new trial was had, the plaintiff appeared in court and dismissed its suit. There is now, therefore, no judgment of the court to bind anybody.

The seventh alleged error (which is the twelfth in the original assignment by counsel) is that upon the admitted facts Becker's claim is not "within the statute under which it was wrongfully asserted." This allegation is too general and indefinite to admit of intelligent consideration. No conceded facts are pointed out in support of the assertion that Becker's claim is not within the statute, nor is attention called to anything in the record tending to show that such claim was "wrongfully asserted" thereunder.

The same criticism applies with equal force to the ninth alleged error. It is equally indefinite and can in no reasonable sense be termed a "specification" of error. It is wholly insufficient in a motion for review

to simply allege failure "to consider material facts established by the evidence," or failure "to decide material issues involved in the record," without specifying the particular facts or issues with reference to which consideration is sought for a ruling desired. The grounds of error should be clearly and specifically set forth. (Geo. W. Macey, *et al.* 6 L. D., 781; Long *v.* Knotts, 5 L. D., 150; Albert H. Cornwell, 9 L. D., 340; Bright *et al v.* Elkhorn Mining Co. id. 503).

Complaint is made in the eighth item of alleged error that effect has not been given to the agreement in writing, made in 1871, between the Rocky Mountain Gold Mining Company and the Union Gold Mining Company, relating in part to the property now in dispute. A copy of this agreement is on file in the record. It is signed by George E. Randolph as attorney in fact for the Rocky Mountain Company, and by Theodore H. Becker as President of the Union Gold Mining Company. Prior to its execution, certain controversies had arisen between said companies relative to their mining operations on the Bates lode. By the agreement it was provided, to the end that such controversies might be amicably settled and a permanent boundary line established between the contending parties, that the west line of claim No. three should be established as such boundary line; and the respective agents of such companies were authorized to make and did make quit-claim deeds from each to the other, in conformity with such agreement. This agreement gave to the Union Company whatever rights the Rocky Mountain Company had, if any, to that part of the Bates lode lying east of the west line of No. three, and to the Rocky Mountain Company whatever rights the Union Company had, if any, to that part of said lode lying west of the west line of No. three. It is contended that, inasmuch as Becker signed said agreement as President of the Union Company, he is for that reason estopped from asserting in this case any individual right or title to claims four and five, they being west of the boundary line thereby established. Though this contention has been most strenuously persisted in by counsel, I am wholly unable to conceive of any principle of law or force of reasoning upon which it can be sustained. The agreement was signed by Becker, not in his individual capacity, but as the executive officer of the Union Company. While it is binding upon the company, it can in no sense be considered as in any manner affecting the individual rights of Becker, if any he had, to the property which was the subject matter thereof. By it the Union Company surrendered to the Rocky Mountain Company only such rights as it *had*, if any, to claims Nos. four and five. If it in fact had any rights to surrender, and they were then known, or afterwards proved to be inferior to the individual rights of Becker, his signature to the agreement as President of the Company was not an act which could operate to estop him from afterwards asserting his individual rights as against any claim of the Rocky Mountain Company based upon said agreement. The statements in said agreement, apparently recognizing some sort of claim in the

Rocky Mountain Company to Nos. four and five at the date of its execution, are not the statements or admissions of Becker, as claimed by counsel, but of the Union Company, and it is perfectly plain that such admissions, if such they be, cannot bind Becker in his individual capacity.

But in addition to this it clearly appears from the evidence in the case that both said companies, at the time said agreement was made, had full knowledge of Becker's claim of title to Nos. three, four and five, and that it was not intended by said agreement to in any way compromise his individual rights in the premises, but, on the contrary, it was then and there understood by all parties that he should proceed to perfect his title by obtaining patent under his application filed October 3, 1868. This was testified to by Becker at the hearing, and he also testified that the Union Company never had or claimed to have any title to any part of Nos. three, four and five, nor any interest therein hostile to his.

Becker's testimony is fully corroborated by affidavits filed in the record of George H. Potts and George B. Satterlee, the latter of whom was trustee for the Rocky Mountain Company when said agreement was made. It is shown by these affidavits that, prior to the execution of the agreement, Becker, on several occasions, notified the Rocky Mountain Company that he was the owner of the property described in therein, and exhibited to its attorneys his title papers to claims three, four and five; that said agreement was signed with the understanding that it should in no wise affect Becker's individual claim to the property, the sole object thereof being to settle the controversies then existing between said companies; that Becker, at the time, gave notice of his pending application for patent for claims three, four and five, and it was further agreed between said companies that their said settlement should in no manner affect the rights of Becker under his said application.

It is objected that this evidence was introduced for the purpose of contradicting the terms of said agreement, and for that reason is inadmissible. There is, however, nothing in the testimony that tends in the least to vary or contradict the agreement. It shows the circumstances attending its execution and was introduced as explanatory of its provisions, and not for the purpose of contradicting its terms. It is clearly admissible. (1 Greenl. secs. 277–282–286–295 [a]; Thorington *v.* Smith, 8 Wall., 1; M. & M. R'y Co. *v.* Jurey, 111 U. S., 584; United States *v.* Peck, 102 U. S., 64; Reed *v.* Insurance Co. 95 U. S., 23; Canal Co. *v.* Hill, 15 Wall. 94). In view thereof, there is no foundation whatever, in my judgment, for the contention of counsel in respect to said agreement.

This brings me to consider the fourth and fifth assignments of error, as above stated. Herein is involved the real gist of the only present legitimate controversy in this case. It is alleged that the Department erred in finding that the annual work required by statute was done on

the property in 1878; and in not finding that the property was wholly abandoned by Becker prior to 1878, and that work was not resumed thereon until after the relocation by Nichols and others in 1879.

Upon this question there is some conflict in the testimony, but the respective decisions heretofore rendered by the local officers, by your office, and by this Department have all been in favor of Becker. After a careful review of the whole record in the case, I see no reason for reversing these uniform rulings. The conflict referred to is rather apparent than real, and the evidence in my opinion fully justifies the finding of the local officers, which has been affirmed throughout. The testimony for protestants is uncertain in character, being positive only to the extent that the witness knew of no work being done on claims three, four and five during the year 1878 by Becker or by any one for him, while a number of witnesses for Becker testify positively that work was done on the claims for every year of the alleged abandonment, and that the work was done for Becker, and at his expense. The claims were worked underground and it is not at all singular that the required amount of work should have been done without being observed by the witnesses for protestants. True, the work was done principally on claim No. three, one witness only testifying that he worked on No. four, during the time (1878) of the alleged abandonment; but the work was done for all the claims (Nos. three, four and five) included in Becker's application. This was in every respect a compliance with the statute. Smelting Company *v.* Kemp (104 U. S., 636–653); Chambers *v.* Harrington (111 U. S., 350); Good Return Mining Company (4 L. D., 221); S. F. Mackie (5 L. D., 199–201). There is, therefore, nothing in the contention that the annual assessment work should have been done on each of the several claims applied for by Becker.

In view of the great pertinacity with which the present motion has been urged by counsel for protestants, the whole record in the case has been examined with great care, and every objection made by the motion has been considered. From this examination I am satisfied that no sufficient grounds for granting the motion exist, and the same is denied.

HOMESTEAD SETTLEMENT—SECTION 2287 R. S.—RES JUDICATA.

HENRY W. LORD.

One who settles upon public land in good faith under the homestead law, and is subsequently appointed register before the land is opened to entry, is entitled to perfect his claim under section 2287 R. S., the same as though it had been initiated by an application to enter.

A settlement made with the intention to secure title through the provisions of section 2287, and without residence on the land, is not in good faith, and does not authorize a purchase under said section.

Section 2287 authorizes the perfection of a pending homestead claim through payment for the land, and not through a constructive residence thereon.

An expression of opinion by the Commissioner as to the validity of an entry pending before the local office, will not preclude said Commissioner, or his successor, from a full examination of the case when it is reached in regular order.

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

Henry W. Lord made homestead entry of the S. ½ of the SE. ¼ Sec. 29, lot 4, Sec. 33, and lots 1 and 2, Sec. 33, and the SE. ¼ of the SW. ¼, Sec. 28, T. 154 N., R. 64 W., Creelsburg, afterwards Devil's Lake, land district, Dakota, on September 29, 1883, the day on which the approved plat of the township was filed in the local office. Subsequently, he relinquished the SW. ¼ of the SE. ¼ of Sec. 29, and on May 2, 1888, made final proof of the remaining land embraced in his entry, upon which final certificate issued.

Your office held that the issuance of said final certificate was illegal, and that the entry should be canceled, for the reason that the record shows that "Lord did not establish an actual bona-fide residence before he made his homestead entry, and that he has failed to maintain (if established) any residence since the date of his expiration of office." From this decision the claimant appealed.

The facts in this case are substantially as follows:

In the spring of 1883, Henry W. Lord, then being in the city of Washington and an applicant for appointment to the office of register for the local land office, which subsequently became the Devil's Lake land office, went to Dakota for the purpose of entering government lands, and on April 30, of that year settled upon the tract of land in controversy, built a house, moved into it, and occupied it from April 30, to May 5, following, when he returned to Washington. On May 22, the President designated Creelsburg (afterwards known as Devil's Lake) as the site for the office of one of the three additional land districts in the Territory of Dakota, provided for by the act of March 3, 1883, and on the same day Lord was appointed register of said district. On September 29, the township plat was filed in the local office, and on the same day Lord made homestead entry.

The motive of claimant in going from Washington to Dakota in April,

1883, was to select a tract for a homestead and to make settlement thereon prior to his appointment, as shown by a letter addressed by claimant on October 7, 1883, to the principal clerk of public lands, from which the following extract is taken:

I was largely indebted to you for the suggestion in March, when it was probable that I would be appointed to this office, that I would have a right before such appt, to enter a quarter section of land. I came out here in April, mainly for that purpose, made a selection, built a house and occupied it until I left in May for Washington on business connected with the location of the office. Late in May, after that, I was appointed register. Now, I see in looking at the law, paragraph or Sec. 2287, that it is provided that 'any bona fide settler who has filed, etc., and subsequently appt.' etc. Now, of course, I could not *file* as the lands were unsurveyed until recently. Plats were rec'd a few days ago, and then I filed, which was the earliest possible to do so, and my filing with a special affidavit has gone forward to Washington, with the others. What I want to trouble you about is, whether I am in danger of a technical difficulty about the filing. I suppose, it not being possible to file, that my squatter's right, with occupancy, would stand for filing until surveys were in, as in the case of any other settler.

This letter was accompanied by the affidavit of claimant, stating that the settlement and improvements were made as above set forth, and to this the Commissioner of the General Land Office, under date of April 22, 1884, replied:

Your homestead entry as an entry made under section 2287 appears regular, and will be allowed to stand, subject to the usual conditions.

On March 15, 1888, Lord gave notice of his intention to make final proof in support of his claim before the register and receiver at Devil's Lake land office on May 2, 1888. Prior to the day on which the proof was to be taken, to wit: April 18, 1888, Lord's term of office expired, and E. G. Spillman, his successor, assumed the duties of register, and Lord made his final proof before Spillman.

The proof appears regular in form. The improvements valued at $583. The estimated value of the land $2000. The land was cropped to wheat each season. In the year 1885, fifteen acres yielded three hundred bushels; in 1886, twenty-five acres yielded six hundred bushels, and in 1887, sixty-seven acres yielded fifteen hundred bushels. In 1888, seventy-five acres were prepared and sown to wheat. Several thousand young trees were planted on the land in 1885, and were growing.

The testimony of claimant in his final proof is fully corroborated by his witnesses.

From the time Lord entered upon the duties of his office, August 1, 1883, until his time expired, he resided at Creelsburg with his family, consisting of himself and wife; he was also necessarily detained at the office until April 30, in closing official matters incident to his official services.

From the foregoing statement of facts, it may be reasonably concluded that Lord's settlement upon the tract in controversy was not made with the bona fide intention and expectation of residing upon it as required

by law, but for the sole purpose of acquiring the land under section 2287. This is apparent from the admission in his letter above referred to, that when it was probable he would be appointed to office he went to Dakota mainly for the purpose of making a selection of the tract, acting upon the suggestion of a clerk in the general land office that he would have the right to enter a quarter section of public lands, if made before his appointment to office, and, as the law (Sec. 2235, Revised Statutes) requires that "Every register and receiver shall reside at the place where the land office for which he is appointed is directed by law to be kept," it is evident that he knew, at the time of his settlement and entry, that he could not maintain a residence on the tract and at the same time perform the duties of the office of register of the Devil's Lake land office.

Section 2287 of the Revised Statutes, under which Lord contemplated acquiring title to the land in controversy when he selected it and made settlement, is as follows:

> 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.

This section is taken from the act of April 20, 1871 (17 Stat., 10), and at the date of the passage of said act and of the revision of the statutes, title could only be initiated under the homestead law by actual entry at the local office. But the third section of the act of May 14, 1880 (21 Stat., 140), provided—

> That any settler who has settled or who shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws.

This act did not enlarge the right given under section 2287, except so far as to allow the claim to be initiated by settlement instead of entry, and I think there can be no question that the settlement of Lord, made April 30, 1883, followed by entry made the day the township plat was filed, conferred upon him as much right to perfect title under section 2287 as if the land had been surveyed, and entry was actually made on that day. In either case, the initiation of the right must have been bona fide, whether by entry as originally provided, or by settlement as provided for by the act of May 14, 1880.

Section 2287 was evidently intended for the relief of settlers who had been appointed to the office of register and receiver after they had made entry of the land, with full expectation and intention of complying with the law as to residence and improvements, by allowing them

to perfect title under the pre-emption laws by making proof and payment to the satisfaction of the Commissioner. From the fact that the law requires that title shall be perfected under the pre-emption law by making *payment*, it is evident that it was not the intention of Congress to allow a homestead entry to be perfected under the homestead law by persons who by being appointed to the office of register or receiver were prevented from complying with the law as to residence for the time required, or that such appointees, even after a bona fide residence had been established, could maintain a constructive residence on the land while engaged in the discharge of his official duties as register or receiver. If it had been intended that such absence should be considered a constructive residence for the period of their official term, it would have provided that title could be perfected under either the homestead or pre-emption law accordingly as the claim was initiated.

But I am also of the opinion that settlement or entry made under such circumstances as are shown by the record in this case, by a person who was afterwards appointed to the office of register or receiver, confers no right upon such person to purchase under section 2287. That section, as before stated, was only intended for the relief of persons who had expended time and money upon a tract of land settled upon or entered under such circumstances from which it could not be reasonably presumed that they did not intend or expect to comply with the law and perform the full consideration required by law of other settlers, by establishing and maintaining a bona fide residence. This is the consideration for allowing such persons, who were afterwards appointed to the office of register or receiver, to purchase the land ; a payment of money being required because it was known that from the nature of the employment they could not maintain a residence on the land and at the same time comply with the law, which requires the local officers to reside at the place where the land office for which they are appointed is directed by law to be kept.

If the settlement is made, as in this case, merely for the purpose of securing the land as a gratuity, without fulfilling the consideration of residence required by the statute, and knowing at the time that the duties of the office would prevent the maintenance of residence on the land, such a settlement or entry is not bona fide within the meaning of the statute or of the character contemplated by it.

Nor do I think that the opinion of the Commissioner, as expressed in the letter of April 22, 1884, would authorize the Department to allow the claimant to purchase under section 2287, although he may have made the improvements upon the faith of said opinion.

The allowance of an original entry by the General Land Office will not preclude the Department from determining whether the land was legally subject to entry when the case comes up for disposition on final proof. Charles W. Filkins, 5 L. D., 49. Nor will an expression of opinion by the Commissioner of the General Land Office as to the valid-

ity of an entry pending before the local office preclude said Commissioner or his successor from a full examination of the same when reached in its regular order, and from ordering a hearing on the merits of the claim. George A. Brock, 5 L. D., 610; Robert Hall *et al*, id., 174.

Besides, in this case the letter of the Commissioner appears to have been in response to an unofficial communication addressed to the principal clerk of public lands, asking his individual opinion as to the right of the claimant to make entry under the circumstances detailed. The Commissioner had no right to exempt claimant from fulfilling any essential requirement of the law, but it now being before the Department in its regular order, it will be acted upon as if no such opinion had been expressed, as stated in the case of Brock, above cited.

Being satisfied that the final certificate in this case was improperly issued, and that I have no authority to pass this claim to patent, or to allow a purchase under section 2287, your decision holding said final certificate and entry for cancellation is affirmed. If this claimant is entitled to relief by reason of acting upon erroneous advice given by the land office, it must be by Congress, or by making entry under the second section of the act of March 2, '89 (25 Stat., 854), allowing persons, who have not perfected title under the homestead laws, to make homestead entry of not exceeding one hundred and sixty acres of public land subject to such entry, such previous entry to the contrary notwithstanding.

Should he determine to make a second entry under the act aforesaid, he will be allowed thirty days in which to exercise this right.

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### HOMESTEAD CONTEST—MARRIED WOMAN—RESIDENCE.

### BULLARD *v.* SULLIVAN.

A husband and wife, while they live together as such, can have but one residence, and the home of the wife is presumptively with her husband.

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

I have considered the appeal of Mary Anne Haywood, formerly Sullivan, from the decision of your office in the case of Robert L. Bullard *v.* Mary Anne Sullivan, holding for cancellation the latter's homestead entry for NW. ¼ of the SE. ¼ and E. ½ of the E. ½ of NW. ¼ of the SE. ¼, and S. ½ of the SE. ¼, and E. ½ of the SE. ¼ of SW. ¼, and SW. ¼ of the SE. ¼ SW. ¼, Sec. 20, T. 3 S., R. 14 E., Stockton land district, California. The record shows that Mary Anne Sullivan made homestead entry for said tract October 30, 1880, and on September 7, 1886, Bullard initiated a contest against the same, alleging that the said "Mary Anne Sullivan has wholly abandoned said tract; that she has changed her residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required

by law; that she has never resided upon said land and made it her home."

Thereupon hearing was ordered and had at the local office and from the evidence submitted thereat, it found in favor of contestant and recommended the entry for cancellation.

From this judgment Mrs. Sullivan appealed to your office and you affirmed the findings of the register and receiver and held the entry for cancellation. She again appealed. From an examination of the evidence I find that both parties were personally present and testified at the hearing and evidence shows that when the claimant made her entry she was a widow and the head of a family consisting of two daughters and a son, all under the age of nine years. During the latter part of November, 1880, she built a board house ten by twelve feet in size upon the tract, furnished it with articles of household furniture suitable to her means, and established residence thereon with her family.

Three months and eight days after she made her entry (Feb. 8, 1881), she married Seth B. Haywood, a resident of La Grange, Cal., and went to reside with him at La Grange. In August, 1881, she removed with her husband to a quarter section of land four or five miles from La Grange, commonly called the "Junction." He made his homestead entry for said land December 14, 1881, and which is described as the SE. ¼, Sec. 25, T. 3 S., R. 14 E., in the same land district.

Claimant testified that she never intended to abandon her homestead; that she made it for the benefit of her children: that she was never absent from her claim six months at any one time, from the date of entry up to the initiation of this contest; that since her marriage to Haywood and up to the time of the hearing, she lived a portion of each year on her claim, with one or more of her children, and the balance of the time she resided with her husband, and on his claim, and that during such periods as she was personally present on her land, her oldest daughter kept house for her step-father.

The testimony of both parties shows that the land in dispute is mostly valuable for grazing purposes, and not more than from three to five acres of the whole tract are susceptible of cultivation. Her improvements consisted of her frame house, and a fence enclosing about half an acre. She owned four or five head of cattle, which she pastured on the tract each year; she testified that her house had been burglarized two or three times during her absences, but that she replaced the articles stolen and had been residing in her house on her claim with her son from May, 1886, continuously up to the time of the hearing; that she visited her husband's claim occasionally during said period but only remained for a short time.

It sufficiently appears from the record in this case that both claimant and her husband are endeavoring to maintain separate residences at the same time, so that each by virtue of said residence may perfect title to land covered by their respective entries. This can not be done.

In the case of Thomas E. Henderson (10 L. D., 266), it was held that a husband and wife while they live together as such, can have but one and the same residence;" and as "the home of a married woman is presumptively with her husband," Angie L. Williamson (ib., 30), I think the decision appealed from is a proper determination of the rights of the parties, and the same is accordingly affirmed.

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### OKLAHOMA TOWN-SITES—CIRCULAR.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *July* 10, 1890.

*To the Trustees of Town-sites*
*in the U. S. Land Districts,*
*Oklahoma Territory.*

To remove any doubts that may exist under regulations dated June 18, 1890, as to how the costs of contests are to be paid, you are hereby instructed that your first duty, as stated in section 10 and the last clause of section 13, is to proceed on the day designated in the notice published, to set apart, except in contest cases, the lots, blocks, and grounds, with the improvements, respectively, to each person or company entitled thereto. You will at this point, and before proceeding to contests, make assessment on all the lots embraced in the town-site, so that each shall bear its fair proportion of all the expenses mentioned in section 15, and no further assessments shall be made on uncontested lots that may be required to meet expenses resulting from contests as to other property. You will then, and not before, proceed to dispose of the contested cases, and you will require each claimant to deposit with the disbursing officer of the board each morning, a sum sufficient to cover and pay all costs and expenses on such proceedings for the day, including the items mentioned in regulation numbered 15, because by section 8 of the act of Congress, under which you are to proceed, all disbursements from the appropriation made must be refunded to the Treasury of the United States. At the close of the contests, on appeal or otherwise, the sum deposited by the successful party shall be restored to him subject to the rules in such cases; but that deposited by the losing party shall be retained and accounted for by the disbursing officer of the board.

Very respectfully,

JOHN W. NOBLE,
*Secretary.*

ATTORNEY—EMPLOYE OF LOCAL OFFICE—SECTION 190 R. S.

SHARITT *v.* WOOD.

A clerk in a local office is within the provisions of section 190 R. S., and is prohibited thereby during the period specified, from appearing as attorney in a case that was pending in said office while he was a clerk therein.

Proceedings had at the instance of an attorney disqualified under section 190 R. S., will not be recognized by the Department.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July* 10, 1890.

I have considered the appeal of Washington Wood, Jr., from the decision of your office dated October 12, 1888, in the case of Benjamin T. Sharitt *v.* said Wood, involving the latter's homestead entry for the SE.¼ of SW.¼, Sec. 22, T. 16 S., R. 2 W., Montgomery land district, Alabama.

August 7, 1886, Wood applied to make homestead entry for said land which was refused and the following endorsed on his application,—"Rejected August 7, 1886, because land is classed as coal." From that action Wood appealed.

On August 10, 1886, Sharitt made application to enter the same tract as an adjoining farm homestead, which application was also refused and the following endorsed thereon—"Rejected August 10, 1886, land classed coal."

Your office after considering Wood's appeal directed that his application be allowed and certificate and receipt were issued bearing date of January 4, 1887.

April 27, 1887, Sharitt filed an affidavit of contest alleging that the said

Washington Wood, fraudulently made said entry of said tract, that he, the affiant made application to enter said tract in person to the register of this land office at Montgomery, Ala., and filed his application with said register and paid him six dollars ($6) in the morning of the 4th day of August, 1886, and affiant claims prior right to enter said land.

Hearing was set for November 9, 1887, and notice of contest was served September 7, 1887. Hearing was continued to the second Tuesday in March, 1888, and again to July 5, 1888, and depositions of certain witnesses for contestant ordered taken before a commissioner of Montgomery, Alabama, June 27, 1888. On the day appointed for the taking of said depositions contestant appeared in person and by his attorneys, Samuel Thompson and W. E. Brown. Claimant also appeared in person and by his attorney, and several witnesses were sworn and testified, and their testimony transmitted to the local office.

July 31, 1888, this case having been called for final hearing W. E. Brown appeared as attorney for contestant.

Claimant appeared in person and by attorney and moved that the

testimony taken before the commissioner at Birmingham, be excluded from the record and not considered in this case for the reasons that one of contestant's attorneys (Samuel Thompson) was at that time and is now disbarred from practicing or appearing in any manner as an attorney or agent for any one before the local land office; and that the associate attorney (W. E. Brown), who appeared for contestant before said commissioner, "was, at the time that Wood and Sharitt made their applications before the local land office, the chief clerk in charge of the register's office, and as such had charge of the applications, and particularly do the records show that he had charge of and did the letter writing in the matter of the application of said Sharitt," and further asked that said Thompson and Brown be each excluded from appearing as atorneys in this case in any future proceedings therein.

W. E. Brown in reply to said motion stated that he (Brown) was employed by contestant as his attorney March 5, 1888, that he was not connected with Samuel Thompson in this case; that he had known that Thompson had been disbarred by direction of the Secretary of the Interior, July 14, 1888, that he (Brown) appeared before the commissioner as Sharitt's attorney and conducted the examination of witnesses.

The local office overruled claimant's motion and held that "We can see no legal reason why W. E. Brown should not act as attorney for Sharitt."

Claimant appealed and on October 12, 1888, your office affirmed the action of the local office, whereupon claimant appealed to this Department.

The ruling of the local officers upon the motion to exclude the testimony in this case was interlocutory and therefore was not properly subject to appeal. The proper course would have been for your office to dismiss the appeal and return the case to the local office for a final decision. Inasmuch, however, as this was not done, and as a dismissal of the appeal now would tend to protract litigation, it would seem to the interest of all concerned to have the question here presented determined at this time, and I have for these reasons concluded to consider and pass upon this appeal.

It appears that said W. E. Brown, whose right to appear as attorney in the taking of the depositions in question, is in dispute, was in the month of August, 1886, when the respective applications of Wood and Sharitt were presented, chief clerk in the register's office and that he continued in that position until October 18, 1886, when he resigned. The decision of your office is upon the theory that the section referred to and the decision of this Department in the case of Luther Harrison (4 L. D., 179), do not apply in this case. I do not understand upon what ground such conclusion is based. The decision referred to is broad enough to cover all clerks or employés and was evidently intended to do so. The letter of your office (3 B. L. P., 399), holding that this section of the Revised Statutes does not apply to employés of the

local land offices was not approved by this Department and did not overrule the decision in the Harrison case. That letter refers to an opinion of the Attorney-General (15 Op., 267), holding that under the act of March 3, 1877, providing for the transmission through the mails free of postage, letters, etc., relating exclusively to the business of the government, the use of the official envelopes provided for was limited to the Executive Departments and the bureaus or offices therein at the seat of government and did not extend to subordinate officers throughout the country. The language used in the section now under consideration is, however, broader and at the same time more specific in its description of the persons falling within its provisions than was the act then being construed by the Attorney-General. Section 452 of the Revised Statutes which prohibits "the officers, clerks, and employés in the General Land Office from purchasing the public lands has been and is held to include clerks and employés in the local offices. The section now under consideration relates to any person employed "as an officer, clerk, or employé in any of the Departments" and must be held to include persons employed in the local offices. The arguments employed in the decision in the Harrison case are just as applicable to this class of employés as to any other. Brown was not at the time these depositions were taken, under the provisions of section 190 Revised Statutes, entitled to appear as an attorney in said case and the proceedings had at his instance as such attorney cannot be recognized by this Department.

The decision appealed from is reversed, and the objection to the depositions so taken is sustained. The papers in the case are herewith returned, and you will direct the local officers to proceed with the hearing in this case with as little delay as possible.

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### DESERT LAND ENTRY.—ALIENATION.—COMPACTNESS.

### THOMAS HUNTON.

An oral promise of the claimant to convey, after perfection of title, a portion of the land in payment of money advanced for the reclamation thereof, does not necessarily call for cancellation of the entry where good faith is apparent.

The nature and location of land, its means and facilities for irrigation and the right of adjacent entrymen are properly matters for consideration in determining whether a desert entry is sufficiently compact to answer the requirements of the law.

A desert entry may be referred to the board of equitable adjudication where the final proof is not submitted within the statutory period, and the delay is satisfactorily explained.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July* 10, 1890.

The record in the case of Thomas Hunton shows that on the 24th day of March, 1880, he made desert land entry No. 178, for the NE. ¼ and SE. ¼, sec. 15, the NW. ¼ of the SW. ¼ and S. ½ of SW. ¼, sec.

14; the NW. ¼ and NE. ¼ of SW. ¼, sec. 23, T. 23 N., R. 67 W., Cheyenne, Wyoming, and made final proof and payment on the 19th day of August, 1884, and received final certificate No. 121, September 8, 1884.

By your office letter of July 27, 1887, this entry was held for cancellation, on the ground—

(1) That in his final proof, Hunton admitted that he had agreed to let his brother have one-half the land.

(2) That the entry is not sufficiently compact, the distance from the northernmost to the southernmost boundary being one and three-fourths miles.

(3) That proof was not made until subsequent to the expiration of the statutory period.

On the 6th October, 1887, Hunton made application, accompanied by affidavit, for a hearing, which was afterwards withdrawn, and on March 21, 1889, a stipulation was signed by E. N. Bonfils, special agent of the General Land Office, and Gibson Clark, attorney for Hunton, with the approval of the Commissioner of the General Land Office, "that the facts alleged in said affidavit (meaning the affidavit of Hunton aforesaid) are true and that said affidavit sets forth all the facts material to said matter, and that the said matter may be considered and determined upon the facts sets forth in said affidavit."

On consideration of said facts, your office on April 11, 1889, again held said entry for cancellation, from which decision Hunton now appeals to this Department.

The affidavit referred to reads as follows:

Thomas Hunton being first duly sworn on his oath, says:

I am the same person who made the above described desert land entry. I made the entry originally at the Cheyenne Land Office on the 24th day of March, A. D. 1880. The number of my declaration being 178. I made said entry in good faith for my own exclusive use and benefit, and paid the first payment of 25 cts. per acre therefor out of my own personal monies. Thereafter I expended in the improvement and reclamation of said lands at least six hundred dollars out of my own personal monies, but the land costing me very much more to reclaim it than I had at first expected, I from time to time borrowed money and procured assistance from my brother, John Hunton, to the amount of four thousand dollars, the greater portion of which sum I used in building ditches upon, fencing, irrigating and otherwise improving this land. This money I received from my brother John Hunton in and during the years 1881, 1882, 1883, and 1884. He had no interest of any kind whatever in the land, and there was no agreement of any kind between us that he ever should have any interest of any kind in it, until some time in the year 1884, about the time I made final proof upon the land and after I had fully reclaimed it, that he spoke to me about the amount of money he had advanced me as before stated, and I then told him that after I had proved up on the land and acquired title to it, he might have a one-half interest in it in payment of the amount I owed him, if he desired it. There was no written agreement between us, conveying or promising to convey any part of the land or any interest in it to him, and no other agreement of any kind concerning said land between us, than that above stated, which was wholly verbal. It was the facts above set forth and none other, which led me to make the statement in my final proof in answer to question 18, as set forth in my final proof deposition, and I made said statement simply in order that I might fairly, fully and truthfully place the officials of the land office in

full possess on of all the facts in the case. In regard to the alleged want of compactness in the form of the entry, it will be impossible to make the entry in more compact form, except by the relinquishment of certain portions, to do which would be a total loss, for the reason that there are no vacant, unoccupied public lands adjoining the lands in this entry, as I am informed and believe. I know there are none which can be irrigated and reclaimed.

In regard to the allegation that the proof was made after the expiration of the statutory period, I have this to say. Either late in the year 1883 or early in the year 1884, I was called upon by the Cheyenne land office to show cause why my said entry should not be canceled for my failure to make proof and final payment within the statutory period. Thereupon I filed in said land office my affidavit setting forth the reasons which had prevented me from fully reclaiming said land within said period. This affidavit, by letter dated February 25, 1884, was duly transmitted to the Hon. Commissioner of the General Land Office at Washington, D. C., and proved to be a satisfactory explanation of my said failure. Thereupon on or about August 20, A. D., 1884, I filed in said Cheyenne Land Office the final proof depositions of myself and my two witnesses. These depositions were not at said time received or acted upon by the register and receiver of said Land Office, but under date of August 20, 1884, and with letter of that date, were transmitted by the register of said Land Office to the Hon. Commissioner of the General Land Office at Washington, D. C., for his instructions. Said final proof depositions were received by the Commissioner of the General Land Office, and having been examined by him, were under date of August 30, 1884, by letter 'C' Vol. i, Page 372, of L. Harrison, Assistant Commissioner, returned to register and receiver at Cheyenne, Wyoming, with instructions to permit me to complete my said entry, which I accordingly did, on the 8th day of September, 1884.

Four questions naturally arise in the determination of this case.

1st, Ought the entry be canceled because, as admitted in the affidavit, Hunton told his brother about the time he made his final proof that he would let him have a half interest in the land when he had perfected his title, in payment of the four thousand dollars loaned or advanced to him by his brother and expended in the reclamation of the land?

I think this question should be answered in the negative. The first section of the act of March 3, 1877 (19 Stats., 377), provides:

That it shall be lawful for any citizen of the United States, or any person of requisite age, 'who may be entitled to become a citizen, and who has filed his declaration to become such' and upon payment of twenty-five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, 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 the 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 necessarially used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of

land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. *Provided*, that no person shall be permitted to enter more than one tract of land and not to, exceed six hundred and forty acres which shall be in compact form.

There is nothing in this act to preclude a sale of the land after the consummation of an entry.

The regulations of the Secretary for the guidance of the Commissioner in the observance of the statute (5 L. D., 708), among other things provide:

> Desert land entries are not assignable, and the transfer of such entries, whether by deed, contract, or agreement, vitiates the entry. An entry made in the interest or for the benefit of any other person, firm, or corporation, or with intent that the title shall be conveyed to any other person, firm, or corporation, is illegal.

It will be observed that the first clause of the regulation has reference only to the transfer of the entry.

Accepting as a fact that a transfer of the entry is violative of the statute, as well as the instructions, and will not be tolerated, yet the affidavit which contains the admitted facts shows that there was no actual transfer, and I am impressed with the belief that the entrymen intended no wrong, but desired only to repay his brother for advances made him to aid him in the reclamation of this tract, so that I am loath to impute bad faith to him, and presuming honest intentions, I think that this clause needs no further consideration to show that there has been no violation thereof.

2d. Was the "entry made in the interest or for the benefit of any other person, etc., or with the intent that the title should be conveyed to any other person, firm, or corporation." On this point the affidavit is positive, and its truth being admitted, it is only necessary to refer to it. He says: "I made the entry in good faith for my own *exclusive* use and and benefit." Finding that its reclamation would cost a great deal more than he had anticipated, after expending $600 of his own money, he was compelled to borrow $4,000 from his brother.

The statement of the entryman impresses me as frank, honest, and manly, and I think no one who reads that portion of the affidavit will come to any other conclusion than that the entryman made this entry for his own benefit, but from a desire to pay his brother the money which he had borrowed of him, he was willing to deed him one-half of the land. It may be that the undertaking was beyond his means and that the law will not uphold the entry by a poor man of such large tracts upon borrowed capital to work a reclamation, and when irrigation of the tract is complete and the certificate issued, deed a portion thereof in satisfaction of the debt, or to accomplish indirectly what is directly prohibited, but in this case no such transfer has been consummated and I can not believe if the entryman had intended to violate the law in this respect that he would have been so frank and open about it. Usually frauds are not perpetrated in that way.

3d. Has the entryman complied with the law in the matter of compactness of entry?

In your holding this entry for cancellation on the ground that the entry was not sufficiently compact, you seem to have been guided by a regulation formerly in force in your office, which provided that "in no case where the full quantity of six hundred and forty acres is entered will the side line on either side be permitted to exceed one mile and a quarter."

In the case of Francis M. Bishop (5 L. D., 429), Secretary Lamar eliminated this provision of the regulation as being in conflict with the spirit of the law providing for desert land entries; that it operated as an obstruction, rather than an aid to its execution.

It is impracticable to establish inflexible rules which shall govern the shape or form of an entry. Each case must depend upon the circumstances surrounding it and whether an entry should be regarded as sufficiently compact to answer the requirements of the law must depend largely upon the nature and location of the land, its means and facilities for irrigation and the rights of adjacent and surrounding entrymen.

In the case of William Thompson (8 L. D., 104), the question of compactness is discussed at some length, and many cases cited where entries have been allowed, although the land entered was quite as objectionable so far as compactness is concerned as in the case now under consideration.

James S. Love (5 L. D., 642) entered 173.44 acres, and his entry was a mile in length. It was held for cancellation by your office because not compact Acting Secretary Muldrow reversed the decision on appeal, and held that it appeared of record that the lands immediately adjoining the entry

have all been entered under the desert land law by other parties so that there (is) no way of rendering said entry more compact than it is and still retain the same quantity of land. The case is precisely like that of Ann E. Miller, decided by this department May 22, 1886. In that case the entry was a mile long and quarter of a mile wide, and the adjoining lands were all appropriated by other persons, and her entry was allowed to stand.

While the decisions of this Department have not been uniform upon the question of what should be considered a compact entry, within the meaning of the statute, yet they have invariably been liberal in the construction of the law, where the entryman has acted in good faith in making his entry and in reclaiming the land, and especially where, as in this case, the surrounding land has all been entered and the rights of other entrymen have not been invaded or molested. This entry is a mile and three-quarters in length; its greatest width being one mile, diminishing north and south from the center to one half mile at the northern extremity and one-fourth at the southern. No suspicion of the lack of good faith can be attached to the entryman; he has fully

reclaimed the land, at an expense of four thousand dollars, and has made valuable improvements thereon, and as the entry can not be reformed without loss to the entryman, it will be held to meet the requirements of the statute in relation to compactness.

4th, Should the entry be canceled because the claimant did not submit his proof within the three years provided for in the statute?

I think not. The admitted facts fully explain the cause of the delay and while it is the repeated holdings of the Department that it has no power to extend the statutory time within which the proof shall be submitted to this class of cases, yet where good faith is shown in the matter of reclamation and no adverse interests have attached, entries made out of time have been authorized and upheld in numerous cases. Martha W. Fisher, 9 L. D., 430; Edward C. Simpson, 9 L. D., 617; George W. Mapes, 9 L. D., 631; George F. Stearn, 8 L. D., 573.

It appearing to my satisfaction that the entryman has acted in good faith, that he was allowed to make final proof after the time prescribed by the statute (the proof in other respects being satisfactory), and there being no adverse claim, the entry will be submitted to the Board of Equitable Adjudication for confirmation.

The decision of your office is accordingly modified.

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### COAL DECLARATORY STATEMENT—SUIT TO VACATE PATENT.

### JAMES D. NEGUS ET AL.

One who has had the benefit of a coal declaratory statement is disqualified thereby to enter under a second filing.

A coal declaratory statement, offered during the pendency of a previous application to file made for the benefit of the same applicant, though in the name of another, confers no right as against an intervening adverse claim.

An applicant for the preference right to purchase coal land under section 2348 R. S., must be in actual possession of the land when he applies for such right, and the labor expended and improvements made must be such as to clearly indicate his good faith.

Suit to set aside patent will not be advised by the Department in the absence of a specific showing of facts sufficient to justify such action.

*Secretary Noble to the Commissioner of the General Land Office, July* 12, 1890.

By letter dated September 21, 1886, your office transmitted (with other papers) for consideration by this Department the petition of James D. Negus and Thomas C. Clark, by James D. Negus his attorney in fact, filed March 2, 1883, asking that the patent issued to Jesse Bell for the SE. ¼ of Sec. 7, and to John Bell for the SW. ¼ of Sec. 8, T. 21 N., R. 116 W., Evanston, Wyoming, "be recalled or proceedings . . instituted to cancel them" and also the separate petitions of Thomas W. B.

Hughes and Orlando W. Joslyn each, by James D. Negus attorney in fact, filed November 24, 1884, for the institution of suit "in the name of the United States to cancel" the patents issued respectively to William F. Bechel for the SE. ¼ of said section 8, and to Edgar M. Morseman for the NE. ¼ of Sec. 17 in the same town and range.

The said petitions although addressed to the Department were filed and have been altogether with the accompanying and additional papers considered in your office where counsel for the petitioners and for the patentees have been heard orally and upon brief.

By the said letter of September 21, 1886, whereby the said patents are sustained, your office sets out that "all papers bearing upon the matter including the contest cases of Abner G. McDaniel *v.* William Bell, James D. Negus *v.* Alfred G. Lee, and Thomas C. Clarke *v.* James H. Johnson, which are referred to by counsel "for petitioners" have been forwarded "informally and without scheduling" to the end that the facts may be fully before the Department.

The record in the said case of McDaniel *v.* Bell was (in response to a letter from counsel for the former) by letter dated November 17, 1887, returned by the Department to your office for appropriate action.

Thereupon your office on January 21, 1888, sustained the cash coal entry of McDaniel for the NE. ¼ of section 18 in said township 21. This action was affirmed by the Department on July 1, 1889 (9 L. D., 15), when the accompanying record was returned for the files of your office.

Sundry papers relating to the said case of Clark *v.* Johnson involving the SE. ¼ of NW. ¼ of said section 8, and to the said case of Negus *v.* Lee involving the SE. ¼ of NE. ¼ of said section 7, are with the pending petitions.

The plat showing the public survey of said township 21, was filed in the local office on April 7, 1882.

On April 25, 1882, the said Morseman, Bechel, John and Jesse Bell made respectively coal cash entries (upon which said patents are based) at $20 per acre, (Sec. 2347 R. S., Act of March 3, 1873, 17 Stat., 607), for the several quarter sections heretofore described.

Subsequently to the date of said entries the said petitioners respectively applied to file certain coal declaratory statements in conflict therewith.

These filings were offered (apparently by Negus) at the local office in manner following:

Joslyn, June 3, 1882, W. ½ NE. ¼ and W. ½ SE. ¼ of said Sec. 17, Hughes, June 3, 1882, N. ½ SE. ¼ and S. ½ NE. ¼ of said Sec. 8, Clark, June 3, 1882, S. ½ NW. ¼ and N. ½ SW. ¼ of said Sec. 8, Negus, June 5, 1882, S. ½ NE. ¼ and N. ½ SE. ¼ of said Sec. 7.

All of said filings were rejected at the local office by reason of conflict with said cash entries.

Appeals from this action were respectively filed by the petitioners in the local office on July 3, 1883, from whence they were transmitted to

your office by letter dated July 8, 1882, where, as stated by your office, they were received July 15, 1882.

It appears that the said cash entries were "posted" on the tract books of your office on June 6, 1882, that they were then "marked 'special' and were examined and approved for patent on July 10 and 12, and patents issued dated July 15, 1882," that the appeals just mentioned were accordingly dismissed July 29, 1882, that appeals from such dismissal were forwarded from the local office on August 14, 1882, and that the same "were retained in your office by informal request of appellant's attorney."

The petitioners claim a preference right under section 2348 R. S., to purchase the tracts embraced in their said declaratory statements.

It is set out in various affidavits (mostly made by said Negus) and also in the pending petitions that the petitioners several claims were surveyed, staked, posted with notice and recorded among the county records during the spring of 1881, that work in developing said claims was then done by men employed by Negus, that in such work there was expended on Negus' claim $77, on Clark's $44, on Hughes' $250 and on Joslyn's over $500, that such work was begun upon the Negus and Clark claims on March 21, 1881, and upon the Hughes and Joslyn claims on April 5, and May 25, 1881, that the men thus employed were driven by Jesse Bell with threats and fire-arms from the claims of Negus and Clark on April 2, 1881, and in like manner from the claims of Hughes and Joslyn by William Sutton and others on June 15, 1881, and that petitioners have since been prevented from working said claims by reason of the "threats and interferences" of said Bell and Sutton.

The material allegation made by the petitioners is to the effect that they had each acquired a preference right to enter the tracts included in their respective filings and that the said conflicting cash entries upon which the patents in question are based were made subject to such rights.

Section 2347, *supra*, provides that a duly qualified person shall "upon application to the register of the proper land office have the right to enter (in the manner prescribed) 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."

Section 2348, *supra*, provides that any qualified person who has 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."

If, therefore, the petitioners had acquired and were in possession of such preference rights of entry at the date of the cash entries by the patentees it would seem under the sections cited that said cash entries

have been allowed in contravention of said rights and that the patents based thereon (in so far as they conflict with the petitioners claims) should be set aside.

But proceedings to vacate a government patent will not be advised by this Department in the absence of a sufficient showing. Thomas J. Laney (9 L. D., 83).

Your office in this connection found that the petitioners had failed to "make out so strong a case of prior right as to warrant the government in attacking the title" conveyed by the patents in question.

In this conclusion I fully concur.

In the case of McDaniel *v.* Bell, *supra*, involving land adjoining that embraced in the said patent to Jesse Bell, the Department found in effect that one William Bell, who on May 11, 1882, applied to file a coal declaratory statement for such land and who, by direction of your office, was allowed to do so in July following, had made such application and filing in the interest and for the benefit of the said James D. Negus.

Rule 9 of the Circular, approved July 31, 1882, (1 L. D., 687), provides that "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." This rule is in my opinion fully sustained by sections 2348, 2349 and 2350, Revised Statutes.

The said application by William Bell for the benefit of Negus having been subsequently allowed and having been made prior to June 5, 1882, it follows that on the latter date when Negus applied to file as stated, in conflict with the cash entry of Jesse Bell, he was not qualified to enter land under the act of 1873 *supra* and could therefore acquire no rights as against such entry.

Consequently it is unnecessary to further consider the said petition of Negus and Clark, except so far as it relates to the claim of the latter.

It is set out in said petition that the men (employed by Negus) who "had been working and representing the claim of Thomas C. Clark as well as the claim of James D. Negus" from March 19, 1881, after being driven from the latter's claim by Jesse Bell ("who entered the mouth of the tunnel made and worked by them, and drew a revolver and pointed it at them and notified them to leave the claim or take the consequences) on April 2, following, resumed work the same day on the Clark claim whence they were driven" in like manner and with like threats and fire-arms by the said Jesse Bell. That the said James D Negus and Thomas C. Clark have since said time been prevented from resuming work on their respective claims by reason of the threats and interferences of the said Jesse Bell and others acting in concert with him, who made threats "to shoot any men who should commence working thereon."

By the circular of July 31, 1882, *supra*, section 18, the Department held that the "opening and improving of a coal mine in order to con-

fer 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."

And the statute (section 2348, *supra*) further requires the applicant for such preference right to be in actual possession of the land at the time when he seeks to exercise such right.

The affidavit of Clark contained in the coal declaratory statement presented as stated for him by Negus, made in New York, May 25, 1882, sets out that he is personally unacquainted with the land, that he has expended from March 19, to April 2, 1881, $44 in "tunnelling and cross cutting."

The petition of Clark and Negus sets out "that said declaratory statement showed that the said Clarke had expended the sum of $44 in working and developing said claim."

For more than a year prior to his application to file as stated in June, 1882, the tract claimed for Clark was admittedly neither in his possession nor subject to his control.

His meagre and vaguely described improvement of the land could not therefore be considered were it not for the general allegation in the said petition to the effect that since the said eviction of his agents in April, 1881, he has been kept out of possession of his claim by the threats of Jesse Bell.

The petitioners (Negus and Clark) however, make no specific showing in support of such charge. They fail to set out when, or to whom, or how often the said threats were made, or to describe the attendant circumstances, nor do they allege or offer to prove that Jesse Bell or hose with him had acted in the premises for the benefit of John Bell whose patent conflicts with the claim of Clark. Neither does it appear that any effort has been made by or for Clark to regain possession of the land.

Conceding therefore that Clark's agents were as alleged forcibly dispossessed in April, 1881, the showing made by him in behalf of the present petition does not (under the circumstances) in my opinion, warrant the belief that his preference right to which he alleged the cash entry of John Bell (made in April, 1882) was subject, can be successfully maintained.

The petitions of Joslyn and Hughes set out that at the times stated in April and May, 1881, the men employed on their respective claims were driven therefrom by William Sutton, and "four other armed men acting in concert with him."

The affidavits of William Bell (apparently the same party who had filed as aforesaid for Negus) filed with said petitions set out that Sutton had then claimed the said tracts for the Union Pacific R. R. Co., and that (Sutton) for some weeks thereafter had kept armed men on said claims to drive off the petitioner's employees. The petitioners, however, neither allege or offer to prove that the conflicting entries of

Morseman and Bechel were made in the interest of said company or that Sutton was in the employ or acting at the instance of said entrymen.

The petitioners (Joslyn and Hughes) alleged generally that since the said dispossession of their agents, they have been kept out of the possession of their claim by the threats and interferences of Sutton and others, but make no specific showing in support of such charge.

The matters presented by the petitions last mentioned being in all material respects similar to those presented by that of Clarke, I must find for the reasons heretofore stated, in connection with the latter, that the preference rights alleged by Joslyn and Hughes have not been sufficiently shown.

The claims of the petitioners are based upon the rights they may have acquired in preference to those of the patentees. They have failed to make a satisfactory showing of such rights. Consequently the Department in the absence of a sufficient showing would not be warranted in recommending suits for the cancellation of the patents involved.

The pending petitions are accordingly denied.

This disposition of the case renders it unnecessary for me to discuss the matters attending the issue by your office of the patents referred to or such other matters as may be presented by the record.

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### CALIFORNIA SWAMP LAND—ACT OF JULY 23, 1866.

### ALLEN ET AL. *v.* MCCABE.

The title to land segregated and sold by the State of California as swamp prior to the act of July 23, 1866, is confirmed to said State by the second clause of section 4 of said act, if the segregation survey conforms to the system of surveys adopted by the United States.

The supervision of the Commissioner of the General Land Office, in the matter of approving township plats constructed by the United States surveyor general showing segregation surveys made by the State prior to said act, is limited to ascertaining whether said surveys conform to the system of surveys adopted by the United States, and if so found, he is not authorized to withhold his approval. *Semble*, if fraud is alleged the Commissioner may refuse his approval.

*Secretary Noble to the Commissioner of the General Land Office, July* 12, 1890.

I have considered the appeal of the State of California, in the case of said State *ex rel.* J. E. Allen, and J. R. Rice, *v.* The United States *ex rel.* W. B. McCabe, from the decision of your office of January 25, 1887, holding for rejection the claim of the State under the swamp land grant to lots 2, 3 and 4, of section 28, and lot 1 and the NE. ¼ of the NW. ¼ of section 33, T. 14 N., R. 9 W., M. D. M., California.

The State claims under the act of September 28, 1850 (9 Stat., 519—section 2479, Revised Statutes) whereby it was granted "the whole of

the swamp and overflowed lands, made unfit thereby for cultivation and remaining unsold on or after the twenty-eighth day of September A. D. eighteen hundred and fifty" and under the act of July 23, 1866 (14 Stat., 218) to quiet land titles in California.

February 27, 1884, the relator William B. McCabe made homestead entry of lot 1, and the NE. ¼ of the NW. ¼, of section 33, and lots 2, 3 and 4 of section 28, in said township.

July 23, 1873, the receiver of the land office at San Francisco forwarded the application of the State of California *ex rel.* Charles Goodwin, to have lots 4 and 5, section 28, and lot 1 and the NE. ¼ of the NW. ¼ of section 33, T. 14 N., R. 9 W., listed as swamp and overflowed land under the act of July 23, 1866. Accompanying said letter was the following statement:

> No adverse claim. It appearing that the State sold said land prior to July 23, 1866—to wit, in 1860—we recommend that the same be listed to the State.
>
> H. E. ROLLINS, *register*,
> CHAS. H. CHAMBERLAIN, *receiver*.

With the letter was transmitted a certified copy of survey No. 18, of the N. ½ of the NW. ¼ of section 33, and the south fraction of the SW. ¼ of section 28, containing ninety-seven acres, made March 14, 1860, by T. J. DeWoody, county surveyor of Napa county, in accordance, as he states, with the act of the legislature approved April 18, 1859, and the instructions of the surveyor-general.

This is the land J. R. Rice bought from the State as H. A. Higley, register of the State land office certifies, under date of August 1860. The certificate states that upon payment of the amount agreed upon and the confirmation of the State's claim, Rice will be entitled to a patent for the tracts described. The amount paid by Mr. Rice in 1860, was twenty-seven dollars and sixteen cents, being twenty per cent of the purchase money and the first year's interest, for ninety-seven acres of swamp and overflowed land. In each of the years 1861, 1862 and 1863, he paid $7.76 annual interest; in 1867 $23.28 being interest to April 1, 1868 and on May 12, 1868, $77.60 being payment in full, was made.

September 15, 1862, Rice, for value received, sold all of his interest in said lands to Charles Goodwin.

Survey No. 19, also transmitted, was of fractional southeast quarter of section 28, T. 14 N., R. 9 W., containing eighty-five and a half acres and was made March 13, 1860, by T. J. DeWoody, county surveyor of Napa county. As in the previous case, the county surveyor certified to the correctness of the survey. This is the land James E. Allen applied to purchase from the State, and for which he made the first payment in 1860, as H. A. Higley, register of the State land office certified under date of August 1, 1860. July 17, 1860, Allen paid $23.94 for said land, being twenty per cent. of the purchase money with interest for the first year. He paid the annual interest of $6.84 for each of the years 1861 and 1862. April 26, 1862, he assigned, for a valuable con-

sideration, all his interest in said tract to James W. McGaugh, who paid interest of $6.84 for each of the years 1863, 1864, 1870, 1871, 1872, and on December 3, 1868, paid $25.27 for three years eight months and nine days. April 30, 1869, for value received, McGaugh assigned all his interest in said land to Charles Goodwin.

August 23, 1884, the United States surveyor-general transmitted a plat of said township 14, showing the amendments made to the map thereof in accordance with the segregation surveys made by the State of California, in sections 28 and 33, prior to July 23, 1866, together with the list of lands so segregated. This list embraces lots 4 and 5 containing 28.41 acres, and lots 1, 2 and 3, containing 89.63 acres, in section 28, as per survey 18, and the NE. ¼ of the NW. ¼ and lot 1, containing 79.63 acres in section 33, as per survey 19, the whole amounting to 197.90 acres.

Upon this list the register of the United States Land Office made the following annotation:

.Returned by United States surveyor-general as upland on plat filed December 14 1869. Homestead entry for lot 4 by William B. McCabe, No. 5911, February 27,1884, The above remarks apply also to these tracts (NE. ¼ of NW. ¼ and lot 1 section 33) and also to lots 2 and 3 of these tracts.

October 22, 1884, there was transmitted the protest of William B. McCabe, who had made homestead entry of lots 2, 3 and 4, section 28 and lot 1 and NE. ¼ of NW. ¼ of section 33, T. 14 N., R. 9 W. against the application of the State of California to have said land certified to said State as swamp and overflowed land, and against the approval of any segregation or survey of said lands or any portion thereof as swamp lands and overflowed land or otherwise. As grounds of protest he alleged that no portion of said land is, or ever was, of the character contemplated by the act granting swamp lands, that the State had never selected or applied for any portion of said land prior to the homestead entry of said McCabe; that whatever claim said State may have had is barred by the lapse of time and its own laches, and that the pretended survey of said lands under the authority of the State of California does not conform to the system of surveys adopted by the United States.

By your office letter of May 12, 1885, you ordered a hearing under the last paragraph of section 4, of said act of 1866, to ascertain the actual character of said tracts September 28, 1850, and your said order of a hearing seems to be based upon the statement of the register of the local office, that said land is returned as "*upland*" by the United States survey of 1869.

Upon the testimony taken at this hearing the surveyor general found that said land was swamp or overflowed land at date of the grant and as such passed to the State, but on appeal of McCabe for the United States, your office by the decision complained of reversed said decision and held the claim of grantees under the State for cancellation.

The issues raised seem to be two; first, was a hearing properly ordered, and second, if so, is your decision sustained by the evidence?

It is claimed by the grantees of the State that by the second clause of section 4, of the act of 1866, the title of the State was quieted in the grantees under the facts shown in the record and that no hearing could be legally had and no inquiry could be made as to the character of the land.

The appeal of the State is based substantially upon the claim that your said decision is not supported by the evidence and is contrary to law, specifically alleging that said decision is contrary to the provisions of the act of Congress of July 23, 1866, and particularly to the provisions of the second clause of the fourth section of said act.

The act of July 23, 1866 (14 Stats., 218), provides in said section four as follows:—

> That in all cases where township surveys have been, or shall hereafter be, made under authority of the United States, and the plats thereof approved, it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California, as swamp and overflowed, all the lands represented as such upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats. The Commissioner shall direct the United States surveyor general for the State of California, to examine the segregation maps and surveys of the swamp and overflowed lands made by said State; and when he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward to the general land office for approval; *Provided*, That in segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land.
>
> In case such surveys are found not to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the Commissioner shall direct the surveyor general to make segregation surveys upon application to said surveyor general by the Governor of said State, within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the general land office representing and describing what land was swamp and overflowed under the grant, according to the best evidence he can obtain. If the authorities of said State shall claim as swamp and overflowed any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant, September twenty-eight, eighteen hundred and fifty, and the right to the same, shall be determined by testimony, to be taken before the surveyor general, who shall decide the same, subject to the approval of the Commissioner of the General Land Office.

The legislature of the State of California enacted several laws, beginning with the act of 1855, for the purpose of ascertaining and segregating the swamp and overflowed lands granted to the State by the act of September 28, 1850 (9 Stats., 519), but which by reason of the failure of the Secretary of the Interior to certify the same to the State under the second section of said act had not yet become available for purposes of sale or reclamation. The act of said legislature under which the sales of the land in controversy were made by the State was an act approved April 21, 1858, (General Laws of Cal., 1850 to 1864, page 592), which provided that any qualified citizen of the State might have a

segregation survey of any alleged swamp land which he desired to purchase, by filing the affidavit provided for by section two of said act, in the office of the surveyor of the county in which the land, or the greater part of it, might be situated.

No general segregation law was enacted until 1861.

With his letter of August 23, 1884, the United States surveyor general transmitted a plat of said township 14, showing the amendments made to the map thereof in accordance with the segregation surveys made by the state of California in section 28 and 33 prior to July 23, 1866. The lots described are lots 1, 2, 3, 4 and 5, section 28, and lot 1 and the NE. ¼ of the NW. ¼ of section 33 and the certificate is in the words following:

U. S. SURVEYOR GENERAL'S OFFICE,
*San Francisco, Cal., July* 23, 1884.

I hereby certify that the above is a correct list of the lands in township 14 north, range 9 west, Mount Diablo base and meridian, selected and segregated as swamp and overflowed lands by the State of California prior to July 23, 1866, as appears by certified copies of State segregation surveys now on file and of record in this office and I further certify that the said surveys conform to the system of surveys adopted by the United States.

Attest.
(SEAL.)

W. H. BROWN,
*U. S. Surveyor General, Dist. of Cala.*

By letter of November 14, 1887, you transmitted a diagram of the whole of said township 14, upon which was the following endorsement:

The above diagram of township No. 14, north, range No. 9, west, Mount Diable meridian, showing amendments to sections 28 and 33, is strictly conformable to the field notes of surveys of swamp and overflowed lands in said sections, by T. J. Dewoody, county surveyor for Napa county, made in April 1860, which are on file in this office. Said surveys have been examined and found to be in accordance with the United States system of surveys and are hereby approved.

W. H. BROWN,
*U. S. Surv. Gen. Cal.*

U. S. SURVEYOR GENERAL'S OFFICE,
*San Francisco, California, August* 23, 1884.

Upon the diagram lots 1, 2, 3, 4, and 5 of section 28 and lots 1 and the NE. ¼ of the NW. ¼ of section 53, are marked "swamp and overflowed lands." In your said letter you say: "Said plat has not been approved by the Commissioner of the General Land Office."

It is contended by the counsel for McCabe that the surveys made in 1860, were illegal and void and were not in conformity with the laws of the State or with the system of surveys adopted by the United States. They discuss the State law and cite decisions of the supreme court of California as to its requirements. Into this discussion I do not think it necessary to enter, because it was decided by Secretary Delano, December 5, 1871 (1C. L. L., 462), adopting the opinion of Assistant Attorney General Smith (id., 453), that the system of surveys adopted by the United States meant those made on the rectangular system as contradistinguished from those made on the geodetic system.

The survey made by the State in 1860, being in conformity with the

system of surveys adopted by the United States and the land having been sold prior to the act of 1866, and when there was no adverse claim to it, the State having made application for the same in due form and the surveyor general of the United States having approved and constructed a township accordingly and forwarded the same to the Commissioner of the General Land Office, for approval, it is necessary to consider the effect of the refusal of the Commissioner to approve the plat.

In the case of Wright and Roseberry, 121 U. S., where there was no formal approval by the Commissioner of the township plat the court treated its official use as approval and said, (p. 517):

> The representation of the lands as swamp and overflowed on the approved township plat would be conclusive as against the United States that they were such lands, if they had not been patented before the return of such township plat to the Land Office. The act of Congress intended that the segregation map prepared by authority of the State, and filed in the State surveyor general's office, if found upon examination by the United States surveyor general to be made in accordance with the public surveys of the general government, should be taken as evidence that the lands designated thereon as swamp and overflowed were such in fact except where this would interfere with the previously acquired interests.

This language does not determine what constitutes the "approved" plats referred to, whether the approval must be by the surveyor general alone or by both the surveyor general and the Commissioner.

After quoting the second clause of the fourth section of said act of July 23, 1866, Secretary Schurz said in the case of the Central Pacific Railroad *v.* State of California (4 C. L. O., 150):

> The act of September 28, 1850, granted none but swampy or overflowed lands, whereas the State had segregated both dry and swampy lands. The clause above quoted was therefore enacted to make an end of controversy by confirming to the State those lands which she had segregated in accordance with the system of surveys adopted by the general government. I am of the opinion that this clause confirms absolutely to the State all lands not in a state of reservation which had been segregated by her prior to July 23, 1866, if the State surveys were made on the rectangular system whether the lands had been surveyed by the United States or not, or whether they were swampy or dry lands, provided no valid pre-emption or homestead claim or other right had been acquired by any settler as provided in the first section of the act.

The land in controversy having been actually segregated in 1860, by a survey made under the laws of the State of California, and having been sold by said State at that time, I am of the opinion that it comes within the second clause of section 4, of said act of July 23, 1866, and that if such segregation survey was made in accordance with the rectangular system the title to the land was absolutely quieted to the State by said act.

In section 11, of the said act of April 21, 1858, of the legislature of California, it was provided that,—

> All surveys under the provisions of this act, shall be made according to the instructions of the surveyor-general, and shall be made to conform to the surveys of the public land by the general government, except that the lands held by actual settlers shall be surveyed after what is known as the geodetic method and such geodetic surveys shall be made to conform to the lines and boundaries established by such settlers.

I am of the opinion that the supervision of the Commissioner for the purpose of approving the township plats constructed by the United States surveyor general of California showing such segregation surveys made under the law of the State prior to July 23, 1866, extends only to ascertaining whether said segregation surveys were made in accordance with the system of United States surveys, and if they are found to have been so surveyed then the approval of the township plats follows as a matter of course; but unless it appears that some other system was used, the Commissioner can not refuse his approval, except perhaps in cases where fraud may be alleged.

In the case at bar, counsel for homestead claimants alleged that said surveys were not made in the method adopted by the general government, but their specifications only allege certain informalities in the affidavits upon which the surveys were based.

I therefore find that the segregation surveys of 1860 under which appellants claim, do conform to the system of surveys adopted by the United States, as certified by the United States surveyor general for California, and should be approved by your office, and that the hearing before the said surveyor general to determine the character of the land was improperly allowed.

Your said decision is accordingly reversed and said land may be certified to the State.

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### TIMBER CULTURE ENTRY—BREAKING.

### LAMSON *v.* BURTON.

The entryman may take advantage of breaking done on the land by a previous occupant.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July* 12, 1890.

I have considered the appeal of George W. Burton from the decision of your office dated December 28, 1886, in the case of Francis G. Lamson *v.* George W. Burton, holding for cancellation the latter's timber culture entry for the SE. ¼ Sec. 3, T. 3 N., R. 19 W., Bloomington land district, Nebraska.

August 14, 1884, Burton made entry for said tract and on September 16, 1885, Lamson initiated a contest against the same alleging "that the said George W. Burton has failed to plow or break five acres since date of entry to present time."

Hearing was ordered and had. The register and receiver from the evidence submitted them found in favor of claimant, and dismissed the contest.

Contestant appealed and you reversed the finding of the register and receiver and held the entry for cancellation, whereupon claimant appealed to this office.

The testimony offered at the hearing shows that prior to the year 1879, at least eleven acres were broken on the north side of the tract in dispute, and that said breaking was cultivated and cropped to wheat in the season of 1879, and that each year thereafter the said eleven acres were cultivated, and in May, 1884, the same were planted to trees, and at the date of claimant's entry there were from thirty to forty additional acres of breaking on said quarter section. While the testimony in this case clearly shows that the claimant failed to break or plow five acres during the first year after his entry, yet, it is sufficiently shown that during said period he had known that there was at least ten acres of said land in a good state of cultivation, mellow and friable, and that its condition for cropping or tree planting during the second and third years, was far better than any prairie land which he might break or backset during the first or second year.

In the case of McKenzie *v.* Killgore (10 L. D., 323), it was held that an entryman may take advantage of breaking done upon the land at date of his entry, but that the length of time between such former work and work done by the entryman should be considered as important in determining whether or not the entryman should have credit for such former breaking or plowing.

In the case at bar the evidence of both parties shows that nearly all of the trees planted in 1884, wilted and died and that on September 30, 1885 (thirteen months and six days after entry) claimant replowed a portion of said tree plat, and at the time of the hearing the whole thereof had been replowed and five acres sowed to winter rye, and that said eleven acres were then in a good state of cultivation.

In deciding the case of Burgess *v.* Hogaboom (10 L. D., 470), it is held that "The timber culture law is not run in a cast-iron mould, and must be construed in the light of reason" and as its object is to encourage the growth of forest trees on prairie lands, and requires that land selected for such purpose should be subdued and made mellow before the tree seeds, trees or cuttings are planted, and as I find that such condition was attained in the case at bar, and as your office did not find any evidence of bad faith on the part of claimant, and as I think the former plowing was so utilized by him that it inured to the benefit of the land, he should have credit therefor.

The decision of your office is accordingly reversed.

PRE-EMPTION—SECOND FILING.

HOMER C. STEBBINS.

A second filing will not be allowed on the ground that the land included in the first is not habitable, unless it is clearly shown that the settler, in the exercise of ordinary diligence, was unable to discover the true character of said land.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 12, 1890.*

The appeal from your office decision in the above case is before me, and the record shows the following facts:

The claimant, Homer C. Stebbins, on April 15, 1886, filed declaratory statement No. 6660 for the SE. ¼ of Sec. 20, T. 27 N., R. 48 W., Valentine, Nebraska, alleging settlement April 13th, same year.

March 25, 1887, George Sutton filed declaratory statement for same land, which was relinquished and canceled August 27, 1887, and on the same day Gilbert J. Wilkerson made homestead entry therefor.

Stebbins, on April 24, 1886, filed his second declaratory statement No. 6832 for the NW. ¼ of Sec. 2, Tp. 25 N., R. 48 W., alleging settlement April 20th of the same year. On October 13, 1888, he made application to the local office to be allowed to amend his first filing, so as to take the land described in his second filing in lieu of that embraced in his first, alleging in his affidavit, which was partially corroborated, that at the time of examining the land embraced in his first filing he had "met with an accident by the bursting of a gun, which injured his eyes, and going home made said filing at land office in Valentine." That after getting relief, fearing "he had deceived himself," he went back to the tract, and found that the land consisted of canons and gravel hills, and was unfit for a farm. Thereupon he made his second declaratory statement, embracing the land last above described, moved on to it in June, 1886, and has lived there ever since, improving it by a house, out-houses, cellar and well, and by the cultivation of fruits and vegetables, and now asks that he may be permitted to retain it, and to that end prays that the amendment be allowed.

On this showing you refused the amendment, and now hold claimant's second filing for cancellation. From this decision he has appealed to this Department.

The provisions in relation to change or correction of entries are embraced in sections 2369, 2370, 2371 and 2372 of the Revised Statutes.

Section 2369 provides for change of entry where mistake has been made through the fault of the government officers, or error in the public records.

Section 2370 extends this provision to cases where patents have issued or may hereafter issue.

Section 2371 makes the same provision applicable to errors in the location of land warrants, while section 2372 provides for the correction

of mistakes made by the-entryman himself in the true numbers of the tract intended to be entered.

These are all the statutory provisions in relation to change or correction of entries, and the statute nowhere provides for an amendment of entry. The Commissioner, however, with the approval of this department, has from time to time, in the interest of justice and equity, allowed changes and corrections to be made by amendment, where entry of a tract of land not intended to be entered has been made through a mistake of the true numbers, where no intervening rights are disturbed, and where the mistake was through no fault or negligence of the entryman. Changes of entry or second entries have also been allowed where after entry it has been discovered that the land is "not habitable and the reasons therefor were not discoverable by the exercise of ordinary diligence at the time of making the entry. (Edward C. Davis, 8 L. D., 507.) In this case Davis entered and improved a quarter section in Nebraska, had built a frame house, planted fruit and shade trees, and had dug a well and discovered that the water obtained from it was poisonous and could not be used by man or beast, and that no other kind of water could be obtained on his claim. This Department found that "by his expenditure upon the land embraced in his original entry and by his efforts to establish a home there, the claimant had sufficiently shown his good faith in making his first entry." The entryman was allowed to make a second entry, on filing a formal relinquishment of the former, accompanied by an affidavit that he had not received money or other consideration or promise of consideration for abandoning his first entry.

Other cases could be cited where a second filing has been allowed on discovering that the land embraced in the first entry was not habitable, but in all these cases the applicant was required to show to the satisfaction of the Commissioner, not only that the land was unfit for the purpose for which it was entered, but also that such defect was not discoverable by the exercise of ordinary diligence.

Now, in the case under consideration there is no pretense that there was any mistake in the numbers of the first entry, or, in other words, that the applicant filed on land different from that which he intended to enter; therefore his application does not come within the letter or spirit of the statute allowing a change of entry (Sec. 2372 R. S.).

Does it then come within the cases recognized by the practice of this Department as entitling applicants to a change of entry or second filing? That is to say, does appellant's application disclose that the land embraced in his first filing is not habitable or fit for farming, and also that this fact was not discoverable by the use of ordinary diligence?

As to the first inquiry, the record shows that the untillable character of the land is shown by the affidavit of appellant alone, and while his application is accompanied by the corroborative affidavit of one Herbert M. Anderson, said Anderson in no manner corroborates the affi-

davit of appellant as to the bad quality of the land. In fact, it would appear that said Anderson is entirely unacquainted with the character of the land, or, being acquainted, is unwilling to make affidavit as to its untillable character.

Further, it appears from the records that within a year from the date of appellant's first filing, George Sutton filed (and presumably with his eyes open and unimpaired) on the same tract, and later, in August, 1887, Gilbert J. Wilkerson made a homestead entry therefor, and for aught that appears to the contrary is now converting the "canons and gravel hills" into a home for his family.

But conceding that appellant's affidavit truthfully describes the land, and that the same is not habitable, or, as his affidavits states, is "unfit for a farm," did appellant before filing exercise ordinary diligence to ascertain the quality of the land, or such diligence as, under the practice of this Department, would entitle him to a second entry?

The evidence as to his diligence consists of his own affidavit alone, and is as follows:—

Homer C. Stebbins, being duly sworn, deposes and says that he made a preemption D. S. upon SE. ¼ Sec. 20, Tp. 27, R. 48, Nebraska, and at the time met with an accident by the bursting of a gun, which injured his eyes, and going home made said filing at land office in Valentine. His eyes were injured by pow d. After filing said D. S. and getting relief to his eyes, he returned to the tract of land fearing that in his excitement and injury he might have deceived himself in the same. After arriving at said tract he found that the same embraced canons and gravel hills that made it unfit for a farm and he selected the NW. ¼, etc.

From this affidavit it does not satisfactorily appear at what time in the proceedings he received the injury which impaired his eyesight. In the first part of his affidavit he says he met with the accident at the time of filing his declaratory statement, farther on he intimates that on receiving the injury he went home and filed on the tract. But granting that his injury was received while he was examining the land, or before he began the examination, the fact still remains that he was so far satisfied with his examination as to "go home and file his declaratory statement." If he did examine the land before filing, then he is certainly not entitled to relief. If he did not examine it, whether by reason of his injury or otherwise, then he must have filed haphazard, and is now asking this Department to cure his own laches.

To sustain appellant's second entry, under the facts disclosed by the record in this case, would be to establish a most dangerous precedent, invite perjury and open the doors of this Department to applicants for change of entry on the most frivolous pretexts.

As claimant has never received any benefit from his first filing, and as the evidence shows that he has expended a considerable sum of money in improving the claim last pre-empted, he will be allowed to make homestead entry for the same land, within a reasonable time after notice of the cancellation of his pre-emption filing, No. 6832, if qualified to make entry under said law.

The decision of your office is accordingly modified.

PRACTICE—APPEAL—NOTICE.

HANNON *v.* NORTHERN PACIFIC R. R. CO.

In all cases where an appeal is held defective by the General Land Office, the papers in the case, together with the appeal, should be transmitted to the Department, and the letter of transmittal should specifically designate wherein the appeal is defective.

An appeal will be dismissed if there is no proof that a copy of the appeal and specifications of error was served on the opposite party.

*Secretary Noble to the Commissioner of the General Land Office, July 12, 1890.*

By letter of April 7, 1890, you transmitted papers in the case of William Hannon *v.* Northern Pacific R. R. Co., involving the NW. ¼, Sec. 17, T. 20 N., R. 3 E., Seattle, Washington, land district.

It seems that on February 1, 1886, Hannon applied to make homestead entry for said land which application was, by the local officers, refused because of conflict with the grant to said railroad company. From that decision Hannon appealed to your office saying, "and for grounds of appeal and reversal relies upon the decision of the Honorable Commissioner in the analogous case of Donald McRae *v.* The Northern Pacific Railroad Company made on or about January 12, 1886, and upon the doctrines and principles therein stated." Your office, on December 23, 1887, affirmed the action of the local officers stating that the decision of your office in the McRae case had, on September 30, 1887, been reversed by this Department. (For case of McRae *v.* Northern Pacific R. R. Co., see 6 L. D., 400.)

It seems that Hannon filed an appeal from that decision and that on October 24, 1888, your office returned said appeal together with those in the cases of Charles R. Corey, Jay A. Carson and John Arthur, to the local office "in order that said parties might comply with the requirements of Rule 93, of the Rules of Practice". No further steps seem to have been taken in this matter until January 29, 1890, when you called upon the local officers for a report. Those officers under date of March 21, 1890, reported that the parties were notified on February 13, 1890, through personal service on their attorney, of your requirements and that no action had been taken. You did not transmit to this Department the appeal that had been filed and I am not advised of the grounds relied upon in such appeal. In all cases where the appeal is for any reason considered defective by your office, all the papers in the case and especially the appeal itself, should be transmitted and the letter of transmittal should specifically designate wherein such appeal is defective.

It is clearly shown in this case, however, by the papers before me that Hannon has not complied with the rules of practice in that he has

failed to file any proof of service of a copy of his appeal and specifications of error on the opposite party, and his said appeal is, for that reason, hereby dismissed.

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PRACTICE—APPEAL—RAILROAD GRANT—SCHOOL SELECTION.

CALL *v.* SOUTHERN PACIFIC R. R. CO.

An appeal will not be dismissed on the ground that a copy thereof was not served upon the opposite party in time, if the record fails to show when notice of the decision was served upon the appellant.

A prima facie valid school selection of record when the grant to this company became effective excepts the land covered thereby from the operation of the grant; and the subsequent cancellation of the selection will not affect the status of the land under the grant.

The case of Childs *v.* Southern Pacific R. R. Co. cited and followed.

*Secretary Noble to the Commissioner of the General Land Office, July* 16, 1890.

On May 15, 1888, Joseph H. Call made application to make homestead entry for the N. ½, SE. ¼, and E. ½, NE. ¼ of section 9, T. 6 S., R. 2 W., Los Angeles land district, California.

The local officers rejected the application "as being in conflict with primary grant to Southern Pacific R. R. Co." Call appealed to your office. By your office decision of July 2, 1888, you affirmed the action of the local officers regarding the N. ½, of SE. ¼, and allowed the entry of the applicant as to the E. ½, NE. ¼.

From this decision both parties appealed. The attorney of the applicant moved to dismiss the appeal of the railroad company, because not taken within the time required by the rules of practice. The notice of appeal is required to be filed within sixty days from the date of service of the notice of the decision and a copy of the notice of appeal must be served on the opposite party within the time allowed for filing the same. See Rules 86 and 93 of the Rules of Practice. The appeal was filed August 31, 1888; the same was therefore taken in time. Whether notice of it was served upon the opposite party within the time required can not be ascertained, since the records and files in the case fail to disclose the time that notice of your office decision was served upon the company. The motion is denied.

The records of your office show that the whole of the said land lies within the twenty mile or primary limits of the grant to said company made March 3, 1871 (16 Stat., 579), to aid in the construction of its branch line of road as shown by the map of designated route thereof filed in your office July 24, 1876.

The records of your office further show that the E. ½ of the NE. ¼, of said section 9 was selected by the State of California as indemnity school land April 14, 1870, and that such selection was canceled January 31,

1871. No other filing or entry appears to have been made for the land in question and on May 25, 1883, the same was claimed by the company under its grant.

On the part of Call it is claimed that the land applied for was excepted from the operation of the railroad grant by reason of having been embraced within the exterior boundaries of the ranchos San Jacinto Viejo and Nuevo at the date when said grant became effective.

This claim cannot be sustained. The question has been decided in the recent case of Childs *v.* Southern Pacific R. R. Co. (9 L. D., 471), see also same case on review (10 L. D., 630) upon facts similar to those in the case at bar, so far as the NW. ¼ SE. ¼ is concerned and in accordance with the opinion specified in the case cited, the appeal of Call must be overruled.

Nor can the appeal of the railroad be sustained. The E. ½ of the NE. ¼ section 9, was excepted from said grant, because of the indemnity school selection by the State which was made prior to the date of the railroad grant, and remained intact until long after said grant became effective. A *prima facie* valid school selection existing when the grant took effect, excepts the land embraced therein from the operation of the grant, and the subsequent discovery of the invalidity of the selection will not inure to the benefit of the company's claim. Southern Pacific R. R. Co. *v.* The State of California, 4 L. D., 437. It cannot be said that the said eighty acres were free from a claim or right in the terms of the act granting the land, while the State laid claim to it under an indemnity school selection, which was of record; and if it was not free from a claim or right the grant did not attach. The validity or lawfulness of the claim is not material. Northern Pacific R. R. Co. *v.* Bowman (7 L. D., 238); Northern Pacific R. R. Co. *v.* Wiley (idem., 354); Laity *v.* Northern Pacific R. R. Co. (8 L. D., 378).

Your said office decision is affirmed.

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### RAILROAD GRANT—INDIAN OCCUPANT.

### SPICER ET AL. *v.* NORTHERN PACIFIC R. R. CO.

(On Review.)

The occupancy of an Indian, who has not abandoned the tribal relation, existing at date of definite location, will not except the land covered thereby from the operation of the grant.

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

I have considered the motion for review of departmental decision rendered April 12, 1890, in the case of R. E. Spicer, *et al. v.* Northern Pacific Railroad Company (10 L. D., 440), involving the NE ¼ of Sec

19, T. 25 N., R. 43 E., Spokane Falls, Washington, filed by said company on April 25, same year, and also the application of James N. Glover, *et al.* intervenors, who claim property within said quarter section through title derived through said company. The record upon which said departmental decision was rendered shows that on September 4, 1889, there was filed in the local land office a certain application, sworn to by R. E. Spicer, J. M. Hooker, and J. S. Bean, and signed by numerous other persons, claiming to be residents on said tract, in which it was set forth that at the time of the withdrawal of said tract for the benefit of said company, on February 21, 1872, and at the time of the definite location of said road through said land, on the 4th of October, 1880, and for many years prior thereto, from 1868 up to 1883, said land was Indian land and during all said time was occupied, possessed, cultivated and improved by an Indian named Enoch; that because of said Indian's possession and occupancy of the land as aforesaid, the same did not pass to the company under its grant, and that said Indian abandoned said claim in the year 1883, whereupon said tract became a part of the public domain and subject to entry under the townsite laws; that said applicants are residents on said tract, and that since the year 1883 a large number of persons have settled upon said tract, built business houses and dwellings, and at the date of said petition had established a town thereon of more than five hundred inhabitants; that since November 28, 1883, said tract had been within the corporate limits of the city of Spokane Falls, but the municipal authorities have neglected to have the same surveyed and platted or to cause it to be entered as a townsite, and that said petitioners therefore ask the Secretary of the Interior to cause said tract to be surveyed as a townsite under the laws of the United States, and that if it be deemed necessary a hearing should be ordered to ascertain whether the tract is public land or inured to the railroad company by virtue of its grant.

A supplemental petition, signed and sworn to by said R. E. Spicer, J. M. Hooker, and William Nonamaker, acting for the original petitioners, was transmitted to this Department by one L. H. Prather, attorney for the parties, on September 21, 1889, in which the matters contained in the original petition were substantially repeated and it was stated that said company was about to take steps to remove the settlers from the tract and to take forcible possession thereof, and for this reason immediate action by the Department was urged. In addition to the foregoing, the record contained the affidavit of said Indian by the name of "Enoch Silliquowya" or Louis Enoch, filed in the local office in July, 1888, which alleged in substance that about twenty-five years prior thereto the affiant settled on the NE¼ and SE¼ of sec. 19, T. 25 N., R. 43 E., in Spokane county, Washington Territory; "that he improved and cultivated the said land, and he constantly lived upon and occupied the same as his home with the purpose and *bona fide* design of procuring title for himself as a homestead thereto from the United States when title

could be procured; that he was living upon the said land as his home in 1872 and up until the year 1883;" that about the latter date said Indian was induced by the fraudulent representations of one H. T. Cowley, agent of said company, to sell and convey his claim to the said company for the sum of $2,000; that said agent represented to him that he could not hold the land or acquire title thereto, and that the land was not worth more than $1,000; that said Indian resided upon said tract solely for the purpose of acquiring title thereto from the United States, and he asked that a hearing be ordered to allow him an opportunity "to prove the truth of his said allegations, and, if true, to enter said land." The affidavit of Enoch was corroborated by the joint affidavit of J. M. Noble and Frank Martin. The record further shows that there was no adverse claim either in the local or general land office, except the claims of Enoch and his father, covering together the east half of said section nineteen, as shown by a letter from the Indian Office dated December 1, 1880, which stated in effect that said Indians had occupied the lands claimed by them, respectively, for many years, and many of them had made valuable and lasting improvements thereon, and that with reference to those residing on the lands found to be within the limits of railroad grants, "some action should be taken looking to the adjustment of these conflicting claims in favor of the Indians."

Upon this record, said departmental decision held that the grant to said company by act of Congress approved July 2, 1864 (13 Stats., 365), authorizes the filing and acceptance of but one map of general route, and that the withdrawal upon what is known as the amended general route of February 21, 1872, was without authority of law, citing the Guilford Miller case (7 L. D., 100); that the settlement, residence and improvement of a tract in an odd-numbered section within the primary limits of said grant by an Indian, who has abandoned his tribal relation, with the intention of acquiring title thereto as a homestead, existing at the date of the definite location of the road on October 4, 1880, served to except the land covered thereby from the operation of the grant, and ordered a hearing to determine the status of the land in question at the date of the definite location of the company's road.

The Northern Pacific Railroad Company filed a motion for the review and revocation of said decision upon the grounds (1) that it was error to hold that it was unnecessary to consider the withdrawal on said amended general route because of the ruling in the Miller case (*supra*), for the reason that the ruling in that case was being again considered by the Department upon the application of the company for a review thereof; and (2) it was error to hold that if the allegations relative to the occupancy of the Indian Enoch be true, they constitute such a claim as would serve to except the land from the operation of the grant.

On May 19, 1890, counsel for Spicer *et al.* filed a motion to dismiss said motion for review because the same did not submit any new facts and

was not supported by affidavits as required by rule 78 of Practice. The motion for review is accompanied by the affidavit required by said rule, and hence, so far as this point is concerned, the motion to dismiss must be denied.

On May 24, 1890, oral argument was heard by the Department, at which the railroad company and said Spicer *et al.* were represented by counsel. At the same time also appeared counsel for James M. Glover, W. H. Taylor, E. B. Hide, and A. A. Newberry, representing their own interests and also "other residents and property-owners in Spokane Falls, Washington," and presented their petition duly verified and supported by affidavits, asking leave to intervene in support of the motion to review and revoke said departmental decision. Their motion to intervene was granted. The intervenors allege in said petition that the whole of said section 19 within the primary limits of said grant to said company has been twice listed to the company, namely: on May 18, 1884, and June 27, 1888; that there is no claim of record for said land adverse to said company; that the city of Spokane Falls was duly incorporated on or about November or December, 1881, and includes within its corporate limits nearly all of said section 19; that all of the NE¼ of said section has been "surveyed and platted for town purposes;" that said petitioners or their grantors have purchased from said company in good faith and for a valuable consideration lots and squares in said quarter section according to the plat of survey of said city and now hold title to the same; that the value of the property so purchased, with the improvements thereon, "is reasonably worth at least eight millions of dollars;" that the right of purchase from said company of a portion of the E½ of said NE¼, known as "the disputed tract," has been the subject of litigation between said company and one H. T. Cowley, pending which a number of persons have "squatted" on a small portion of said tract and have built thereon rough board dwellings; that many of those whose names are on said application for a survey of said land are occupying said dwellings on said disputed tract; that the statements made in said application for survey are false; that the Indian Enoch never settled upon said NE¼ of said section 19 with the purpose or "intention of acquiring title thereto under the Indian homestead law of the United States, nor in any other way;" that said Indian has never abandoned his tribal relations, but has continuously asserted the same, and as late as March 3, 1887, signed his name, as chief of the Middle Spokane tribe of Indians, to an agreement between said tribe and commissioners representing the United States, wherein said Indians agreed to go to and remain upon the Joco or Cœur d'Alene Indian reservation, and that said chief Enoch and two other chiefs were to receive an annuity of $100 for ten years; that prior to July, 1888, the right of said company to said NE¼ has never been questioned, and that prior to that time said intervenors and their grantors had placed upon the land improvements "aggregating in value several millions of dollars, consisting of stores, ware-

houses, churches, schools, hotels and fine dwelling-houses;" that on or about August 4, 1889, the most valuable part of said quarter section and the improvements thereon were destroyed by fire, and the owners thereof were actively engaged at the time of said departmental decision in rebuilding the same; that the effect of said decision has been to cast a cloud upon the title of said property so that confidence has been shaken and capitalists have declined to make any further advances to complete the improvements already begun, and that the growth and prosperity of said city have been greatly hindered. It is further alleged that should said order be continued, it will cause "great loss of money and business prospects, unsettle values, cloud titles to property which has been bought and sold for many years past under warranty deeds, and which has been improved in good faith and at an enormous outlay of money." The intervenors therefore ask that said departmental decision be revoked; that said application for survey be dismissed, and that such other relief be granted "as in justice and equity may be right."

The aforesaid allegations are corroborated by the affidavits of Arthur A. Newberry, W. H. Taylor, E. B. Hide, and James M. Glover. Newberry swears to the location of said tract, the value of the improvements placed thereon, and the destruction of the same by fire on August 4, 1889, and the efforts to rebuild the same, and that "the improvements now upon said quarter section amount to more than four millions of dollars." He also swears that upon this tract are located the public school, the city gas-works, many churches, a five-story brick hotel costing $300,000, many handsome dwelling-houses, and that within two hundred feet of the north line of said quarter section are located seven national banks." He further swears that the school district of Spokane Falls has recently voted the issuance of $250,000 worth of bonds for educational and other purposes;" that the sale of said bonds "has been rendered extremely difficult, if not impossible, and the improvement and advancement of the general welfare of the city has been greatly retarded" because of the rendition of said departmental decision; that prior to said decision many of the applicants for survey were occupying by sufferance rough cabins built upon a portion of the E½ of the NE¼, and the NE¼ of the SE¼ of said sec. 19; but that since said departmental decision and ruling they have occupied the balance of the NE¼ and other portions of said section 19, breaking enclosures and occupying ground which has been in the exclusive possession of said Newberry and other owners for many years past; that said Newberry is the owner and in possession of a large amount of property situated on said tract, which, prior to said departmental decision, was worth in the market about $100,000, and on account of said decision has become of no market value. Newberry's affidavit is corroborated by W. H. Taylor, E. B. Hide, and James M. Glover.

The intervenors also submit the record of the proceedings of the Indian council held at Spokane Falls on August 16 and 17, 1877, by

inspector Watkins, in which said Enoch objected to being pushed "to become a citizen;" also the record in the Indian office showing the action of said Enoch, who was one of the Indians to sign the articles of agreement made by the Commissioner of the United States with the "chiefs, head men and other Indians of the Upper and Middle bands of Spokane Indians" on March 18, 1887. The ninth article of said agreement provides that "in consideration of the ages of chiefs Louis Spokane Garry, Paul Sculhault, Antarkan, and Enoch, the United States agrees, in addition to the other benefits herein provided, to pay to each of them for ten years the sum of one hundred dollars per annum." This agreement is signed by "Chief Enoch." In addition, the affidavit of Enoch himself, dated May 19, 1890, in which he swears that prior to the year 1883, he settled, improved, and for twenty-four years continuously resided upon the tract of land now within the limits of Spokane Falls, Washington; that during the spring of 1883 he sold said tract to the Northern Pacific Railroad Company for $2,000; that he was advised at that time to select another tract outside the reservation, which he did, but, by so doing, he did not consider his tribal relations severed. He also swears "I have not, nor do I intend to abandon my tribal relations. I was present at Spokane Falls during the spring of 1887, and signed articles of agreement made out and concluded at that place between the commissioners appointed for that purpose and the Upper and Middle bands of Spokane Indians, and am to receive benefits as per article nine of said agreement, when ratified by Congress, at which time I expect to be removed to the Cœur d'Alene reservation."

There is also filed the affidavit of Sidney D. Waters, who was the United States Indian agent at the Colville agency in Washington during 1883–84 and 85. Said Waters swears "that he is well acquainted with Enoch Silliquowya; that said Indian was one of the Indians belonging to the Colville agency during all the time said affiant was Indian agent of said agency; that said Indian has never severed his tribal relations and has never adopted the habits and customs of the white race, except as to dress." Another affiant, S. F. Sherwood, swears that he has been for many years a government interpreter with the Indians; that he speaks the Spokane langauge, and has known said Indian Enoch continuously since long prior to 1872. He states "I know him to be a Spokane Indian belonging to the Spokane Indian tribe, and that he never severed his tribal relations. . . . I have talked with him and he told me he had never severed his tribal relations and never did anything inconsistant with his tribal relations, but always maintained them." Another affiant, James Monaghan, swears that he is a resident of Spokane Falls and has known Enoch since 1872; that he has no interest in this case except as a citizen of said city; that

> I know he attended the councils of the tribe and did everything that the other Indians did indicating the maintenance of his tribal relations . . . He always claimed to be a tribal Indian. . . . His settlement was like that of hundreds of other Indians around Spokane Falls, and he never manifested any intention of

taking up the land under the public land laws, to the best of my knowledge. . . . I know for twenty-five years that Enoch is a well-known Indian, claimed to be such, regarded as such by his tribe and by the community in Spokane Falls, and differing in no respect from the balance of his tribe, but tribal in every feature of his conduct.

H. T. Cowley swears that he (Cowley) is a citizen of the United States, a resident of Spokane Falls since 1874, and first became acquainted with Indian Enoch in the summer of 1674; that "at the time I first knew Enoch he belonged to the Spokane Indian tribe, and he never in fact severed his tribal relations;" that there was an Indian council held by A. C. Watkins, Special Commissioner of the Indian Office, in 1877; that "at that council Enoch attended and made a speech, in which he declared that the Spokane Indian tribe had been promised and were entitled to an Indian reservation; . . . that they did not wish nor intend to take lands in severalty." Said Cowley further swears "I was present at the settlement between Enoch and the Northern Pacific Railroad Company. It was accomplished chiefly through the efforts of the Commissioner of Indians Affairs and his correspondence with Mr. Villard, then the president of the Northern Pacific Railroad Company, and nothing could have been fairer or better understood. . . . After Enoch made this settlement he immediately went down on the Spokane River somewhere and took up some other land." Still another affiant, John A. Sims, swears that he is a resident of Spokane Falls and that he has no interest in this case except that of a citizen of said city; that in September, 1872, he was appointed Indian agent to the Colville, Spokane and other tribes of Indians in the then Territory of Washington, and that as such agent he visited Spokane Falls and became acquainted with said Indian Enoch. The affiant says:

Indian Enoch was then a member of the Spokane Indian tribe, and he called upon me, as Indian agent of the tribe, to settle a dispute between himself and a white man by the name of Swift. . . . I remained agent of these same Indians until October, 1883. During the time I was such agent I frequently saw Enoch, frequently heard of him, knew that he attended the councils of the tribe; that he never to my knowledge did anything toward severing his tribal relations, but exercised his tribal rights. I know he received supplies from the government as a tribal Indian, and is so registered.

The affiant further swears that when Enoch came to see him relative to his negotiations with said company, the only claim of Enoch's then recognized was for improvements and possession; that affiant told Enoch he would do the best he could for him and communicated with the Indian Office relative to said proposed sale, but the Commissioner of Indian Affairs advised affiant to see Enoch and recommend a relinquishment by him upon the payment by the company to him of the sum of $2,000; that the money was paid by the company and Enoch executed the relinquishment with a full knowledge of what he was doing; that when Enoch signed the quit-claim deed he was fully satisfied with the amount paid; that said conveyance was approved by said affiant as required by the regulations of the Department.

On June 26, 1890, counsel for Spicer *et. al.* filed in the Department another affidavit of said Enoch, dated June 18, same year, and also a brief in answer to a brief of said company filed at the oral argument, which, together with all the briefs filed and arguments made, have been carefully considered. In his last affidavit, made before the local attorney of Spicer *et al.*, Enoch substantially denies the allegations made in his former affidavit relative to his tribal relations, and swears, among other things, that while he was living on said tract he "had abandoned his tribe and was living separate and apart from them for the purpose of getting title to said land from the government." The said affidavits of Enoch are so contradictory in themselves that they must be wholly discarded in passing upon said motion.

No action was taken by your office upon the application of Spicer *et al.* asking for a survey of said tract or a hearing with reference to the status thereof. Upon the allegations and affidavits presented by Spicer *et al.* a *prima facie* case was made which clearly made it the duty of the Department to order a hearing upon the same. But the affidavits and record evidence submitted on the part of the intervenors, disregarding the affidavits of Enoch, show conclusively that said Enoch has never abandoned his tribal relations, and hence at no time has he been qualified to make entry of said land under the homestead laws. Secretary Cox to the Commissioner of the General Land Office (1 C. L. O., 283); Circular of April 1, 1870 (idem); Indian homestead act of March 3, 1875 (Sup. R. S. U. S., 167; 18 Stat., 420), and circular of March 25, 1875 (2 C. L. O., 493).

Since it appears that said Enoch has not abandoned his tribal relations, it necessarily follows he was not qualified to make settlement, and his said occupancy of the land in dispute at the date of the definite location of the road on October 4, 1880, did not serve to except the land from the operation of the grant. Ramage *v.* Central Pacific R. R. (5 L. D., 274); Southern Pacific R. R. *v.* Saunders (6 L. D., 98); Northern Pacific R. R. *v.* Kerry (10 L. D., 290); Northern Pacific R. R. *v.* Roberts (id., 427).

Under the supervisory authority of the Department, said hearing was ordered upon the showing presented by the ex parte affidavits of the applicants who asked for a survey of said tract as a town-site, but the record evidence and the affidavits submitted by the company and the intervenors in support of said motion for review show without doubt that said Enoch has never abandoned his tribal relations, and that if the new testimony had been before the Department when the original and amended applications were considered, said hearing would not have been ordered. It, therefore, now appears that there are no sufficient reasons for ordering a hearing before the local officers in this case.

This conclusion renders it unnecessary to consider the validity of the withdrawal of February 21, 1872, upon the filing of the alleged map of general route.

Said decision of April 12, 1890, directing that a hearing be had, is accordingly revoked, and said applications for a survey of said tract are hereby dismissed.

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### DESERT LAND ENTRY—FINAL PROOF—RECLAMATION.

### LEE *v.* ALDERSON.

The intervention of an adverse claim defeats the right to perfect an entry, where proof of reclamation is not made within the statutory period.

Proof of reclamation should not only show that water has been brought upon the land, but also what proportion of each legal sub-division has been irrigated.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July* 18, 1890.

I have considered the appeal of William W. Alderson from your office decision of October 26, 1888, wherein you hold for cancellation his desert land entry No. 59, for Sec. 20, T. 2 S., R. 6 E., Bozeman, Montana.

On May 13, 1881, he filed in the local office his declaration of intention to reclaim said tract under the provisions of the acts of Congress approved March 3, 1877 (19 Stat., 377), and on the same day paid the twenty-five cents an acre therefor, amounting to $160, and obtained the usual certificate from the local officers. At the expiration of the three years allowed him within which to reclaim the land, namely, on May 13, 1884, Daniel Lee filed his declaration to reclaim the same tract, accompanied by the usual affidavits of the desert character of the land, and at the same time tendered the first payment of twenty-five cents per acre.

This application was rejected by the local officers, for the reason that the tract was covered by Alderson's entry of May 12, 1881.

On May 16, 1884, Lee filed his affidavit of contest against Alderson's entry, charging that he "has not complied with the desert land act in any way since making said entry; and that said tract is not and has not been irrigated or reclaimed or cultivated by said party as required by law."

In pursuance of instructions from your office, a hearing was duly had on Lee's averments against said entry, and the local officers on August 12, 1886, recommended the cancellation of the entry, basing their opinion on "the impossibility of claimant's obtaining water" to irrigate the tract; and by your said office decision you affirm the same, because the evidence sustains the charge that "said Alderson has not complied with the desert land act and that said tract had not been irrigated or reclaimed or cultivated as required by law." From this judgment Alderson appeals, charging that you erred:

I. In holding that it was necessary for Alderson to cultivate the land in order to reclaim the same by bringing water thereon.

II. In finding and holding that said land had not been irrigated.

III. In holding (impliedly) that it is necessary to irrigate the whole tract in order to reclaim it by carrying water thereon.

IV. The decision is contrary to the law and the evidence.

Alderson never submitted his final proof until June 23, 1884, forty days after his three years had expired. In the meantime Lee had applied to enter the land and filed his affidavit of contest. Alderson offers his excuse by saying that he was prepared to offer proof on May 3, 1884, but was restrained from so doing on the information obtained from the register that "results of reclamation by the production of crops," had to be shown, and that he could not show such results; but that he learned soon thereafter that such proof was not necessary when he submitted his proof.

Rule 30 of the rules established for the submission of cases to the board of equitable adjudication (6 L. D., 800), provides as follows:

> All desert land entries in which neither the reclamation nor the proof and payment were made within three years from the date of entry, but where the entryman was duly qualified, the land properly subject to entry under the statute, the legal requirements as to reclamation complied with, and the failure to do so in time was the result of ignorance, accident or mistake, or of obstacles which he could not control, and *where there is no adverse claim.*

Alderson never began the construction of his ditch until November, 1883, about five months before the time for making his proof would expire; he says "unexpected financial reverses" prevented his constructing his ditch sooner; but this could not excuse his laches in failing to submit proof of reclamation in time, especially when there was an adverse claimant.

The evidence of claimant shows that he constructed a ditch from Lime Kiln Creek to a point about one half mile south of the south line of the tract. This ditch was about three miles long and about twenty-six inches at the bottom, near three feet at top and about twelve inches deep. It intersected a "coulee" or dry creek, a few feet wide, which led on to the land, thence through the section. He claims that this "coulee" enters the land at the highest or near the highest place and that water can be taken from it to all parts of the land; that water was running through this ditch and into the "coulee" and on to the land May 1, 1883.

It is contended that this result having been accomplished that the land is reclaimed "by conducting water upon the same." He says from this ditch water *can be distributed* over and through all of the soil; that if necessary he will build a reservoir on the "coulee" to distribute the water. That this ditch will enable him to irrigate the land.

This may all be true, but the carrying of water to the land, and even through the land without showing the presence of lateral ditches and water therein through the several smallest legal subdivisions, is not sufficient to show the reclamation of the land within the meaning of the statute.

The question is not what may be done; but the proof must show what has been done to reclaim the land. The evidence fails to show that this tract was reclaimed, although it does show that water was brought to it.

The proof must show what proportion of each legal subdivision has been irrigated. Adam Schindler (7 L. D., 253); Wm. Holland, 6 L. D., 38.

Your said office decision is affirmed.

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RESERVATION—DEPARTMENTAL AUTHORITY.

GEORGE HERRING.

A reservation of public land for a proper purpose made by the local office, on the request of the surveyor-general, if unrevoked, may be considered as having been approved by the Department, hence made by competent authority and the land included therein not subject to entry.

*Secretary Noble to the Commissioner of the General Land Office, July* 19, 1890.

By letter dated January 7, 1880, the surveyor-general of California requested the local officers at Visalia to suspend "from entry and sale" sections 5, 6, 7 and 8 in T. 14 S., R. 28 E., M. D. M., for the reason that they "are covered by trees of the *sequoia gigantia* variety, some of which are reported to be forty feet in diameter and from three hundred to four hundred feet high, constituting a remarkable and rare curiosity which should be preserved."

The said letter also set out "that the tracts named being exceptional in character will be made the subject of a report to the Department with a view of bringing the matter to the attention of Congress.

By letter dated June 1, 1880, the surveyor general, stating that his information had been erroneous, directed the local office, for the reasons stated, to so suspend in lieu of the sections described, section 31, of T. 13 S., and also (at the suggestion of the local office) sections 5 and 6 of T. 14 S., and range aforesaid.

On June 17, 1887, George Herring filed an application to enter the NW. ¼ of SW. ¼, N. ½ of SE. ¼ and NE. ¼ of SW. ¼ of said section 6, under the provisions of the act of June 3, 1878 (20 Stats., 89).

This application with the proof submitted September 15, 1887, in support thereof was rejected, by reason of said suspension.

From this action Herring took no appeal.

On March 1, 1888, Herring again made application to enter in like manner the said land and on May 31st following, presented proofs in support thereof.

On the date last mentioned the local office rejected said proof for the reason that Herring's said application "was not in the form required by the act of June 3, 1878."

Herring appealed.

Thereupon on February 29, 1889, your office found that his rights had not been affected by his previous application. By the same decision, however, your office held "that the presence upon the land of

growing mammoth trees renders it exceptional in character" and therefore not subject to entry under the act referred to and affirmed the action below.

Herring again appeals.

Along with his appeal from the local office Herring filed an affidavit made June 21, 1888 (not corroborated) wherein he avers that on September 15, 1887, he offered proof at the local office in support of his application made in June preceding, that upon the rejection of such proof he employed a land lawyer in Visalia to take an appeal to your office that some time after, the said lawyer "became ill and died," that thereafter he had no notice or information that said appeal had not been taken "until the lapse of many weeks."

The reservation requested by the surveyor-general in 1880, has so far as the record discloses not been revoked. The said reservation may, for the purposes of this case be therefore considered as having been approved by this Department and consequently, in contemplation of law, as having been made by the President who "speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." Wolsey *v.* Chapman (101 U. S., 755). See also Graham *v.* Southern Pacific R. R. Co. (5 L. D., 332).

There is no statute giving a general authority to the President to reserve lands. But the right of the President to put public lands in reservation so that all questions in reference to them might be properly considered, has always been maintained by the courts.

In the case of Grisar *v.* McDowell (6 Wall., 363, 381) the supreme court said that "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 trees referred to have been, as stated, correctly described by the surveyor-general as constituting a "remarkable and rare curiosity which should be preserved." To that end, the lands containing them were withdrawn from sale and entry so that all questions in regard to them could be properly considered.

Being thus placed in reservation by competent authority and for a sufficient reason it was "not in the power of a party to acquire rights by treating such reservation as of no effect." See opinion of attorney-general Devens in the matter of the Southern Pacific Railroad grant (16 Op. 80) and cases cited.

The reservation referred to being in existence at the time of Herring's application, I must find in accordance with the views herein expressed that the same has been properly denied.

This disposition of the case renders it unnecessary for me to discuss the other matters that are presented by this appeal.

The decision appealed from is affirmed.

OSAGE LAND—FILING—FINAL PROOF.

BOYD *v.* SMITH.

Where two claimants for Osage land are each in default as to filing within the prescribed period the superior right must be accorded to the one who makes the first filing, subject only to defeat in case of failure to submit final proof within six months after such filing.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July* 18, 1890.

August 18, 1886, F. W. Boyd made Osage declaratory statement No. 5252, alleging settlement in October, 1881, for lot 6, Sec. 26, T. 26 S., R. 25 W., Garden City, Kansas.

August 28, 1886, Kate Smith filed Osage declaratory statement No. 5293 for the same land, alleging settlement March 1, 1886.

Smith offered final proof January 22, 1887, and Boyd January 24, 1887. The local officers rejected Smith's offered proof, and accepted that of Boyd, on the ground of prior settlement by Boyd.

Smith appealed to your office, and on January 17, 1889, your office affirmed the action of the local officers, from which decision Smith now appeals to this Department.

Both claimants have satisfactorily shown compliance with law as to residence, improvements and cultivation.

The point relied upon by Smith for reversal is, that in the original act of Congress providing for the sale of the Osage lands payment was required to be made within one year of settlement, and that Boyd not having offered final proof and payment until several years after settlement, had forfeited his rights thereunder, and Smith having made her final proof and tendered payment within the year, should prevail over the claim of Boyd.

In the case of Hessong *v.* Burgan (9 L. D., 353), it is held that under the act of Congress of May 28, 1880 (21 Stat., 143), and the departmental regulations in reference to the same, filing must be made within three months from settlement, and final proof and payment within six months after the filing. Neither Smith nor Boyd filed within three months of settlement, and the fact that Smith's settlement antedated her filing but five months, while Boyd's was five years before filing, can give Smith no preference over Boyd, as both were in default, and Boyd's filing having been made prior to that of Smith he thereby acquired priority over Smith, which could only be defeated by failure to make final proof within six months thereafter, and as he made such proof January 24, 1887, within the prescribed time, his claim must prevail, and the fact that Smith's proof was offered within a year of settlement, while Boyd's was not, can have no bearing in the case, as both were in *pari delicto* as to filing. Had Smith alleged and shown settlement within three months of filing her declaratory statement, she would have

had priority over Boyd, because she would thereby have complied with the *regulation* as to filing, which has the force and effect of law (see case above cited).

The act of May 28, 1880 (21 Stat., 143), in effect, modifies the provision of the law of May 9, 1872 (17 Stat., 90), requiring payment within one year of date of settlement, which counsel for appellant seem to rely upon.

The decision of your office is affirmed, and Smith's declaratory statement 5293 is canceled.

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PRE-EMPTION ENTRY—SETTLEMENT.

OHIO CREEK ANTHRACITE COAL CO. *v.* HINDS.

One who enters upon land as the representative of another, and remains thereon in such capacity, is not a settler within the meaning of the pre-emption law.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July* 18, 1890.

On May 27, 1887, William Hinds filed pre-emption declaratory statement alleging settlement February 11, 1885, upon the E. ½ of the SW. ¼, Sec. 26, and E. ½ of the NW. ¼, Sec. 35, T. 14 S., R. 87 W., Gunnison, Colorado.

In pursuance of his published notice of intention he submitted proof in support of his entry at the local office on November 9, 1887. W. L. Yule, President of the Ohio Creek Anthracite Coal Company, filed affidavit of protest against the acceptance of said proof. Both parties appeared by counsel.

Separate motions were made by claimant's attorney to dismiss the said protest for failure to specifically set forth the charges and "for the reason that there are no corroborating affidavits." These motions were denied November 14, 1887.

Thereupon the hearing was proceeded with upon different days until November 24, 1887, when the case closed.

Upon the evidence submitted, the local officers recommended the acceptance of the claimant's proof and the approval of his entry. The company appealed from this judgment and your office, on March 29, 1889, reversed this decision and sustained the contest and rejected Hind's proof. From this order he appeals.

From an examination of the record it appears that at some time prior to October 1883, the land in question with some four thousand acres of adjoining coal land, had been purchased from a party having color of title by the Mt. Carbon Anthracite Coal company of which said Ohio Creek Company is the successor. At the time of such purchase there were three or four houses on the land, one of which had previously been used as a hotel.

In August, 1883, one W. L. Hinds, the claimant's son, occupied a dwelling-house on the land as superintendent of the Mt. Carbon Company, where in October following he was joined by the claimant, a director in said company, who came from New York in its interest.

The property of the Mount Carbon Company was subsequently sold and ultimately conveyed to its said successor.

In the course of such re-organization, the claimant having obtained a judgment against the Mt. Carbon Company, bought its certain personal property at the resulting sheriff's sale in Gunnison County, and afterwards transferred his interest therein to the said new company for forty shares of its stock.

The claimant, who became a director in the Ohio Creek Company, continued to occupy the said dwelling-house until the time of trial. His son became the superintendent of the last-named company, and remained on the land until June 1, 1887, when he resigned.

The claimant averred in his proof that he made "settlement" on the land in October, 1883. He testified that he first thought of pre-empting the same in February, 1885, "the day of the sheriff's sale." He further states that from the latter date until June, 1887, his "board" and that of his son, had been paid by the said Ohio Creek company.

The improvements on the land valued as high as $8000, were all made or at least paid for by the said Ohio Creek company, with the exception possibly, of about one-eighth of an acre cultivated and some fencing, sage brush and hay cutting by the claimant.

Within a few days after his filing, the claimant submitted to the said Ohio Creek Company a proposition in writing whereby he offered to "execute a quit claim of all my (his) rights, title and interest in and to any and all the improvements situate on the" tracts heretofore described.

The attorney, who drew said writing testifies that the claimant had given the description therein contained from memory and that the said proposition referred solely to the adjoining coal land and not to the tract involved.

The claimant, however, states in said writing that he hoped said proposition would be accepted as he incurred great trouble and expense in moving from New York and that "to move again will entail like trouble and expense."

That the claimant went on the land and, during at least the greater part of the time covered by his proof, remained thereon simply as the representative of the companies named and not with the intention of acquiring the same under the pre-emption laws, is, I think, clear.

Consequently he can not be said to have been a settler thereon within the meaning of the pre-emption law. Griffin *v.* Pettigrew (10 L. D., 510).

Moreover his said offer to sell out to the protestant company tends strongly to impeach the integrity of his filing.

The action of your office in rejecting the claimant's proof is, in view of the foregoing, hereby affirmed.

The claim of the said Ohio Creek company to the land involved is not presented by this record, and no ruling is made in regard thereto.

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HOMESTEAD CONTEST—ATTORNEY—APPEAL—RELINQUISHMENT.

PIKE *v.* ATKINSON.

An attorney who advances money for the prosecution of a contest does not secure thereby such an interest in the case as will entitle him to an appeal in the event the contest is dismissed.

The preference right of a contestant is not defeated by a relinquishment, accompanied with an application to enter, filed after the initiation of the contest.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July* 18, 1890.

I have considered the case of John C. Pike *v.* William S. Atkinson, on appeal by the former from your decision of December 4, 1888, dismissing his contest against the homestead claim of Atkinson and allowing the homestead entry of Daniel Sullivan to stand, for the S. ½ NE. ¼ and S. ½ NW. ¼ of Sec. 30, T. 12, R. 15 W., Grand Island, Nebraska, land district.

The facts are as follows:

On March 9, 1885, Atkinson made homestead entry for this land, and on March 12, 1886, one James Hunter filed affidavit of contest against the same. Hearing was set for May 3, 1886. On March 27th, same year Atkinson executed a relinquishment and gave it to one Roe, attorney for Hunter. The testimony in the contest case was taken on May 23rd, and the case was taken under advisement by the local officers. On June 2, 1886, Pike filed affidavit of contest against the said entry, alleging abandonment and that the Hunter contest was a collusion between Atkinson and Hunter, and Hunter's attorney (Roe), and that it was for speculation. The hearing of this contest was set for August 23, 1886. July 1, 1886, Hunter withdrew from his contest and the same was dismissed. On November 10, 1886, the day to which Pike's contest had been continued, he appeared with counsel and Atkinson being in default, Roe appeared and moved the local officers to postpone the hearing until the final disposition of his, Roe's, appeal from their refusal to re-instate the Hunter contest. This motion was overruled and the testimony was heard and the case was passed for decision.

On February 21, 1887, Daniel Sullivan filed the relinquishment of Atkinson and filed application for homestead entry for the land. This was filed subject to the rights of contestant, John C. Pike. On March 2, 1887, the local officers decided the contest in favor of Pike and allowed him thirty days "preference right of entry," Sullivan's entry to be canceled if Pike should make application to enter.

From this decision Sullivan appealed and your office on December 4, 1888, held that there was no sufficient ground for awarding the preference right of entry to Pike, and dismissed his contest and allowed Sullivan's entry to stand intact. From which decision Pike appealed.

Your decision states the testimony sufficiently full and complete.

Although Roe as attorney for Hunter, had expended some money for his client, yet he has no such interest in the case as will entitle him to an appeal, hence the local office did not err in overruling his motion to postpone the hearing until his attempted appeal should be heard.

Roe was evidently holding the relinquishment of Atkinson for speculation.

While it is true that the contest of Pike was not the cause of the relinquishment by Atkinson, yet it is apparent that the filing of said relinquishment in the local office was the result of the contest, as at the hearing in November evidence had been submitted which must have resulted in the cancellation of the entry, and the only opportunity that Roe had of obtaining any money for said relinquishment was to sell the same and file it and procure the cancellation of the entry before it was canceled on the evidence submitted at the hearing. The cancellation thus being the result of the contest by Pike, he must have a preference right of entry, and the entry of Sullivan must be canceled should Pike still assert his right.

Your decision is therefore reversed.

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### PRE-EMPTION FINAL PROOF—PAYMENT—PROOF OF NON-ALIENATION.

JOHN J. SCHNEIDER.

Delay in making payment for the land will not defeat a pre-emption entry allowed prior to the regulations requiring proof and payment to be made at the same time.

Where the final proof is not made before the local office, and the delay in making payment is fairly explained, additional proof of non-alienation is not required, if it appears that the entryman had complied with the law up to the date of final proof, and had not then sold or agreed to sell the land.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July* 18, 1890.

On March 31, 1883, John J. Schneider made pre-emption cash entry for the S. ½ of the NE. ¼ and S. ½ of the NW. ¼, Sec. 13, T. 135 N., R. 58 W., Fargo, Dakota.

In his declaratory statement filed April 15, 1881, the land was erroneously described as the S. ½ of the NE. ¼ and N. ½ of the SE. ¼ of the section named. Attention having been called to such error by your office, his application to amend said filing was allowed by your office letter of January 11, 1886.

He made proof before the deputy clerk of the district court for Ran-

som county on January 13, 1883, showing that he is a married man and that he had continuously resided upon the land from April 11, 1881, to the date of his proof and that his improvements consist of a log house twelve by fourteen feet, stable, well, five acres broken and cropped in 1882, valued at $300.

On January 15, 1886, your office suspended the said entry "on account of insufficient proof, the pre-emption affidavit on file with the case not covering the date of entry" and required the claimant to furnish "said affidavit without delay."

The local office on July 23, 1887, reported that the entryman had, December 31, 1886, been notified of the foregoing and that "no action had been taken."

Thereupon your office, December 14, 1887, directed the local office to "advise the party that in lieu of the pre-emption affidavit required by said letter, he will be allowed to furnish an affidavit of continued residence on and non-alienation of, the land down to date of entry, March 31, 1883, proof having been made before the clerk of the court on January 13, 1883."

The notice of this requirement was sent the entryman January 7, 1888, by registered letter, which was returned uncalled for.

From the said decision of December 14, 1887, F. T. Day, who swears that he is the owner of the land in question and that the whereabouts of the entryman, who "neglects and refuses" to comply with the said requirement, are unknown and cannot be ascertained, has appealed to this Department.

The affidavit of the entryman's attorney, dated March 13, 1883, sets out that the delay in forwarding the testimony of the entryman and witnesses to the local office was caused by "impossibility of obtaining the funds with which to make final payment for said tract at an earlier date."

The entryman's proof was made prior to the circular of November 18, 1884, (3 L. D., 188), whereby pre-emption claimants were required to make proof and payment at the same time.

Consequently the delay in making payment for the land should not be permitted to affect the entry involved. R. M. Barbour (9 L. D., 615).

The entryman's proof shows a substantial compliance with the law and his pre-emption affidavit thereto attached sets out that he had neither sold nor agreed to sell the land.

Consequently, the entryman's proof having been made before an officer other than the register or receiver, and the delay in payment having been fairly explained, the case at bar is clearly governed by the rule laid down in the case of Charles Lehman (8 L. D., 486), wherein the Department has held that if the pre-emptor has in fact complied with the law up to the time of making proof and can at that time truthfully make the requisite affidavit, a sale thereafter without such affidavit having been made, and prior to the issuance of final certificate, will

not of necessity defeat the right to a patent. See also Grigsby *v.* Smith (9 L. D., 98) and cases cited.

The record does not show whether or not the entryman between the date of his proof (January 13, 1883) and the issue of his final certificate (March 31, 1883), had alienated the land.

But under the authority cited, I must find from the record before me, that such alienation would have been immaterial. I can, therefore, see no reason for disturbing the entry in question.

The decision appealed from is accordingly reversed.

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### OKLAHOMA TOWN SITES—COMMUTED HOMESTEAD.

### CIRCULAR.

*Regulations to be observed in the execution of the provisions of the second proviso of the twenty-second section of the "act to provide a temporary government for the Territory of Oklahoma," etc., approved May 2, 1890.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., July 18, 1890.*

*To the Registers and Receivers of the U. S. Land Offices, Oklahoma Territory.*

GENTLEMEN: All applications to commute homestead entries, or portions thereof, to cash entries, at the rate of ten dollars per acre, for the purpose named in the twenty-second section of the act above cited, will be made through your respective offices and addressed to the Hon. Secretary of the Interior, in accordance with the following regulations:

1. Entries under said section must be made according to the legal subdivisions of the land, and no application for a less quantity than is embraced in a legal subdivision or for land involved in any contest, will be received by you.

2. A party desiring to found a city or town upon land embraced in his homestead should present his application (form 4001) at the local land office of the district in which his land is situated, and, if his application and the status of his homestead entry are found to be in accord with the foregoing requirements, you will so advise him and allow him two months within which to prepare and file with you triplicate plats of the survey of the land applied for, duly verified by the oaths of himself and the surveyor.

3. Such plats must state the name of the city or town, describe the exterior boundaries thereof according to the lines of public surveys, exhibit the streets, squares, blocks, lots and alleys, and must specifically set forth the size of the same, with measurements and area of each municipal subdivision; and, if the survey was made subsequent to May 2, 1890, the plats must also show that the provisions of the first proviso of the section of the act under consideration have been complied with,

viz: the setting apart of "reservations for parks (of substantially equal area if more than one park) and for schools and other public purposes, embracing in the aggregate not less than ten nor more than twenty acres."

4. Upon receipt of the plats you will transmit the same to this office, for examination and the approval of the Secretary of the Interior, together with the application to make entry and your joint report as to the status of the land applied for. Should the plats be approved, one of them will be retained in this office and the other two returned to you with directions to notify the applicant of their approval and that he will be allowed three months within which to make the proof hereinafter prescribed and to perfect his entry of the legal subdivision, or subdivisions, applied for, exclusive of the portions reserved for parks, schools and other public purposes (which are to be patented, as a gift to the town when organized as a municipality, for the specific purposes for which they were reserved), by tendering the purchase price of that portion of the land actually entered. One of the approved plats returned to you will be retained in your office and the other delivered to the applicant to be placed on record and file in the office of the recorder of the county in which the town is situated.

5. Notice of intention to make cash entry as above contemplated, shall be the same in all respects as is required of a claimant in making final homestead proof, and the entry when made will be given the current number of the series of commuted or cash entries provided for in the twenty-first section of the above cited territorial act. Proof in accordance with the published notice, consisting of the testimony of the claimant and two witnesses, must be furnished relating——

1st. To the strict observance of the warning contained in the President's proclamation of March 23, 1889, if the land applied for is within that portion of the Territory of Oklahoma opened to settlement thereby. Should the land be located in a portion of the Territory which may hereafter become open to settlement by operation of law or a proclamation of the President, it will be necessary for the claimant to show that he has strictly observed the spirit and letter of the provisions under which settlement in said portion became permissible.

2nd. The claimant's citizenship, and qualifications in all other respects, as a homesteader, the same as in making final homestead or commuted proof under the act relating to the Seminole lands, approved March 2, 1889, and the territorial act admendatory thereof, approved May 2, 1890.

3rd. Due compliance with all the requirements of the homestead law, by the claimant, up to the date of commuting to cash entry.

4th. The foregoing to be accompanied by the usual proof of notice by publication, together with the certificate of the register and receiver showing that the duplicate homestead receipt has been presented to them and canceled in respect to the land purchased for townsite pur-

poses, and the certificate of the county recorder to the effect that a plat of the town, bearing the approval of the Secretary of the Interior, has been made of record and placed on file in his office.

6. After notice has been given an applicant that this homestead is free from contests, and is not in conflict with any other entry, and pending the preparation and approval of the town plats, you will neither accept any affidavit of contest nor order any hearing involving the land applied for; and after the approval of the plats, no contest initiated as such and looking to the defeat of the proposed cash entry, will be entertained by this office.

7. Parties appearing at the time and place of making proof and protesting against the allowance of the cash entry, simply as objectors or friends of the government, will be heard, permitted to cross-examine the claimant and his witnesses without additional cost to the claimant, and their complaints and the facts developed will be duly considered by you, and such action taken as you may deem proper, except that you will order no hearing in any such case. Should a protestant desire to carry his action into a contest, between which proceedings there exists a clear distinction (see McCracken *v.* Porter, 3 L. D., 399, and Martin *v.* Barker, 6 L. D., 763), he will be required to file with you a sworn and corroborated statement of his grounds of action, and that the contest is not initiated for the purpose of harassing the claimant and extorting money from him under a compromise, but in good faith to prosecute the same to a final determination, which statement you will transmit with the claimant's proof, and if the allegations therein contained are considered sufficient by this office to warrant the ordering of a hearing, you will be so advised and a hearing will be ordered upon compliance by the contestant with the condition that he shall deposit with you a sufficient sum to cover the costs thereof.

8. Notice of your actions or decisions in all matters affecting an entry, or an application to enter, under the foregoing instructions, and the proof thereof, shall be the same as in ordinary cases; and any person feeling aggrieved by your judgment in such matters may, within ten days from receipt of notice thereof, appeal to this office. Within the time for filing an appeal, the appellant shall serve a copy of the same on the appellee who will be allowed ten days from such service within which to file his brief and argument. Appeals from the conclusions of this office lie to the Secretary of the Interior, subject to the foregoing restrictions as to time, the same as in other matters of like character.

Respectfully,

LEWIS A. GROFF,
*Commissioner.*

Approved,
JOHN W. NOBLE,
*Secretary.*

HOMESTEAD CONTEST—CITIZENSHIP—EVIDENCE—ATTORNEYS.

KIRKPATRICK *v.* BRINKMAN.

A contest against a homestead entry on the ground that the entryman is not a citizen must fail if declaration of intention to become a citizen is filed prior to the initiation of suit.

A stipulation as to matters of evidence to be considered on the trial is within the province of attorneys of record, and such action is binding upon the parties, in the absence of misconduct on the part of the prevailing party.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July* 21, 1890.

Sophia Brinkman, November 28, 1882, made homestead entry No. 10,066 for the SE. ¼ of Sec. 27, T. 5 N., R. 24 W., 6th P. M., Blooming-ton, Nebraska. On June 18, 1886, Elias T. Kirkpatrick filed affidavit of contest, alleging that said Sophia Brinkman was not a citizen of the United States at the date of her entry, and also that she had not complied with the law in relation to settlement and residence. Hearing was set for August 6th, before the local office.

A. J. McPeak, a notary public, was appointed by the register and receiver to take depositions of witnesses as to the allegations involved in the affidavit of contest, at his office in Arapahoe, Nebraska, July 30, 1886.

On said last date the parties appeared at the office of McPeak, attended by counsel, and a stipulation was signed by F. B. Taylor, attorney for contestant, and Sheppard and Black, attorneys for contestee, by which contestant withdrew all objections as to the sufficiency of residence, cultivation, etc., leaving only for the consideration of the local officers the allegation of non-citizenship.

The stipulation covers five pages of foolscap, but for the purposes of this case it is only necessary to note one clause thereof, namely:

> That on the 7th day of June, 1886, contestee appeared before said district court, it being the first day of the first term of said court after contestee had learned she was not a citizen of the United States, and made application to be naturalized. Contestee was at that time informed by the judge of said court that all she could do was to declare her intention to become a citizen of the United States, which she then and there did.

A copy of said declaration, duly authenticated, is also filed with the papers in the case.

In view of this stipulation, the local officers recommended the dismissal of the contest. Kirkpatrick appealed to your office, and on December 5, 1888, your office affirmed the action of the register and receiver, and the contestant now appeals from said decision to this Department.

It will be noticed that claimant's declaration of intention to become a citizen preceded by nearly two weeks the filing of the affidavit of con-

test, and as it is clear from the stipulation that claimant at the time of making her entry honestly believed that she was a citizen (she having been informed by her husband in his life-time that he was a Union soldier) and her declaration having been made prior to the initiation of the contest by Kirkpatrick removed the disability of alienage that existed at the time of making her entry (6 L. D., 485; 4 L. D., 564; 3 L.D., 452; 2 L.D., 627).

Since the decision of your office dismissing the contest, contestant has employed another lawyer, Taylor having left the country, and now for the first time the point is raised, that Taylor "sold out" his client when he signed the stipulation. That contestant did not intend nor authorize his attorney to waive the question of residence and cultivation, and asks that he may show lack of residence, etc.

The argument of contestant's last counsel consists largely of uncalled for villification and abuse of opposing counsel, and abounds in vituperation to such an extent as to be in bad taste and certainly does not add strength to an argument. If Mr. Kirkpatrick employed a dishonest attorney, that is not the fault of the entryman unless it can be shown that she corrupted him or was a party thereto, and she should not be made to smart for the conduct of opposing counsel. The client is ordinarily bound by the admissions of his attorney and a stipulation as to matters of evidence to be considered in the trial of the case is peculiarly within the province of attorneys of record, and their action therein is binding upon their clients unless the prevailing party is guilty of misconduct. And inasmuch as the question of residence and cultivation will necessarily be considered when claimant offers her final proof, and the contestant will then have the opportunity to offer any rebutting evidence he may have, I do not now deem it necessary to open the case for that purpose.

The decision of your office in dismissing the contest is therefore affirmed.

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### HOMESTEAD AND PRE-EMPTION—CONFLICTING SETTLEMENT RIGHTS

### CLARK *v.* MARTIN.

One who occupies land as the tenant of another may, on the termination of the tenancy, make a legal settlement on said land, by remaining thereon with the intention of making the same a home to the exclusion of one elsewhere.

The extent of the pre-emption right is limited to the land actually included within the settlement of the pre-emptor.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July* 21, 1890.

I have considered the case of Samuel Clark *v.* George C. Martin on appeal by the former from your office decision of January 31, 1889, cancelling his pre-emption filing number 1334, and accepting the final

proof of said Martin for the SW. ¼ of NE. ¼; SE. ¼ of NW. ¼, NE. ¼ of SW. ¼ and NW. ¼ of SE. ¼ of section 28, T. 22 S., R. 20 E., Gainesville, Florida, land district. The facts are these:

On February 12, 1885, Martin made a homestead entry for said land and on March 10, same year, Clark filed a pre-emption declaratory statement for same land, alleging settlement February 10, 1885.

On September 10, 1885, Martin submitted commutation proof; Clark appeared and offered adverse testimony and on October 13, following, Clark submitted pre-emption final proof and Martin appeared and offered adverse testimony.

The matter was referred to your office, and a hearing was ordered which was had December 17, 1886, and the local officers held Clark's declaratory statement for cancellation and accepted the commutation proof of Martin.

From this decision Clark appealed and your office decision of January 31, 1889, affirmed said decision from which he again appealed.

The testimony shows: That Samuel Clark was a freedman over sixty years of age at time of hearing; that in 1866 he settled upon the SE. ¼ of NW. ¼ and SW. ¼ of NE. ¼ of said section 28, and built a house, cleared, fenced and cultivated a small parcel of said land; subsequently he made additions thereto until he had some thirty acres cleared and fenced. He built some out-buildings and planted orange, banana, grape-fruit, and other valuable trees thereon. In 1868 he attempted to make a homestead entry for this land but by mistake entered the NE. ¼ SW. ¼ and NW. ¼ of SE. ¼ of said section. He had built his house upon the SE. ¼ of NW. ¼ and his "clearing" extended onto the SW. ¼ of NE. ¼. He did not offer final proof within seven years, but went to the land office about one month after the time had expired and was informed that he was too late. In March, 1878, one W. B. Center made homestead entry for the SE. ¼ of NW. ¼ and SW. ¼ of NE. ¼ of said section (being the land occupied by Clark). He made no settlement or residence on the land but went there and informed Clark that he entered the land and owned it and gave Clark the first information he had that there was a mistake in his (Clark's) entry.

In 1879 Center died; his sister was appointed administratrix of his estate and guardian of his children, and one Coogler (who was law partner of Martin), as agent for this guardian in December, 1881, sold the rights of said heirs to one I. N. E. Shoemaker of Reading, Pa., who went upon the land, claimed to own it, built a house upon the SW. ¼ of NE. ¼ of the section, made some improvements on that tract and cleared, fenced, and planted to orange trees about seven acres in the NE. ¼ of SW. ¼ of the section.

The entry of Clark was canceled on April 10, 1881, and on the 23rd of December following, Shoemaker made homestead entry for the N. W. ¼ of SE. ¼ and NE. ¼ of SW. ¼ of the section. On July 20, 1883, the Center entry was canceled by relinquishment and on 23rd of same

month Shoemaker's homestead entry was canceled by relinquishment and on same day he filed pre-emption declaratory statement for the four tracts in controversy, alleging settlement December 17, 1882.

Shoemaker went upon the land occupied by Clark in December, 1881, and all of the improvements made on it were made before he had any title except an agreement with Coogler, as agent of the guardian of Center's heirs. Coogler says in an affidavit, "When I put Shoemaker in possession of the Center lands in 1881, Sam Clark was still residing upon the place at the spring and I told Shoemaker that Clark was only a tenant at will."

In July, 1883, immediately after filing his pre-emption declaratory statement, Shoemaker moved with his family back to Reading, Pa., wholly abandoning the land. He never returned to reside upon it; but in December, 1884, visited Florida and in January, 1885, offered final proof on his declaratory statement, which was rejected because of abandonment and failure to maintain a residence on the land.

Clark continued to reside upon the tract during the time Shoemaker was making his improvements and while he was absent from the State. It is shown that Clark is very ignorant, and that he was timid about asserting his rights; that he was disposed to admit the superiority of white men; in fact he was afraid of Center and did not know what he could do with Shoemaker—so he in fact admitted the superior right to the land, in Center first, and afterward in Shoemaker, and in the winter of 1884–5 he made preparations to leave the place and go to the farm of his step-son. He had a part of his crops grown in 1884, stored there and was arranging to move during the winter. Shoemaker testifies that he was at Clark's in February, 1885, and Clark and his wife told him they were going away. Martin offered testimony showing that Clark said that he would not stay there and improve the place for another man. Shoemaker was there February 9, 1885, to get oranges to take north with him. He and Clark talked over the matter and he informed Clark that he was going north to stay and Clark told him he had a house over on Landy's (his step-son's) place and that they were getting ready to move.

Coogler, as agent for Shoemaker, had sold the improvements on the land to Martin after Shoemaker's failure to "prove up", and on February 12, 1885, Shoemaker's relinquishment was placed on file and Martin's homestead entry was immediately made.

The local officers treat Clark as the tenant first of Center and afterwards of Shoemaker, and Martin and they cite Conk *v.* Rechenbach (4 L. D., 257), in which it is held that "one holding as a tenant of another acquires no settlement rights under the homestead law." The principal part of Shoemaker's testimony is for the purpose of showing that Clark admitted his (Shoemaker's) ownership, but as I have said it was a kind of admission growing out of ignorance and timidity, and it is immaterial as to whether it was tenancy or not, for if the relation of landlord and tenant ever existed between them that relation terminated with Shoe-

maker's abandonment of the land; it certainly could not exist after the local officers, on a hearing, had decided that he had abandoned the tract. From that time Clark could by act and intent become a settler. That is, if he had in his mind given up the idea of retaining his home upon this land and had made preparations to move away, and if Shoemaker is correct in his statement, that was the condition of his occupancy, and if from being advised of his right to remain, or upon the information that Shoemaker had failed to make proof and was not going to return to the land as it seems Clark learned, he changed his intention and determined to remain and make his home there, the tenancy being ended, he could by "a combination of act and intent on his part, the act of occupying and living upon the tract and the intention of making the same his home to the exclusion of a home elsewhere," make a legal settlement. See West *v.* Owen (4 L. D., 412). This the testimony shows he did—he did remain on the land—and he swears that his intention in so remaining was to make his home there to the exclusion of one elsewhere, and in this he is corroborated by all the circumstances in the case.

This eliminates from the case the question which is made by counsel, to wit, whether Clark filed in time under the statute. Shoemaker fixes his visit February 9th, Clark says he made settlement on the 10th. He is probably correct as to the day, as Shoemaker is an intelligent man and probably gave the date correctly. This would seem to settle this case, but I am clearly of opinion that Clark never had in contemplation the NW. ¼ of SE. ¼ or NE. ¼ of SW. ¼ but only the two "forty acre lots" on which he had made his improvements and while his declaratory statement covers the tracts mentioned, I do not think his settlement in fact included them. Your decision is modified as follows: The homestead entry of Martin for the SE. ¼ NW. ¼ and SW. ¼ of NE. ¼ of said section 28, will be canceled and the proof of Clark as to these tracts accepted. The pre-emption declaratory statement of Clark for the NE. ¼ of SW. ¼ and NW. ¼ of SE. ¼ of said section will be canceled and the proof of Martin accepted for said tract.

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### HOMESTEAD CONTEST—SUFFICIENCY OF CHARGE—EVIDENCE.

### McKANN *v.* HATTEN.

The testimony in a case should be confined to the charge as laid in the affidavit of contest.

A contest must fail if the charge as laid therein is not established by a preponderance of the evidence.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July* 21, 1890.

I have considered the case of John K. McKann *v.* Susan Hatten on appeal by the latter from your decision of June 30, 1888, affirming the decision of the local officers holding for cancellation her homestead

entry for the NW. ¼ of Sec. 35, T. 31 N., R. 46 W., Valentine land district, Nebraska.

On June 6, 1884, she made homestead entry for said tract, and on December 7, 1885, McKann filed affidavit of contest against the same alleging, as the only ground thereof, "that the said Susan Hatten has not settled upon said tract as required by law."

Notice of the contest was given by personal service. The charge contained in the notice was "For abandoning her homestead." The hearing was set for February 19, 1886. The parties appeared and the contestee by her counsel filed a motion to dismiss the cause "for the reason that contestant has not served notice of this contest upon claimant as required by law."

The local officers disregarded this motion, appointed a commissioner to take testimony and continued the hearing until August 19, 1886.

Both parties appeared before the commissioner; and the contestant offered testimony to show a failure to establish residence on the land. This testimony was objected to by the attorney of contestee.

August 19, 1886, the day of hearing the attorney for Hatten filed with the local officers a brief in which he insisted that—"the only allegation in this case is that claimant has not settled upon said tract . . . . so the question of continuous residence can not be called in question in this case." He insisted that only such testimony as related to settlement could be considered and "claimant asks the register and receiver to dismiss this contest."

The local officers on considering the testimony found that "the allegations made by the contestant are sustained and therefore recommended that the entry be canceled."

From this decision Hatten appealed to your office, and on June 30, 1888, your office, decided that the testimony disproved the allegation of contestant, and proceeding you say:—"Her plea of poverty although made in good faith, will not excuse total failure to establish residence after a lapse of more than twenty months from entry. Said entry is therefore held for cancellation on the ground of such failure."

From this decision Hatten appealed to this Department.

The testimony shows that in July 1885, claimant had a foundation for a dug-out house commenced and partly excavated; that she had a log house put upon the land during the same month, but at the initiation of the contest it had not been roofed or completed. She had six acres of breaking done, and during the summer of 1885, raised crops thereon; that while said house was in course of construction, and for some time during the summer of 1885, she lived in a tent on the claim; that she had household furniture in the tent and after she returned to Hay Springs to work, she occasionally came back and stayed in the tent; she worked some on the claim during the summer raising vegetables, beans, etc. She was poor and during the summer of 1885, was sick a portion of the time confined to her bed; she worked at Hay Springs,

earned her living by washing, and spent her surplus earnings—which were not much—in improving her claim, and when the parties went to the house to put up notice of contest, the house was roofed but not "chinked" and a door was hung therein, but the house was not yet made habitable.

The contestant resided in Sheridan County, Nebraska. Was an attorney-at-law, and appeared in his own behalf.

The affidavit in this case was defective and uncertain, and the uncertainty as to what the contestee would have to meet was increased by the charge contained in the notice, and by the want of action by the local officers on the motion to dismiss. While it is not the province of this Department to take up and pass upon defects in pleadings not noticed or waived by the party interested, it is quite apparent that this attorney was objecting to a hearing upon the affidavit as it was presented. The motion to dismiss was sufficient to call the attention of the local officers to this fact, and to notify them that counsel was not intending to waive any of his client's rights, yet no amendment was made to the affidavit, and the contestant launched his case upon the charge therein contained, hence the testimony should have been confined to that charge. "The admissibility of evidence is determined by the charge under investigation." Prince *v.* Wadsworth (5 L. D., 299).

This entryman made settlement and established residence upon the land, and had she completed her house and moved into it, there could be no question but that her residence would have dated from the day she moved into her tent upon the land. In Franklin *v.* Murch (10 L. D., 582), Franklin moved into a tent upon the land, and lived there until his house was completed. It was held that—"Franklin became an actual settler the instant he pitched his tent upon the land, with the intention of making it his home."

It appears that Miss Hatten, by reason of poverty and sickness, had not finished her house at the time the contest affidavit was filed, but she appears to have been trying to complete it, as she had it "roofed" and a door hung when the parties visited it to put up notice of the contest. She had lived on the land a part of the summer of 1885 beginning in July, and had raised vegetables in a garden on the land, but she had been at Hay Springs some time, although not absent from the land six months, when the contest was initiated.

Your decision is inconsistent with itself and in conflict with the uniform decisions of this Department. You say the testimony disproves "the allegations of contestant," but you sustain the contest and hold the entry for cancellation.

"The burden of proof is upon the contestant to establish his charges by a preponderance of evidence, and bad faith can not be imputed to a claimant upon mere circumstances of suspicion." Scott *v.* King (9 L. D., 299). See also Neff *v.* Cowhick (6 L. D., 660), and Tibergheim *v.* Spellner (6 L. D., 483).

Having found the allegations disproved, there was nothing remaining to be done but dismiss the contest. The entryman has a right to have his case tried by settled rules of practice, and if the law and decisions are disregarded, every entry is placed in jeopardy. Adherence to law and the rules of practice is necessary to avoid confusion in the hearing of causes and for the protection of the rights of parties.

Your decision is reversed, and without intimating any opinion concerning the acts of good faith or rights of the entryman, or as to how far sickness and poverty tend to excuse absence from the land, I find that the contestant failed to establish his case by a preponderance of the evidence and the contest is accordingly dismissed.

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PRACTICE—CERTIORARI—APPLICATION.

A. B. COOK.

The writ of certiorari will be denied if, from the application therefor, it is apparent that the applicant's appeal if before the Department would be dismissed.

*Secretary Noble to the Commissioner of the General Land Office, July 21, 1890.*

A. B. Cook has filed a petition asking that the papers in the matter of his application to enter the NE. ¼ SE. ¼ Sec. 17, T. 13 N., R. 19 W., Helena, Montana, be certified to the Department for consideration and action.

It appears that on November 20, 1889, Cook applied to enter said tract under the homestead law which application was rejected by the local officers for the reason that the tract was within the granted limits of the grant for the Northern Pacific Railroad Company, and had passed to said company under its grant. On appeal your office on March 4, 1890, found that the land was within said limits; that the map of general route was filed on February 21, 1872, notice of which was received at the local office on May 6, 1872; that one Amelia Esch on February 28, 1872, filed declaratory statement for the tract alleging settlement on the 2nd of the same month; that the line of road was definitely located on July 6, 1882, and concluded that the claim of Esch excepted the land from the operation of the withdrawal on general route, but that as it did not appear there was any adverse claim to the tract at definite location, nor was any alleged by Cook, the land passed to the company at that time.

It further appears that on March 17, 1890, Cook filed in your office a waiver of his right of appeal from said decision, whereupon the case was regularly closed upon the records; that on May 12th following he filed notice of appeal from said decision, in which he set out that since he filed the waiver of his right of appeal, one Patrick H. Mahoney had applied to file pre-emption declaratory statement for said land, alleging

on oath that at the date of the withdrawal on general route and of the definite location, the tract was occupied by certain described pre-emption claimants; that he, Cook, was ignorant of the facts so alleged by Mahoney, "and is not now advised as to the truth" of the same, but that if said allegations are true he is advised and believes that the land did not pass to said company. He therefore concludes that he is entitled to the tract, and withdraws said waiver.

It further appears that your office on May 26, 1890, refused to entertain the appeal for the reason that the case had been closed on the filing of said waiver. Thereupon this petition was filed.

It does not seem necessary to consider the question whether under all circumstances said waiver would have terminated the right of appeal even in the presence of another applicant for the land. The writ of certiorari will be denied however if on the showing made it is apparent that the applicant's appeal, if before the Department, would be dismissed. Rudolph Wurlitzer (6 L. D., 315). It should be premised that the case made here must stand upon its own merits, independent of that made by Mahoney. Your office found that "it does not appear that there was any claim for the land" at definite location, "neither is any alleged by applicant." This finding is in no manner questioned by Cook. He entirely fails to aver that there was any claim to the tract adverse to that of the company, at date of definite location. In the absence of such claim the tract would pass to the company under its grant. Cook refers to certain allegations as made by Mahoney, but does not even adopt them as his own, on the contrary he distinctly says he is "not now advised of the truth of" such allegations. Were the case here on appeal with no allegation to contradict the finding of fact of your office upon which the decision rested, the appeal would be dismissed. Under the ruling above cited that disposition will be made of this application and it is so ordered.

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### OKLAHOMA LANDS—GENERAL CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., July* 21, 1890.

REGISTERS AND RECEIVERS,
*U. S. Land Offices, Oklahoma Territory.*

GENTLEMEN: The 18th, 19th, 20th, 21st, 22nd, 23d, 24th and 25th sections of an act of Congress, approved May 2, 1890, entitled "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," embrace provisions for the disposal of certain land therein designated.

None of said lands are now open to settlement except what is known

as the "Public Land Strip," and the lands described in the President's proclamation of March 23, 1889, but due notice will be given when the other tracts mentioned are open to settlement.

All of said lands have been surveyed except the "Public Land Strip", and that is now being surveyed. You will be supplied with the township plats, tract books, blank forms, official circulars, and other requisites for the proper transaction of your business in connection therewith.

The statute contains some provisions which are applicable to all of the lands described therein as being within the Territory of Oklahoma, while other provisions are applicable only to certain tracts. The general provisions are as follows:

GENERAL PROVISIONS.

Sections sixteen and thirty-six in each township in the Territory are reserved for school purposes, and all tracts of land in said Territory which have been set apart for school purposes, to educational societies, or missionary boards at work among the Indians, are not open to settlement, but are granted to the respective educational societies, or missionary boards for whose use the same has been set apart. It is your duty, in reference to the latter reservation, to inform yourselves as to what tracts are covered by said provision, and advise the proper parties that for the better protection of their rights, they should at once take steps to put their claims of record, so that your tract books and the records of this office will show said reservations. The remainder of the lands are made subject to entry by actual settlers under the general homestead laws with certain modifications.

Your attention is directed to the general circular issued by this office January 1, 1889, pages 13 to 30 inclusive, 42 to 57 inclusive, and 86 to 90 inclusive, as containing the homestead laws and official regulations thereunder. These laws and regulations will control your action, but modified by the special provisions of the act of March 2, 1889 (25 Stat., 854) (see circular of March 8, 1889, 8 L. D., 314), and the act of May 26, 1890, (see circular of June 25, 1890, 10 L. D., 687), and the special provisions of this act as hereinafter specified.

The provision in section 20, that all homestead entries for lands within said Territory shall be in square form as nearly as may be, has reference to the purpose and intent of the homestead laws generally, contemplating entries by quarter sections which are in square form, when this is practicable, but not requiring it as an absolute rule, and permitting entries to be made of different tracts to make up the full quantity allowed and intended to be entered. When this is the case it is required that the tracts shall be contiguous to each other, so as to form one body of land, although not in strictly square form, and in such cases the ruling to that effect should be applied as given on page 45 of circular of January 1, 1889.

No person who shall at the time be seized in fee simple of a hundred

and sixty acres of land in any State or Territory, will be entitled to enter land in said Territory.

The statute provides that sections 2304 and 2305 of the Revised Statutes (see pages 24, 25 and 26 of said circular of January 1, 1889), shall, except as to the modifications contained in the act, apply to all homestead settlements in the Territory, but makes no mention of sections 2306 and 2307 thereof, under which soldiers and sailors, their widows and orphan children, are permitted, with regard to the public lands generally, to make additional entries in certain cases, free from the requirement of actual settlement on the entered tract. (See pages 26 and 27 of said circular). It is, therefore, held that soldiers' or sailors' additional entries cannot be made on these lands under said sections 2306 and 2307, unless the party claiming will, in addition to the proof required on pages 26 and 27 of said circular, make affidavit that the entry is made for actual settlement and cultivation, according to section 2291, as modified by sections 2304 and 2305 of the Revised Statutes, and the prescribed proof of compliance therewith will be required to be produced, and the additional payment in cases where the same is prescribed by this act will be required to be made before the issue of the final certificate.

The statute reserves public highways four rods wide "between each section" of land in the Territory, but provides that no deduction shall be made, where cash payments are provided for, in the purchase money on account of such reservation.

Settlement in the interest of another or others, is prohibited and a penalty provided for the violation of said provisions.

In allowing townsite entries you will be guided by the circulars of instructions issued by the Department under dates of June 18, 1890 (10 L. D., 366), and July 18, 1890, 11 L. D., 68, so far as applicable, and such further instructions as may be hereafter issued.

## SPECIAL PROVISIONS.

The special provisions which are applicable to certain of the lands but not to all are as follows:

It is provided in the statute that section 2301 of the Revised Statutes shall not apply to any of the lands mentioned in sections 18 and 21 of said act. (See pages 19 and 88 of said circular of January 1, 1889.) Therefore, entries made thereon will not be subject to commutation under that section.

## PUBLIC LAND STRIP.

Actual settlers at the date of the act, upon the lands known as the "Public Land Strip" will be allowed the preference right to enter the lands upon which they have settled under the homestead laws, but they are not permitted to receive credit for more than two years residence prior to the date of the act.

LANDS ACQUIRED FROM MUSCOGEE AND SEMINOLE INDIANS.

The lands acquired by the cession of the Muscogee (or Creek) Nation of Indians, and from the Seminole Nation of Indians by release and conveyance, are made subject to entry under the provision of sections 12, 13 and 14, of the act of March 2, 1889 (25 Stat., 1004) (See circular of April 1, 1889, 8 L. D., 336), and section 2 of the act of March 1, 1889 (25 Stat., 759), which reads as follows:

That the lands acquired by the United States under said agreement shall be a part of the public domain, but they shall only be disposed of in accordance with the laws regulating homestead entries, not exceeding one hundred and sixty acres to one qualified claimant. And the provisions of section twenty-three hundred and one of the Revised Statutes of the United States shall not apply to any lands acquired under said agreement. Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of Congress, shall not be permitted to occupy or to make entry of such lands or lay any claim thereto.

Said lands are described as follows:

Beginning at the northwest corner of the Creek country, thence following the eastern boundary of the Territory to the Canadian river, thence following the Canadian river to the western boundary of the Territory, thence north along said western boundary to the south line of what is known as the Cherokee lands lying west of the Arkansas River, or as the "Cherokee Outlet," thence east along said line extended to the place of beginning.

Each settler upon said lands will be required, when he tenders his final proof, to make payment, in addition to the fee and commissions ordinarily required in homestead entries, of the sum of one dollar and twenty-five cents per acre for the land so taken by him.

In addition to the instructions hereinbefore given as being applicable to all of the lands within said Territory, you will be guided by the instructions contained in the circular of this office dated April 1, 1889 (8 L. D., 336), in allowing entries for these lands, but in the affidavit required by the second paragraph of the third section of said circular, you will require to be inserted, the date upon which the lands entered are open to settlement, in lieu of the date there given.

OTHER LANDS NOW OCCUPIED BY ANY INDIAN TRIBE.

Entry for other lands within said Territory, now occupied by any Indian tribe, which shall, by operation of law or proclamation of the President of the United States, be opened to settlement, will be allowed under the homestead laws, excepting section 2301 thereof, but each settler will be required, when he tenders his final proof, to make payment, in addition to the fee and commissions ordinarily required to be paid in homestead entries, of a sum per acre equal to the amount per acre which is paid for the relinquishment of the Indian title, but in no case

shall such payment be less than one dollar and twenty-five cents per acre.

In allowing entries for such lands, you will be guided by the instructions hereinbefore given as applicable to all lands within said Territory.

LANDS DESCRIBED IN PRESIDENT'S PROCLAMATION OF MARCH 23, 1889.

Section 21 of said act allows parties who have settled upon the lands described in the President's proclamation of March 23, 1889, to obtain patent therefor, twelve months from date of locating upon said homestead, by showing a compliance with all the laws relating to such homestead settlement and paying for the lands so entered at the rate of one dollar and twenty-five cents per acre. Applicants to purchase under this provision will be required to furnish evidence of naturalization, the same as in five year proof.

Applications to purchase, under this section, will be made upon form 4–001. Such applications the register will retain in his office. See section 2355, Revised Statutes.

A cash certificate and receipt—forms 4–189 and 4–131, respectively—will be issued, if the proof is satisfactory, and the same will be reported upon the regular abstract of lands sold. The proof and final affidavit, in such cases, will be made upon the regular homestead blanks, modified as the circumstances required.

GREER COUNTY.

The statute provides for the final adjudication of the controversy between the United States and the State of Texas, regarding the ownership of what is known as Greer county. Appropriate instructions will be issued in the event that said lands are decided to belong to the United States.

CASH PAYMENTS.

In entries for lands, where a cash payment is required to be made, in addition to the fee and commissions ordinarily required in homestead entries, said amount should not be collected when the original entry is made, but is required to be paid when final proof is tendered.

Very respectfully,

LEWIS A. GROFF,
*Commissioner.*

Approved,
JOHN W. NOBLE,
*Secretary.*

PRACTICE—APPEAL—INTERLOCUTORY ORDER.

BOWMAN *v.* SNIPES.

An appeal will not lie from an interlocutory order of the local office.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 22, 1890.*

October 17, 1882, Jesse L. Snipes made timber-culture entry No. 63, for the NW. ¼ of Sec. 22, T. 121 N., R. 78 W., Aberdeen, Dakota. September 27, 1887, Fred J. Bowman filed an affidavit of contest, charging failure to comply with the law during the third and fourth years after entry.

Notice was issued, and the hearing set for December 27, 1887. October 26th previous to the day set for trial contestant filed additional affidavit, alleging failure to comply with the law during the fifth year after entry, and the 26th of December was set for the hearing of this last affidavit.

November 14, 1887, contestant filed an affidavit, setting forth the inconvenience and expense of bringing witnesses to Aberdeen, and thereupon the register directed depositions to be taken before J. M. Paul, a notary public, at Bowdle, Dakota. The taking of these depositions was continued several times by consent and stipulation of counsel, and on May 15, 1888, the day last set for taking the depositions, defendant, Snipes, did not appear before the notary, but instead filed an affidavit before the register and receiver, stating that "on the 13th he had been informed that contestant would not prosecute the case further, and so he had advised his witnesses that they need not go to Bowdle." He further stated in said affidavit that most of his witnesses were in Aberdeen, and that it would be expensive for him to go to Bowdle, and he asked that the case might be continued until May 22, 1888, and heard at the land office in Aberdeen. This was granted by the register, and a telegram sent to Paul, the notary, informing him of this action.

The reasons assigned by the register, in his letter forwarding the record, for this order, are that "this case had already occasioned a great deal of unnecessary trouble and annoyance to the local office, and the further fact that cases sent away from the local office are invariably returned in bad shape, unwarranted orders made and entered of record, and the testimony taken in such manner as to be unintelligible."

From this order of the register, Bowman appealed, and your office sustained his appeal and directed the hearing of testimony before the notary at Bowdle.

From this decision Snipes appeals to this Department.

Rule 43 of Practice provides:—"Appeals from the final action or decisions of registers and receivers lie in every case to the Commissioner of the General Land Office," which would seem to imply that it is only

in cases of final action or decision of those officers that appeals will lie. And it stands to reason that such should be the case to avoid the petty annoyances, of cumbering the record, clogging the progress of the trial, and delaying the expeditious disposition of the case by the party aggrieved appealing from every adverse ruling. No appeal will lie from an interlocutory order of the local office. Horn *v.* Burnett, 9 L. D., 252. The rule is the same in relation to appeals from interlocutary decisions of the General Land Office. Jones *v.* Campbell, 7 L. D., 404.

The contest will proceed according to the direction of the register, and if the decision should be adverse to the contestant, on appeal to the General Land Office from the final judgment of the local officers, all matters in controversy including the order now complained of, will be reviewed by your office, and if it is found that any material rights of contestant have been denied him thereby, he will be granted all proper relief on his appeal.

Your decision is therefore reversed.

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### RAILROAD GRANT—ACT OF APRIL 21, 1876.

### KNAPP *v.* NORTHERN PACIFIC R. R. CO.

An entry made in good faith by an actual settler within the limits of a railroad grant prior to the time when notice of withdrawal is received at the local office, and under which due compliance with law is shown, is confirmed by section 1, of the act of April 21, 1876, and the cancellation of such entry, prior to the passage of the act will not defeat the confirmatory operation thereof.

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

On August 27, 1870, Cornelius Knapp made homestead entry of the S ½ NE ¼ and NE ¼ SE ¼, Sec. 17, T. 9 N. R. 2 W, Vancouver, Washington, which is within the primary limits of the grant to the Northern Pacific R. R. Co., as shown by map of general route filed August 13, 1870, and of map of definite location filed September 13, 1873.

The notice of withdrawal was received at the local office October 19, 1870.

The right of the road having attached prior to the allowance of Knapp's entry, he was on July 12, 1873 notified that it would be canceled if it was found, upon the definite location of the road, to fall within the limits of the grant.

After the definite location of the road the act of June 22, 1874, was passed (18 Stat. 194) providing that where lands, granted to any railroad company, be found in the possession of actual settlers whose filing or entry had been allowed subsequent to the time when by the decision of the land department the right of the company was declared to become attached, the company shall upon filing proper relinquishment of its claim, be allowed to select other land in lieu thereof.

Knapp was advised of the provisions of said act and was allowed thirty days, within which to show his connection with the land, and to make the necessary application to the company. Failing to comply with said conditions his entry was canceled August 30, 1875, and on December 3, 1884, the company listed the land but it has not been certified.

On December 20, 1888, Knapp filed an application for the re-instatement of his entry, supported by affidavits showing that he began to improve the tract about the month of September 1870, built a comfortable dwelling house twenty-four by twenty-eight feet, and on or about the first day of February 1871 occupied said dwelling with his family "and that he has ever since resided thereon with his family, and made the same his exclusive and continuous home and now resides thereon." The affidavits also show that he continued to improve and cultivate the tract from the date of his settlement in 1870 to the time of the filing of said application, to wit: December 18, 1888.

Your office held that a homestead claim existing prior to the receipt of notice of withdrawal at the local office is confirmed by the act of April 21, 1876 (19 Stat. 35). The entry of Knapp was therefore reinstated and the selection by the company held for cancellation. From this decision the company appealed alleging the following grounds of error:

I. Error to rule that the homestead claim of Knapp is confirmed under the act of 21, April 1876.

II. Error not to have ruled that Knapp having failed to avail himself of the privilege accorded him by letter of March 29, 1873, and by permitting his entry to be canceled his case is '*res adjudicata*' and cannot be re-opened.

The first section of the act of April 21, 1876 provides

That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land-grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land-office of the district in which such lands are situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto.

It is evident that it was the purpose of this act to confirm all entries of lands within the limits of any land grant, made in good faith by actual settlers, prior to the time when notice of withdrawal was received at the local land office, where the homestead or pre-emption laws have been complied with, and such entries serve to except such tracts from the operation of withdrawal—so far as the rights of the original entryman are effected thereby—as if the settlement or entry had been made prior to the date of withdrawal. If excepted from withdrawal for the benefit of such entrymen, they were also excepted from the grant upon definite location, provided the entryman continued to comply with the

pre-emption or homestead laws as to residence; cultivation and improvement. Therefore the material question in this case is whether the cancellation of the entry of Knapp for the reason that he had failed to secure the relinquishment of the company under the act of June 22, 1874, is *res adjudicata* and takes the case out of the operation of the act of April 21, 1876.

While the act of June 22, 1874, is entitled "An act for the relief of settlers on the public lands" the relief contemplated by the act can only be obtained by the will and action of the company. It confers upon the railroad company the right to relinquish their title to such lands as were occupied by settlers at the date the rights of the company attached, and to select others in lieu thereof. The settler has no right under the act that he could enforce against the company, but if the company failed or refused to relinquish, the entry would be subject to cancellation whether the settler took action or not, and the cancellation of the entry in this case upon the failure to act did not change the status of the entry so far as it affected the rights of the parties.

Subsequently the act of 1876 was passed for the relief of such settlers which confirmed these entries, and so far as it affected the rights of the original entryman who had complied with the pre-emption or homestead laws, such entries were as effective to except the tract from the operation of the grant for all time—as if the entry had been made—prior to the date of withdrawal.

A similar question was involved in the case of Southern Minnesota R. R. Co. *v.* Bottomly (4 L. D. 208). In that case the land office in a contest between the company and the entryman held the entry for cancellation, which was affirmed by the Department October 23, 1874, on appeal by Bottomly. Execution of this decision was however suspended to ascertain whether the company would relinquish under the act of June 22, 1874. The company on November 3, 1874 refused to relinquish, and no other action was taken in the matter until June 5, 1877, when Bottomly inquired about the tract and was informed that he would be allowed thirty days to obtain the relinquishment of the company. No relinquishment was obtained, but—the cancellation of his entry not having been entered in the local office—he was permitted to make proof and receive final certificate. Subsequently he applied for patent and it was upon this application that the decision of your office was made from which the appeal was taken when it last came before the Department.

It was contended by the company that the Department had by its decision of October 23, 1874, declared that it was not a competent entry to defeat the grant, and that question was *res adjudicata*. But upon this question the Secretary said:

> But for one thing the rule invoked would be applicable and operative, and the judgment of 1874 would stand. That one thing was the passage of the remedial act of 1876 (cited *supra*) pending the execution of the judgment. That act took hold of and became operative upon all cases within its purview, which at the date of its passage had not been finally and fully disposed of.

It is true that in the case cited it is said that although the "judgment had been rendered, it was, and still is unexecuted," and that "the entry is still of record." But I cannot see that this would in anywise affect the question. In both cases the judgment of cancellation had been rendered, but in neither case was the land certified to the company and the failure to make the entry of cancellation on the records of the local office did not diminish the right of the road in the one case, nor did the entry of it affect the right of the settlement in the other. Nor does the fact that Bottomly had made final proof and received final certificate affect the question. The governing principle that controls in both cases is that as to such settlers who had complied with the pre-emption or homestead laws as to residence and cultivation the tract was excepted from the operation of the grant as effectually as if the entry had been made prior to and was existing at date of withdrawal, and no action of the land office short of certification to the company, would be such an execution of the judgment of the Department as to withdraw the entry from the operation of the act of 1876.

So long as the Department has jurisdiction of the land it has the right to re-instate the entry and to allow the settler to make compliance with the land laws.

Your decision is affirmed.

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### HOMESTEAD—SOLDIERS' DECLARATORY STATEMENT.

LEVI WOOD.

A soldier's homestead declaratory statement cannot be filed for unsurveyed land.

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

On July 30, 1888, Levi Wood applied to file a soldier's declaratory statement for a tract of unsurveyed land in the Buffalo, Wyoming land district. His application was rejected at the local office by reason of conflict with the Fort McKinney military reservation.

On appeal by Wood your office, on March 30, 1889, without considering the question of such conflict, affirmed the action below for the reason that the land was unsurveyed, and on May 24th following your office denied a motion filed by Wood for a review of its said former decision. Wood appeals.

It appears that the tract involved lies between the east boundary of the said military reservation and the sectional survey, showing the west lines of section 26 and 35, T. 51 N., R. 82 W.; that said tract at the time "of original survey was supposed to be within the limits of said reservation and so marked on the official plats," and that from a recent survey it was found to be excluded therefrom.

By section 2309 Revised Statutes the duly qualified soldier is per-

mitted to file before settlement "a declaratory statement as in pre-emption cases," and required within six months thereafter to begin his settlement and improvement.

An entry under the pre-emption law must be made "by legal subdivisions." (Section 2259, R. S.) The declaratory statement upon which said entry is based must describe in like manner the land so entered. This is conclusively shown by section 2266 R. S., whereby the pre-emption settler on unsurveyed land is required to file such statement within three months after the receipt of the township plat at the local office.

The soldiers declaratory statement under section 2309, *supra* being the same "as in pre-emption cases" must therefore describe in accordance with the public surveys the land which he purposes to enter under section 2304 R. S., whereby his entry is also required to be made "according to legal subdivisions."

The appellant has made no settlement on the land and (as I am advised by your office), although a contract for the survey of the strip between the said reservation and the public surveys has been awarded, the land involved is still unsurveyed.

The application in question must therefore be denied.

The decision appealed from is affirmed.

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### RAILROAD GRANT—SETTLEMENT—ALIEN.

### CENTRAL PACIFIC R. R. CO. *v.* BOOTH ET AL.

The settlement and residence of an alien upon lands within the limits of a railroad grant does not except the lands covered thereby from the operation of the grant.

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

I have considered the case of the Central Pacific Railroad company *v.* Henry Booth and James P. Robson, as presented by the appeal of the former from the decision of your office, dated April 5, 1886, rejecting its claim to the E. ½ of SE. ¼ of Sec. 33, T. 7 N., R. 2 W., Salt Lake City land office Utah Territory, and allowing said Robson to make homestead entry of said tracts.

The record shows that said tracts are within the limits of the grant to said company by acts of Congress approved July 1, 1862, and July 2, 1864 (12 Stat., 489, and 13 Stat., 356), the right of which is held to have attached to the granted lands on October 20, 1868 (5 L. D., 661).

On March 15, 1869, and October 5, 1877, the township plat of survey was filed in the local land office. On May 14, 1869, one Henry Booth filed his pre-emption declaratory statement, No. 425, for said tract alleging settlement thereon April 15, 1858. On May 14, 1869, Booth also filed his declaration to become a citizen of the United States.

The company, on December 26, 1884, made application to have said land patented under said grant, and said Booth was duly notified to appear and show cause why said application should not be allowed.

On February 18, 1885, said Robson made application to enter said tract under the homestead law, and the same was rejected by the local office.

The hearing was duly had on February 19, 1885, both parties being present. Upon the evidence submitted the local land officers awarded said land to the company, for the reason that at the date when the right of said company attached to its granted lands, said Booth was an alien and he could acquire no right under the settlement laws of the United States.

On appeal, your office reversed the action of the local land officers, holding that the settlement and residence of said Booth at the date when the right of the company attached served to except the land covered thereby from said grant; that the claim of the company must be rejected, and Robson allowed to enter said land.

The evidence submitted shows, that Booth was residing on said land, with his family, on October 20, 1868, and continued to reside thereon until 1870, when he sold his improvements, consisting of a dwelling house and other improvements, all valued at $700 or $800. It also appears that Robson is the present occupant of the land and has resided thereon since the spring of 1874, and that his improvements are worth from $1000 to $1500.

The sole question presented in the record is, will the settlement and residence of an alien upon lands within the limits of said grant at the date of the definite location of its road except the same from the grant? This question must be answered in the negative.

Section three of said act of July 1, 1862, grants to said company "every alternate section of public land designated by odd numbers, to the amount of five alternate sections per mile on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

Section four of said act of July 2, 1864, enlarged the grant, by striking out the word "five" in section three of the act of July 1, 1862, and inserting in lieu thereof the word "ten," and provided (inter alia), that "any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim."

It will be observed that the enlarging act expressly provides that the claims which shall not be impaired are, "pre-emption, homestead, swamp land or other lawful claim." The occupancy of land by an alien can not be considered a "lawful claim," for he knows that an alien can not acquire title to land from the United States under the settlement laws.

It was expressly ruled by this Department, in the case of Southern

Pacific R. R. Co. *v.* Saunders (6 L. D., 98), that an alien can acquire no right to public land before filing declaration of his intention to become a citizen. See also Titamore *v.* Southern Pacific R. R. (10 LD, 463). It follows, therefore, that the decision of your office was erroneous, and the same is therefore reversed.

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### RAILROAD GRANT—FINAL PROOF PROCEEDINGS.

### FLORIDA RY. AND NAVIGATION CO. *v.* DODD.

The failure of a railroad company to appear in response to a published notice of intention to submit final proof precludes its denial of the correctness of the case as made by the record, but forfeits no right to which it is entitled under the law as shown by the record.

No rights can be acquired by entry or settlement upon lands that were free at date of definite location, and passed thereby under the operation of the grant.

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

I have before me the appeal of the Florida Railway and Navigation Company from your office decision of May 7, 1887, holding for confirmation William C. Dodd's pre-emption cash entry, made October 28, 1884, for the NE. ¼ NE. ¼ Sec. 23; S. ½ SW. ¼ Sec. 13, and SE. ¼ SE. ¼, Sec. 14, T. 18 S., R. 22 E., Gainesville district, Florida.

The tracts in the odd-numbered sections are within the six mile primary limits of the grant claimed by the Florida Railway and Navigation Company (successors to the Atlantic, Gulf and West India Transit Company), between Waldo and Tampa.

The records show that one Daniel F. Perry made homestead entry for the land in question May 24, 1877, which was canceled June 30, 1880, also, that William C. Dodd (the appellant here) filed declaratory statement on said land, November 24, alleging settlement November 19, 1883. No other entry or filing appears to have been made therefor, except the entry now under consideration.

No appearance was made in behalf of the railroad company to contest the claim of Dodd, in response to the published and posted notice of his intention to make final proof. Your office held that "by such failure to appear, said company waived whatever claim it might otherwise have asserted in the premises, and is barred from objecting to subsequent action on the entry in this (your) office."

There is no doubt that by its "failure to appear," when it had its "day in court," the company, like any other defaulting party, is barred both from denying the correctness of the case made by the record, and from objecting to the consequences which the law attaches to that case. But, except in this sense, and to this extent, such a default waives no "claim" at all, and the absent party forfeits no right which even the

case made in its absence by its adversary shows that it has in law. See case of Randolph *v.* Northern Pacific Railroad Company (9 L. D., 416).

The case made by the record here, admitting the literal correctness of every allegation made by Dodd and his witnesses, shows the legal title to the land in dispute to be in the company. It is the ruling of this Department (5 L. D., 107), that the definite location of this portion of the company's road occurred in December, 1860, and according to the record the land in dispute was at that time vacant public land. Neither Perry's homestead entry, of May, 1877, nor Dodd's pre-emption settlement, of November, 1883, could in any way effect the company's right, which had thus become vested some twenty years before. The facts proved by Dodd go simply to his own residence and improvement long after the tract had ceased to be public land; their being in proof, accordingly, in no way justifies the awarding of the company's land to Dodd.

Said decision is accordingly reversed.

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### RAILROAD GRANT—WITHDRAWAL ON GENERAL ROUTE.

### McARTHUR *v.* NORTHERN PACIFIC R. R. CO.

Land included within the limits of withdrawal on general route is held in reservation until definite location of the road, and the status of such land, under said withdrawal, is not affected by the fact that said land also fell within the limits of a subsequent order which purported to withdraw it for indemnity purposes.

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

This is an appeal by J. Amos McArthur from your office decision of January 13, 1888, affirming the local office and rejecting his application of November 26, 1887, to make homestead entry for the N. ½ NW. ¼ and SE. ¼ NW. ¼ and NW. ¼ of NE. ¼ Sec. 13, T. 5 N., R. 3 E., Vancouver, Washington Territory.

On August 13, 1870, the Northern Pacific Railroad Company filed in your office a map showing the general route of its road from a point at the mouth of the Walla Walla river, in said Territory, along the course of the Columbia, to about the first range line west of the Willamette principal meridian, and thence north to the point where the international boundary first touches the tide waters of the Pacific Ocean.

Upon the filing of this map, the land within the limits of the grant to said company upon each side of the route, as so indicated, was withdrawn from settlement by operation of law. Buttz *v.* Northern Pacific R. R. Co., 119 U. S., 55.

By joint resolution of May 31, 1870, (16 Stat. 378) the designations of certain lines of the company's road were changed: that which by the granting act was known as the branch line (*via* the valley of the

Columbia river to a point at or near Portland in the State of Oregon) was changed to "main road" or "main line", and that which had been designated as main line (across the Cascade mountains to Puget Sound) was changed to branch line. By the same resolution there was conferred upon the company a grant of lands for the line of its road from Portland to Puget Sound. Northern Pacific R. R. Co., *v.* McRae (6 L. D. 400).

The land involved is within the limits of the said statutory withdrawal on the map showing that part of the general route of the Northern Pacific Railroad between Ainsworth and Portland, filed August 13, 1870. It also fell outside of the granted and within the indemnity limits of the grant as designated by the map showing the definite location of the company's road between Portland and Kalama, filed September 22, 1882.

The appellant insists that said withdrawal of August 13, 1870, was by virtue of the said joint resolution of May 31, 1870, and not by the original grant of July 2, 1864; that the limits of the grant by said resolution having been definitely fixed, the land not having been selected as indemnity by the company, and the order which purported to withdraw it for indemnity purposes having been revoked by the Department, on August 15, 1887 (6 L. D. 133), it was subject to the appellant's application.

I cannot agree with this contention. The land being within the limits of the withdrawal on the general route of the road between Ainsworth and Portland, the said withdrawal is in full force and effect, until the road is definitely located, and its grant thereby defined between the points named and opposite the tract involved. This has not been done. The land was, therefore, at the date of appellant's application to enter subject to such withdrawal.

The fact that the land had been within the limits of the order which purported to withdraw it for indemnity purposes, could not affect its prior withdrawal by operation of law.

Your decision is affirmed.

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### SURVEY—SPECIAL AGENT'S REPORT.

### EDWARD G. MCCLELLAN ET AL.

A survey should not be approved if the corners are not marked as indicated therein, and as required by the rules and regulations.

*Secretary Noble to the Commissioner of the General Land Office, July 25, 1890.*

With your letter of April 4, 1890, you transmit the papers in the matter of the appeal of Edward G. McClellan and Thomas K. Stewart from your decision rejecting the surveys of the exterior boundaries of

townships 24 and 25 north, range 31 east, M. D. M., Nevada, made under their joint contract No. 169, executed March 14, 1884.

This action was taken by your office upon the report of Special Agent P. F. Bussey, who examined and inspected said surveys, and who reported that said work had been performed with gross carelessness; that very many corners on the township lines were not found by the examiner, and that the field notes do not describe any of the corners as they actually exist in the field, and that from his examination he did not find a corner so marked that a person could determine in what township or range the lands were situated. Other facts are set forth in the report of the special agent, showing material discrepancies between the field notes of the deputy surveyors and the actual findings of the special agent, and that said survey was grossly imperfect. If the facts as found by the special agent are true, it can scarcely be contended by the appellants that the survey should be accepted.

The appeal from your decision is based solely upon the following grounds:

The instrument used by the inspector on the examination of the work was such a poor one that it would be impossible for the best surveyor living to run a line with it which could be sworn to as the only true and correct line as the inspector has done in his report, the said instrument being a very cheap open-sight compass, of a kind that has been condemned by the Commissioner of the Land Office for years, and not allowed to be used upon any government surveys.

The inspector is totally incompetent to make examinations of surveys, never having seen an instrument till after he had been appointed inspector and come to this State a few weeks before entering upon this examination.

The said inspector while doing the work and making out his report was under the influence of Chas. W. Irish, the present surveyor general for Nevada, who has used every means in his power to cast odium upon all surveys made in this State prior to his appointment, and, under this influence, formed an opinion against said survey before making his examination, made out his report according to suggestions from Chas. W. Irish, and after said report was sworn to and signed by his assistants who certified to its correctness, made material alterations before sending it to Washington. In proof of these charges we enclose affidavits of the inspector's compassman and the draughtsman in the surveyor general's office.

We therefore protest against any and all examinations and reports made by the present inspector or by any other incompetent person, and believe that you will see the injustice of accepting the reports of any person who knows no more about surveying than a common farmer about army tactics.

The present surveyor general has made alterations in field notes of surveys sent into his office by deputy surveyors, and we have no means of ascertaining that he has not done so in the notes furnished the inspector by him of this survey.

This appeal is supported by the affidavit of W. T. Moran, the compassman who assisted the special agent in his examination, who states that the instrument used was inferior, and that he objected to undertake the work with such an instrument, but he was informed by Bussey and Irish that it was sufficiently accurate for the purpose of the examination, as the object was simply to run the lines close enough to find the corners; that he expected with the aid of flagmen to be able to retrace the lines sufficiently well to meet the requirements, but before

the examination was commenced the flagmen were discharged by Bussey, and that he was required to run the lines without flagmen, depending entirely upon the needle for line, and being required to act as chainman, carrying over a rough and mountainous country, in addition to the instrument and chain, two heavy pins, weighted with lead. He further states:

A true line could not be run under such conditions, and affiant had not been instructed to run true lines, but only to run closely enough to enable the corners to be found with reasonable searching; and affiant says that it was with this understanding, gained from the unmistakable statements of C. W. Irish and P. F. Bussey as to the method and object of the examination, that he consented to work with such an instrument and in such a manner; and it was with this understanding as to the requirement and instructions that he made affidavit to the report of the examination.

I have recited and quoted from the affidavit fully for the purpose of showing that it does not necessarily impeach the report of the examiner or the affidavit of the affiant to said report, but merely shows the difficulties under which he made his examination. It does not show that he did not find the corners that should have been marked as indicated by the field notes of survey, but on the contrary it shows that he must have run the lines close enough to find the corners, because it appears that in many instances he found the corners marked although not in the manner nor in the exact spot as indicated by the survey. He states that he did not find any of the corners described as they actually existed in the field, and that in the eleven miles of line examined he found only two quarter section corners, although he made diligent search in the locality where they ought to be found; that McClellan, one of the contractors, told him before his examination that he would find a great many of the corners had been obliterated by the ranch-men who did not want their land surveyed because they wanted their cattle and sheep to range upon it; but that he took particular pains to find out if this was true and from his examination found that there was no person living near there, nor was there any grass or springs near the line to make it an object for any person to obliterate the corners, nor was the character of the country such that they would be likely to be obliterated by the elements.

As an illustration of the failure of the deputy surveyor to properly mark the corners, I quote from the report of the examiner which is verified by the compassman, in which he says:

I desire your particular attention to the corner common to Twps. 24 and 25, ranges 31 and 32. In the field notes of the contractors, they say, they set a post 4 ft. long, 4 inches square, 12 inches in the ground. This post is not there. This corner is on a piece of ground the like of which I have never seen anywhere only in this immediate vicinity. It is a patch of black glossy gravel and is almost as smooth as a floor, and looks like it had been rolled with a heavy roller and it is with difficulty that a person can remove one of these gravel stones from the ground. This is the point at which they dug pits 24 x 18 x 12 inches.

Now what process could have been used to place this gravel back in its place so that it cannot be seen that it has ever been removed?

Further, they describe a mound of earth 2½ ft. by 5 ft. at the base, while I find a mound of stones and no signs of any earth. I can assure you that if the dirt had been piled here on this gravel plat I think some traces of it would be visible still.

Further, they say nothing about the mound of stones that I find here.

I have dwelt at length upon this last mentioned corner because it is a township corner, and should be one that would attract their attention and be as they describe it.

Further, I know of no other corner any nearer to what they describe than this one.

This is one of the many corners indicated by the survey that the examiner with the aid of the compass-man actually found, notwithstanding the difficulties he had to contend with in finding it, at which no pits and mounds, monuments or post, as shown by the field notes could be found, or else were not marked as indicated by the field notes.

Again the affidavit states that "he has *been informed and believes* that the report of this examination was materially altered by P. F. Bussey and C. W. Irish after it had been sworn to by this affiant, and without his knowledge and consent," but he does not state in what respect it was altered, nor have appellants attempted to show that it has been altered in any respect whatever, although they have had full opportunity to do so if such is the fact.

A further discussion of this question is unnecessary. From what has been stated it is shown from the report of the examiner that the survey was grossly defective in failing to mark the corners as indicated by the survey, and as required by the rules and regulations, and said report in this respect at least has not been impeached, nor have the appellants even denied it.

Your decision is affirmed.

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LAND DEPARTMENT—CLERK IN SURVEYOR GENERAL'S OFFICE.

Distinguished 5 L. D. 257, 260

HERBERT MCMICKEN ET AL.

(On Review.)

Clerks in the office of the surveyor-general are clerks or employés in the office of the Commissioner of the General Land Office, in contemplation of law, and therefore, under the inhibition of section 452 of the Revised Statutes, disqualified to enter public land.

Directions given for the formulation of a circular in accordance with the construction of law adopted herein.

*Secretary Noble to the Commissioner of the General Land Office, July* 25, 1890.

On February 14, 1883, Herbert McMicken, Albert J. Treadway, and John P. Tweed made timber land entries for, respectively, the SE. ¼, the NW. ¼, and the SW. ¼ of Sec. 20, T. 18 N., R. 3 W., Seattle land district, in the then Territory of Washington. The entries were held

for cancellation by your office, on June 11, 1888, because the entrymen at the date of said entries were employees in the office of surveyor-general of said Territory. On appeal here, the judgment of your office was affirmed (10 L. D., 97), and the case is brought before me again on a motion to review and reverse the former decision.

The material facts in relation to the three entries being the same, contrary to the usual practice, the three cases were consolidated and considered together. Those facts, as stated in your office decision, are undisputed, and show that said tracts were "offered" lands and had been such for seven years; that the entrymen were clerks in the office of the surveyor-general, as stated, but acquired their knowledge of the character of the lands from personal inspection of the same, and that, prior to making said entries, they informed the register and receiver of their then employment, and inquired as to whether there was any inhibition against the proposed entries by them. "The local officers decided that the circular of August 23, 1876 (prohibiting entry by local officers and others), did not apply to them." Thereupon, the entries were made, the money paid for the land, and the final certificates issued on February 14, 1883, as before stated. Subsequently, on August 17, 1883, said tracts were purchased by one Aden C. King.

Section 452 of the Revised Statutes provides that—

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

It was held in my decision that said section—

> was intended to extend the disqualification to acquire public lands to officers, clerks, and employees in any of the branches or arms of the public service under the control and supervision of the Commissioner in the discharge of his duties relating to the *survey* and *sale* of the public lands. . . . . Officers, clerks and employees in the offices of surveyors-general fall clearly within the mischief contemplated by the statute, and the reason of the law applies to them with equally as much force as to those in the central office at Washington.

It is insisted that clerks in the office of a surveyor-general do not come within the inhibition contained in the section of the Revised Statutes before quoted. It is ingeniously argued that the surveyors and surveying system of the United States were not a part of or under the control of the General Land Office until placed there by the first section of the act of July 4, 1836 (5 Stat., 107), now embodied in section 453 of the Revised Statutes; that the prohibition to be found in section fourteen of said act of 1836 only applied to officers whose salaries were therein "provided for;" that clerks in the surveyor's office not being "provided for" were not intended to be included, and that section 452 of the Revised Statutes being a mere generalization of section fourteen of the original act ought not to be construed as an enlargement of the same so as to include classes not embraced in the original prohibition.

In the case of the United States *v.* Bowen (100 U. S., 508), the supreme court say :—

> The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress.

Can it be said that there is such an ambiguity about section 452 as to require a resort to the original act to ascertain the meaning of said section. Such ambiguity is not on the face of the section, for it plainly and clearly prohibits officers, clerks and employees of the General Land Office from being interested directly or indirectly in the purchase of the public lands. This [prohibition can hardly be misunderstood by any one reading it. I do not think therefore it is a case of ambiguity when the language of the original act should be referred to, but that we must accept said section as the expression of the legislative will.

It is therefore apparent that officers, clerks and employees of the General Land Office are prohibited from being interested in the purchase of the public lands. Are the entrymen herein either officers, clerks or employees of the General Land Office ?

Section 441 of the Revised Statutes says that the Secretary of the Interior is charged with the supervision of the public lands. Section 462 of the Revised Statutes says there shall be in the Department of the Interior a Commissioner of the General Land Office, and section 453 says :

> The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, etc.

The surveyor-general is appointed by the President and his salary is fixed by law. Congress makes an appropriation therefor and for clerk hire and other expenses in his office in gross. These appropriations are expended by him. The clerks are selected and their compensation fixed by him. But these appropriations are all contained in the general appropriation bill for the Department of the Interior, which is charged, through the Commissioner of the General Land Office, with the administration of the land affairs of the nation. Through the General Land Office the money is advanced to the surveyor-general to meet the salaries of clerks and other expenses of his office. All is done under the direction and supervision of the Commissioner of the General Land Office. The surveyor-general is required to and does make report quarterly to the Commissioner of all his expenses, and an annual report of all his work for the year. These accounts are allowed or disallowed as seems proper. Among the other expenses which undergo this scrutiny is clerk hire. His employment of clerks, as well as the amounts to be paid them, is regulated, in this manner, by the Commissioner. The right to do so

has never been questioned, so far as I can ascertain. Thus the clerks, though selected by the surveyor-general, are paid by the Commissioner at a compensation allowed by him, and it makes no difference that the pay comes out of the appropriation for surveys, since the whole subject is under the supervision of the Commissioner.

For the reasons here given, in addition to those before stated, I have no difficulty in affirming the former ruling that clerks in the office of surveyor-general are clerks or employés in the office of the Commissioner of the General Land Office, in contemplation of law, and therefore within the inhibition of section 452 of the Revised Statutes.

But it is urged in behalf of the entryman that this construction of the law, if correct, is new, and should not be made retrospective so as to affect entries which were made when a different construction of the law prevailed in the Department.

If the statute were one admitting of a doubtful construction, there might be some force in this last position. But in the face of what I regard as its plain prohibition, in a matter of so much importance, as a proper administration of the land department by officers free from the enticements of personal speculation, I do not feel that I would be justified in permitting a violation of the law in this instance, more than in any other.

The motion is denied and the papers are herewith sent to you.

As the action of the register and receiver in this case may lead to the belief, in the public mind, that the prohibition of the law does not apply to all the officers and employees of the General Land Office, you are directed to cause to be formulated a circular, in accordance with the construction placed upon the law herein, which shall be so comprehensive and specific as to meet all the requirements of the law, and to cover the cases of all officers or employees of the Land Department, wherever located or employed. This circular when prepared will be transmitted to me for approval.

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DOUBLE MINIMUM LAND—ACTS OF JUNE 15, 1880, AND MARCH 2, 1889.

JOHN BAXTER.

Land within the limits of a railroad grant, and reduced in price by the act of June 15, 1880, is again raised to double minimum if subsequently falling within the limits of another grant.

Section 4, act of March 2, 1889, does not reduce the price of land within the limits of a railroad grant, if the portion of railroad opposite thereto was completed prior to the passage of said act.

*Secretary Noble to the Commissioner of the General Land Office, July* 25, 1890.

I am in receipt of your communication of June 21, 1890, transmitting for my consideration the application of John S. Baxter for repayment of one dollar and twenty-five cents per acre, excess paid upon cash

entry for the S. ½ SW. ¼, NW. ¼ SW. ¼ and SW. ¼ NW. ¼, Sec. 22, T. 49 N., R. 6 W., Ashland, Wisconsin.

It appears that said entry was made by Baxter August 14, 1889, and payment was made thereon at the rate of two dollars and fifty cents per acre. Application for repayment of said excess was made by Baxter, which was refused by your office May 17, 1890, and he now files a motion for review of said decision, which you have referred for my consideration.

The land in controversy was increased to double minimum by being within the limits of the grant to the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, as shown by map of definite location filed June 17, 1858, and was offered at that price June 21, 1859.

The third section of the act of June 15, 1880 (21 Stat., 237), provided:—

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

This land having been raised to double minimum prior to January, 1861, was by the terms of said act reduced to one dollar and twenty-five cents per acre; but subsequently it fell within the limits of the grant to the Northern Pacific Railroad Company, by definite location, made July 6, 1882, and by reason thereof was again raised to two dollars and fifty cents per acre.

The fourth section of the act of March 2, 1889 (25 Stat., 854), provides:

> That the price of all sections and parts of sections of the public lands within the limits of the portions of the several grants of lands to aid in the construction of railroads which have been heretofore and which may hereafter be forfeited, which were by the act making such grants or have since been increased to the double minimum price, and, also, of all lands within the limits of any such railroad grant, but not embraced in such grant lying adjacent to and coterminous with the *portions of the line of any such railroad which shall not be completed at the date of this act,* is hereby fixed at one dollar and twenty-five cents per acre.

This tract is within the limits of a portion of the Northern Pacific Railroad Company that was completed at the date of the passage of the act of March 2, 1889, and was therefore not affected by said act, but the price remained at two dollars and fifty cents per acre, which was the price of the land on August 14, 1889.

This case differs from the case of Jacob A. Gifford (8 L. D., 583), in this: In the Gifford case the land was opposite a portion of the road that had not been completed at the date of the act of March 2, 1889, and the price of said land having been fixed by said act at one dollar and twenty-five cents per acre, it was held that the double minimum price having been charged for said land upon an entry made subsequent to the passage of the act, was erroneous, and repayment should therefore be allowed. But in the present case the land was double minimum at

the date of the purchase, and the price of two dollars and fifty cents per acre was not erroneously charged. There is no ruling of the Department, either in the case of Jacob A. Gifford (supra), the decision referred to in your letter, or in the case of George I. Clark (6 L. D., 157), hat would authorize repayment of any part of the purchase money in this case, but the doctrine therein announced is directly to the contrary. The application should be refused.

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RULES OF PRACTICE—APPEAL.

VESUVIUS LODE.

The Department will not undertake to review a decision of the General Land Office in the absence of an appeal, where due notice of the right to such remedy has been given, and no reason is shown for failure to comply with the rules of practice.

*Secretary Noble to the Commissioner of the General Land Office, July 25, 1890.*

On June 5, last "Sam'l J. Wallace, for J. O. Voorhies" filed a memorandum stating certain facts in reference to the Vesuvius Lode claim in the Pueblo district, Colorado, and claiming that Voorhies was entitled to a patent for a certain portion of the same.

The paper was referred to you for your consideration and a statement of the facts. Your report, dated June 16, is now before me.

It appears that on December 31, 1883, Joseph Oscar Voorhies made mineral entry upon said Vesuvius Lode claim, lying partly in Sec. 8, partly in Sec. 17, and partly in Sec. 16, T. 22 S., R. 72 W.; that on January 8, 1885, your office held the entry for cancellation to the extent of the portions lying in sections 16 and 17, on the ground that the title to section 16 was in the State of Colorado under the grant for school purposes, and because the portion in section 17 was embraced in a patent issued to one David C. Douglas on January 2, 1880.

No appeal therefrom was taken. On February 14, 1890, your office canceled said entry in accordance with said former decision, and by letter of the same date directed that additional evidence be furnished "of the existence of a vein or lode within the portion of the claim in section 8, the course and direction thereof, and a certificate by the United States surveyor-general showing the statutory expenditure of $500, upon and for the development of the aforesaid portion in section 8," and stated that in case of failure to submit such evidence within sixty days from notice, the remainder of the entry would be held for cancellation.

You state that claimant has filed no appeal, although advised of his right so to do, and you decline to recommend that the entry so canceled in part be re-instated, or that the unpatented portion be approved

for patenting, as long as claimant fails to comply with your said requirements.

The memorandum filed is not sworn to. It alleges that claimant obtained his right to said claim in accordance with law, that some one surreptitiously obtained patent to the portion in section 17, "by means of script; but subsequently gave quit claim to this claimant in recognition of his rights;" that said claimant has in good faith spent thousands of dollars on the lode.

Claimant asks that the government issue a patent for the part of the claim in section 8, without requiring compliance with the directions of your office.

The questions presented are not in any sense properly before the Department. If claimant has been injured by the decision of your office his remedy lies in appeal. It appears he has been notified of this and has failed to avail himself of this remedy. No reason is given for his failure. The vast amount of litigation in the Department renders it necessary that certain rules of practice be adopted, to the end that cases be regularly and certainly disposed of. The Department can not undertake in justice to itself and claimants to waive an observance of such rules when no cause whatever appears for so doing.

The application is accordingly dismissed.

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CONTEST—APPLICATION—PROCEEDINGS BY THE GOVERNMENT.

DEAN *v.* PETERSON.

During the pendency of a rule to show cause why an entry should not be canceled for failure to submit proof within the statutory period, an application to contest said entry should not be allowed.

The rejection of an application to contest an entry carries with it the rejection of an accompanying application to enter.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 28, 1890.*

On April 7, 1879, Charles E. Peterson made homestead entry for the NE. ¼, Sec. 11, T. 16 S., R. 23 W., Hays City now Wa Keeney, Kansas.

On June 12, 1886, a letter (not registered), to which no response has been made, was sent (presumably) from the local office to Peterson at the post-office nearest said tract, calling upon him to show cause why his said entry should not be canceled for failure to make proof within the statutory period of seven years.

On February 26, 1887, G. Frank Dean, alleging a failure by Peterson to establish and maintain his residence on the land, applied to contest the said entry, and also to make homestead entry for the land.

The local office rejected Dean's application to contest, on account of the pendency of the said rule to show cause, and his application to

enter on account of the existing entry of Peterson. This action was on appeal by Dean sustained by your office decision of September 24, 1888. Dean appeals.

The proceeding by the government against the Peterson entry (shown by the records of your office to be uncanceled) was, at the time of Dean's application to contest, and, so far as the record disclosed, is still pending. As no rights can be acquired under an affidavit of contest filed during the pendency of proceedings against the entry by the government (Canning *v.* Fail, 10 L. D., 657), the said application was properly rejected. Dean's homestead application must also be denied, as the rejection of an application to contest necessarily carries with it the rejection of the accompanying application to enter. Drury *v.* Shetterly, 9 L. D., 211; Arthur B. Cornish, id., 569.

The decision appealed from is affirmed and your office is directed to take prompt action with regard to the entry of Peterson.

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INDIAN LANDS—ALLOTMENT—ACTS OF MAY 23, 1872, AND FEBRUARY 8, 1887.

JOHN AND PETER ANDERSON.

Members of the Citizen band of Pottawatomie Indians may elect whether they will take allotments under the act of May 23, 1872, or February 8, 1887.

New selections may be allowed under the act of 1872 in lieu of allotments thereunder pending and unperfected at the passage of the acts of March 1, and 2, 1889, and certificates of such allotments may issue on the payment of the sum per acre originally given by the United States for the land.

*Secretary Noble to the Commissioner of Indian Affairs, July* 14, 1890.

I acknowledge the receipt of your communication of March 4, 1890, relative to allotments of lands to John and Peter Anderson members of the Citizen band of Pottawatomie Indians.

I concur in your opinion that these Indians are entitled to have the lands selected allotted to them under the act of May 23, 1872, and to certificates of allotment for such land upon the payment of thirty and fifteen cents per acre respectively, if they so elect to take allotments under said act; and that certificates should issue in the name of Julia Anderson for the land allotted to her in 1875, upon similar payment of fifteen cents per acre.

I transmit herewith an opinion of the Honorable Assistant Attorney General for the Department of the Interior, in relation to the matter, and an order of the President, modifying executive orders of May 24, 1887, and July 12, 1889, and granting authority to the Citizen Pottawatomie Indians to elect whether they will take allotments under the act of 1872 or 1887.

OPINION.

*Assistant Attorney General Shields to the Secretary of the Interior, June 11, 1890.*

I have the honor to acknowledge the receipt, by reference of Assistant Secretary Bussey on the 31st of March, of a communication from the Commissioner of Indian Affairs relative to the applications of two members of the Citizen band of Pottawatomie Indians for allotments of lands under the provision of the act of May 23, 1872 (17 Stats., 159). By said reference, my opinion is asked "as to the price per acre to be paid by the within-named Indians for the lands to be allotted to them."

Said act of 1872, entitled "An act to provide homes for the Pottawatomie and absentee Shawnee Indians in the Indian Territory," provides for allotments of land to each member of the Pottawatomie Citizen-band within the limits of the thirty-mile square tract selected for the Pottawatomie Indians in the Indian Territory, west of the Seminole reservation

> To each head of a family, and to each other member twenty-one years of age, not more than one quarter section, and to each minor of the tribe not more than eighty acres, and such allotments shall be made to include, as far as possible, for each family, the improvements which they have made.

Provision was made in said act for the issuance of certificates to the allottees, and that the land allotted shall be exempt from taxation, and "shall be alienable in fee, or leased or otherwise disposed of only to the United States, or to persons of Indian blood, lawfully residing within said Territory with permission of the President, and under such regulations as the Secretary of the Interior shall prescribe." It was further provided

> That such allotments shall be made to such of the above-described persons as have resided or shall hereafter reside three years continuously on such reservation, and that the cost of such lands to the United States shall be paid from any fund now held, or which may be hereafter held by the United States for the benefit of such Indians, and charged as a part of their distributive share, or shall be paid by said Indians before such certificates are issued.

It appears that under the provisions of said act twelve allotments were made in 1875 to John Anderson and Peter Anderson and members of their families, and a schedule of the same was approved by Sectary Chandler on November 23, 1875.

On May 23, 1887 (Ind. Div., v. 50, p. 358), the Department in a letter to the President concurred in the opinion expressed by the Indian Office that the Citizen Pottowatomie Indians are entitled to allotments under the act of February 8, 1887 (24 Stats., 388), if they so desired. The President on May 24, same year, approved the recommendation of the Department and duly authorized it to allow allotments to said Indians under said act of 1887.

On July 10, 1889, the Department transmitted to the President for his action the recommendation of the Indian Office, in which the Department concurred, that said

order of the President of May 24, 1887, be canceled, and a new order issued authorizing allotments thereon, so that children born since May 24, 1887, may receive allotments, but that those who, since the date of the President's order above referred to, have passed the age of eighteen years, or who have married, may receive the quantity of land allowed them by the provisions of the act.

This recommendation was approved by the President on July 12, 1889, and by departmental letter of July 13, same year, was transmitted to the Indian Office, with the statement that said authority of the President was "for the allotment of lands to the absentee Shawnee and Citizen Pottawatomies, located on the Pottawatomie reservation, Indian Territory, under the provisions of the act of February 8, 1887."

It further appears that one of the applicants, namely, John Anderson, on July 18, 1889, claimed the right to have allotted to him under said act of 1887, the quantity of land allowed to allottees under said act of 1872, free of payment to the United States for any part thereof; that if this was not so, then he had the right to allotments under both acts, as both were still in force; and that if wrong in both of said claims, he should be allowed the quantity of land named in the act of 1872, upon payment of the price as therein required. The Indian Office advised the attorney of said Anderson, on September 4, 1889 (id., vol. 60, p. 385), that his clients must elect to take their allotments under one or the other of said acts, and that they would not be allowed to take under both. The Honorable Commissioner expresses the opinion that said Indians are entitled to allotments under said act of 1872; that, although the lands selected by said applicants for themselves and families, except the allotment in the name of Julia Anderson, are not those approved by Secretary Chandler, as aforesaid, yet, since the Department has generally allowed allottees to change their selections upon sufficient showing, at any time prior to the "issuance of the evidence of title," said applicants should be allowed allotments for lands selected by them under said act of 1872, if there are no prior valid claims thereto, upon the payment of thirty and fifteen cents per acre, respectively, and that certificate shall issue in the name of Julia Anderson upon the allotment made in her name in 1875, upon a like payment of fifteen cents per acre. The lands applied for by John Anderson are part of the lands of the Creek Nation of Indians ceded to the United States for homes for such other civilized Indians as the United States may choose to settle thereon, under the provisions of the treaty of June 14, 1866 (14 Stats., 785), to the United States in consideration of the sum of thirty cents per acre. (See Article III id., p. 786.) On March 1, 1889 (25 Stats., 757), Congress ratified and confirmed the agreement made with said Indians on January 19, 1889, by Secretary Vilas, whereby the Indians made an absolute cession of said land, in consideration of a sum esti-

mated to amount to $1.25 per acre. By the treaty of March 21, 1866 (14 Stats., 755), the Seminoles ceded to the United States their lands "to locate other Indians and freedmen thereon," the consideration being fifteen cents per acre, and by section twelve of the act of Congress approved March 2, 1889 (25 Stats., 1004) an additional sum of money was appropriated "to pay in full the Seminole Nation of Indians for all their right, title, interest and claim which said nation of Indians may have in and to certain lands ceded" by said treaty of 1866, which is estimated to amount to ninety-four cents per acre.

The question submitted is whether said applicants shall be required to pay the amount originally allowed to said Creek and Seminole Indians, respectively, namely, thirty and fifteen cents per acre, or the full amount paid by the United States for the complete Indian title and claim.

The answer to said inquiry involves the further question whether said applicants can have allotments under said act of 1872, or can be allowed to have allotments under the act of 1887, at their election. If said executive action, as above recited, is to remain unrevoked and unchanged, then it would seem that the applicants would be required to take allotments under said act of 1887.

Said letter to the President transmitted the communication of the Commissioner of Indian Affairs "upon the subject of the allotment of lands in severalty to members of the Citizen band of Pottawatomies and the absentee Shawnee Indians" located upon the reservation as aforesaid. It quotes from the report of the Commissioner relative to the amount of land allowed to each allottee, as follows:

> To each head of a family, and to each other member twenty-one years of age not more than one hundred and sixty acres, and to each minor of the tribe not more than eighty acres, the cost of the same to be reimbursed to the United States before certificates are issued. Three years continuous residence upon the reservation is also required.
>
> Under this provision, married women over twenty-one are entitled to not more than eighty acres, while under the allotment act of February 8, 1887, they are entitled to no land. Minors are also entitled to not more than eighty acres, while under the act of February 8, 1887, minors under eighteen, not orphans, are entitled to forty acres.

And "as the Indians were required to pay for their land under the act of 1872," the Commissioner expresses the opinion, "that the said act can in no way govern the quantity of land to be allotted under the later act."

The statement of the Commissioner relative to the limitation of the quantity of land to be allotted to the married women of the Pottawatomies is erroneous, as the act of 1872 provides that each Indian over twenty-one years of age may have not more than one hundred and sixty acres.

The President was required to give direction "for the allotments of lands to the Indians indicated under the act of February 8, 1887,"

which he did on May 24, 1887. The subsequent executive action did not change the direction as to the act, under which allotments to said Indians were to be made. This direction of the President is binding upon this Department until changed or modified by the proper executive action. Until authority is given by the President to allow said applicants to receive allotments under said act of 1872, in my judgment, they can not be allowed to take allotments thereunder.

The question "as to the proper form in which patents should be issued for lands allotted, and to be allotted, to the Lac de Flambeau band of Chippewa Indians, in Wisconsin," was submitted for my opinion by Acting Secretary Chandler. In my opinion, dated September 18, 1889, it was held (1) that the treaty of September 30, 1854 (10 Stats., 1109), was not repealed, changed or modified by said act of 1887; (2) that the right of allotment was conferred by said treaty of 1854, and that patents for allotments thereunder should be in accordance with the terms of said treaty, whether the selections and allotments were made or the approvals signed before or after the passage of the act of 1887. This opinion was concurred in by you on September 23, 1889, and transmitted to the Commissioner of Indian Affairs for his information (9 L. D., 392). It may be observed that the precise question submitted was: "What kind of patent should issue where allotments were made under the treaty of 1854, and subsequent to the act of 1887;" and the answer was made that they should issue under the provisions of said treaty. There are expressions in said opinion which possibly convey the impression that all allotments provided for by acts or treaties prior to said act of 1887 must necessarily be made under the terms of the prior act or treaty, but the language of the whole opinion shows that it was not the intention to so hold. It must be remembered that section one of the act of 1887 expressly provides:

> That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act.

Since under said act of 1872 a larger amount of land may be taken than under the act of 1887, the applicants should be allowed allotments under the former act. It is true that under said act of 1872, the lands allotted must be paid for by the allottees; but that fact alone does not deprive the Indians of the right to take under said act if they so elect. As to the price, it would seem but just that the Indians be permitted to pay the amount originally given by the United States for the land, because they would have been so entitled at the time the allotments were made prior to the acts of 1889 (*supra*), and as they relinquish these lands for the new allotments desired, it is practically an exchange of lands, and I therefore concur in the opinion of the Commissioner that the Indians, if allowed allotments under said act of 1872,

should be required to pay for the land allotted the price designated in said treaties under which they were ceded to the United States. But I am clearly of the opinion that no allotments should be allowed under said act of 1872, until said executive action be revoked or modified. I see no objection, if authority be given by the President, to allowing said Indians to elect under which of said acts they will take allotments; but until the President so directs I am of the opinion that said applicants can take new allotments only under the act of 1887, and should not be required to pay any price for the lands selected by them.

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### RAILROAD GRANT—ISSUANCE OF PATENTS.

### UNION PACIFIC RY. CO., KANSAS DIVISION.

The failure of the Leavenworth, Pawnee and Western Company to signify under seal its acceptance of the provisions of the act of July 1, 1862, does not defeat the right to patents thereunder, for (1) section nine of said act, by which the grant is made to this company, does not in terms require said acceptance to be under seal; and (2) the resolution of the board of directors of said company accepting said provisions, duly certified as the action of said board, was received by the Department as a valid acceptance of said provisions, and the validity thereof subsequently recognized by the Department and Congress, the road constructed and titles vested on the faith of that transaction.

The grant is not controlled by the designation of the general route but by the definite location of the road, and the departure of the company in its location and construction of the road from the line of general route, as designated by the map of 1866, does not work an abridgement of the grant.

The President's acceptance and approval of the road, as constructed on its line of definite location west of Fort Riley to the one hundredth meridian of longitude, meets the statutory requirement that such route shall be subject to the approval of the President, as the map of said route was accepted by the Secretary of the Interior, and the road constructed on the faith of said acceptance.

Directions given for the issuance of patents.

*Secretary Noble to the Commissioner of the General Land Office, June 28, 1890.*

By letter of December 17, 1887, your office submitted a statement relative to the suspension of patents for lands in the State of Kansas granted by "acts of July 1, 1862, and July 2, 1864, to the Leavenworth, Pawnee and Western, afterwards the Kansas Pacific railroad company, now known as the Union Pacific railway company, Kansas division."

Said report states that "on October 1, 1883, the governor of the State of Kansas addressed a letter to the Department in which after referring to petition and argument respecting said grant filed in the Department by Hon. S. J. Crawford, attorney for the State and to the fact that lists embracing several hundred thousand acres had been, or were about to be filed in this office for certification, regardless of the failure of said company to comply with the law as shown by Mr. Crawford, he re-

quested that no more lands be certified to the railway company until the grant had been adjusted according to law, in order that the rights of the State as well as the settlers might be protected. November 3, 1883, Hon. S. J. Crawford filed in this office a printed copy of his petition and argument referred to by the governor and asked that the issue of patents to said company be suspended until the questions submitted were determined."

It appears from said report that thereupon an order directing that the issue of such patents be suspended, was made by your office.

Said report further states that:

> The Union Pacific Railway has, since 1883, filed lists of selections and applications for patents for upwards of 800,000 acres and has paid the fees for selecting and surveying the same.
>
> On the 22nd October, 1886, Messrs. Shellabarger and Wilson, of this city, attorneys for said company, requested that patents for such of the selected lands as were clearly subject to the company's selection be issued at the earliest practicable day.

Your office after a review of the questions presented concluded in said report that the points raised by Mr. Crawford "do not reach to the right of the company to the lands now in controversy," and proposed, with the approval of the Department, to prepare and submit for approval lists of the selected lands, as a basis for patent.

I have considered the questions presented, as will appear by the following:

By section one of the act of Congress approved July 1, 1862, (12 Stat., 489), the Union Pacific Railroad Company was authorized to construct a railroad from a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican River and the north margin of the valley of the Platte River, in the Territory of Nebraska, to the western boundary of Nevada Territory.

By section seven it was provided,

> That within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route, or routes to be withdrawn from pre-emption private entry and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named.

By section nine thereof the Leavenworth, Pawnee and Western Railroad Company of Kansas was authorized

> To construct a railroad and telegraph line from the Missouri river at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned.

Said section further provided that the route in Kansas west of the meridian of Fort Riley was to be subject to the approval of the President to be determined by him on actual survey and the company was required to file its acceptance of the conditions of said act in the Department of the Interior within six months after the passage of the act.

It is urged by Mr. Crawford that said company failed to file its acceptance of said grant, *under seal*, and is therefore disqualified from receiving the lands granted.

It should be noted that the provision in section seven of said act, "That said company shall file their assent to this act under the seal of said company in the Department of the Interior," applies in terms only to the Union Pacific Company. The road in question is not mentioned until section nine thereof is reached, and that section provides that it shall file its "acceptance of the conditions of this act in the Department of the Interior, within six months after the passage of this act." The requirement of the seal is omitted.

But if this is not a conclusive answer to the objection, the records of the Department show that on November 24, 1862, a resolution of the board of directors of the Leavenworth Pawnee and Western railroad company was received, transmitted by J. H. McDowell, president of the company, and certified by the secretary thereof, as taken by him from the books of the company, accepting the provisions of said act. This resolution was accepted by the Department as a proper one, and its receipt acknowledged. Subsequently, in response to a resolution of the Senate, the Department transmitted a copy of said resolution to that body, on March 4, 1864, pending the passage of the amendatory act of that year increasing the grant to said company. The validity of the acceptance has never been questioned. The Department has acted on it, the road has been built, and Congress with a full knowledge of the character of the acceptance, has conferred additional grants on the company.

The government in two of its branches, and the company have treated the acceptance as valid and titles have vested on the faith of that transaction. As between them there can be no question of the validity of the acceptance. Perhaps it will not be questioned that a corporation may bind itself by acts not under seal. It is well settled in the United States that the acts of a corporation evidenced by vote are as completely binding upon it, and are as complete authority to its agents, as the most solemn acts done under its corporate seal. Angell and Ames on Corporations, section 257. Bank of United States *v.* Dandridge, 12 Wheat., 64; 2 Kent Com., 288; Garrison *v.* Combs, 22 Am., Dec. 120, (7 J. J. Marshall 84, Kentucky).

The conditions of the amendatory act of 1864 were accepted by the company, under seal.

The main objection urged against the issue of patents has reference to a change of the route of the road. The following recital of facts becomes necessary.

By letter dated July 2, 1862, Mr. Thomas Ewing, as attorney for the Leavenworth, Pawnee, and Western railroad company, filed in your office a map of the State of Kansas, and the Territory of Nebraska, on which was indicated in pencil, the "probable" route of the road from a point on the Kansas river opposite the town of Lawrence, thence up said river to the mouth of the Republican river thence up that river to the 100th meridian of longitude. On July 17, 1862, the local officers for the proper land districts in Kansas and Nebraska were directed to withdraw the lands within fifteen miles of said probable route from settlement and entry. This withdrawal was subsequently modified so as to open the lands in the even numbered sections to entry under the preemption and homestead laws at the double minimum price.

By said act of Congress approved July 2, 1864, (13 Stat., 356) the act of July 1, 1862 was amended so as to increase the grant to ten sections per mile, to be taken within a limit of twenty miles on each side of the road, and to provide for the withdrawal of the odd sections within twenty-five miles of the road on filing map of general route.

By section five of said act the time for designating the general route of said railroad, and of filing the map of the same, and the time for the completion of that part of the railroads required by the terms of the act of 1862 of each company, was extended one year from the time designated in the act of 1862.

On July 1, 1865, a map showing the general route of the road in question from the Missouri River to the one hundredth meridian of west longitude, was filed. The line shown upon said map was almost identical with the line of "probable route" designated by the map filed by Mr. Ewing in 1862. The map was referred to your office for appropriate action and with your office letter of July 3, 1865, returned to the Department, with the recommendation that as the odd sections within fifteen miles of the line shown thereon were already withdrawn, no further withdrawal should be ordered until the road had been surveyed and located and a map thereof filed in the Department. No further withdrawal was made at that time.

By act of Congress approved July 3, 1866, (14 Stat., 79) amendatory of said act of 1864, the Union Pacific Railway Company, eastern division was authorized to designate the general route of its road, and file a map of the same, at any time before December 1st, 1866, and upon the filing of said map of general route, the Secretary of the Interior was directed to withdraw from *sale* the lands along the entire line, so far as the same might be designated. It was provided, however, that said company should connect its road with the Union Pacific Railroad, but not at a point more than fifty miles westwardly from the meridian of Denver.

On July 11, 1866, the company filed a map designating the general route of its road from Fort Riley, up the Smoky Hill River, to the western boundary of Kansas, whereupon the odd sections within twenty-

five miles of such route were withdrawn from entry by order of the Secretary of the Interior and in November following, such of the lands withdrawn along the route up the Republican as were not within twenty-five miles of the new route were restored to settlement and entry.

The road west of Fort Riley was definitely located in sections, the maps of which were filed as follows:

From Fort Riley to Fort Harker, May 8, 1867.
From Fort Harker to Fort Hays, Sept. 21, 1867.
From Fort Hays to the 335th mile post, Dec. 6th, 1867.
From the 335th to the 405th mile post, May 6th, 1870.
From the 405th mile post to Denver, Colo., May 26, 1870.

The line of definite location as shown upon these maps is not identical with the line of general route, the distance between the two lines amounting in some places to as much as twenty-five miles.

Following the filing of these maps the withdrawal previously ordered on the line of general route was adjusted to the line of definite location, i. e., such of the lands within the twenty-five mile limits of the withdrawal on general route as were not within twenty miles of the line of definite location were restored to entry, and at the same time such of the lands within twenty miles of the line of definite location as were not within the limits of the withdrawal on general route were withdrawn for the benefit of the grant.

It is urged that the action of the company in departing from its line of general route, and locating and constructing its road upon another and different route, was an abandonment of its grant to the extent of such departure, or at least an abandonment of such lands as are outside the withdrawal on general route, though within the withdrawal on definite location.

This question is very thoroughly considered by your office in said report, as follows:

If the designation of the line of 1866 was such a designation of the line of the road that the right of the company thereby attached to the odd numbered sections along such line, it follows that such line could not afterwards be changed so as to affect the grant without the consent of Congress. Van Wyck *v.* Knevals, 106 U. S , 360.

The question then is whether the right of the company attached to lands along the line of 1866 upon the filing of the map designating the same.

The grant to the Kansas Pacific Railway Company is of the alternate odd numbered sections within twenty miles on each side of its road, "not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or pre-emption claim may not have attached *at the time the line of said road is definitely fixed.*"

The seventh section of the act of July 1, 1862, as amended by act of July 2, 1864, provides:

"That within two years after the passage of this act said company shall designate the *general route* of same in the Department of the Interior, whereupon the Secretary of the Interior, shall cause the lands within twenty-five miles of said designated route or routes to be withdrawn from pre-emption, private entry and sale."

Here, apparently, are two separate and distinct lines; first, a preliminary or general line, to be followed by a withdrawal of the odd sections within twenty-five miles thereof, and, second, a final or definite line the designation of which identifies, and attaches the company's right to the granted lands.

Until the line of the road was definitely fixed the grant was in the nature of a float requiring a *definite location* to attach or anchor it to the particular sections granted.

In the case of Kansas Pacific Railway *v.* Dunmeyer, (113 U. S., 629), the supreme court, discussing the grant to said company, distinguished between the general route and the definite location, and defined the purpose and effect of each, and its decision in that case is conclusive of the question involved herein. Speaking of the line of definite location the court said:

"Wherever the road might go the grant was limited originally to five sections, and, by the amendment of 1864, to ten sections on each side of it within the limit of twenty miles."

"When the line was fixed, which we have already said was by the act of filing this map of definite location in the General Land Office, then the criterion was established by which the lands to which the road had a right were to be determined. Topographically this determined which were the ten alternate sections on each side of that line where the surveys had then been made."

And in the case of Buttz *v.* Northern Pacific Railroad Co., (119 U. S., 55), the court said:

"The act of Congress not only contemplates the filing by the company in the office of the Commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate sections as have not, at that time, been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant, or other claims of rights, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry or pre-emption of the adjoining odd sections, within forty miles on each side, until the definite location is made."

These and similar decisions h old that the designation of the general route in no way controlled the grant, and that its purpose was to preserve the lands from other appropriation until the road could be definitely located. Kansas Pacific Ry. Co., *v.* Dunmeyer; Buttz *v.* Northern Pacific R. R. Co., *supra*; Northern Pacific R. R. Co., 10 C L. O., 74.

In the Dunmeyer case, the supreme court, discussing the effect of the filing of the map of general route of the Kansas Pacific Railway, said:

"This action does not like the filing of the line of definite location, vest in the company a right to any specific piece of land. It establishes no claim to any particular section with an odd number. It authorizes the Secretary to withdraw certain lands from sale, pre-emption, etc."

The grant being of the odd numbered sections within twenty miles of the line of definite location, and no right to any specific lands being vested in the company by the designation of the general route, it follows that in fixing its definite location, the company was not necessarily required to conform to the line of general route.

Said report further truly states that,—

This Department has uniformly permitted a change of line after filing of a map of general route, and after such change has adjusted the withdrawal on general route to the line of definite location.

I concur in the conclusion reached by your office on this point.

Again it is urged that the designation of the route west of Fort Riley and the withdrawal thereon were illegal because that portion of the route was not approved by the President, and that consequently the grant west of Fort Riley has failed.

It is said that, "In ordering the unauthorized, unlawful, and forbidden withdrawal of July 11, 1866, Secretary Harlan, following in the footsteps of Commissioner Edmunds, seems to have disregarded all statutory requirements, legal principles, and advisory opinions. In

support of this objection the opinion of Assistant Attorney General Smith of October 3, 1871, approved by Secretary Delano, (1 C. L. L., 365), is cited.

That opinion held that the Kansas Pacific did not acquire a right to lands west of the meridian of Fort Riley under the act of 1862, because its route was not approved by the President, but that it did acquire such right by the third section of the act of March 3, 1869, (15 Stat., 324). To this it must be answered that said opinion is in conflict with that of the United States supreme court, delivered in 1878, in the case of the Missouri, Kansas and Texas Railway Company *v.* Kansas Pacific Railway Company, (97 U. S., 491). The court there held (syllabus) that by the act of July 3, 1866 (14 Stat., 79), the Kansas Pacific railway company

was authorized to designate the general route of its road, and to file a map thereof at any time before December 1, 1866: *Provided*, that after the filing of the map the lands along its entire line so far as designated, should be reserved from sale by the Secretary of the Interior. Within the specified time, the company filed a map designating as such general route a line from Fort Riley to the western boundary of Kansas, by way of the Smoky Hill river. The lands upon this route embracing among others, those now in controversy, were accordingly withdrawn from sale; and in January, 1867, the road was completed for twenty five miles, approved by the Commissioners appointed to examine it, and accepted by the President. Held, 1. That the title of the company attaching to those lands by the location of the road, followed by the construction thereof, took effect, by relation, as of the date of the said act of 1862, so as to cut off all intervening claimants, except in the cases where reservations were specially made in it, and the amendatory act of 1864. The lands there in question lay west of Fort Riley.

The provision of the statute on this point is, "The route in Kansas, west of the meridian of Fort Riley, to the aforesaid point, on the one hundredth meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey."

The route of 1866 was not approved by the President in person. The company however, constructed its road upon the line of definite location and the same was accepted and approved by the President. This would appear to meet the requirement of the granting act independently of the decision of the supreme court. The map of the route was filed and accepted by the Secretary of the Interior, and on the faith of this the road was built. The President never disapproved of the route.

As a matter of fact, however, it is evident that the Department, after the passage of the act of 1866, treated this provision as not extending to the new route authorized by said act, but as still applicable to the abandoned route up the Republican where an actual survey and approval by the President was required for the purpose of ascertaining the amount of bonds of the United States to which the company would have been entitled had it constructed its road upon that route, it being restricted to that amount by the terms of the act of 1866.

A survey of the route from Fort Riley to a connection with the Union Pacific Railroad at the 100th meridian was accordingly made during the summer of 1868, under the direction of the Department of the Interior, by Brevet Major C. W. Howell, Capt. of Engineers, U. S. Army, for the purpose of ascertaining "the most direct and practicable route for a railroad upon the route prescribed by the provisions of the act of 1862," which survey, together with the recommendation of Secretary Browning that the amount of bonds to be issued to said company in aid of the construction of its road along the new route be restricted to the length of the old route as ascertained by said survey, was approved by the President October 30, 1868.

Said report further says:

I deem it proper, however, to add that the Pacific Railway commission has called for much information from this office in respect to the status of grants of land to the Pacific R. R. corporations, and I have understood that some recommendation may possibly be made to Congress by said commission touching the control or disposition of unpatented lands. I am not advised of the nature of the report that has been made by the commission, but I think it proper to submit for your consideration the question of the expediency of deferring the perfection of railroad titles by issue of further patents to the companies which are in default in their indebtedness to the United States, pending the report of the commission, or of action by Congress in the matter of the adjustment of such indebtedness.

The facts with reference to this matter are as follows: Pursuant to the provisions of the act of Congress of March 3, 1887, (24 Stat., 488). The United States Pacific Railway commission on April 17, 1887, was appointed by the President. The act was entitled, "An act authorizing an investigation of the books, accounts, and methods of railroads which have received aid from the United States, and for other purposes." The report of the commission was submitted to Congress with a message from the President dated January 17, 1888.

The message was devoted largely to the question of the indebtedness of said companies to the government. It says:

The majority of the commission are in favor of an extension of the time for the payment of the government indebtedness of these companies, upon certain conditions. But the chairman of the commission, presenting the minority report, recommends, both upon principle and policy, the institution of proceedings for the forfeiture of the charters of the corporations and the winding up of their affairs.

In reference to the land grants the President said:

I desire to call attention also to the fact that if all that was to be done on the part of the government to fully vest in these companies the grants and advantages contemplated by the acts passed in their interest has not yet been perfected, and if the failure of such companies to perform in good faith their part of the contract justifies such a course, the power rests with the Congress to withhold further performance on the part of the government. If donated lands are not yet granted to these companies, and if their violation of contract and of duty are such as in justice and morals forfeit their rights to such lands, Congressional action should intervene to prevent further consummation. Executive power must be exercised according to existing laws, and executive discretion is probably not broad enough to reach such difficulties.

With all the facts and the recommendations of the President before it, the Fiftieth Congress expired without enacting any further legislation on this subject.

I have thus carefully examined all the objections urged suggested against the issuance of the patents here in question and have found no reason to justify the further suspension of the same. The road has been completed, the selections have been made, and the fees paid, and the objections urged are not founded in law. There are no adverse claims. I, therefore, concur in the proposal of your office that proper lists of the selected lands be prepared and submitted for approval, as a basis for patent.

The existing law on this subject is found in the fourth section of said act of 1862, as follows:

*And be it further enacted,* That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turn-outs, watering-places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners.

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### OSAGE LAND—FINAL PROOF.

### EWING *v.* CHILDERS.

The fact that the receiver's receipt is dated one day beyond the six months from the time of making Osage filing is not such an irregularity as will defeat the entry, where the proof and final affidavit were made within said period and good faith is otherwise apparent.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July* 29, 1890.

I have considered the appeal of William H. Childers from your office decision of December 19, 1888, in which you reject his final proof on his Osage declaratory statement No. 6376, for the SW. ¼ of Sec. 10, T. 27 S., R. 12 W., Larned, Kansas, and hold his filing for cancellation.

He made his filing on said tract on November 14, 1884, alleging settlement September 10th of that year.

Joanna E. Ewing filed Osage declaratory statement No. 5726, on October 6, 1884, for the S. ½ SE. ¼ and E. ½ SW. ¼ of the same section, alleging settlement September 15, 1884. She made her final proof be-

fore A. S. Fay, probate judge of Pratt county, Kansas, on April 4, 1885, and obtained the receiver's receipt No. 5012 for the first payment, dated April 7, 1885.

On January 28, 1885, Childers gave notice of his intention to make final proof on March 25, 1885, and Ewing filed protest against allowing Childers' proof as being in conflict with her filing as to the E. ½ SW. ¼ of said section.

Hearing was had on Ewing's protest, and on February 25, 1887, the register and receiver held for rejection the final proof of Childers, and on appeal you affirm that judgment.

The facts found by the local office and also by your said office decision are fully set out, and, after a careful examination of the testimony, I find such statements substantially correct.

The testimony shows that Childers purchased the improvements on said tract from one Huston about September 1, 1884. The improvements consisted of a "dug-out," which Childers describes as "about six feet high; had a door four feet high, a knob lock and good hinges; it was dug down three and a half or four feet." The proof shows it was not in a habitable condition during the winter; and while he called it his home, the most he did, up to the time he made his proof, was to make occasional visits to it.

Ewing made her home on the land from September 1, 1884, with occasional absences therefrom; these absences being for the purpose of making money to pay for the land were clearly excusable; her improvements were ample; her good faith manifest.

It is insisted that she did not make her proof and payment within six months after filing her declaratory statement, as required in proceedings to obtain Osage lands. She filed her declaratory statement October 6, 1884; she made her proof April 4, 1885, and the receiver's receipt for the first installment of $50 is dated April 7, 1885. The fact of the receiver's receipt being dated one day beyond the six months from the time of making an Osage filing is not such an irregularity as will defeat the entry, where it is shown the proof and final affidavit were made within the six months, and good faith is otherwise apparent.

The decision of your office is affirmed.

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### PRACTICE—RECORD OF PROCEEDINGS IN THE LOCAL OFFICE.

### SPERLING *v.* MCGREW.

In hearings before the local officers, or other matters that come before them officially, the record of such proceedings should show with exactness the dates when papers are filed, or any actions are taken by them.

A rehearing is required where the record of proceedings in a contest is indefinite, and it cannot be determined therefrom whether the defendant had due notice of the day set for hearing.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 29, 1890.*

I have considered the appeal of Benj. H. McGrew from the decision of your office, dated January 14, 1889, in the case of A. D. Sperling *v.* said McGrew, holding for cancellation McGrew's timber culture entry for the SE. ¼, Sec. 25, T. 34 N., R. 47 W., (Valentine series) Chadron land district, Nebraska.

This entry was made April 8, 1884, and on April 10, 1886, Sperling initiated contest against the same, alleging that claimant had "failed to cultivate or partially cultivate the first year's breaking as required by law, and has not cured the laches up to this date, and has put the said timber claim in the hands of an attorney for sale."

It is further alleged that he (contestant) had made personal inquiry and caused inquiry to be made at Bordeaux, the entryman's last known place of residence in Nebraska and after due diligence personal service could not be had. Thereupon a hearing was ordered for July 14, 1886, depositions of witnesses to be taken July 7, 1886, before a notary public of Chadron, notice of said hearing to be given claimant by publication.

On the day appointed for the taking of depositions the contestant appeared in person and with his witnesses. The entryman appeared by attorney and moved to dismiss the case on the ground of defective notice. Contestant and his witnesses were sworn and testified and were cross-examined by claimant's attorney. No testimony was offered in behalf of the entry.

July 16, 1886, the local officers, after considering the case held that personal service of the notice of hearing could have been made upon the claimant, and that as his name was published in the notice as McGrea instead of McGrew, and as the evidence failed to show his good faith, they recommended that the contest be dismissed.

From this finding the contestant appealed, and on June 30, 1888, your office remanded the case for further hearing because of said defective notice.

September 25, 1888, was set for the re-hearing and claimant was personally served with notice of the same by the sheriff of Dawson county, Nebraska.

On the day fixed for trial both parties appeared at the local office, but it does not appear that any testimony was then taken. The case appears to have been continued until October 24, 1888, at whose instance, or for what reason, is not shown by the record.

On said September 25, 1888, however, a second affidavit of contest was made by the contestant. This affidavit was not executed before the register or receiver, and does not on its face purport to be an amendment to the original affidavit of contest, and its allegations are entirely different.

When said additional or new affidavit was filed is not shown by the record, but it seems to have been treated by the local office as an amended affidavit, and sets forth that

> the said entryman has failed to plant timber, trees, seeds or cuttings, during the year ending 1888, upon the second five acres. The second five acres has not been cultivated this year except to plant a patch of potatoes, no seeds or trees have been planted since 1886, and the breaking was growing up to weeds and grass and that one James Striker claimed to have purchased the same conditional.

On October 24, 1888, the day to which the hearing appears to have been continued, testimony was submitted by contestant on the allegations contained in both the affidavits of contest. Contestee did not appear at said hearing.

November 10, 1888, his attorney filed a motion for re-hearing, alleging that he was not aware of the day set for the hearing until after October 24, 1888, when he received a letter from his client instructing him to defend his rights in the premises.

The local officers overruled said motion and on November 24, 1888, claimant appealed and your office affirmed the action of the local office and held the entry for cancellation, whereupon claimant appealed to this Department.

Referring to the testimony taken at the hearing of October 24, 1888, it is to be noted that it is in the handwriting of F. M. Dorrington, who was at the time contestant's attorney. The record as a whole, in this case, is, to my mind, indefinite and unsatisfactory in many respects. As already indicated, it does not show when the second affidavit of contest was filed and the only evidence of service of notice, under said affidavit, is the sworn statement of the attorney for contestant, Mr. Dorrington. Against this is the statement of claimant's attorney in his motion for re-hearing, that he was not aware of the day set for hearing until after said day had passed.

Under all the facts and circumstances of the case, I am of the opinion that a further hearing should be had. The decision appealed from is, therefore, set aside, and the case is returned to your office for such steps as may be necessary to such hearing.

The two affidavits of contest herein referred to may be treated as consolidated and as together containing the charges to be met by the entryman at the further hearing above directed.

In this connection I deem it proper to suggest that you call the attention of the local officers to the necessity for making their records complete in the matters which come before them officially, in the way of hearings, or otherwise. It will be observed that most of the difficulty found in this case arises from the fact that the local officers did not properly note the dates of filing papers and of actions taken by them, at the several steps in the progress of the case.

MINERAL ENTRY -CONFLICTING CLAIMS.

## MOSS ROSE LODE.

A mineral entry made during the existence of another entry for the same tract is irregular, but may be allowed to stand on the cancellation of the previous entry.

A decision of the Department holding an entry for cancellation "without prejudice to the claimant's proceeding *de novo* in a regular manner," is in effect only a permit to the claimant to renew his application subject to all adverse rights.

*Secretary Noble to the Commissioner of the General Land Office, August 2, 1890.*

This record presents the appeal of Charles H. Pratt from your office decision of May 16, 1889, holding for cancellation his mineral entry No. 244, made November 19, 1887, for the Moss Rose lode claim in the Gunnison, Colorado, land district.

It appears that the greater part of the ground covered by said entry was also embraced in mineral entry No. 150, for the Sylvanite No. 2 lode claim. The Sylvanite application was filed in the local office on April 13, 1885, and the entry allowed July 11, 1885.

On September 10, 1885, Pratt filed a protest against the Sylvanite entry, alleging *inter alia* that (as stated by your office) "there never was any plat or notice posted in a conspicuous place upon the claim as required by law."

Your office, after a hearing had to determine the matter thus alleged, held October 27, 1887, the Sylvanite entry for cancellation "without prejudice to the claimant's proceeding *de novo* in a regular manner."

This action was on appeal sustained by the departmental decision of December 19, 1888, (7 L. D., 554), which, on motion for review was adhered to May 4, 1889 (8 L. D., 457).

The Moss Rose application was filed November 21, 1885, and during the statutory period was adversed by the Sylvanite claimants. The resulting suit was subsequently, August 23, 1886, dismissed by agreement of counsel.

It appearing that the Moss Rose application was made during the existence of the Sylvanite entry your office by the decision appealed from held that the entry (Moss Rose) in question was invalid and should be canceled.

I am not favorably impressed with this view of the case.

An entry, though made when land was not subject to appropriation, on the removal of the bar may be allowed to stand. Schrotberger *v.* Arnold (6 L. D., 425). See also E. S. Newman (8 L. D., 448).

The allowance of the Moss Rose entry during the existence of the Sylvanite, may have been irregular, but the latter has been canceled by order of the Department and so far as the record discloses the question is between appellant and the government. It was, however, furthermore held by your office that the allowance of the Moss Rose entry

would operate to defeat the "manifest intention" of the Department in affirming (as stated) the judgment of your office whereby the Sylvanite entry was held for the cancellation "without prejudice to the claimant's proceeding *de novo* in a regular manner," or in other words, that under said judgment the Sylvanite claimants were entitled to renew their application and pursue the same to entry in preference to and without regard to the rights of the appellant.

The Department upon a proceeding instituted by the appellant (a party in interest) found the Sylvanite entry to be invalid by reason of illegal posting of notice on such claim. To hold the appellant's rights in the premises inferior to those of the Sylvanite claimants is therefore, obvious error. The effect of the said departmental decision was simply to permit such claimants to renew their application subject of course to all adverse rights.

The Moss Rose entry (if regular in other respects), will in accordance with the views hereinbefore expressed remain intact.

The decision appealed from is reversed.

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### PRE-EMPTION—SECOND FILING—ALIEN.

### BIRTCH *v.* CUDDIGAN.

A declaratory statement filed by one foreign born, who has not made a declaration of intention to become a citizen, becomes valid if such declaration is made prior to the intervention of a valid adverse right.

A second filing will only be allowed where the claimant by reason of a prior or adverse right is unable to perfect title under the first.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 2, 1890.*

I have considered the appeal of William Cuddigan from your decision of February 8, 1889, rejecting his claim and holding for cancellation his declaratory statement for the SW. ¼ of NW. ¼ of Sec. 27, T. 45 N., R. 8 W., Montrose, Colorado.

Said filing was made May 24, 1886, alleging settlement August 1, 1885.

You held the same for cancellation as illegal for the reason that Cuddigan had, at Winona, Minnesota, on September 13, filed a declaratory statement for the NW. ¼ of Sec. 9, T. 106, R. 23, alleging settlement thereon July 28, 1856.

Appeal is taken by Cuddigan upon the ground that said filing was illegal and void, for the reason that at the time he made the same he was not qualified to do so, as he was foreign born and did not declare his intention to become a citizen of the United States until December 1, 1856, hence that he had a right to make a second filing.

The tract for which filing was made was approved to the State of

Minnesota, December 1, 1862, under the act of Congress approved March 3, 1857, making a grant of land to the Territory of Minnesota to aid in the construction of railroads.

Counsel for the appellent in their argument say, Cuddigan declared his intention to become a citizen December 1, 1856, "but never afterwards made any claim to the land on which his illegal and void filing had been made. He did not ratify his first act, nor claim anything under it, but abandoned the land, which was subsequently certified to the Transit R. R. Co., under act of March 3, 1857."

In my opinion the evidence in the case does not sustain this view. At the hearing Cuddigan testified that he had filed for land in Minnesota, and when asked why he was not able to prove up on the same he answered,

I had not the means, I was burned out and lost my title and the land fell to a railroad company. I lost by the fire my team and everything I had and as a result I was unable to pay for the land within the time required by law, my filing was on an odd section within a railroad grant and on my failure it fell into the railroad's hands.

Ques. When you filed on this land you had a prior right to the land.

Ans. Yes.

Ques. And their right did not accrue until your rights were forfeited.

Ans. They had no rights until mine were forfeited.

Ques. At the time you settled upon the land in Minnesota on which you say you made your filing was it government land thrown open to settlement and pre-emption.

Ans. Yes.

He further testified:

Ques. Were you ever notified by the land office in Minnesota of the cancellation of your filing on said Sec. 9, or of a contest of that filing.

Ans. No.

Ques. When you went to the land office to prove up what did the register tell you.

Ans. He told me to go home, I had lost my title, that the railroad had it.

It is thus evident that at the time Cuddigan declared his intention to become a citizen December 1, 1856, he was asserting a claim to this land, and that he continued to assert a claim to the same until after the tract was held to have inured to the grant for railroad purposes under an act approved months after he became qualified to perfect title.

It is a well established principle that a declaratory statement filed by one foreign born, who has not declared his intention to become a citizen, becomes valid upon the claimant declaring his intention to become a citizen, if said declaration is made before a valid adverse right intervenes. Mann *v.* Huk (3 L. D., 452); Soustilie *v.* Lowery (6 L. D., 15).

The principle is also established that a second filing will only be allowed when the claimant, by reason of a prior or superior right, is unable to perfect title to the land. Allen *v.* Baird (6 L. D., 298).

Applying these rules to Cuddigan we find that prior to the initiation of any adverse right he had qualified himself to perfect title to the land claimed by him, and for which he had made a filing, and that his failure

to thus perfect title was not owing to the presence of any adverse claim or right. His second filing was therefore illegal.

Your decision is affirmed.

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PURCHASE PRIOR TO PATENT.—CONFLICTING EQUITIES.

MURPHY *v.* SANFORD.

The purchaser of land prior to the issuance of patent therefor takes an equity only, and has no greater or different right than the entryman.

The protection afforded by equity to a bona fide purchaser without notice extends only to a purchaser that holds the legal title.

As between one holding under a pre-emption entry, where by mistake the patent failed to describe the land actually purchased, and another claiming under a subsequent location of such land, made with a knowledge of the facts with respect to the prior purchase, the superior equity is with the former, and patent should issue to correct the mistake.

*Secretary Noble to the Commissioner of the General Land Office, August 2, 1890.*

I have considered the case of John Murphy *v.* Wayland W. Sanford on appeal by the latter from your decision of February 17, 1890, holding for cancellation the soldier's additional homestead entry of Jay C. Bacon for the NE. ¼ of the SW. ¼ of Sec. 4, T. 48 N., R. 14 W., Ashland, Wisconsin land district.

On April 22, 1889, Jay C. Bacon made soldier's additional homestead entry for said land and on the next day, by his attorney in fact, one Herbert R. Spencer, conveyed it to Wayland W. Sanford. Afterwards Bacon and his wife executed in person another deed conveying said land to Sanford.

On August 16, 1889, the local officers transmitted the affidavit of one John H. Murphy setting forth that he was the owner of said tract of land and had "enjoyed undisputed possession and occupancy of said tract of land until one Jay C. Bacon having discovered an error in the United States patent filed an additional homestead entry for the NE. ¼ of the SW. ¼ of said section" and that his ownership and possession of said land were facts of general notoriety. Afterwards Murphy, by letter of August 27, 1889, transmitted two patents, issued to Wellington Gregory, one dated June 1, 1859 for the NW. ¼ of the SW. ¼ of said section, based upon pre-emption certificate No. 327, and the other dated May 3, 1860, for the SE. ¼ of the SW. ¼ and the W. ½ of the SW. ¼ of said section, based upon military bounty land warrant No. 22,827. At the same time Murphy transmitted an abstract of the title to the SW. ¼ of said section certified by one "K. W. Lewis, abstracter." The first item in this abstract is as follows:—

The book of original entries on file in the office of county clerk shows that the SW. ¼ of Sec. 4, T. 48, R. 14, was entered by Wellington Gregory 25 September 1856.

Said abstract of title shows also the following conveyances viz:—

The two patents hereinbefore mentioned, filed for record May 4, 1886.

Warranty deed, Wellington Gregory to T. C. Tiernan, dated October 25, 1856, recorded May 18, 1857, conveying SW. ¼ said section.

Mortgage, Tiernan to Gregory, dated October 25, 1856, recorded November 11, 1856, and satisfied August 24, 1857, describing SW. ¼ said section.

Will, Thomas C. Tiernan, to his wife and children by name, dated June 20, 1862, filed for record April 17, 1886, devising and bequeathing all his property.

Warranty deed, Heirs of T. C. Tiernan, deceased, to Charles N. Aker, dated March 31, 1886, recorded May 3, 1886, conveying SW. ¼ said section.

Warranty deed C. N. Akers to D. George Morrison, dated April 12, 1886, recorded May 3, 1886, conveying SW. ¼ said section.

Warranty deed, D. George Morrison and wife to John H. Murphy, dated April 29, 1886, recorded May 4, 1886, conveying SW. ¼ said section.

Power of attorney, Jay C. Bacon and wife to Herbert R. Spencer, dated December 9, 1879, recorded April 23, 1889, authorizing the sale and conveyance of "any lands he may acquire by him as an additional homestead entry."

Duplicate receipt, United States to Jay C. Bacon, dated April 22, 1889, recorded April 23, 1889, for NE. ¼ SW. ¼ said section.

Warranty deed, J C. Bacon and wife by attorney in fact Herbert R. Spencer to Wayland W. Sanford, dated April 23, 1889, recorded same day, conveying NE. ¼ SW. ¼ said section.

Confirmatory deed, Jay C. Bacon and wife to Wayland W. Sanford, dated May 1, 1889, recorded May 7, 1889, conveying NE. ¼ SW. ¼ said section.

Among the papers in this case I find also certain papers from the files of your office and relating to the entries made by Wellington Gregory. These papers show, and it is admitted by the attorney for Sanford that Gregory filed pre-emption declaratory statement for said SW. ¼ of Sec. 4, and on September 25, 1856, submitted final proof in support of said filing. It seems that he paid for said land with military bounty land warrant No. 22,827, for one hundred and twenty acres, and $50 in cash, separate receipts being issued. The receipt and certificate issued upon the cash payment which are numbered 327, describe the land covered thereby as the "north west quarter of the south west quarter" of said section four and the certificate has on the back this memorandum—"Bal. of this claim satisfied by Wt. 22,827 act Mch. 3, 1855, for SE ¼ SW ¼ and W. ½ SW. ¼."—The application accompanying the warrant referred to describes the "SE. ¼ of SW. ¼ and W. ½ of SW. ¼ of said section, and has on the back this memorandum—"Bal. of this claim satisfied by certificate 327 for NW. ¼ SW. ¼."

Sanford, through his attorney, filed in your office an abstract of title of the SW. ¼ of said section 4, certified by the register of deeds for Douglas county as being "a true and correct abstract of all deeds or other conveyances on file or of record" in his office. This abstract shows substantially the same facts as the one filed by Murphy, except that it makes no statement as to the matter set forth in item one of that abstract. Accompanying this abstract was an affidavit executed by said register of deeds, containing the following statement:

> That none of the records in my office show the entry by Wellington Gregory of the said land above described. Affiant says that there is a book in the office of the county clerk (auditor), or in the county treasurer's office that shows some of the early land office entries, but affiant says said book is kept in said offices as a convenience in assessing taxes, but that said book forms no part of the public records of my office as provided by statute.

He also filed affidavit of Herbert R. Spencer, stating that before the purchase of this land by Sanford, he, affiant, went with said Sanford and one N. S. Bowers to the office of the register of deeds for Douglas county, where said land is situated and they carefully searched the records of said office, but found nothing to indicate that the United States had sold or parted with the said land previous to the entry by Bacon. He further states that they visited the local land office and found nothing in the records of that office to show that the land had been entered by any one or that the United States had disposed of or sold said land previous to the sale to Bacon. There was filed also the affidavit of N. S. Bowers stating that he was associated with Sanford in the purchase of this land, having furnished a part of the purchase money; that before making such purchase he wrote to the Commissioner of the General Land Office as to the status of said tract and received a reply stating that it was vacant public land; that he carefully examined the records of the office of register of deeds for Douglas county, and the records of the local land office and found no record of any conveyance of the title to said tract by the United States and that he then joined in good faith in the purchase of said land and in good faith paid his proportion of the purchase money. They also filed copies of two letters of your office addressed to N. S. Bowers stating that the records of your office showed said tract was vacant public land. Sanford also made affidavit to the effect that he had made inquiry and had examined the records of the local land office and of the office of register of deeds for Douglas county, and finding nothing to show that the United States had parted with title to said tract until the homestead entry of Bacon, purchased said land.

With these facts presented by the papers in the case, your office held that the purchase by Gregory vested in him such a right to the land as served to segregate it from the public domain and that after that sale, the government had no right or power to sell to another, and decided that the patent to Gregory, dated June 1, 1859, should be canceled, that a patent issue to John Murphy for the north east quarter of the

south west quarter of said section, and that Bacon's entry be held for cancellation.

It may be well before considering the controverted questions in this case to mention some points which are too well established by the decisions of this Department and of the supreme court of the United States to admit of dispute.

Bacon by his entry acquired not the legal title, but an equitable title only to this tract of land. The legal title thereto still remains in the United States. Sanford as the vendee of Bacon took an equitable title only and occupies the same relationship to this case as his grantor, the immediate claimant from the United States would have held had there been no sale, that is, he stepped into the shoes of the entryman and has no greater or different rights or equities. This was admitted in the course of argument of this case by Sanford's attorney and it is unnecessary to cite authorities in support of the proposition. Although the attorney for Sanford describes him as a bona fide purchaser without notice and seems to rely to a considerable extent on the protection afforded purchasers of this description for the success of his client here, yet I do not think the facts here presented bring him within that category or that it is necessary to here discuss the extent of the protection to be afforded bona fide purchasers without notice. In order to entitle one to protection as such a purchaser he must hold a legal title. In Story's Equity Jurisprudence, Sec. 64 c, in speaking of the protection afforded by equity to bona fide purchasers without notice, it is said:

> The purchaser, however, in all cases must hold a legal title, or be entitled to call for it, in order to give him a full protection of his defense; for if his title be merely equitable, then he must yield to a legal and equitable title in the adverse party.

And again in Sec. 1502, it is said:

> To entitle himself to this protection, however, the purchaser must not only be bona fide, and without notice, and for a valuable consideration, but he must have paid the purchase money. So, he must have purchased the legal title, and not be a mere purchaser without a semblance of title; for even the purchaser of an equity is bound to take notice of, and is bound by, a prior equity; and between equities the established rule is, that he who has the prior equity in point of time, is entitled to a like priority in point of right.

In Vattier *v.* Hinde (7 Pet., 252) the supreme court said:

> The rules respecting a purchaser without notice are framed for the protection of him who purchases a legal estate and pays the purchase money without knowledge of an outstanding equity. They do not protect a person who acquires no semblance of title. They apply fully only to the purchaser of the legal estate. Even the purchaser of an equity is bound to take notice of any prior equity.

In Boone *v.* Chiles (10 Pet., 177) in stating the matters that must be set forth in an answer claiming protection as a bona fide purchaser without notice, it was said:

> The title purchased must be apparently perfect, good in law, a vested estate in fee simple, 1 Cr. 100; 3 Cr. 133, 5; 1 Wash. C. C., 75. It must be by a regular convey-

ance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor and has no better standing in a court of equity, 7 Cr. 48; 7 Pet., 271; Sugden 722. Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchaser without notice; the case stated must be made out, evidence will not be permitted to be given of any other matter not set out.

This same doctrine is adhered to in Root *v.* Shields (1 Woolworth's Cir. Ct. Rep., 340).

Under these rulings it is clear that Sanford has not the qualifications necessary to entitle him to protection as a bona fide purchaser without notice.

The question, then, to be determined in this case is as to which of these parties, each claiming an equitable title to this land, has the better claim thereto. The general rule applicable in such cases is expressed in the maxim *Qui prior est tempore, potior est jure.* Mr. Broom in his work on legal maxims 1,356 in discussing this maxim says:

So, when there are conflicting rights as to real property, courts of equity will inquire, not which party was first in possession, but under what instrument he was in possession, and when his right is dated in point of time; or if there be no instrument, they will ask when did the right arise—who had the prior right?

See also Story's Equity Jurisprudence, Secs. 381–1502. In the decision in Boone *v.* Chiles *supra*, it is said:

It is a general principle in courts of equity, that, where both parties claim by an equitable title the one who is prior in time is deemed the better in right.

It is urgently insisted, however, on the part of Sanford that if Murphy or any of his grantors, either immediate or remote, had exercised ordinary care in the examination of his title papers the mistake in question would have been discovered, and could have been corrected prior to the intervention of this adverse claim; and that third parties who were induced by the condition of the title to this land, as disclosed by the record, to invest money in the purchase thereof, have in the face of this laches the stronger equities. This amounts to the claim that the particular facts in this case take it out of the general rule.

It should be noted in this connection that there is no statement by or on behalf of Sanford that his grantor Bacon the immediate claimant from the United States, ever made any examination prior to his entry as to the condition of the title to this tract of land, and also that none of the affidavits filed in Sanford's interest alleges ignorance on the part of Bacon, Sanford or Bowers of the existence of a claim of some character to this land adverse to the title of the United States. Indeed the examination of the records claimed to have been made, could not result otherwise than in apprising the inquirer of the existence of such a claim, for the records showed conveyances by Gregory and others of the whole SW.$\frac{1}{4}$ of said section including the land in controversy. This knowledge having been gained, there was then demanded of the proposed purchaser of an equity only, something more than ordinary diligence—something more than an inquiry to ascertain whether such

claim was a legal and perfect one. The examination thus demanded would naturally have included both an inspection of the tax books of the county in which the land was situated and inquiries in the neighborhood of the land as to who claimed and controlled it. Such an examination being demanded, the claims of these parties must be determined in the light of the facts that would have been disclosed thereby, and this is especially so in the absence of an allegation on their part of ignorance of such facts. This examination and inquiry would have disclosed that Gregory and his grantees had claimed said land since 1856, as shown by the various conveyances and the payment of taxes. An inquiry to ascertain when and by what authority this land was assessed for taxation would have led to an examination of the book which the register of deeds for said county explains was kept in the office of the county clerk, or of the treasurer, which would have disclosed the fact that Gregory had purchased the whole of the southwest quarter of said section. The submission of a statement of these facts, a knowledge of which these parties are chargeable with, to your office would have resulted in the discovery of the error in issuing two patents to the same party for the same tract of land. In fact the records of that county advertised the existence of such an error in that they showed two patents issued by the United States to the same party, Gregory, for the same piece of land. One purchasing an equitable title to this land in the face of these circumstances must be held to have acted with a knowledge of the facts in the case, and to have deliberately taken the chances of defeating whatever claim was outstanding.

It is true the information given by your office was based upon apparently superficial examination of the records and the information imparted was incorrect and misleading, yet this cannot alter the facts as they actually existed, or confer upon one receiving such information any rights to which the facts would not entitle him.

It is true that Murphy and his grantors were guilty of a degree of laches in allowing to go uncorrected for so long a period a mistake which would have been discovered by an examination of their title papers. It is, however, a well known fact that purchasers of public land rely most implicitly upon the correctness of the title papers issued by the officers of the government, and that it is not an unusual occurrence for patents to lie in the land office uncalled for even longer periods than in this case.

This case is upon that point not materially different from that of Simmons *v.* Ogle (105 U. S., 271). Ogle rested his claim on the assertion that his remote grantor John Winstanley bought the tract of land involved from the United States on December 30, 1835, although patent never issued on said purchase. Simmons rested his claim on a patent from the United States to himself, dated June 12, 1874. The circuit court rendered a decree in favor of Ogle. The supreme court found from the evidence that Winstanly did not purchase this tract from

the United States, but said in the course of the decision—"If the purchase and payment now stated and alleged in the bill were satisfactorily established by the evidence, the decree should be affirmed."

It is clear in this case that Gregory actually bought this tract in controversy and paid therefor the consideration prescribed by law; that he had done everything required of him to acquire a vested right thereto. It was said in the decision of the case of Wirth *v.* Branson (98 U. S., 188):--

> The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside.

See also Cornelius *v.* Kessel (128 U. S., 456), and authorities there cited.

After a careful consideration of this case in connection with the arguments advanced and the authorities cited by the attorneys, I am of the opinion that the question as to which of these parties has the stronger equities should be resolved in favor of Murphy.

Among the papers filed by Sanford is a certified transcript of the record of Wellington Gregory's naturalization, which shows that naturalization papers were issued to him on November 9, 1868, upon the statement "that he was naturalized in Superior City, Wis., in May 1854, and that his naturalization papers were burned in the following year," and due proof of residence and good character. Accompanying this was the affidavit of the clerk of the circuit court of Douglas county setting forth that he has in his custody "all records showing declarations of intention to become citizens of the United States that have ever been executed in said county of Douglas in which is located the City of Superior," and that diligent search through said records from the organization of the county in 1854 disclose the fact that Wellington Gregory never made application for citizenship, or declared his intention of becoming a citizen of the United States." Although these papers are not referred to in the argument of counsel, and it might therefore be concluded that no stress is laid upon them, I have thought best to say that in my opinion they are not sufficient to overcome the finding of the local officers from the final proof submitted that Gregory was at the date of said proof a qualified pre-emptor.

For the reasons herein stated I concur in the conclusion reached in your office. It is not necessary to cancel either of the patents heretofore issued. A patent should be issued for the tract in controversy, the NE. ¼ of the SW. ¼ of said section 4, which should refer to the former patent and state that it is in correction thereof, and should issue to Wellington Gregory instead of in the name of the applicant Murphy. With this modification the decision appealed from is affirmed.

RAILROAD GRANT—ADJUSTMENT—RESERVATION—LATERAL LIMITS.

MISSOURI, KANSAS, AND TEXAS RY. CO.

The opinion expressed by the Department in 1860 that the right of the Indians to lands in the New York Indian reservation had lapsed, and the subsequent proclamation of the President directing the sale of said lands, acted upon for the period of thirty years, recognized by Congress, and acquiesced in by the Indians, precludes departmental action looking toward the recovery of title to lands lying within said reservation, and patented to this company under its grant of 1863, and the acts amendatory thereof.

The lateral limits of the grant, as fixed by the original withdrawals, should not be readjusted with the view of recovering title to lands patented to said company, that may thus be shown to lie outside of said limits as re-adjusted, for (1) the title to said lands has passed out of the company; (2) it must be presumed that in making the original withdrawals all matters necessary to a legal determination were duly considered; and (3) the said withdrawals have stood unquestioned for a long term of years, and titles that have vested thereunder should not now be disturbed.

The allowance of indemnity in accordance with the principles announced in the case of the Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 6 L. D., 195, is approved.

*Secretary Noble to the Commissioner of the General Land Office, August 2, 1890.*

By letter of July 21, 1887, your office transmitted an "adjustment" of the grant for the Missouri, Kansas and Texas railway company, and stated that, "The limits of the grant upon which withdrawals were ordered were laid off before all the lands were surveyed, and as to surveyed lands the withdrawal limits were not adjusted to the smallest legal subdivisions. Your office further stated that it became necessary therefore to define the exterior limits of the grant accurately, but adjusted to the smallest legal subdivisions of the public surveys. "This made some slight variations on the extreme outward limits, and also disclosed an error in the withdrawal maps in this, that in closing the public surveys upon the first guide meridian east of the 6th principal meridian the range thus made was two miles in width instead of one mile, and as a result of which the limits of the grant had been laid down one mile too wide wherever such range was embraced within the limits of the withdrawal." Your office accordingly prepared and submitted "a map showing with precision the lateral limits of the grant in conformity with the principles laid down in the case of Leander Scott *v.* Kansas Pacific railway company (5 L. D., 468)," and made the adjustment of the grant in accordance therewith.

Continuing, your said office letter set out the various amounts of land patented for said company, and concluded that it had received an excess of 271,907.86½ acres above what it is entitled to and recommended that proper steps be taken to recover said excess from the company.

By letter of June 21, 1889, said adjustment was returned to your

office with directions that the questions involved be again examined and a report submitted in accordance with the present rulings of the Department.

On November 18, 1889, your office transmitted a second adjustment of said grant in which the following statement is made:

| | | |
|---|---|---|
| Total area of grant | | 1,134,791.08 |
| Deduct on account of moieties: | | |
| A. T. and S. F. | 37,161.14 | |
| L. L. and G. | 90,898.74 | |
| | | 128,059.88 |
| Net area of grant | | 1,006,731.20 |
| Approved in granted limits | 122,656.53 | |
| to L. L. and G. within clear limits | 1,663.36 | |
| | | 124,319.89 |
| Loss to grant | | 882,411.31 |
| Approved as indemnity | | 494,072.38 |
| Due as indemnity | | 388,338.93 |

I understand from this that the company has failed by 388,338.93 acres, to secure the total number of acres in its grant, after deducting moieties for grants of even date.

The explanation of the different results reached by said adjustments is stated by your office as follows:

> In the former adjustment deduction was made on account of prior grants for railroads, Indian reservations, and selections on account of grants to the State for internal improvements, etc. These deductions, under departmental decision in the matter of the adjustment of the grant for the Omaha company (6 L. D., 195), are erroneous, and in the adjustment now presented indemnity has been allowed for such losses.

The company claims its lands by virtue of the grants of March 3, 1863, (12 Stat., 772), July 1, 1864 (13 Stat., 339), and July 26, 1866 (14 Stat., 289). The first act makes a grant for the Atchison, Topeka and Santa Fe road with a branch from where it crosses the Neosho, down the Neosho valley to a point where the Leavenworth, Lawrence and Galveston road enters said valley. The line of said branch as definitely located left the main stem at Emporia and ran southeasterly, corresponding with the road as afterwards built. The withdrawal for the branch was made in 1863. The act of 1864, provided for a road from Emporia, northward, *via* Council Grove, to a point near Fort Riley on the branch Union Pacific railroad. No action was taken under this act affecting the questions here in issue. The act of 1866 provided for a road from Fort Riley "or near said military reservation, thence down the valley of the Neosho river to the southern line of the State of Kansas," being the line defined in said two former acts. The withdrawal necessary for the entire line was made in 1867, and the road was built. The grant was of "every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, not exceeding in all ten sections per mile with

a provision for indemnity lands to be selected not beyond twenty miles from the line of the road.

By letter of October 31, 1887, your office referring to said first adjustment stated that an important matter in connection with said grant had not been taken into consideration in making up the statement of areas included in the grant This important matter was described by your office as follows:

> A portion of the lands through which this and certain other roads run, is embraced in the reservation established for the New York Indians by treaty of January 15, 1838 (7 Stat., 550), and that reservation does not appear to have been extinguished at date of railroad grants, and has never been extinguished.

Your office further stated that on August 17, 1860, the Commissioner of the General Land Office submitted to this Department a proposed proclamation for the sale of the lands within said reservation, which proclamation was signed by the President on August 21, 1860, in conformity with which said lands were offered for sale; that said Commissioner apparently assumed the reservation had been extinguished, and that assumption was erroneous as shown by the action of the government in 1868, when "a treaty was concluded between the United States and the New York Indians for the surrender of all claims under the the treaty of 1838, but the treaty of 1868 was not ratified by the Senate;" that "it cannot of course be held that the President intended by proclamation *of sale* to have formally or actually extinguished a treaty reservation, or that it would have been competent for him to have done so. . . . Reserved lands were not granted to such companies, and their rights are derived from grant and not from executive action." It was further stated that 276,602.24 acres have been patented to or for railroad companies in said reservation, mostly for the company here in question, and it was recommended that proper steps be taken to secure the reconveyance or recovery of such lands under the provisions of the act of March 3, 1887.

Against this recommendation the attorneys for the company urge that the question has become *res adjudicata* by virtue of the decision of the supreme court in the case of Kansas City, Lawrence and South Kansas R. R. Co., *v.* The Attorney-General (118 U. S., 682). That action was brought to set aside the title to certain lands, being a portion of those herein under consideration. The appellant company *supra*, claimed as the assignee of the Missouri, Kansas and Texas Ry. Co. The court held that there was no sufficient reason found in the record for disturbing the certificates and patents therefor issued to said latter company. In the statement of said case which precedes the opinion of the court it is recited:

> Mr. William Lawrence (representing settlers), for appellee, argued the following general propositions: . . . . . Sixth Proposition.—It is submitted that the lands in controversy are not subject to any land grant, because included in the New York Indian reservation under the treaty of January 15, 1838, never legally revoked.

After considering certain allegations of the bill, and concluding that they furnished no reason for disturbing said titles, the court concluded:

> There are other grounds urged for granting the relief sought by the bill, but they are not sufficient to justify such a decree, nor are they important enough to require further discussion here.

On this statement it is claimed by said attorneys that the question here presented, was properly before the court, and decided. An examination of the record of that case, however, shows that such claim is not well founded. The question now before me was not put in issue by the pleadings in that case. The New York Indian reservation was not mentioned, either in the bill, the answer or the replication, nor was any reference made thereto. The bill urged that the lands were excepted from the grant for the Missouri, Kansas and Texas road by reason of conflict with other railroad grants; because the road was not constructed to a certain point contemplated in the grant; and because the company had received more lands than it was entitled to, etc. After considering these three propositions the court concluded with the expression above cited. But the "other grounds" there spoken of must be held to be those put in issue by the pleadings, of which there were several. Certainly no judgment could have gone against the company, on the record, on a plea which it had no opportunity of answering, nor do I think the mere mention of an extraneous fact by an attorney in argument would place that fact in issue, "where the second action between the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." Cromwell *v.* County of Sac. (94 U. S., 351).

However, I find myself unable to agree in said recommendation that steps be taken to secure the reconveyance of these lands under the act of March 3, 1887, for the following reasons.

By said treaty of 1838 the New York Indians ceded and relinquished to the United States all their right, title and interest to the lands secured to them at Green Bay, in the Territory of Wisconsin, by the Menomonee treaty of 1831 (except a small tract); and in consideration thereof the United States agreed to set apart the land subsequently embraced in said New York Indian reservation, "to have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States" issued in conformity with section 3, of the act of May 28, 1830, (4 Stats., 411), the proviso of which declares that "such lands shall revert to the United States if the Indians become extinct or abandon the same." It was agreed that said Indians then residing in New York should remove to said lands so set apart, and that such of the tribes as fail "to accept and agree to remove" within five years "or such other time as the President may from time to time appoint shall forfeit all interest in the lands so set

apart to the United States." The United States agreed to appropriate $400,000 to aid said Indians in removing from their homes, etc. But few of the Indians went to said lands, and of these but thirty-two received "certificates of allotment" for their respective shares of land. In a report to the Department, subsequently transmitted to Congress, and dated February 9, 1883, Commissioner of Indian Affairs Price stated that no time was ever fixed by the President within which the removal must be made, that but $20.477.50, of the $400,000 promised, were appropriated, and that on the other hand the Indians, in any considerable numbers, never manifested a desire to remove to the western lands, but on the contrary opposed such removal.

In a letter dated April 19, 1858, to the chairman of the committee on Indian Affairs of the House of Representatives in reference to a bill then pending affecting these lands Secretary Thompson said:—(Vol. 3, p. 93, Ind. Div.),

> The Indians who have failed to remove have by the express terms of the treaty of 1838 forfeited their title to the reserve and a due regard for the interest of the white population of Kansas would seem to require that this large and valuable body of land should no longer be withheld from settlement.

On June 16, 1860, he wrote to the Commissioner of Indian Affairs, as follows: (Vol. 3, p. 327, Ind. Div.),

> Herewith is returned, with my approval endorsed thereon, the list of locations made for the New York Indians, in Kansas, which was transmitted with your report of the 9th inst.
>
> Your recommendation that the balance of the tract heretofore reserved for the New York Indians in Kansas, be turned over to the General Land Office, to be disposed of as other public lands, is approved, and you will so inform the Commissioner.

The proclamation of the President of 1860, referred to by your office thereafter directed public sale in certain townships, of the public lands not covered by individual Indian locations, "in the late" New York Indian reservation. From that time at least the lands in said reservation have been treated as subject to the operation of the land laws. Meanwhile the lands have been disposed of and numerous towns have grown up thereon. On November 5, 1857 (11 Stat., 735), a treaty was concluded with the Tonawanda band of Senecas (one of said tribes), by which said band relinquished all its claims to said land under the treaty of 1838, in consideration of which the United States agreed to pay and invest for them the sum of $256,000. On June 20, 1884, the Senate committee on Indian Affairs referred to the court of claims a bill, to provide for a settlement with said New York Indians for the "unexecuted stipulation" of said treaty of 1838. Thereupon suit was entered praying for a money indemnity in lieu of said lands so lost. The suit is still pending. It does not appear that the Indians are now making claim for the land itself.

It thus appears that for thirty years both the executive and legislative branches of the government have acted on the theory that the right of

said Indians to these lands had expired. While there is force in the suggestion of your office that the executive, ordinarily, has not power to extinguish a reservation created by treaty, in this case, the expressed opinion of this Department that the Indian right had lapsed, and the proclamation of the President following thereupon, directing the sale of the lands, acted upon for thirty years, must be considered a bar to any further action on the part of this Department looking to the disturbance of titles long since vested thereunder. The proclamation directed the sale of 1,222,240 acres of the 1,824,000 acres embraced in the reserve. It was recommended by your office and the Secretary. See Pueblo of San Francisco (5 L. D., 483); Atlantic and Pacific Railroad Company (8 Ibid., 165); United States *v.* Burlington and Missouri R. R. Co. (98 U. S., 341).

I come now to the question of the re-adjustment of the limits of said grant. The original withdrawal from the crossing of the Atchison, Topeka and Santa Fe railroad, at Emporia, southward was made in 1863; from Emporia northward, in 1867. These withdrawals have remained constantly in force, and in accordance therewith lands have ever since been patented or certified. In other words the lines thus established have been accepted as the limits of the grant for over twenty years. It is now proposed to re-adjust these limits, and bring suit to recover the title to such lands as have been patented outside the new limits. It appears that the Missouri, Kansas and Texas company has sold all the lands it received under the grant, and it may be presumed that in the lapse of time the title to much of it, has changed hands many times. It appears from an inspection of the diagram submitted that the old and new limits follow the same general course there being a slight variation throughout the entire length. They cross each other many times, and consequently some lands that lay within the old limits are outside the new, and *vice versa*. As far as the question relates to lands lying along the ten-mile or granted limits I have little difficulty; for, any lands patented as granted lands, which now appear to be outside the granted limits, would necessarily fall within the indemnity limits, and consequently under the operation of the grant. These lands it may be assumed, therefore, in the absence of adverse claims would have passed to the grant, as indemnity though at present charged to it as granted lands. I cannot conceive that under these circumstances a court would lend its aid to set aside the existing title. If on the other hand lands along such limits have been treated as indemnity lands, and now appear to be in the granted belt, the cause of complaint would seem to be in the company rather than in the government.

As to the lands along the outer or indemnity limit a somewhat different question arises. Your office finds that 21,421.99 acres lying within the original indemnity limit and patented as indemnity lands, are outside the new limit and consequently beyond the operation of the grant. This arises from two causes: first, because the old limits were

not adjusted to the smallest legal subdivisions, and second, because in closing the public surveys upon the first guide meridian east of the 6th principal meridian a tier of sections in the range thus made "was two miles in width instead of one" as a result of which the limits of the grant were laid down "one mile too wide," wherever such range was embraced within the limits of the withdrawal.

The company insists that your office is in error as to this second class of lands on the ground that it is entitled to every alternate odd numbered section "to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile," as such sections may be found *surveyed;* that it takes the section itself or its equivalent in area, whether greater or less than 640 acres.

I do not find it necessary to consider the merits of this contention, for the purposes of this case. When the withdrawals were made it was well known to the Department that sections as surveyed, frequently exceeded six hundred and forty acres, or one square mile in area. While it does not appear affirmatively that the question was considered by the Department or your office in making the withdrawals, that fact itself lends color to the presumption that it was, at that time, not considered a necessary factor in defining the limits of such withdrawals. It should be presumed that the Secretary considered all matters necessary to a proper and legal determination of the questions before him. His action in this matter has been followed, unquestioned, for many years, though the existence of the irregular survey must have been known. Under these circumstances I cannot conceive it to be the duty of the Department to re-open this question, *sua sponte*, and take steps looking, to the disturbance of titles so vested. But if this view is not conclusive, the question must be disposed of with that relating to the lands which now appear to be beyond the limits by reason of a more accurate measurement. It should be premised that the grant remains unsatisfied, by several hundred thousand acres. During the many years intervening since the withdrawals, the accuracy of the limits has not been questioned. Meanwhile the lands, sparsely settled in 1867, have been practically all disposed of. Titles that vested under the deliberate action of the Department have passed from hand to hand many times. Under these circumstances, as was said by Secretary Vilas, in the case of St. Paul, Minneapolis and Manitoba Ry. Co. (8 L. D., 255), I am compelled to recognize at the outset that the question is presented at such a time and under such conditions as impose limitations upon judgment which would not affect its examination as an original question.

The question here is between the government and the company. If the original withdrawals were erroneous, the fault is due to the government and not the company. "If it be inequitable to grant the relief prayed against a citizen, such relief will be refused by a court of equity, though the United States be the suitor," said Mr. Justice Field in delivering the opinion of the court in the case of United States *v.* Flint

(4 Sawyer, 58, affirmed in 98 U. S., 61). He further said, after stating that no laches in bringing suit can be imputed to the United States:—

Yet the facility with which the truth could have been originally shown by them . . . . the changed condition of parties and property from lapse of time; the difficulty from this cause of meeting objections which might perhaps at the time have been readily explained; and the acquisition of interests by third parties upon the faith of the decree, are elements which will always be considered by the court in determining whether it be equitable to grant the relief prayed. All the attendant circumstances will be weighed, that no wrong be done to the citizens, though the government be the suitor.

In the case of the Atlantic and Pacific R. R. Co. (8 L. D 165), it was said:—

Under such circumstances, and after the lapse of so many years, many decisions of the supreme court demonstrate that it can not be expected the patents would be set aside and thereby the property rights acquired under them and so long enjoyed without challenge, sacrificed by a different interpretation of the granting act from that which was deliberately adopted and acted upon. The only probable consequence of instituting such a litigation would be uncertainty, depreciation of values for a time and distress to a large community and numerous citizens.

I therefore conclude, basing my judgement on the decisions of the courts, and the Department, and on the equitable considerations in favor of the vested titles that no action should be taken by this Department looking to a re-adjustment of said limits.

In your said letter of November 18, 1889, you say:

In the former adjustment a change was made not only in the limits of the grant for the road under consideration, but all roads coming in conflict therewith, the limits were changed as far as the conflict extended.

The other roads referred to are I presume the Atchison, Topeka and Santa Fe, the Leavenworth, Lawrence, and Galveston roads, under the act of 1863, and the Union Pacific by act of 1862. On the principles above announced these limits should not be re-adjusted within the limits of this road, at least for any purpose looking to the disturbance of titles so vested.

You further state:

From Emporia southward in the conflict with the grant for the Atchison Topeka and Santa Fe R. R. Co., the grant is of even date, while north of this point the grant for the latter company is the prior grant, and upon establishing a terminal at this point to separate the grants, it is found that the Missouri Kansas and Texas R. R. Co., received patents for 6,845.62 acres north of said terminal. Until the adjustment submitted by Mr. Sparks, no terminal was ever established, but the line of the Atchison Topeka and Santa Fe R. R., seems to have been the dividing line recognized, at the time the lands were patented.

In the conflict between said companies the Missouri Kansas and Texas R. R. Co. received patents for 12,653.92 acres as indemnity, of lands situated within the primary limits of the grant of the Atchison Topeka and Santa Fe R. R. Co., and in the conflict with the Leavenworth Lawrence and Galveston R. R. Co., the Missouri Kansas and Texas R. R. Co, received patents for 6,315.93 acres as indemnity, which are shown to be within the primary limits of the grant for the Leavenworth Lawrence and Galveston Co.

In the adjustment herewith submitted the company is charged with receiving these lands, but as it is clearly shown, that as the adjustment stands, the company is entitled to more land than could be found within its limits, a further consideration of the matter, as affects the adjustment, is unnecessary.

As the title to these lands so patented is not disputed by either of the other companies, I do not find it necessary for the purposes of this case to consider this question further.

The allowance of indemnity in accordance with the principles announced in the case of Chicago, St. Paul, Minneapolis and Omaha Ry. Co., (6 L. D., 195) is approved.

Said first adjustment is accordingly modified and that submitted by your letter of November 18, 1889, is approved.

In your letter of December 12, 1889, it is shown that there is "due as indemnity" to the company 389,458.93 acres, instead of 389,338.93 as appeared from the former letter.

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RAILROAD GRANT—INDEMNITY SELECTION—PRE-EMPTION FILING.

NORTHERN PACIFIC R. R. CO. *v.* MOLING.

The right to select a tract as indemnity under a railroad grant, is not defeated by the mere fact that the selection is within the primary limits of another grant, if the tract is vacant public land at date of selection.

The expiration of the statutory life of a pre-emption filing, without proof and payment having been made thereunder, warrants the presumption that all claims under such filing are abandoned.

*Secretary Noble to the Commissioner of the General Land Office, August 2, 1890.*

I have considered the case of the Northern Pacific Railroad Company *v.* John Petter Moling on appeal by the former from your office decision of November 2, 1886, rejecting its application to select as indemnity the following tracts of land, viz: the SW. ¼ of the NW. ¼ and the NW. ¼ of the SW. ¼ of Sec. 29, Tp. 131 N., R. 39 W., 5th P. M., Fergus Falls, Minnesota, land district.

These tracts are geographically within the ten miles (granted) limits of the grant for the benefit of the St. Paul Minneapolis and Manitoba (St. Vincent Extension) Railway Company, under which rights are held to have attached December 19, 1871.

Said tracts are also within the thirty miles (indemnity) limits of the grant for the Northern Pacific Railroad Company under which grant a withdrawal was ordered by your office letter of December 26, 1871, received at the district land office January 10, 1872. The plat of this township was filed in the local office March 27, 1873, and on June 16, of that year John Benson filed pre-emption declaratory statement No. 1519 (unoffered series) for these tracts and other land alleging settlement thereon January 10, 1871, which filing has not been canceled.

On December 29, 1883, the Northern Pacific Railroad Company applied to select these tracts as indemnity for tracts alleged to have been lost from its grant, which application the local officers rejected for the reason that the land was "in the granted limits to St. Paul, Minneapolis and Manitoba Railway Company and included in declaratory statement No. 1,519 filed June 16, 1873, alleging settlement January 10, 1871, not canceled" from which action the company appealed.

On January 29, 1884, John Petter Moling applied to make homestead entry for this land. A hearing was ordered by the local officers, with notice to Moling and the St. Paul, Minneapolis and Manitoba Railway Company to determine the status of the land. On the date fixed for said hearing these parties appeared and on the testimony submitted the local officers decided that Benson's claim excepted the land from the grant and that Moling's application should be allowed, from which decision the company appealed.

In your office the respective appeals of the St. Paul, Minneapolis and Manitoba Railway Company and the Northern Pacific Railroad Company seem to have been considered and passed upon in one and the same decision.

It was held that the land in controversy was excepted from the grant to the former company by reason of the settlement and filing of Benson which existed at the date the right of said company attached under its grant.

In regard to the claim of the latter company it was said in your office decision—

> The Northern Pacific Railroad Company was not made a party to the hearing although it was a claimant, by virtue of its application and appeal for the land. Its rights are not prejudiced however, because it is not entitled under any circumstances to select the land because one company can not go into the granted limits of another to seek indemnity and for the further reason that a *prima facie* valid pre-emption filing of record, is a bar to the selection of the land embraced therein for indemnity purposes under the grant.

Moling's application to enter was rejected for the reason that his entry could not be properly admitted while the Northern Pacific Railroad Company's appeal was pending.

From this decision the Northern Pacific Railroad Company alone appealed so that the only question now before this Department for consideration is as to its claim.

The mere fact that this land was within the limits of the grant to the State of Minnesota, since in fact it was not granted land, does not constitute a bar to its selection as indemnity under another grant. Allers *v.* Northern Pacific R. R. Co. *et al.*, (9 L. D., 452).

The fact that these tracts were within the limits of the former grant does not afford sufficient grounds for the rejection of the application of the Northern Pacific R. R. Co., to select them as indemnity, and the action of the local officers and of your office in so far as the same was based upon that ground can not be sustained.

I cannot concur in the conclusion that Benson's filing was sufficient to prevent the selection of this land as indemnity under the present application. At the date of the application December 29, 1883, the time prescribed for making proof under said filing had expired. The presumption then arose that all claims under that filing had been abandoned. Northern Pacific R. R. Co. *v.* Stovenour (10 L. D., 645). This presumption is not attempted to be rebutted, but on the other hand is strengthened by the testimony submitted in the hearing had between the homestead applicant and the St. Paul, Minneapolis and Manitoba Railway company, which shows that Benson had no family and that he died in 1875.

Under these circumstances the tracts in dispute must be held to have been at the date of the application to select the same as indemnity, vacant public land and therefore subject to such selection.

The decision appealed from is reversed, the homestead application of Moling is rejected and the application by the Northern Pacific R. R. Co., to select said land as indemnity will be allowed unless some reason not shown by the record now before me appears for refusing the same.

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### HOMESTEAD CONTEST—APPEAL—POSSESSION.

### KELLER *v.* BULLINGTON.

The General Land Office has no jurisdiction over a case after an appeal is filed from its decision therein.

The occupation and possession of public land, for the purpose of working a stone quarry thereon, confers no right or title, either as against the United States, or others having a valid claim under its laws.

The fact that land entered under the homestead law contains a stone quarry, or that the entryman knew such fact when he applied to enter does not vitiate the entry, if good faith is otherwise apparent.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 2, 1890.*

The record in the case of Keller *v.* Bullington, transmitted from your office to this Department by letter dated the 20th of October, 1888, has been considered. It involves the title to the N ½ of the SE ¼ of Sec. 23, T. 5. S. R. 11 W., of the Huntsville, Alabama, land district.

From this record it appears that on the first day of February, 1887, Bullington made a homestead entry (No. 15,806) of the land above described.

On the 14th of June, 1887, Keller filed an affidavit of contest, alleging, in substance, that he purchased at public sale, in 1884, from Robert B. Lindsay, administrator of F. C. Vinson, deceased, a large tract of land in Colbert county, Alabama, and that this land, thus purchased, and afterwards conveyed to him, covered the tract embraced in Bullington's homestead entry, and consequently that his right to the

same was prior and superior to that of Bullington. He further stated that his land contained a stone-quarry; that in October, 1886, he sold a half interest in his said land to W. S. Hull and authorized him to open the said quarry; that Hull had opened this quarry at great expense and was engaged in operating the same, as Bullington well knew, at the time he (the said Bullington) made his homestead entry; that this entry was not made in good faith, according to the true intent and spirit of the homestead law, but with the view of getting possession of the said stone-quarry, and for purposes of speculation.

On filing this affidavit of contest a hearing was asked for and ordered. After due notice, both parties appeared before the local officers at Huntsville, with their respective witnesses and attorneys, and submitted their testimony. When this testimony was considered, the register and receiver of the local office sustained the contest and recommended the cancellation of Bullington's entry. Thereupon, he appealed to your office where on the 6th of April, 1888, said decision was affirmed and the entry held for cancellation. Bullington then appealed to this Department. His appeal bears date the 30th of April, 1888, and was filed on the same day. Afterwards, to wit, on the 2nd of May, 1888, his appeal having never been acted upon or withdrawn, he applied for a reconsideration of your office decision of April 6, 1888.

On this application, your office, on the 28th of June, 1888, reconsidered and revoked its decision, dismissed the contest, and allowed Bullington to proceed and perfect his title. From this last-named decision, Keller appealed. His appeal was entered on the 16th of August, 1888, and on the 29th of the following May he filed a paper in this Department stating, in effect, that his appeal had been taken simply to save any rights that might have been forfeited in consequence of his neglect to appeal, and that he denied the right of the Commissioner of the General Land Office to reconsider and revoke his decision after an appeal from that decision had been filed.

This position, thus brought to the notice of this Department, is sustained by numerous decisions. The filing of an appeal from a decision of the Commissioner places the case beyond his jurisdiction. Sapp *v.* Anderson, (9 L. D., 165); McGovern *v.* Bartels (3 C. L. O., 70); King *v.* Leitensdorfer (3 L. D., 110); Gray *v.* Ward, *et al*, (5 L. D., 410); John M. Walker, *et al*, (5 L. D., 504); Ida May Taylor, (6 L. D., 107); Rudolph Wurlitzer (6 L. D., 315).

Following the rules here laid down, the application for a re-hearing filed in your office on the 2nd of May, 1888, and all papers in support thereof, must be, and hereby are, excluded from the consideration of this case. Then it rests upon the decision of your office made April 6, 1888, and the appeal therefrom. This appeal presents all the questions of law and fact involved in the controversy, and submits the whole case for consideration and final decision according to its actual merit.

It appears from the record that Keller, on making a careful examina-

tion of his title papers, found that he had no right whatever, under his purchase from Vinson's administrator, to the land covered by Bullington's entry, but still insists that he and Hull have rights, even superior to those of Bullington, in and to portions of the said tract by reason of their having occupied and worked the stone-quarry thereon as above stated. But such occupation and possession confers no right of title against the United States, or against those having a valid claim of title under its laws. An occupant of public land claiming title by virtue of his possession, as against an adverse claimant, must show that he occupies and holds the same under some proceeding or law purporting to give him at least a right of possession. Deffeback *v.* Hawke (115 U. S., 392); Sparks *v.* Pierce, (id., 408).

Keller does not pretend to hold the land in question under any law or proceeding purporting to give him a legal right to its possession or ownership from the United States. He assails Bullington's title, contending that when he made his entry he knew that the land embraced within its boundaries covered the stone-quarry above mentioned, and that his object in making the entry was to secure the land and the quarry for speculative purposes.

If it can be shown that the entry was made for speculative purposes in violation of the homestead law, it should, of course, be canceled; but the mere fact that the land contains a stone-quarry, or that the entryman knew of its existence at the time he made his application to enter, does not vitiate his homestead entry. Under an act of March 3, 1883, (22 Stats., 487), all public lands in the State of Alabama, except those previously reported as containing coal and iron, are subject to disposal as agricultural lands. There is no evidence found in the record tending to show that this land had been reported as containing coal and iron in March, 1883, when said act took effect.

An effort has been made to show that Bullington, after making his entry, had sold or offered to sell his interest in the land, but it appears in evidence that he refused to sell or agree to sell without consulting the local officers of his land district as to his rights under the homestead law to make such sale, and when advised by them that he had no such right, nothing further was heard in reference to the sale.

At the time that Bullington made his entry, the land was unappropriated public land, subject to entry under the homestead law. He was fully qualified to make the same and he immediately commenced building a house, a corn-crib, several cabins, and other improvements and cultivated about four acres of the land in crops. He was in full possession of the property, with his family, when this contest commenced, on the 14th of June, 1887, about four and a half months after he made his entry. It appeared in evidence that portions of the land embraced therein are mountainous and unfit for cultivation; but I think the preponderance of the testimony tends to show that the most of it can be cultivated in cereals, fruits and vegetables, or used for grazing purposes.

It further shows that Bullington in good faith had complied with the requirements of the homestead law as to residence, cultivation and improvements up to the time that this contest was inaugurated.

If it should appear when he submits his final proof that he has not honestly and fairly complied with the spirit of the homestead law then his entry can be attacked, but during the four months he has been upon the tract, I am impressed with the belief that he has acted in good faith, hence, the decision of your office of April 6, 1888, is reversed and the contest dismissed.

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### RAILROAD GRANT—PRE-EMPTION CLAIM.

NORTHERN PACIFIC R. R. CO. *v.* STUART.

Land covered by a prima facie valid pre-emption filing at date of withdrawal on general route is excepted thereby from the operation of said withdrawal.

A pre-emptor is not estopped from proving that his settlement was made at a different and earlier date than that alleged in his declaratory statement.

*Secretary Noble to the Commissioner of the General Land Office, August 2, 1890.*

I have considered the case of the Northern Pacific Railroad Company *v.* James Stuart, involving pre-emption cash entry made by the latter for the SE. ¼ of the SW. ¼, the NE. ¼ of the SE. ¼, and the S. ½ of the SE. ¼, of Sec. 21, T. 13 N., R. 19 E., North Yakima land district, Washington.

Said Stuart filed declaratory statement for the tract described on March 6, 1886, alleging settlement in March, 1885, and made proof and payment on July 9, 1886.

The local officers, at the end of the quarter, forwarded the papers in the case of this and other entries made during the quarter, for the examination of your office.

Your office, when it came to act upon Stuart's proof, observed that the tract covered by his entry was located within the limits of the withdrawal ordered upon the map of general route of the amended branch line of the Northern Pacific Railroad company—which order was received at the local office July 18, 1879; also within the granted limits upon the map of definite location—filed May 24, 1884.

Your office thereupon by letter of December 10, 1887, directed the attention of the local officers to the location of the tract within railroad limits as above set forth, but approved Stuart's entry; and at the same time notified the railroad company of Stuart's entry, and of their right of appeal from the action of your office approving the same.

The company appealed to the Department, January 23, 1888.

In addition to the facts hereinbefore mentioned, the records of your office show that one Ira A. Johnson filed declaratory statement for said tract October 5, alleging settlement September 6, 1878.

It will be seen that at the date of the receipt by the local office of the

order of withdrawal upon the map of general route, (July 18, 1879, *supra*,) Johnson's unexpired filing, *prima facie* valid, excepted the tract therefrom. (Northern Pacific R. R. Co., *v.* Stovenour, 10 L. D., 645).

Stuart's declaratory statement alleges settlement in March, "1885." And in his final proof, made July 19, 1886, in reply to the question, "When did you first make settlement on the above described land," Stuart answered, "March 5, 1885."

On the other hand: in reply to the next question, "When did you first establish actual residence on the land you now seek to enter?" Stuart answers, "March, 1882."

One of these answers must be an error on the part of Stuart—or of the person making out his papers (which are evidently not in Stuart's handwriting). To determine which is correct, reference must be had to other evidence in the record.

Samuel Hubbard, one of claimant's final proof witnesses, testifies that he has known claimant since October, 1884; and in response to the question, "When did he commence his residence thereon?" answers, "Before I knew him." This shows residence before October, 1884.

Charles Z. Cheney, the claimant's other witness, in response to the question, "When did claimant first settle on his claim?" answers, "March, 1882;" and in response to the further question, "When did he commence his residence thereon?" answers, "March, 1882."

The above-named witnesses were cross-examined. On cross-examination witness Cheney says: "Claimant has raised corn, grain, potatoes, and vegetables of all kinds; he has cut and stacked hay each year for four years."

The amount of improvements made by the claimant—aside from those purchased by him from a former occupant of the tract—are large even for four years.

There is a strong preponderance of evidence to show that Stuart's settlement and residence were made in March, 1882.

Notwithstanding claimant's declaratory statement alleged settlement in 1885, he was not thereby estopped from proving that it was actually made at another and earlier date. "The law gives him a right to the land from the date of his settlement; and his right is not to be defeated by a discrepant allegation he may have made, when it is shown that it was made by mistake" (Zinkand *v.* Brown, 3 L. D., 380; Tipp *v.* Thomas, ib., 102).

Holding that Stuart's settlement dates from March, 1882, such settlement excepted the tract from the grant upon the subsequent filing (May 24, 1884, *supra*,) of the map of definite location.

The railroad company does not deny that Stuart's settlement and residence preceded the filing of the map of definite location, but claims the tract solely on the ground that it was error to hold that Johnson's filing excepted the land from the withdrawal on the map of general route.

The decision of your office, holding the tract subject to entry by Stuart, is affirmed.

### TIMBER LAND ENTRY—PRE-EMPTION CLAIM.

TENNY *v.* JOHNSON ET AL.

A timber land entry under the act of June 3, 1878, can not be allowed for land included within a bona fide pre-emption claim, and the right of the pre-emptor is not affected by the fact that his improvements are not on the particular subdivision in conflict.

In determining the good faith of a pre-emption claim, asserted for land subject to entry under said act of 1878, it is competent to consider the character of the land involved.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 2, 1890.*

I have considered the case of John R. Tenny against Charles A. Johnson and Alexander Sealander on appeal by the former from your decision of January 9, 1889, rejecting his application to enter the W. ½ SE. ¼ and E. ½ SW. ¼ Sec. 33 T. 24 N., R. 1 W., Olympia, Washington land district.

The facts are as follows:

On July 6, 1885, Alexander R. Sealander filed pre-emption declaratory statement for the S. ½ SE. ¼ of Sec. 33 and W. ½ SW. ¼ Sec. 34, T. 24 N., R. 1. W., Olympia land district, alleging settlement June 23, 1885.

On July 11, 1885, Charles A. Johnson filed pre-emption declaratory statement for the SW. ¼ SW. ¼, E. ½ SW. ¼ and NW. ¼ SE. ¼ of Sec. 33, same township and range, alleging settlement June 23, 1885.

On April 17, 1886, John R. Tenny filed an application to enter the E. ½ SW. ¼ and W. ½ SE. ¼ Sec. 33, same township and range, under the timber and stone act of June 3rd 1878 and tendered proof and payment therefore July 13, 1886, and supplemental proof August 12, 1886. This application being in conflict with Sealander's declaratory statement for the SW. ¼ SE. ¼ of said section 33, and with Johnson's declaratory statement for the E. ½ SW. ¼ and NW. ¼ of SE. ¼ of said section 33, a hearing was ordered on August 13, 1886 to be held at the land office at Olympia, October 4, 1886, to determine the validity of said pre-emption declaratory statements.

By stipulation of the parties the testimony was taken at Seattle, Washington, before a notary public, at which hearing Johnson appeared in person and Sealander and Tenny by attorneys. The testimony was taken and returned to the office and on March 5, 1887, the register and receiver decided that said tracts sought to be entered by Tenny were not on April 17, 1886, subject to said entry and Tenny's application was rejected. From this decision he appealed to your office and on January 9, 1889, you affirmed said decision, from which judgment he appealed to this Department.

The testimony introduced by Tenny's attorney related chiefly to the nature of the land, and it showed that said land was somewhat broken

and that the greater portion of it was covered by fir and pine timber. It showed incidently that the pre-emptors had each made some improvements on their respective lands, but that these improvements were not on the particular land sought to be entered by Tenny.

The testimony introduced by Johnson and Sealander showed that each had built a cabin on his land and made some clearing. Sealander being sick was unable to attend the hearing. The testimony showed that Johnson had a comfortable house twenty-four by fourteen feet and about five acres cleared and in cultivation; that he had raised very good vegetables on the land; that his family had been living in the house from January, 1886, except during a portion of the time when his children were at school. Tenny did not appear at the hearing and no witness of the seven called in his behalf appears to have ever known or ever seen him.

The fact that the particular tracts sought to be purchased by Tenny did not cover the particular subdivisions upon which the pre-emptor's improvements were situated cannot affect their rights in the premises, nor does the fact that the greater portion of the land is excellent timber land, make any difference in the case. The testimony as to the quality of the land involved, was, however, competent as reflecting upon the bona fides of the pre-emptors, the objection thereto and motion to rule out were not well taken.

In Porter *v.* Throop (6 L. D., 691) these questions were fully discussed and decided. It was said—

> While as a matter of fact, there were no improvements or settlement on the one hundred and twenty acres of land in dispute, in contemplation of law, Throop's improvements and settlement on the forty acre tract not in dispute covered the entire tract.

As to the other point it was said—

> The exception in the act of June 3, 1878, is in favor not of the 'settler' but of the 'bona fide settler' . . . . and while the act in exempting from its operation lands claimed by a 'bona fide settler' *ex vi termini* recognizes that there may be a bona fide settlement on lands of the character described therein, that is lands chiefly valuable for timber and 'unfit for ordinary agricultural purposes,' . . . . and the fact that the land is of such a character, might be a circumstance, taken in connection with other facts of the case, shedding light upon the question of the *bona fides* of the settler.

I have considered all the testimony in the case, and I find that both Johnson and Sealander have acted in good faith in the matter of their pre-emption claims, and after a careful examination of the entire record I find no sufficient reason for disturbing the conclusion reached by both your office and the local officers and the decision of your office is therefore affirmed. Tenny's application to enter said land is rejected.

It appears from the record in the case that a motion to dismiss the appeal was filed. The motion is not found with the papers, and the case being one of some importance, I have reviewed the entire record,

and passed upon the merits of the case, disregarding the motion to dismiss, of which the appellee in view of the conclusion reached, can not complain.

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PRIVATE CLAIM—INDEMNITY.

ASA HICKMAN.

The right to indemnity under section 3, act of June 2, 1858, does not exist if the claim under which such right is asserted was satisfied by location prior to the passage of said act.

*Secretary Noble to the Commissioner of the General Land Office, August 2, 1890.*

In the report of the register and receiver for the southwestern district of Louisiana, made under the act of March 3, 1823 (3 Stat., 756), providing for the examination of titles to land between the Rio Hondo and Sabine River, the claim of Asa Hickman, assignee of John Mayhew, 3d class No. 233 for six hundred and forty acres on the bayou Santaburb, by virtue of inhabitation, occupation and cultivation, was recommended for confirmation. American State Papers, Green's Ed., Vol. 4 p. 69.

By the act of May 24, 1828 (6 Stat., 382), the claims in the third class above (with a few express exceptions, that of Hickman not being among the exceptions), were confirmed.

By application, dated December 12, 1887, Leo Vandigaer, the duly appointed curator of the vacant succession of Asa Hickman, deceased, alleging that the claim mentioned remained "wholly unlocated and unsatisfied," applied to the surveyor-general at New Orleans for the issue of certificates of location, "under section three of the act of June 2, 1858" (11 Stat., 294), in satisfaction of said claim.

The register and receiver at Nachitoches certify, that the records of their office show that the claim mentioned has not been located or satisfied, as provided by the confirmatory act of May, 1828, *supra*, and their certificate, dated October 14, 1887, accompanies the said application.

By letter, dated December 24, 1887, the surveyor-general at New Orleans, after stating that the records of his office show that said claim "has never been located, surveyed or satisfied by the government," transmitted, in satisfaction thereof, eight certificates of location of eighty acres each for authentication by your office.

On April 25, 1888, your office, finding said claim to have been located in place on Sec. 35, T. 7 N., R. 9 W., in the Nachitoches, formerly Opelousas, land district, and that consequently it was not entitled to indemnity, held for cancellation the said certificates of location.

From this action the applicant appeals here.

Your office found the claim to be so located for the reason that in patent certificate No. 626, in favor of Asa Hickman his heirs and as-

signs, dated at the Opelousas land office September 13, 1833 and signed by the register it was designated as section 35 etc., that the tract books of your office "show that said section is reserved to satisfy this claim" and that the receiver at Nachitoches, by letter of January 27, 1888, reports that the said section is entered in the tract book as "purchased by Jno. Mayhew . . . . Asa Hickman, assignee."

In the tract books of your office opposite said section 35, is entered the said claim of Asa Hickman and also another claim of like nature by William Hickman.

The receiver at Nachitoches in his said letter of January 27, 1888, in response to your office instructions to report the status of said section 35, reports further that on the township map the claim of "William Hickman" is marked upon the said section and that the same claim is entered in a list of Rio Hondo claims on file in the Nachitoches office as embracing the whole of section 35. It also appears from said letter and from the records of your office that a patent certificate No. 107 dated April 21, 1853, for said section 35 has been issued in favor of William Hickman.

Subsequently to his appeal the applicant filed—under rule one hundred of practice—certain papers as additional evidence. Among the papers thus filed I find a certified copy of the township plat approved July 14, 1832, on file in the surveyor-general's office; a certified copy of sections 26, 27, 34 and 35 "as taken from the map of said township approved July 17, 1832" on file in the land office at Nachitoches, and a certified copy of an extract from the original field notes of the survey of said township, that have been approved and which are on file in the surveyor-general's office.

On both of the maps referred to "Asa Hickman" is marked upon the south half of sections 26 and 27, and "William Hickman" on section 35. The field notes mentioned are those of the deputy surveyor who in July 1832 ran the interior sectional lines of said township, and who with reference to the line between sections 26 and 35 stated that "Asa Hickman" claims section 26 and "William Hickman" section 35.

The evidence concerning the location of the claim in question seems therefore to be the said patent certificate to Asa Hickman, and the tract books referred to showing the location of the claim involved to be on said section 35, the township plats and the surveyor's notes which tend to show that it was located on sections 26 and 27, the certificate of the local officers, and the statement of the surveyor-general to the effect that it has not been located at all.

In the report of the register and receiver at Opelousas *supra*, the claim involved, to wit, that of Asa Hickman is thus described "bounded above by other land claimed by the claimant, on other sides by vacant land." By the same report the said claim of William Hickman, also for six hundred and forty acres is described as "situated on the Bayou Santaburb bounded on the *lower* side by land claimed by William Cummings. Am. State Papers, Vol. 4, p. 49, No. 107.

On the township plat (filed as aforesaid) in the surveyor general's office, section 16 is marked "Wm. Hickman" and a house is sketched thereon. The land in section 21 immediately adjoining 16 on the south or by which it is "bounded on the lower side" is marked "Williams Cummings." On the same plat the south half of section 26 adjoining section 35 on the north or by which that section (35) is "bounded above" is marked Asa Hickman.

When therefore the said boundaries of the claim involved and of the William Hickman claim, as given by the commissioners before whom was produced the original evidence upon which both claims are based, are considered in connection with the township plat in the surveyor general's office, it seems clear that the true location of the claim in question to be as shown by the patent certificate to Asa Hickman and by the tract books of your office, i. e., on the said section 35. And also that the marking of William Hickman's claim upon said section 35, and the issue of a patent certificate in his name for the same section in 1853 were erroneous.

The 2d section of the confirmatory act of 1828, *supra* provides that claims confirmed thereby shall be located "under the direction of the register and receiver . . . . in conformity with the legal subdivisions of the public surveys and shall include the improvements of the claimants respectively."

On the said township plat in the surveyor general's office, a house is marked as being upon the other land of Asa Hickman in section 26, while no improvements are marked on section 35. Counsel contend that the improvements of Asa Hickman upon the claim involved, being thus shown to have been on section 26, it was error to hold that it had been located on section 35. The fact that an improvement is noted on the adjoining land of the claimant, by no means shows that his improvements upon the claim in question had been disregarded in locating the same. Counsel contend that as the confirmatory act of 1828, *supra*, provided for the location of the claim in question, "under the direction of the register and receiver," the patent certificate to Asa Hickman executed by the register alone is not proper proof of the location of the claim.

In support of this contention several cases are cited wherein certificates having been issued by the register, your office, before issuing patents under section 2447, Revised Statutes, act of December 22, 1854, 10 Stat., 599, required the local officers to issue their joint certificate of location *nunc pro tunc*.

In this connection I am advised that the files of your office contain a considerable number of "patent" certificates for claims confirmed by the act of 1828 that have been transmitted by the local officers in the regular course of business, but that said files contain but few "location" or "final" certificates.

These locations or final certificates are, in most instances shown to have been filed by or for the respective claimants.

It thus appears that in locating the claims so confirmed the custom of the local office was to issue to the party applicant as his evidence of title a location or final certificate whereby the confirmation and location of his claim were duly set forth and to transmit for the files of your office a certificate showing their action in premises. The certificate so transmitted was, as in the case at bar, the patent certificate.

But the confirmatory act of 1828 *supra*, made no provision for the patenting of claims confirmed thereby, and no such provision was made until the act of December 1854 *supra*. As no patent could have been legally issued upon patent certificates transmitted before the date of the last named act it follows that such certificates were forwarded for the information of your office.

The final or location certificate that was undoubtedly issued to Asa Hickman for the claim involved is not in the record. But that such certificate was duly issued and the claim involved properly located, can not in the face of the said certificate bearing date but little more than five years after the act of 1828, whereby the register certifies to your office the location of the same, and which location corresponds with the description upon which the claim was confirmed, at this time be successfully controverted.

For reasons stated I must find that the claim in question was located upon the said section 35 on or before September 13, 1833, the date of the patent certificate to Asa Hickman.

The said claim having been so located, it follows that the same was not unsatisfied at the date of the act of June 2, 1858 *supra*, under which indemnity is asked.

The decision appealed from is affirmed.

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### MINING CLAIM—ADVERSE PROCEEDINGS.

### BROWN ET AL. *v.* BOND ET AL.

The local office has no authority to allow a mineral entry during the pendency of adverse judicial proceedings.

The failure of an agent, who files an adverse claim, to furnish therewith proof in corroboration of his sworn statement of authority, will not defeat the right of the adverse claimant to have the controversy settled by judicial proceedings.

*Secretary Noble to the Commissioner of the General Land Office, July 2, 1890.*

This case comes before the Department upon the appeal of applicants from the decision of your office of October 17, 1889, holding for cancellation mineral entry No. 133, Glenwood Springs, Colorado, made by David R. C. Brown and associates for the Franklin Lode claim, Pitkin county, Colorado, alleging the following grounds of error:

1. Error in finding from the record that J. W. Deane was the duly authorized agent or attorney in fact of the Rhoderic Dhu lode claimants, or either of them, for the purpose of filing the adverse claim.

2. Error in finding from the record that any adverse claim was filed against the Franklin lode claim during the period of publication of notice of an application for a patent therefor, or at any other time.

3. Error in finding that the owners of the Rhoderic Dhu lode claim were entitled to any notice of the rejection of their so-called adverse claim or of the action of the register and receiver in allowing the entry of the Franklin claim.

4. Error in holding the entry of the Franklin claim for cancellation on the law and the evidence of the case.

The application was filed August 2, 1887, and within the period of sixty days of publication required by law an adverse claim was filed by J. W. Deane, Esq., alleging, under oath, that he is the legal representative of the owners of the Roderick Dhu lode claim, which conflicts with the Franklin.

The material issue presented by this appeal is, whether an adverse claim was filed in accordance with the provisions of law and the rules and regulations of the Department governing such claims. If it were, then the local officers were without jurisdiction to allow an entry upon the application, because the filing of such an adverse claim by operation of its own force stays all proceedings, except the publication of notice and making and filing of affidavit thereof, until the controversy shall be decided by a court of competent jurisdiction, or the adverse claim waived. Revised Statutes, section 2326.

The record shows that notice of the application for patent was published in a weekly newspaper, consecutively, from August 6, 1887, the date of the first insertion, to October 8, 1887, the date of the last. The rules and regulations of the Department required that in all cases sixty days must intervene between the first and last insertion of the notice, and that when published in a weekly paper ten consecutive insertions are necessary. In this case the sixty days of publication did not expire until October 6, and hence an adverse claim filed on October 5, was within the time required by law.

The adverse claim filed by Deane, as attorney for the Roderick Dhu claimants, was endorsed by the register, "filed October 5, 1887," and was included in the abstract of adverse claims received from that office during the month of October, 1887, and for which the legal fee required for filing adverse claims was collected and accounted for. It is therefore evident that the claim was filed within the time required by law.

The only ground upon which the local officers allowed the entry of the Franklin lode claim seems to have been, because the adverse claims "were signed by attorneys without showing or filing proper authority or proof," in conformity with the law and circular of instructions issued by the Department, and the main ground of error alleged by applicants in the decision of your office is in reversing this finding of the local office, and in finding that Deane was the duly authorized agent or attorney in fact of the Roderick Dhu Lode claimants, or either of them, for the purpose of filing the adverse claim.

The act of April 26, 1882 (22 Stat., 49), provides:

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.

On May 9, 1882, the Department issued a circular of instructions to registers and receivers, carrying into effect the provisions of said act (1 L. D., 685), in which it is directed that—

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.

The adverse claim filed by Deane on October 5, 1887 (No. 70), purports to be "in behalf of George Bond, D. M. Van Hoevenbergh and other owners of the Roderick Dhu lode mining claim, and for them and as their legal representatives." The nature, boundaries and extent of said adverse claim were fully set forth, as required by law, and the abstract of title of the Roderick Dhu lode claim and the adverse plat showing conflict between said claim and the Franklin lode claim were filed as exhibits thereto, to which reference was made.

In verifying the protest, Deane swears:

That he is the attorney and legal representative of the adverse claimants, above named, in this protest and adverse claim above subscribed by him because he is familiar with the facts and represents owners whose addresses are not at present known and whose rights in the premises it is necessary to protect. That he has read the same and knows the contents thereof. That the same is true in substance and in fact, and that this adverse claim is made in good faith and to protect a better and prior title.

On the day said claim was filed, the register of the United States land office at Glenwood Springs, Colorado, addressed the following letter to George Bond and D. M. Van Hoevenbergh:—

You are hereby notified that your adverse and protest No. 70 "Rhoderick Dhu" veins M., application No. 143, survey No. 4632, Franklin lode, D. R. C. Brown et al., claimants, has been this day filed in the records of this office.

You are also notified that you will be required to commence proceedings within thirty days in a court of competent jurisdiction to determine the question of right of possession, and prosecute the same with reasonable diligence to final judgment, failing to do which your adverse will be considered waived, and the application of survey 4632 for patent be allowed.

On November 1, 1887, the adverse claimants instituted in the district court for the county of Pitkin, State of Colorado, suit in support of their adverse claim as owners of the Roderick Dhu mining claim against the Franklin Mining Company and others as claimants and applicants for patent of the Franklin lode mining claim, and on August 30, 1889, the clerk of said court certified that said suit is still pending and undetermined in said court. It was after the institution of said suit that the entry was allowed. Subsequently, the owners of the Rhoderick Dhu lode mining claim, through their attorney filed a petition to the Commissioner of the General Land Office, alleging that on October 5, 1887, "J. W. Deane, Esq., was the agent, attorney and legal representative of D. M. Van Hoevenbergh and others, owners of the Rhoderick Dhu lode min-

ing claim, and as such filed a protest in the land office at Glenwood Springs, Colorado, protesting against the issuance of a patent or receiver's receipt to the owners of the Franklin lode mining claim for that lode." The petitioners prayed that "they may be granted a hearing before some competent officer as to the matter and things set up in this petition, and that the receiver's receipt heretofore issued to the Franklin lode mining claim be held for cancellation and that your petitioners be permitted to file additional proof of the agency of said J. W. Deane, who filed the protest herein." This petition was verified by the affidavit of H. T. Tissington, one of the owners of said Rhoderick Dhu claim, made in behalf of himself and Van Hoevenbergh, Bond, and othe owners, in which he stated that the contents of said petition were known to him, and that "the same is true of his own knowledge, except as to those matters which are therein stated upon information and belief, and as to them he believes it to be true."

The petition in this case and the affidavits and papers filed in support thereof show that Deane was in fact the duly authorized agent and attorney of the owners of the Roderick Dhu lode claim on October 5, 1887, with authority to file the adverse claim for said owners, and he had under the law authority to verify it, if cognizant of the facts stated. But the contention of the applicants for patent is that the statute contemplates that the direct and specific authority to act in the particular matter must exist and *appear* at the time of the filing. To this it may be replied, that such authority did in fact exist, and substantially appear at the time of filing of the adverse claim. That part of the rules and regulations of the Department which requires that "where an agent or attorney in fact verifies the adverse claim, he must distinctly swear that he is such agent or attorney," was complied with by Deane when he filed the protest, alleging under oath "that he is the attorney and legal representative of the adverse claimants above named in this protest and adverse claim", and the only omission was in failing to comply with the remaining requirements of the rule, to wit: "and accompany his affidavit by proof thereof." That he was such agent subsequently appears by the affidavit of one of the owners to the petition herein, which was not the ratification of an unauthorized act of Deane, but proof of the fact that authority did exist at the date of the filing of the adverse. So that the sole question is, whether the failure of an agent to file accompanying proof, in corroboration of his affidavit, as required by the rules, will defeat the right of the adverse claimant to have the controversy settled by a court of competent jurisdiction.

The act merely requires that the adverse claim "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 it is only by the rules and regulations of the Department that he is required to make affidavit that he is the agent and attorney, and to accompany his affidavit with proof thereof.

While the Secretary of the Interior has the power to establish rules and regulations to give effect to the provisions of an act which have all the force and effect of law, if not in contravention of it, yet the failure to comply with the technical requirements of the rules and regulations was a mere irregularity, and will not defeat the right of the claimant to have the controversy settled by the appropriate tribunal, if he has complied with the statute.

The material question is, whether the person filing the adverse claim was in fact the duly authorized agent of the persons for whom he purported to act.

Besides, the local officers notified the claimant on the day the adverse claim was presented, that it had been filed with the records of that office, and they were notified and required to commence proceedings within thirty days in a court of competent jurisdiction to determine the question of right of possession, and to prosecute said claim to final judgment, and upon failure to do so the adverse claim would be considered waived and the application for patent be allowed. Acting upon this notification, the adverse claimants commenced their suit in the proper district court within thirty days and three days before the entry was allowed by the local officers. This removed from the land office for the time being all jurisdiction in the premises, and any action taken by them afterwards was void and of no effect.

In the case of Reed *v.* Hoyt, 1 L. D., 603, which was a case where an adverse claim of Silas Reed against an application for a mine in Utah was rejected by Commissioner McFarland, because sworn to in Boston, Massachusetts, Secretary Teller said that:—

> 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.

In McMaster's case, 2 L. D., 706, it was held by Secretary Teller that:

> Although section 2326 of the Revised Statutes requires that "an adverse claim shall be upon oath of the person or persons making the same," and the present claim was filed upon the oath of their attorney only, and although your decision dismissing the adverse claim became final against such claimants for want of appeal so far as respects proceedings in the Land Department, I am of the opinion that the claim having acquired a status in the courts, the question of its regularity and validity should be left to the judgment of the court, and that pending the proceeding this Department should take no action therein.

It will be observed that the application in this case was made under the act of May 10, 1872, which required the adverse claim to be verified by the oath of the claimants themselves, and an agent was not authorized to verify it.

Again, in the case of Meyer *et al. v.* Hyman, 7 L. D., 83, it was held by Secretary Vilas that an entry allowed prior to the final disposition of adverse proceedings must be canceled, where it appears that such adverse claim is still undetermined. See also Richmond Mining Company *v.* Rose, 114 U. S., 576.

All of the questions herein presented can be determined by the court in which the suit on the adverse is pending, and that court having acquired jurisdiction of the case prior to the allowance of the entry, it was therefore improvidently allowed, and the decision of your office holding it for cancellation is affirmed.

[NOTE: An application for the recall of this decision was denied by Secretary Noble, August 5, 1890.]

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DESERT LAND ENTRY—APPLICATION.

JACOB P. OSWALD.

The failure of an applicant for desert land to show personal knowledge of the land entered, does not call for cancellation, if the entry was allowed in accordance with existing practice which did not require such showing on the part of the applicant.

*Secretary Noble to the Commissioner of the General Land Office, August 4, 1890.*

With your letter of July 5, 1889, you transmit the appeal of Jacob P. Oswald from your office decision of February 15, 1889, holding for cancellation his desert land entry No. 460, made July 13, 1887, for the W. ½ NE. ¼, Sec. 26, T. 44 N., R. 98 W., Evanston, Wyoming.

It appears that Oswald is a citizen of St. Louis, Missouri, and that his declaration for said entry was executed in that city June 17, 1887. It was forwarded to the local land office, accompanied by two affidavits made by Jay L. Torrey and James T. McGinnis, who testified from personal knowledge and observation that they had frequently passed over the land, and that the same "is desert land"—the affidavits being otherwise in regular form and containing the usual averments required of witnesses in desert land entries.

The register and receiver permitted the entry, and issued the usual certificate on the payment of the twenty-five cents per acre.

The declaration of claimant stated: "that I became acquainted with said land by representations of parties well acquainted therewith."

By your office letter of November 22, 1887, you directed the local officers to inform the claimant "that he must furnish within sixty days from notice a supplemental affidavit fully setting forth his personal inspection of each subdivision of the land and his knowledge of the character thereof being desert, in default of which his entry will be held for cancellation."

On January 7, 1888, Mr. P. A. Torrey, of St. Louis, Missouri, the attorney for claimant, addressed a communication to your office, in which he says:—

It is no relief to say that they (referring to eight claimants, including claimant herein,) are allowed sixty days to obtain personal knowledge of the land and submit proofs needed, for these men can not leave their daily work for the purpose or afford

the expense connected therewith. As these men do not now possess personal knowledge of the character of the land in question and can not obtain it on possible terms, and since it is perfectly evident that they performed to the letter and the spirit their part of the implied agreement, I earnestly beg on their behalf that the decision of the Honorable Commissioner in these cases be reconsidered and the entries allowed to stand.

On February 13, 1888, you acknowledged the receipt of Mr. Torrey's letter, and declined to reconsider your requirement that claimant should have personal knowledge of the desert character of the land before entry, citing as authority the case of Matthew J. Byrnes, decided by Assistant Commissioner Stockslager July 20, 1886 (13 C. L. O., 108).

After due notice, and on failure to meet your office requirement, you held the entry for cancellation.

The errors assigned are the following:

1. The ruling appealed from is not in accord with the established rules and regulations of the Department.

2. It is not in accord with the act of Congress relating to the reclamation of desert lands.

The second section of the act to provide for the sale of desert lands in certain States and Territories, approved March 3, 1877 (19 Stat., 377), is as follows:

> That all lands, exclusive of timber lands and mineral lands, which will not without irrigation produce some agricultural crop, shall be deemed desert lands within the meaning of this act which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

Section 3 of said act provides that the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.

There is nothing in the act requiring applicants to have a personal knowledge of the desert character of the land; but it does require that such desert character shall be ascertained by "proof of two or more credible witnesses." But the determination of what may be considered desert land "shall be subject to the decision and regulation of the Commissioner of the General Land Office."

By a general circular issued by Commissioner Sparks and approved June 27, 1887 (5 L. D., 708), applicants for desert lands were required "hereafter" to have a personal knowledge of lands intended to be entered. That the required affidavit could not be made by an agent, nor "upon information and belief," but must be made from a personal examination of the lands. But it was provided in that circular that "Nothing herein will be construed to have a retroactive effect in cases where the official regulations of this department in force at the date of entry were complied with." This circular was mailed to the local land office on July 15, 1887, and August 1, thereafter, was fixed as the date when its requirements should take effect, a reasonable time being allowed for its transmission and promulgation. See circular approved December 3, 1889 (9 L. D., 672).

Prior to June 27, 1887, and certainly up to September 1, 1884, it was not the practice of your office to require applicants for desert lands to have a personal knowledge of their desert character. See letter of Commissioner McFarland in case of Fritz W. Guenis *et al.*, September 1, 1884, addressed to the local office at Evanston, Wyoming.

On July 20, 1886, in the case of Matthew J. Byrnes, *supra*, Assistant Commissioner Stockslager decided that "the desert land act contemplated that persons entering land thereunder shall have a personal knowledge of the land they propose to enter, obtained from an examination of each and every legal subdivision thereof, which fact must be set forth in the declaration."

But I am unable to find that such a construction or interpretation of the act was ever prior to that time given, and then only applied to the Byrnes case, at the Visalia, California, land office; nor was such interpretation ever of general force or the public advised of the new requirement, until August 1, 1887, the date when the general circular of June 27, 1887, *supra*, took effect, and it expressly provided that such construction was not to have a "retroactive effect."

The claimant herein made his application July 13, 1887; such application was made in accordance with existing regulations, which did not then require an applicant for desert lands to have a personal knowledge of the same, and his application was properly allowed. James Bowman (8 L. D., 408).

I therefore direct that the entry be allowed, subject to future compliance with the law.

Your said office decision is reversed.

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### RAILROAD GRANT—CONFLICTING ENTRY—SWAMP SELECTION.

### ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RY. CO.

Land covered by an entry at date of definite location is excepted thereby from the operation of the grant, and the subsequent cancellation of the entry does not affect the status of the land under the grant.

The act of July 28, 1866, reviving the grant of February 9, 1853, was not a new donation of lands included within the limits of the original grant, but a waiver of the right of the government to insist upon the terms of reversion contained in said grant.

Under the provisions of this grant, that "any and all lands reserved to the United States by any act of Congress, for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act," lands covered by *prima facie* valid swamp selections at the date when said grant becomes effective are excepted therefrom.

*Secretary Noble to the Commissioner of the General Land Office, August 4, 1890.*

The appeal of the St. Louis, Iron Mountain and Southern Railroad Company from the decision of your office, dated April 11, 1888, reject-

ing its claim to the lands hereinafter described is before me for consideration.

The company claims said land under the act of February 9, 1853 (10 Stats., 155), as revived and extended by the act of July 28, 1866 (14 Stats., 338), granting to the States of Arkansas and Missouri, respectively, certain lands to aid in making a railroad from a point on the Mississippi river, opposite the mouth of the Ohio river, in the State of Missouri, by the way of Little Rock, to the Texas boundary line, near Fulton in Arkansas, together with certain branches therein designated.

It appears that the line of road was definitely located August 11, 1855, and consequently that the claim of the company then attached to the lands in place, granted by the original act.

The additional lands in place, granted by the act of July 28, 1866, were reserved by the act from all future appropriation to any other purpose than that therein contemplated, and the claim of the company attached thereto at the date of the passage of the act.

On May 31, 1881, as appears from your office decision, the said company "listed" the SE. ¼ of SW. ¼, Sec. 6, T. 2 N., R. 14 W., and, on January 7, 1882, the following described tracts, to wit:—

| | | | | | |
|---|---|---|---|---|---|
| SE. ¼ SW. ¼, | Sec. | 18, | T. | 16 N., | R. 3 E., |
| SW. ¼ | " | 12 | " | 18 " | " 3 " |
| W. ½ SE. ¼, | " | 20 | " | 19 " | " 4 " |
| SW. ¼ NW. ¼, | " | 22 | " | 16 " | " 1 " |
| Lot 5 of NW. ¼ | | 30 | " | 3 " | " 9 " |

in the Little Rock land district, Arkansas, within the six miles granted limits of said act of February 9, 1853; that on the same day said company "listed" the following described tracts, situated in the same land district, and within the five mile additional limits granted by the act of July 28, 1866, to wit:—

| | | | | | |
|---|---|---|---|---|---|
| NE. ¼, SW ¼, | Sec. | 3, | T. | 14 N., | R. 2 E., |
| Lots 2 and 3 of NW. ¼, | " | 31, | " | 9 " | " 2 W., |
| W. ½ SW. ¼, | " | 23, | " | 11 " | " 2 " |
| NW. ¼ & NW. ¼ SW. ¼, | " | 1, | " | 16 " | " 2 " |
| W. ½ lot 2 NE. ¼ | " | 3, | " | 12 " | " 4 " |
| S. ½ NE. ¼, | " | 27, | " | 3 " | " 8 " |

March 5, 1855, one Claiborne Wright entered the tract first described. This, it will be observed, was five months before the line of railroad was definitely located.

June 15, 1858, Wright's said entry was canceled, and the purchase money refunded.

All the described tracts, except the one entered by Wright, were, prior to August 11, 1855—the date of definite location of road—selected by the State of Arkansas as swamp lands. The State's claim to these lands under the swamp land act was rejected by your office, and said selections canceled February 25, 1882. As one of said tracts was covered by Wright's entry, and all the others by unadjudicated swamp selections at the time the company's claim attached to the lands granted

for its use, your office held that they were thereby excepted from said railroad grants.

The company, by its attorneys, objects to said decision, and assign error therein as follows:

1st. In holding that the said SE. ¼ of SW. ¼, Sec. 6, T. 2 N., R. 14 W., was excepted from said company's grant by the entry of one Claiborne Wright existing at date of definite location of the line of road, said entry having been canceled long before the act of July 28, 1866, reviving and extending said grant.

2nd. In holding the remainder of said tracts excepted from said company's grant by an alleged selection thereof by the State of Arkansas under the prior swamp land grant to said State: (a) Because only land actually swamp or so found by the Secretary of the Interior are within the exception from said railroad grant; (b) The claim of the State under such swamp grant was rejected by the General Land Office on March 15, 1881, upon the formal admission of record made by the State that said lands were *not* swamp lands, and the want of record proof that said lands were in fact swamp or overflowed within the meaning of that grant; (c) The lands being admitted not of the character contemplated by the swamp land grant, same were subject to disposal by Congress and lawfully inure to this company under the grant made to it by Congress.

Section 2 of the act of February 9, 1853, provides:

That there be and is hereby granted to the States of Arkansas and Missouri, respectively, for the purpose of aiding in making the railroad and branches as aforesaid, within their respective limits, every alternate section of land designated by even numbers, for six sections in width on each side of said road and branches; but in case it shall appear that the United States have, when the line or route of said road is definitely fixed by the authority aforesaid, sold any part of any section hereby granted, 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 Governors of said States, to select, subject to the approval aforesaid, from the lands of the United States most contiguous to the tier of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold, or to which the right of pre-emption has attached as aforesaid, which lands, being equal in quantity to one half of six sections in width on each side of said road, the States of Arkansas and Missouri shall have and hold to and for the use and purpose aforesaid: *Provided,* That the lands to be located shall in no case be further than fifteen miles from the line of the road: *And provided further,* That the lands hereby granted shall be applied in the construction of said road, and shall be disposed of only as the work progresses, and shall be applied to no other purpose whatsoever: *And provided further,* That any and all lands reserved to the United States by any act of Congress, for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of the said railroad and branches through such reserved lands.

Section 1 of the act of July 28, 1866, provides:

That the "Act granting the right of way and making a grant of land to the States of Arkansas and Missouri to aid in the construction of a railroad from a point upon the Mississippi opposite the mouth of the Ohio river, via Little Rock, to the Texas boundary, near Fulton, in Arkansas, with branches to Fort Smith and the Mississippi River," approved February nine, eighteen hundred and fifty-three, with all the provisions therein made, be and the same is hereby, revived and extended for the term of ten years from the passage of this act; and all the lands therein granted, which reverted to the United States under the provisions of said act, be, and the same are

hereby, restored to the same custody, control, and condition, and made subject to the uses and trusts in all respects as they were before and at the time such reversion took effect."

and section 2 of said act provides:

That there is hereby granted, added to, and made part of the donation of lands hereby renewed and made subject to the same uses and trusts, and under the same custody, control, and conditions, and to be held and disposed of in the same manner as if included in the original grant, all the alternate sections and parts of sections, designated by odd numbers, lying along the outer line of lands heretofore granted, and within five miles on each side thereof, excepting lands reserved or otherwise appropriated by law, or to which the right of pre-emption or homestead settlement has attached.

The status of these lands when the grant took effect must determine whether they are subject thereto. Neilson *v.* Northern Pacific R. R. Co. *et al.* (9 L. D., 402;) Showell *v.* Central Pacific R. R. Co. (10 id., 167).

As for the tract covered by the entry of Wright, it is clearly excepted from the original grant under the clause in the act of 1853, providing for indemnity in case the "United States have when the line or route of said road is definitely fixed, by the authority aforesaid, sold any part of any section hereby granted, or that the right of pre-emption has attached to the same," etc. The subsequent cancellation of the entry could not change the status of the land, or operate in favor of the company (Northern Pacific R. R. Co. *v.* Kerry, 10 L. D., 290), unless it was thereby brought within the grant under the reviving act of 1866. An examination of said act does not, however, bear out this theory.

It did not purport to grant lands that were excluded from the operation of the former act, but only to "revive" and "renew" said act "with all the provisions therein made," for the further period of ten years. It was not a new donation of the lands included within the limits of the original grant, but a waiver of the right of the government to insist upon the terms of reversion contained in said grant. Alabama and Chattanooga R. R. Co. *v.* Clabourn, 6 L. D., 427.

As for the tracts covered by the swamp selections, the provisions in section 2 of the original grant "That any and all lands reserved to the United States by any act of Congress, for the purpose of aiding in any object of internal improvement, *or in any manner for any purpose, whatsoever*, be and the same are hereby reserved to the United States from the operation of this act," works an exclusion of these lands from the grant; for at the date when the grant became effective, both within the original and additional limits, said lands were covered by *prima facie* valid selections under the swamp grant. The words of exception are broad in their significance and leave but slight room for construction. Lands reserved in *any manner* or for *any purpose whatsoever* are expressly excluded from the grant. In the administration of the swamp grant lands formally claimed thereunder must of necessity, during the pendency of such claim be reserved from any other disposition, and this is the ruling of the Department. Starr *v.* State of Minnesota, 8 L. D., 644; State of Oregon, 9 id., 360.

The same rule has been applied in cases of indemnity school selections, even where it subsequently transpired that the selection was invalid. Niven *v.* State of California, 6 L. D., 439; Call *v.* Southern Pacific R. R. Co., 11 L. D., 49.

The same effect is given to a railroad indemnity selection, it being held to preclude the allowance of an entry for the land covered thereby. Rudolph Nemitz, 7 L. D., 80. It would therefore appear that the Department has uniformly construed the formal assertion of a claim to a particular tract of land under a congressional grant to work a reservation of such tract during the pendency of such claim. Indeed the recognition of any other rule would frequently operate to defeat the execution of a grant in accordance with its terms.

As the condition of the lands at the time when the grant becomes operative determines whether they are included therein, it must be held that the pending swamp selections excluded the lands covered thereby from the operation of this grant.

The decision of your office is accordingly affirmed.

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### TIMBER CULTURE CONTEST—AGENT.

### DAVIES *v.* KILLGORE.

A timber culture entryman who entrusts the care of his claim to an agent is responsible for the negligence of said agent in performing the requisite acts of compliance with law.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August* 4, 1890.

This appeal involves timber-culture entry No. 5241, made by Charles Killgore October 26, 1883, for the W. ½ of the NW. ¼ and the W. ½ of the SW. ¼, Sec. 6, T. 14 N., R. 19 W., Grand Island, Nebraska.

James Davies filed affidavit of contest November 10, 1886, alleging that "defendant has not planted or caused to be planted to trees, seeds or cuttings five acres of said tract from date of entry up to November 8, 1886." By stipulation the testimony was taken before A. R. Samson, notary public, at Broken Bow, Custer County, Nebraska. Three witnesses were examined by contestant, all swearing that, up to November 10, 1886, no seeds, trees or cuttings had been planted on the land embraced in the entry. No witnesses were introduced by the defendant, but by agreement of counsel it was stipulated that, on the part of defendant,

Charles Killgore will swear that he is a non-resident of the State of Nebraska and has been for two years last past; that when leaving for Wyoming Territory, two years ago, he paid William Smiddy to attend to his timber claim for him, and agreed to pay him for doing the work necessary to comply with the timber-culture law the sum of twenty-five dollars per year and that he has paid him that sum for the past

two years, and further agreed that he should have the benefit of any crop that should be raised on the broken land on said claim; also that said William Smiddy would swear that he received the above consideration, and agreed to attend to the work and arranged for all the work to be done up to the time of planting timber on said tract; that about the last of August or first of September, 1886, himself and four other men went on to the tract for the purpose of planting box elder seeds thereon, and did so plant five acres of land with box elder seeds, and that the land so planted was on that that he had been shown as being on Charles Kilgore's timber claim, and that he always supposed until to-day, the day of hearing, that it was on Kilgore's timber claim, and he now ascertains that said seeds were planted on a timber claim adjoining this one on the north, with which he was not concerned in the least, instead of on the Kilgore timber claim as intended; and that another witness will swear that he went there with Smiddy to help him plant seeds on the Kilgore timber claim and that the seeds were planted where directed by Smiddy.

On this evidence the register and receiver found in favor of the contestant, and recommended the cancellation of the entry. On appeal to your office, the decision of the local officers was reversed and the contest dismissed, and the contestant has appealed to this Deparment.

While it has been and still is the policy of this Department to deal liberally with entrymen who are honestly endeavoring to comply with the requirements of law in perfecting their entries, still it has always held that the entryman should exercise ordinary diligence, and if his failure is attributable to the lack of such diligence his mistakes ought not to be rectified at the sacrifice of the inchoate rights of others who are diligent and honest in the prosecution of their claims.

In the case under consideration the claimant, Killgore, made entry under the timber-culture law, which requires at least eight years to perfect his title, and contented himself with employing an agent at twenty-five dollars a year to attend to all the requirements of the law, while he took up his permanent residence in another State, and, apparently, thereafter gave no heed to his claim.

It is true that the presence of an entryman on his claim is not required under the timber-culture act, yet, if he chooses to entrust the culture of timber to an agent, he will be held responsible for his negligence and can not plead exemption from responsibilty for his careless or heedless mistakes in failing to comply with the law upon the ground that he has employed and paid him to do the work necessary to perfect the entry. (Hemstreet *v.* Greenup, 4 L. D., 493.)

The only question to determine then is, did Smiddy exercise ordinary care and prudence in ascertaining the true location of defendant's entry. The evidence of his diligence is set out in the stipulation from which it appears that Smiddy planted the five acres on land that "he had been shown as being on Charles Kilgore's timber claim." There is no statement as to who showed him the tract or that the person showing him resided in the vicinity, or knew anything about the location of the claim, and there is no explanation of how he came to rely upon the judgment of the person directing him where to plant.

It further appears from the record that Smiddy had been for two years in charge of the timber culture on this claim, during which time

he had "arranged for all the work to be done up to the time of planting timber," and after such two years supervision does not know where the claim is located.

I do not think this Department would be justified in excusing mistakes so heedlessly made as this evidently was, and as the claimant must be held responsible for the carelessness of his agent, the decision of your office is reversed and the entry of Kilgore canceled.

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### RAILROAD GRANT—PRE-EMPTION FILING.

UNION PACIFIC RY. CO. *v.* PHILLIPS.

A *prima facie* valid pre-emption filing existing at date of definite location excepts the land covered thereby from the operation of the grant; and the fact that the pre-emptor did not reside upon, cultivate, or improve the land included in his claim, does not relieve the grant from the effect of said filing.

*Secretary Noble to the Commissioner of the General, Land Office, August 4, 1890.*

On December 3, 1889, the Department rendered decision in the case of the Union Pacific Railway Company *v.* George G. Phillips, involving the SE. ¼ of the SW. ¼ of Sec. 5, T. 1 N., R. 66 W., Denver land district, Colorado.

Said Phillips applied to make timber-culture entry of the tract described; but his application was rejected by the local officers, on the ground that it was within the granted limits of the Union Pacific Railway.

The line of road of said railway was definitely located opposite said tract on August 20, 1869.

On April 21, 1866, one Thomas Laws had filed pre-emption declaratory statement for said tract (with others); which filing was canceled November 13, 1873, for relinquishment, executed by said Laws August 14, 1873.

Said departmental decision (of December 3, 1889,) held that, as the tract in question was unoffered, Laws's filing was at date of the definite location of the road an unexpired filing; and as such served to except the tract from the grant.

Counsel for the railroad company alleged that said departmental decision had been rendered on an incomplete record, and at his request the Department, on December 7, 1889, directed your office to return the decision, together with the entire record in the case, with a view to a further examination thereof in the light of the additional papers.

Your office, on December 21, 1889, transmitted the record as directed.

On inspection of the record, it appears that the paper belonging therewith that was not originally transmitted, was an affidavit of

Thomas Laws, executed August 14, 1873, in which said Laws declared that he had "never resided upon, or improved, or cultivated, said land in any way or manner whatever."

Counsel for the railroad company contend that without settlement, improvement, or cultivation, a pre-emption filing is a nullity, and could not except the tract from the grant.

This contention can not be maintained.

The question as to whether the pre-emptor . . . . . inhabited and improved the land, and performed other duties required by the pre-emption law, is not a matter that concerns the company. . . . . It is sufficient that there was, at the date of the withdrawal, a claim to the land in dispute of such a nature and character as the act defines; and any question as to the lawfulness of such claim at that date, or as to the performance by the claimant of certain specified conditions, is immaterial (Northern Pac. R. R. Co. *v.* Stovenour, 10 L. D., 645; citing Kans. Pac. R. R. *v.* Dunmeyer, 113 U. S., 629–641; Newhall *v.* Sanger, 92 U. S., 761).

I see no reason, therefore, why said departmental decision of December 3, 1889, should not be promulgated by your office, and the same is herewith returned for that purpose.

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### OSAGE LAND—SECTION 2260, R. S.—RESIDENCE.

### JACKMAN *v.* MCDANIELS.

One who quits or abandons residence on his own land, to reside on Osage land in the same State, is disqualified thereby to purchase said land.

A settler who purchases land from the State, by virtue of his residence thereon, is precluded thereby from subsequently claiming residence on public land during the period covered by his proof under the State law.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 5, 1890.*

With your letter of June 22, 1889, you transmit the appeal of William D. McDaniels from your office decision of January 2, 1889, wherein you hold for cancellation his Osage declaratory statement No. 6952, filed by him December 20, 1884, for the NW. ¼ of Sec. 22, T. 34 S., R. 20 W., Larned, Kansas, alleging settlement September 20, 1884.

Harry B. Jackman filed Osage declaratory statement, No. 8653, April 29, 1885, for the same tract, alleging settlement January 27, 1885.

On November 23, 1885, McDaniels made final proof in support of his filing; Jackman protested against allowing the final proof of McDaniels, asserting a prior right to the land and on December 12, 1885, he made his final proof.

Hearing was had on Jackman's protest and, on February 17 1887, the local officers decided in favor of Jackman and recommended the cancellation of McDaniels' filing and on appeal, you affirm that finding.

I have examined the testimony and the same is correctly set forth in your said office decision.

The principal errors assigned are as follows:—

1. In holding that a certificate of the probate judge of Barber county, Kansas, to a claimed fact is evidence in the case when such certificate is made in general terms.

2. In holding that appellant moved from his own (the school tract) to the land in question without stronger proof as to the identity of the appellant with the person whom it is claimed entered the tract of school land December 23, 1884; that it cannot be assumed in the absence of proof that both are one and the same person.

The certificate alluded to is as follows:

STATE OF KANSAS, *Barber Co. ss.*

In the Probate Court in said county.

In the matter of the application of William McDaniel to purchase the SE. ¼, Sec. 16, T. 34, R. 20, he having proven his continuous residence on said land by two affidavits of William Bott and John L. McDaniel. It is, therefore ordered and adjudged that said applicant be allowed to purchase said land at the appraised value, viz., $480, this 23rd day of December, 1884.

H. H. HARVEY,
*Probate Judge.*

[SEAL.] I hereby certify that the above is a true and correct copy as appears of record in my office.

H. H. HARVEY,
*Probate Judge.*

The statutes of Kansas, Laws of 1876, Ch. 122, Art. 14, invest probate courts with jurisdiction to hear and determine whether a settler upon school land is qualified to purchase the land at the appraised value and its decision upon the facts duly submitted and upon every question involved is binding upon both the settler and the State unless appealed from. (State *v.* Dennis, 39 Kan., 509).

The statutes of Kansas (Sec. 5298, Chap. 92, Laws of 1881) authorize a petitioner for such lands to purchase same on making proof that such petitioner "has settled upon and improved" the lands as set forth in his petition, and the certificate of the probate judge above set out, shows that McDaniels on December 23, 1884, "proved" his continuous residence on the school land, and thereupon he was permitted to purchase the same at the appraised value.

The certificate objected to is informal in failing to show what the original is from which the "copy" was made; but the testimony of McDaniels himself, shows he purchased the school lands and he identifies himself as the same William McDaniels, who made the purchase of the school lands.

A settler on Osage lands must have the qualifications of a pre-emptor; no person who quits or abandons his residence on his own land to reside on the public land in the same State or Territory shall acquire the right of pre-emption. Section 2260, Revised Statutes of the United States.

McDaniels was not a qualified pre-emptor at the time he made his fil-

ing since he was then living on the school lands as shown by him December 23, following, on which day he purchased his school lands; moreover, the statutes of Kansas required him to show continuous residence prior to purchasing school lands, and having obtained the benefits of his own State laws in obtaining school lands, he can not be permitted to deny the finding of the probate court, on his own petition, namely, that he resided on the school lands, in order to show that he was residing on government lands during the same period, for the purpose of pre-empting the same.

The filing of McDaniels is, therefore, canceled, and your said office decision is affirmed.

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### CONTEST—WITHDRAWAL OF CONTESTANT.

### WELLS *v.* HEWITT.

In cases of contest the government is a party in interest and is not precluded by the withdrawal of the contestant from considering the evidence, and passing upon the rights of the entryman; but the government will not on its own motion cancel an entry unless bad faith is clearly shown.

In determining whether a claimant for public land has manifested good faith in the assertion of his claim, his mental, as well as his physical, condition may be considered.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 6, 1890.*

By letter of June 27, 1889, you transmitted the papers in the case of Sumner J. Wells *v.* Oliver N. Hewitt on appeal by the latter from your office decision of October 22, 1888, holding for cancellation his homestead entry for the SE. ¼ of Sec. 29, T. 13 N., R. 61 W., Fargo, Dakota land district, upon the contest of Wells charging failure to establish actual residence. By letter of April 12, 1890, you transmitted the withdrawal by Wells of his contest. This withdrawal is accepted and Wells' connection with the case is thereby ended. In cases of contest the government is a party in interest, and is not precluded by a contestant withdrawing his contest from considering the evidence and passing upon the right of the entryman as between himself and the government. Overton *v.* Hoskin (7 L. D., 394). While this is true, yet the government will not of its own motion cancel an entry if bad faith on his part is not clearly shown. Bell *v.* Bolles (9 L. D., 148).

I think the evidence in this case shows that this entryman had not, prior to the contest established an actual residence on his claim and therefore justified the conclusion reached in your office, as between him and Wells, yet after contest he established his residence and has cultivated and improved the tract to such an extent that as between him and the government, I am not prepared to say that the facts present such a degree of bad faith on his part as to demand that he shall not

be given further opportunity to support his entry in the absence of any adverse claim or rights, and especially so as he will be obliged to show on submitting his final proof, that he has fairly complied with the spirit of the law.

He made his entry January 3, 1884, the contest was initiated May 15, 1886, and the hearing had July 6th following.

The testimony shows that the entryman is an honest, hard-working man, who can easily be imposed upon. He went upon the land in the fall of 1883, and built a small house or shanty and dug a well. In December he went to his sister's and lived during the winter of 1883–4. In the spring he returned to his claim and found that some one had removed his house. He secured timber at considerable cost and built another in June, 1884, and broke fifteen or eighteen acres of land. While breaking he lived in his house, and during the summer dug another well. He was very poor and worked about at different places to get means to live upon and to improve and cultivate the land. He was frequently on the tract working a few days at a time. Built a sod and pole stable at quite an expense, having to haul the poles about fifty miles. Voted in the precinct where the land is situated, claimed it as his home and says he had no other. In this he is corroborated. At the initiation of the contest he had a pair of oxen, a wagon, a plow and was preparing to cultivate twenty-five or thirty acres of land which he had broken.

While his residence is not at all satisfactory, yet I do not find such evidence of bad faith as to absolutely demand the cancellation of his entry. Judging him charitably, I am inclined, under all the circumstances of the case, to give him until he submits his final proof to show a compliance with the law, if he can. He is to be judged in the light of his mental as well as his physical condition for the purpose of getting at his intent during the time he has been asserting claim to this tract. Using these cardinal principles as a guide, I am inclined to the belief that he in the exercise of his understanding and means, intended to honestly comply with the law and rules of the Department. Whether he will be able to show a compliance with the homestead act as to residence, remains to be determined by future considerations, but for the present, let this entry stand and give him a further opportunity to satisfy the Department that in reason and fairness he is entitled to the tract in question.

### RAILROAD GRANT—INDEMNITY SELECTIONS.

### LITTLE ROCK AND MEMPHIS R. R. CO.

Under the grant of February 9, 1853, as revived and extended by the act of July 28, 1866, the aid given by Congress was intended equally for every part of the road and its branches, and deficiencies existing on one of said branches may be made up by selections from lands within the indemnity limits of the other branch.

*Secretary Noble to the Commissioner of the General Land Office, August 2, 1890.*

By letter of October 10, 1889, you submitted list 7, of indemnity selections, embracing 31,192.24 acres, made by the Little Rock and Memphis Railroad Company, successor to the Memphis and Little Rock Railroad Company under the act of Congress approved July 28, 1866 (14 Stats., 338), which revived and extended the act of February 9, 1853 (10 Stats., 155). The list is submitted for such action as may be deemed proper in the premises.

The question presented is whether, under said grant, lands may be taken along one branch of the road, as indemnity for lands lost on the other.

The act of 1853 provided for the construction of a railroad "from a point on the Mississippi river, opposite the mouth of the Ohio, in the State of Missouri, *via* Little Rock, to the Texas boundary line near Fulton, in Arkansas, with branches from Little Rock in Arkansas, to the Mississippi river, and to Fort Smith in said State."

The lands in said list are opposite the Little Rock and Fort Smith or western branch of the road, but selected in lieu of losses along the Little Rock and Memphis or eastern branch.

The granting clause of said act was as follows:

That there be and is hereby granted to the States of Arkansas and Missouri, respectively, for the purpose of aiding in making the railroad and branches as aforesaid, within their respective limits, every alternate section of land designated by even numbers, for six sections in width on each side of said road and branches.

The indemnity clause is:

But in case it shall appear that the United States have, when the line or route of said road is definitely fixed by the authority aforesaid, sold any part of any section hereby granted, 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 aforesaid, from the lands of the United States most contiguous to the tier of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold, or to which the right of pre-emption has attached as aforesaid, which lands, being equal in quantity to one-half of six sections in width on each side of said road, the States of Arkansas and Missouri shall have and hold to and for the use and purpose aforesaid: *Provided*, That the lands to be located shall in no case be further than fifteen miles from the line of the road.

There is certainly no expression in this clause that would limit indemnity selections to the branch on which the loss occurred. The only lim-

itations on the right of selection thus made, are that the lands so selected shall be lands of the United States, "most contiguous to the tier of sections above specified," (*i. e.*, to the granted sections), equal to the amount so lost as described, and in no case further than fifteen miles from the line of the road. That the word "road" as here used, includes the branches as well as the main stem is evident from the fact that most of the indemnity lands along the lines of the branches lay more than fifteen miles from the main stem. To say that the word "road," means only the main stem would, therefore, practically, defeat the indemnity grant for the branches, a conclusion obviously opposed to the purpose of the grant. For a like reason the word "road" as used throughout the indemnity clause necessarily includes the branches. It therefore appears that in providing for indemnity selections Congress made no distinction between the main line as such and the branches.

Nor does it appear from the grant by the State of Arkansas to the Memphis and Little Rock railroad company that the legislature contemplated a change in that respect. The act of the legislature of Arkansas of January 19, 1855, provides:

> That the lands within this State, along the length of the Memphis and Little Rock railroad from Hopefield, opposite the city of Memphis, in the State of Tennessee, to Little Rock, with the right conferred by the act of Congress of selecting other land in lieu of such lands as may have been sold or otherwise appropriated by the United States and which lands were granted by an act of Congress to the States of Arkansas and Missouri, to aid in the constructing a railroad from a point on the Mississippi River, opposite the mouth of the Ohio River, by way of Little Rock, to the Texas boundary near Fulton, in Arkansas, with branches to Fort Smith and the Mississippi River, approved February 9th, 1853, are hereby granted to the Memphis and Little Rock Railroad Company so that they may be legally applied in aid of the construction of said branch railroad separately from said main trunk line, or the Fort Smith branch thereof.

Section seven of said act provides:

> That said lands shall be selected by said company in conformity with said act of Congress, and when so selected, all the title of the State of Arkansas, in and to said lands shall be fully vested in said company for the purposes set forth in said act of Congress.

It will be observed that the right of selection as defined by Congress is not abridged by this act; on the contrary it is expressly declared that such lands shall be selected in conformity with the act of Congress. Furthermore, a consideration of the nature of the grant points to a like solution. The grant was to the State, for the purpose of aiding in the construction of a railroad with two branches. In case sufficient vacant lands were found within the granted limits the grant was satisfied therefrom. Along the line of the Memphis branch the deficit within the granted limits was very great, owing principally to the swampy charcter of the country, such lands having theretofore been granted to the State.

The company having exhausted the lands opposite said branch now asks

to be allowed to select lands along the Fort Smith branch not needed in aid of the construction of the latter. It appears from the records of your office that in 1883 the grant for the Little Rock and Fort Smith road or western branch, having been so far adjusted as to permit of the restoration of the vacant lands along said line, theretofore withdrawn for said road, to the mass of public lands, your office by letters of March 31, of that year, to the various local offices concerned, directed the restoration to the public domain of all such vacant unappropriated lands, not included within the limits of any other grant. The restoration was accordingly made. It thus appears that said western branch road can have no legal claim to the lands here selected, nor has it asserted any. It has received its full quota under the grant and within its own limits.

It must be conceded that the aid given by Congress was intended equally for every part of the road and branches. Unless legislation to the contrary has intervened this intent should be carried out. It has been seen that the State legislation is in harmony with the granting act in this matter. There is therefore nothing in the legislation to warrant a denial of the right now asserted, and the nature of the aid extended by Congress indicates that such selection should be allowed.

But we are not without authority on this point. On August 5, 1852, your office held, in the matter of the Illinois Central railroad that a deficiency on the main line might be made up by selection of indemnity on a branch, and *vice versa*. This rule was followed in the construction of the grant. It was also applied in the administration of the grant of May 15, 1856, to the State of Iowa, made in almost similar terms, so far as the point in question goes, with the present, for a road from Lyon City, etc., " with a branch from the mouth of the Tete des Morts to the nearest point on said road." (11 Stats., 9.)

On December 2, 1875, in the case of the road now known as the St. Paul, Minneapolis and Manitoba railway, having a grant similar to that here in question, viz., the act of March 3, 1857 (11 Stats., 195), Secretary Chandler held that the lands withdrawn for the main line and branch were "equally liable to selection on account of either line," the grant to both being treated as an undivided grant. (2 C. L. O., 134).

This ruling was adhered to by Secretary Vilas (8 L. D., 255).

In the latter case the Secretary said:

> Limiting the view to the act making the grant to the State of Minnesota, it is to be noted that, irrespective of the question of whether the " branch " could be treated as a part of the "road," it is plain that it was the purpose of Congress that any deficiency in the granted limits, should be made up from the indemnity limits without restriction to selection of lands within the limits of coterminous sections. In other words, there can be no doubt that Congress intended that if a deficiency occurred at any point in the granted limits and there were lands within the indemnity limits sufficient to supply all the deficiencies in the granted limits, selections might be made of lands wherever found in the indemnity limits longitudinally to an extent sufficient to supply such deficiencies.

For a further discussion of the question, reference is made to the case.

In the consideration of the matter my predecessor was led to say that the same rule had been applied to the grant to the States of Arkansas and Missouri, here in question. This statement does not appear to be borne out by the record. In a letter dated August 6, 1858, from Commissioner Hendricks to Secretary Thompson, it was said:

> In the case of the grant to Arkansas, by act of February 9, 1853, transferred by the State to several companies,—the adjustment of which commenced under my predecessor, and has lately been completed,—the trunk and branches were treated as separate roads, and the rights and extent of each determined on the principle laid down by this office on the 30th March last, above mentioned. I would also state that Arkansas in transferring the railroad grant to the several companies, makes a grant to each in severalty, transferring the lands etc., upon the main trunk to one company and upon the branches to others.

The decision of your office therein referred to as of "30th March last" was in reference to the Minneapolis and Cedar Valley railroad also under the grant of March 3, 1857, *supra*, and held, "the selections for the branch road in lieu of the lands disposed of within the six miles limits of the same, must be made from the alternate odd numbered sections outside of six and within fifteen miles of the line of route of said branch."

However the error of fact in my predecessor's decision was not at all vital to the case or to his argument. By reference to the above extract it will be seen he reached the same conclusion independently of said fact. This more fully appears from the further discussion in the opinion. Again, the statement by Commissioner Hendricks loses much of its importance in the light of other facts. The statement was not made in any case then pending before him, but was a mere recital in a letter which primarily referred to a different grant. A careful research in your office satisfactorily discloses the fact that the question was never formally presented to Mr. Hendricks in any case. Indeed, this presentation is the first of which any record remains. Certainly the matter has heretofore never reached the Secretary.

Whether the State had the power to abridge or modify the right of selection as defined by Congress, need not be discussed, for in this instance she transferred it intact as it was given by Congress. The question, therefore, reverts to a consideration of the Congressional enactment. In this aspect, that question is in all material respects similar to those cases already cited, and decided by the Department as stated. In the light of precedents the branch having selected vacant public lands within the limits defined by the grant, in the absence of adverse claims, is entitled to the relief sought.

The list is accordingly returned with my approval.

FINAL PROOF PROCEEDINGS—ADVERSE CLAIMANT—IMPROVEMENTS.

FINDLEY *v.* FORD.

Adverse claimants of record are entitled to special notice of intention to submit final proof, and where proof is submitted without such notice, republication is required with special citation to the adverse claimant.

The pre-emption law does not specify the nature or extent of the improvements required of the settler, only requiring that they should be such as to indicate good faith.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 6, 1890.*

I have considered the case of David M. Findley *v.* Patrick Ford on the appeal of the former from your decision of March 15, 1889, accepting the final proof of Ford for SE. ¼ of NW. ¼ and SW. ¼ of NE. ¼ and W. ½ of SE. ¼ Sec. 28, T. 26 S., R. 11 E., M. D. M. San Francisco, California land district and dismissing protest of appellant against the same. The record shows that on July 9, 1886 Ford filed pre-emption declaratory statement for said land, alleging settlement July 2, 1886, that Findley had filed declaratory statement for said land October 4, 1883, alleging settlement October 2, 1883.

On March 30, 1886, Elisha Terrill filed pre-emption declaratory statement No. 2L, 635, for this land in controversy, alleging settlement March 14, of the same year. On December 9, 1886, Ford gave notice by publication of his intention to make final proof on January 24, 1887. On said day D. M. Findley and others filed a protest against said proof alleging therein that said Findley had occupied the said land for three years past and further that Ford had not complied with the requirements of the law in the matter of his pre-emption.

Ford offered his final proof at the close of which Findley, by his attorney cross-examined him and his witnesses and offered testimony adverse to Ford's claim.

Upon consideration of the testimony the register and receiver found:—

1st. That Ford initiated his claim by trespassing upon the enclosure of others to establish his settlement, and—

2nd. That his residence, cultivation and improvements are not sufficient to show good faith.

Upon these findings they recommend that his final proof be rejected and that his claim be canceled. From this decision he appealed and on March 15, 1889, you reversed the judgment appealed from, dismissed the contest and allowed Ford's final proof. From which action Findley appealed. He does not assert any claim to the land under his declaratory statement, and shows by his testimony that at the time of filing the same he owned and resided with his family upon a ninety acre tract of land near Arroyo Grande, California, which home he would have to quit or abandon to make residence on the land in controversy. His

pre-emption declaratory statement had expired by limitation; he had never offered final proof and his attorney in his brief admits that Findley appears not as a claimant but as a contestant.

Then the questions to be determined are:—

1st. What is the effect of the failure of Ford to serve Terrill with notice of his intention to make his final proof?

2nd. Did Ford comply with the pre-emption law?

Taking these questions in their order, it is admitted that Terrill was not notified by Ford of his intention to make final proof. "Adverse claimants of record should always be specially cited both in homestead and pre-emption notices of intention to make proof." Instructions, November 25, 1884, 3 L. D., 196; Tuttle *v.* Parkin, 9 L. D., 495. So that I take it that before this entry can be perfected notice should be given in compliance with these rules.

As to Ford's compliance with the law, the testimony shows that after filing his declaratory statement he built a cabin on the land eight by ten feet, seven or eight feet high, with plank roof, battened door and earth floor. It was rather an inferior structure but in July 1886, he placed therein a bed, table, cooking utensils, some dishes etc., and began living therein. Some time later he procured a cooking stove and put it in his house. He testified that he had lived there continuously since making the filing; that he was an unmarried man, and had worked some for his neighbors, but slept at his house generally when so working; he had cleared and prepared for plowing some four acres of ground and had plowed about two acres; he had also prepared about one hundred fence posts preparatory to fencing his land. In these matters he is corroborated.

In the protest it is alleged that Findley had occupied the ground for three years, and as the testimony showed that Ford had taken the lumber for his house through the fence of Wear, who is an adjoining land proprietor, it is seriously claimed by Findley that Ford was thereby a mere trespasser and can acquire no rights by settlement, residence or improvement on the land, and he cites numerous decisions to support his position, but I do not deem it necessary to repeat them here, for it must be remembered that in the case at bar there was no occupant of the land, no one in possession thereof, rightfully or otherwise, no growing crops thereon, no fence around this specific tract, so that this matter of trespass, so fully argued and so much relied upon by the local officers, is a mere abstract proposition, inapplicable to the facts in this case.

While the improvements of Ford are quite meagre, the testimony shows that he had established and maintained a residence upon the land for more than six months prior to offering final proof. In the case of Chas. S. Hofwalt (9 L. D., 1), it is said—"Pre-emption is a preference right of entry based upon settlement, inhabitancy and cultivation . . . . . The pre-emption act does not specify the nature

or extent of the improvements and only requires that they should be such as would indicate the good faith of the entryman."

In the case of John E. Tyrl (3 L. D., 49), where it appears that the entryman had cleared about one half acre of the land but cultivated no portion of it nor raised any crop thereon, it is held that clearing the land of timber for the purpose of planting it, is cultivation within the meaning of section 2301 Revised Statutes.

Under these decisions and this testimony Ford's proof should be accepted, but as Terrill has not had his day in court, your decision is modified as follows: The protest of Findley and others is dismissed. Ford will make new publication of notice and specially cite Elisha Terrill, and in the absence of protest, and the failure of Terrill to show cause, if any, why his declaratory statement should not be canceled and Ford's proof allowed, the proof already made will be accepted and if there is no other legal objection, the entry will be passed to patent.

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PRACTICE—STARE DECISIS.

JOHN T. NAFF.

The General Land Office in the disposition of cases that fall within well settled rulings of the Department must be governed by such rulings until they are reversed by departmental authority.

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

I am in receipt of a communication from Acting Commissioner Stone, dated August 5, 1890, calling the attention of the Secretary of the Interior, "with a view to repayment, to the pre-emption filing No. 4,813 of John T. Naff, made at the Spokane Falls land office, on the 15th day of July, 1884, for the E. ½ SE. ¼, SW. ¼ SE. ¼, and the SE. ¼ SW. ¼ of Sec. 12, T. 19 N., R. 43 E., W. M."

After making a statement relative to the final proof and payment for said land, the embezzlement by the absconding receiver of the local office of the $400 first paid by the pre-emptor, and the making of new proof and payment for said land, the Acting Commissioner states:

Heretofore the decisions of this Department have been to the effect that no repayments of purchase money can be made *unless* strictly provided for by statutes; even when the money has been paid twice (see 5 L. D., 114). If this be the spirit of the rulings of the Department, there can be no doubt that great injustice is being done to settlers, and has been done in the past. It is not to be presumed that there shall be a particular statute to cover every particular right, wrong, or remedy.

The Commissioner further says:—

It was not the intention of Congress to pass so many many wise, just and liberal laws providing homes for settlers, and then permit them to be harassed, and their rights injured by harsh implications of this department. The mass of unwritten laws are as great, and of as much weight, as the written laws. Many rights are not re-enforced by statutes.

He is therefore of the opinion, "in view of the circumstances of this case . . . . . that repayment should be made."

No application by said Naff for repayment accompanies said communication, nor, indeed, is it expressly stated that he has made any.

The Acting Commissioner makes an argument in support of the right of Naff to repayment, but does not specifically request any instructions in the premises. It is true he cites the case of the Heirs of Isaac W. Talkington (5 L. D., 114), which holds a contrary view to that expressed by him.

It is not intended to express any opinion herein relative to the right of Mr. Naff to repayment. If he has such right, he must show it primarily to your office, and, if its decision be adverse to him, he has the right of appeal. But, in passing upon the question, your office must be governed by the well settled rulings of the Department, which alone has the authority to overrule its own decisions. Any other procedure would make the appellate tribunal inferior to the subordinate and necessarily create inextricable confusion. Troy's Heirs *v.* Southern Pacific Railroad Company (2 L. D., 523); J. H. Kopperud, 10 L. D., 93. No unwritten law can overturn the departmental decisions, duly rendered and promulgated for the guidance of all concerned. If Mr. Naff has made application for repayment, the same should be duly considered by your office in the light of the departmental rulings, and, if adverse to him, he should be advised of his right of appeal to the Secretary of the Interior, and if he exercise such right, his case will be carefully considered.

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### CONTESTANT—PREFERENCE RIGHT—SETTLEMENT.

### POWERS *v.* ADY.

A successful contestant, who has due notice of the cancellation of the entry and fails to exercise the preference right within the statutory period, has thereafter no right of entry that can be asserted in the presence of a valid intervening adverse claim.

Personal acts of the settler are essential to the acquisition of settlement rights.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 8, 1890.*

I have considered the appeal of Anna V. Powers from your decision of December 27, 1888, rejecting her application to enter the SW. ¼ of Sec. 11, T. 122, R. 77, Aberdeen, Dakota.

The facts in the case are stated in your office letter.

The contestant Powers had full notice of the cancellation of the prior entry on the land which she had contested, and failed to exercise the right given her by the statute of making entry for the tract within thirty days from the date of the receipt of said notice, and even if this failure was the result of ill health and want of means, it is beyond the

power of this Department to afford relief in the presence of a valid adverse claim.

From an examination of the evidence I am not satisfied that she acted in perfect good faith in the matter of delaying her application to enter. The explanation given by the contestant and her father of the attempted sale of the right to enter the land is not satisfactory. It is, however, unnecessary to discuss that question at length.

Up to the date of hearing the contestant had not made a *bona fide* settlement on the land or established a residence thereon.

The slight improvement put upon the tract by the father at the request of the contestant, consisting of a little breaking and the commencement of a sod shanty, can not be considered a personal settlement. McLean *v.* Foster (2 L. D., 175); Byer *v.* Burrill (6 L. D., 521).

The contestant did not even go upon the land after the improvements were made until more than a month after Ady had made his homestead entry, and her presence for two separate nights only, in a sod shanty without a floor and without a stove or any article of furniture, or any of the appliances for housekeeping, can not be considered a settlement in the absence of any subsequent act indicating a desire to make a *bona fide* residence.

Your decision is affirmed.

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PROCEEDINGS ON SPECIAL AGENT'S REPORT—EVIDENCE.

UNITED STATES *v.* O'DOWD.

In a hearing ordered to test the validity of an entry the testimony offered on final proof can not be considered, but due weight should be given to the legal presumption that the entry is valid.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August* 8, 1890.

I have considered the appeal of Anthony O'Dowd from the decision of your office dated May 15, 1889, holding for cancellation his pre-emption cash entry, for the NW ¼, Sec. 5, T. 122 N., R. 65 W., Aberdeen Land District, South Dakota.

* * * * * *

As it appears from the record in the case at bar, the claimant and his transferees were duly notified of the time and place of the hearing, and failed to appear thereat, either in person or by attorney. While the evidence given by the witnesses for the government at said hearing is general in its character, and was drawn out by leading questions, yet it establishes a *prima facie* case against said entry. Under these circumstances it was incumbent upon the entryman to offer proof in support of his entry, if he desires to uphold the same. James Copeland (4 L. D., 275); Etienne Martel (6 L. D., 285).

The testimony submitted as final proof can not be considered in arriv-

ing at a conclusion in this case, but due weight should be given to the fact that an entry had been allowed. Tangerman *et al. v.* Aurora Hill Mining Co. (9 L. D., 538).

For the reasons herein given the decision appealed from is affirmed.

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TIMBER CULTURE CONTEST—GOOD FAITH OF CONTESTANT.

McANULTY *v.* WOOD.

A contestant will not be permitted to take advantage of his own wrong to establish a charge of non-compliance with law, and thus secure a preference right of entry.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August* 10, 1890.

On August 25, 1886, Wm. A. McAnulty filed a contest against the timber culture entry of Seeley C. Wood, made November 30, 1883, for the N. ½ NE. ¼ and N. ½ NW. ¼ Sec. 33, T. 21 S., R. 21 W., Larned, Kansas, charging that said entryman "failed to break the ten acres required by law during the first two years of his said entry and up to the present time, and said Seeley C. Wood has offered for sale, and has sold his right and title to said tract of land for a valuable consideration."

The testimony taken at the hearing upon said contest shows that there were not ten acres broken on the tract in controversy during the first and second years of the entry. McAnulty, the contestant swears that Wood the entryman broke what was supposed to be five acres the first year and employed him (McAnulty) to break the other five the second year. He states that he measured the breaking done by Wood, and broke the same quantity; that he agreed to complete the amount of breaking required by law with the understanding that Wood had five acres broken, and he, witness, was to break the same amount, but he did not break five acres because there was not five acres broken by the entryman. He testified that there were about eight acres and twelve rods in the piece measured by him, but there was also an acre of breaking on the tract not included in the breaking measured by him.

The local officers found that—

> There appears to have been the full amount of breaking done to meet the requirements of the law, but the plaintiff and some other parties, by a system of 'horse back survey' starting from a point that they were not positive was an established corner by the government survey, throw a portion of the breaking intended to have been on tract in dispute, upon an adjoining quarter section,—

which finding was affirmed by your office.

While it is true that the plan adopted by contestant to find the exact line of the claim was too uncertain to establish definitely the line—the north-east corner having been located by mere conjecture—yet one of the witnesses testified that he saw the corner stone before it was re-

moved, and knew the line from having built a fence on the prolongation of the east line of the claim. There was also no evidence offered by Wood denying the accuracy of the line as found, or to show where the true line was or that the breaking was all upon the claim in controversy.

But it is shown by the testimony of contestant that he was employed by the entryman to break five acres the second year, both parties supposing that the first breaking embraced the full quantity of five acres, and that it was understood that the breaking to be done by contestant would complete the full quantity required by law. He swears that he knew there was only eight acres and twelve rods broken, but he failed to communicate it to Wood. He further swears that W. S. Wood, a son of the entryman, offered to sell him the tract and then offered to sell it to another, when he, the contestant, told W. S. Wood that he could get it cheaper by contesting it.

I do not think the contestant has shown such good faith in the premises as to prevent the entryman from curing the default, even in face of this contest, and as it is shown by the testimony that prior to the hearing the defendant had two more acres broken, thus completing the amount required by law, to cancel this entry and award to contestant the preference right of entry would be to aid him in taking advantage of his own wrong.

There was no testimony showing that the entryman had offered to sell the tract, the only testimony upon this point being that W. S. Wood, a son of the entrymen, had offered to sell, but there was no evidence showing that he was the agent of the entryman, or had authority to make such an offer.

For the reasons above stated the decision of your office dismissing the contest is affirmed.

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### SETTLEMENT RIGHTS—RELINQUISHMENT.

### CASON *v.* LADD.

One who is occupying land as the tenant of an entryman, acquires no right as a settler, on the relinquishment of the entry, that can be set up to defeat the intervening entry of another.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August* 11, 1890.

The tract in controversy, to wit, the S.½ SE¼. Sec. 31, T. 18 S., R. 6 W., Larned land district, Kansas, was formerly embraced in the timber culture entry of Joseph H. Leavitt which was relinquished November 12, 1885. On the same day Zachius E. Ladd made timber culture entry of said tract and on November 20th following Daniel E. Cason applied to make homestead entry of the tract alleging settlement April 15, 1885, which was also allowed. Ladd then filed application to have the homestead entry of Cason canceled and upon a hearing had thereon

the local officers held said entry for cancellation, which decision was affirmed by your office.

From said last decision Cason appealed alleging the following grounds of error:—

First. Error in holding that the entry of Ladd segregated the land as against the claim of Cason who was an actual settler upon the land at the time the entry of Leavitt was canceled, and the entry of Ladd was made of record, and with the intention of claiming the same as a homestead.

Second. Error in not holding that the right of Cason attached *eo instanti* upon the cancellation of Leavitt's entry.

Third. Error in holding that Cason could not legally enter the land as against Ladd because he went upon the tract as the tenant of Leavitt, for the reason that Leavitt's right ceased the instant his entry was canceled and the tract then became public land, and the right of Cason that instant attached, by reason of his residence upon the land at the time with the intention of claiming the same as a homestead.

Fourth. Error in not holding that the entry of Ladd was subject to the prior right of Cason by reason of Cason's prior settlement.

The testimony shows that Cason went upon the land as the tenant of Leavitt while the land was covered by Leavitt's timber culture entry, and was upon the land at the date of the filing of the relinquishment of said entry by Leavitt. Cason acquired no rights by virtue of his occupancy of the land as the tenant of Leavitt while the land was segregated by Leavitt's entry, and not having gone upon the land with the intention of making it his home and to acquire it under the settlement laws, his right as a settler did not attach upon the cancellation of Leavitt's entry, but could only attach from the moment he went upon the land with the intention of making it his home under the settlement laws and performing some act indicative of such intent. Franklin *v.* Murch (10 L. D., 582).

Ladd's entry having been made the same day the relinquishment was filed, the subsequent entry of Cason was improperly allowed.

The decision of your office canceling said entry is therefore affirmed.

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### PRACTICE—SECOND CONTEST—APPEAL—ENTRY.

### DRUMMOND *v.* REEVE.

A charge of non-compliance with law directed against an entry, coupled with an allegation that the pending suit of another against such entry is collusive, affords a proper basis for a contest.

Failure to appeal from the rejection of an application to contest an entry defeats all rights of the contestant thereunder.

An application to enter land, covered by the prior entry of another, can not be entertained in the absence of a charge against the validity of such entry.

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

The appeal of William Drummond from your office decision of August 27, 1888, is now before me, and the accompanying record shows that on

August 4, 1881, Oliver P. Reeve made timber-culture entry No. 4086, for lots 3, 4 and E. ½ of SW. ¼ Sec. 6, T. 24 S., R. 33 W., Garden City, Kansas.

August 20, 1886, W. H. Harris initiated a contest against said entry, and accompanied it with an application to enter the tract under the timber culture law. September 13, 1886, George R. Moore also filed contest, and application to enter the same under said act.

Each of these contests charged non-compliance with the law in relation to cultivation and planting the land with trees.

On September 25, 1886, William Drummond, the appellant herein, applied to the receiver to make homestead entry of the same tract, and accompanied his application with an affidavit of contest against the entry of Reeve, alleging in addition to failure to comply with the timber-culture act, that the contests of Harris and Moore were of a friendly nature, that each of them was a warm friend of the defendant Reeve, and that their respective contests were brought for the purpose of "smuggling" the land and preventing a legal contest, and that said Reeve has repeatedly offered to sell his relinquishment to said tract for a valuable consideration. The application of Drummond to enter and contest was rejected by the receiver, the affidavit of contest being endorsed:

Presented and rejected this 25th day of September, 1886, for the reason that there are at this date two contests undetermined and pending upon said tract.

S. THANHOUSER, *Rec'r.*

Underneath this endorsement the following appears:

Thirty days for appeal to the Hon. Commissioner.

November 17, 1886, Reeve filed a relinquishment of his entry, and on the same day the same was canceled, the contests of Harris and Moore dismissed, and Anna M. Boyle allowed to make timber-culture entry No. 8431 for the tract.

Upon Reeve's relinquishment is the following endorsement written with a pencil:

CONTEST CLERK: Notify contestant of filing of this relinq. and contestant's pref. ight.

C. F. M. NILES, *Reg.*

On the 27th of the same month Drummond again applied to make homestead entry of the land, which application bears the following endorsement:—

Presented and rejected this 27th day of November, 1886, at 11:15 a. m., for the reason that there is at present a filing upon the tract, viz: Anna M. Boyle, November 17, '86. There appears however to be some grounds for the accusation of fraud in third contest of William Drummond *v.* O. P. Reeve, as Anna M. Boyle, the present entryman is contestant in neither case, having a prior right over the case of Drummond *v.* Reeve. Both of these contests were dismissed by Rec. November 17, '86, the date of Anna M. Boyle's T. C. filing. Thirty days for appeal to Hon. Com. Genl. Land Office.

C. F. M. NILES, *Reg.*

December 27th following, Drummond filed his appeal from this action of the register.

January 11, 1887, Anna M. Boyle filed a motion to dismiss the appeal, because it was not filed in time, and because a copy of the appeal was served on Boyle instead of Reeve.

Your predecessor overruled the motion to dismiss the appeal, but affirmed the action of the register in rejecting Drummond's homestead application of November 27, 1886, and held that the action of the receiver in rejecting appellant's application to contest, made September 25, 1886, was wrong, but that he is bound thereby by his failure to appeal within the thirty days allowed him; he also held that the action of the register in dismissing the contests of Harris and Moore on the filing of Reeve's relinquishment was wrong, but that their interests are lost by their having failed to appeal therefrom, but he concluded his judgment by allowing Drummond "the privilege of appeal from so much of this decision as denies his application to enter said tract, and no more." From this judgment Drummond now appeals to this Department.

The action of the receiver in rejecting Drummond's application to contest the entry of Reeve was unauthorized by law, and gave rise to all the complications that subsequently appear in this case. This offered contest of appellant alleged collusion with the claimant upon the part of both prior contestants, and the record in the case undoubtedly gives color to such charge. But having failed to appeal from the rejection of his contest application of September 25th, he has lost his rights thereunder. Hawkins et al. *v.* Lamm, (9 L. D., 18); Conly *v.* Price, (ib., 490).

And the timber-culture of Boyle having been allowed prior to his last application of November 27, to enter under the homestead law, such application not having been accompanied by an affidavit of contest against the Boyle entry, was properly rejected. Hence, Drummond has no standing before the Department, for the reasons:

1st. He failed to appeal from the rejection of his application to contest the entry of Reeve.

2nd. He failed to accompany his application of November 27, to make homestead entry, with an affidavit of contest, charging that the relinquishment of Reeve and the entry of Boyle were the result of a collusive contest, prosecuted for such fraudulent purpose.

The decision of your office is therefore, affirmed.

### HOMESTEAD SETTLEMENT—PRE-EMPTION CLAIM.

BEEBE *v.* CALLAHAN.

The validity of a homestead settlement is not affected by the fact that it is made pending the issuance of final certificate on pre-emption proof, previously submitted by the settler in due compliance with law.

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

I have considered the appeal of George W. Beebe from the decision of your office dated February 7, 1889, in the case of said Beebe *v.* Enoch Callahan, holding for cancellation the former's pre-emption declaratory statement for the N. ½ of NE. ¼ Sec. 11, and NW. ¼ of NW. ¼ Sec. 12, T. 31 N., R. 15 W., Niobrara land district, Nebraska.

May 30, 1884, Callahan made homestead entry for said tract, and on March 23, 1885, in accordance with published notice, he offered final commutation proof for said land before the clerk of the district court at O'Neill, Nebraska and on the same day Beebe filed a protest against the acceptance of Callahan's commutation proof alleging that he, Beebe, made settlement on said tract May 9, 1884, and established actual residence thereon June 4th which was continuous, and filed his pre-emption declaratory statement for the same June 12, 1884; that he could prove that Callahan did not settle upon nor make improvements on the land until one or two weeks after May 9, 1884.

Both the final proof and protest having been transmitted to the local office, hearing was ordered and set for June 11, 1885, before the register and receiver. On the day appointed the parties appeared in person and by their respective attorneys. A large amount of testimony was offered by both parties and the local officers from an examination thereof, found that Callahan made settlement upon the land May 7, 1884, and that he established actual residence on the land July 5, 1884, which was continuous; that he has a well and nine acres of breaking, and had raised a crop on a portion of the breaking one season; that he had "made final proof in support of a pre-emption filing for the E. ½ NW. ¼ and W. ½ NE. ¼ Sec. 12, T. 31, R. 16 W., . . . . April 23, 1884, . . . and as . . . final certificate bears date May 16, 1884," he was not qualified to make settlement for other lands prior to that date, and although his settlement was prior to the time Beebe settled on the land, they rejected his commutation proof and recommended his homestead entry for cancellation. From this judgment he appealed to your office, where, on February 7, 1889, after considering the evidence, you concurred in the findings of the register and receiver as to the prior settlement, residence and improvement of Callahan on the tract in dispute, but reversed that portion of their findings as to the illegality of claimant's settlement, citing as authority for so doing the case of Joseph W. Mitchell (7 L. D., 455), and held protestant's

pre-emption declaratory statement for cancellation and returned the commutation proof "for further attention." From this decision Beebe appealed to this Department.

Reviewing the evidence in the case, I think it fairly shows that Callahan made settlement on the tract covered by his homestead entry, and established his residence thereon with his family, to the exclusion of one elsewhere, within the time required by law, and that the same was continuous.

This case as to the qualifications of Callahan to make a settlement at the date he alleges seems to come within the rule laid down in the decision cited by your office and in the later decision of the same case, (8 L. D., 268).

The judgment appealed from seems to be justified by the facts, and in accordance with the rulings applicable to such cases, and is therefore affirmed.

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PRACTICE—EVIDENCE—DEPOSITIONS—TIMBER CULTURE.

FIERCE *v.* MCDOUGAL.

Failure to endorse the title of the cause on the envelope enclosing depositions does not necessarily exclude the depositions from consideration, where no apparent prejudice to the interests of either party results from the absence of such endorsement.

A technical objection to the regularity of depositions, can not be raised on trial, by one who participates in the examination of the witnesses, and, at such time, takes no exception to the proceedings.

An irregularity in the transmission of depositions may be waived by agreement of counsel.

A timber culture entry must be canceled if the evidence shows that the failure to secure a growth of timber results from the want of ordinary diligence on the part of the entryman.

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

This case comes before the Department upon the appeal of C. McDougal from the decision of your office holding for cancellation his timber-culture entry, made February 23, 1874, for the SE. ¼ Sec. 23, T. 18, R. 18 W., Wa Keeney, Kansas.

Contest was filed against said entry February 24, 1885, by Henry Fierce, alleging that the entryman had failed to plow, plant, and cultivate to trees ten acres, as required by law, specifically setting forth in his affidavit the grounds upon which said allegation is based.

At the hearing ordered upon this contest counsel for the entryman moved to suppress the depositions of witnesses McFadden, Burns, Hart, Miller, Donleavy and Koon, upon the ground that said depositions were not transmitted to the local officers according to law, there being no

endorsement on the sealed package indicating the character of its contents, or that the depositions were sealed by or in the presence of the officers before whom they were taken. He also moved to suppress the testimony of witnesses Hayes, Anderson, Reed, Wood, and McFadden, upon the ground that there was no stipulation between the parties to take said testimony before A. H. Morris, and the official character of Morris was not authenticated.

These motions were overruled by the local officers, and upon the testimony submitted they found that the charges in the affidavit of contest were sustained, and recommended the cancellation of the entry.

From said several rulings and findings the entryman appealed, and upon consideration thereof your office affirmed the rulings and findings of the local office and held the entry for cancellation. Whereupon the entryman appealed, alleging error in said decision, substantially as follows:

(1) In holding that the depositions of McFadden and others were taken under a commission regularly issued, and that the omission of the endorsement of the title of the case on the envelope was not essential and material, and was not a fatal defect.

(2) In holding that there was any stipulation between the litigants to authorize the taking of the depositions of Hayes, Anderson, and others before A. H. Morris, and in considering said testimony as evidence.

(3) In holding that there was any substantial default in complying with the requirements of the law during any of the years following the entry to date of hearing.

The records show that the contestant, in compliance with rule 24, rules of practice, made affidavit before the local officers that McFadden, Burns and the other witnesses therein named were material witnesses for contestant, and resided more than fifty miles from the local office, and at the same time filed interrogatories to be propounded to said witnesses, stating their names and residence, which were served upon the opposite party. Upon this a commission was issued by the local officers, appointing A. J. Yawger, clerk of the district court for Rush county, Kansas, to execute the same, and in pursuance thereof, said testimony was taken by the person named therein, and was returned to the local officers in compliance with rules 28, 29 and 30, of practice, except in failing to have "the title of the case endorsed on the envelope."

While it is true that rule 30 requires that the title shall be endorsed on the envelope containing the deposition and should be observed, yet, I do not think a failure so to do is necessarily fatal to the taking of the deposition. A rule of the Department may always be waived in the interest of substantial justice, as rules are made to facilitate rather than to embarrass and defeat it. Caledonia Mining Company *v.* Rowen, 2 L. D., 719.

There is nothing in the record to show that the failure to make this endorsement was prejudicial to the rights of either party to the controversy. The depositions appear to have been fairly taken and correctly mirror the facts as given by the witnesses. Under such circumstances, I do not believe there was any substantial error in the local office overruling the motion to suppress the depositions for that reason. Neither do I think there was any error in overruling the motion to suppress the testimony of Hayes and other witnesses, taken before A. H. Morris. The evidence of these witnesses was taken under a stipulation signed by Fierce, the contestant, and A. H. Bain, as attorney for contestee, agreeing that the testimony shall be taken at Walnut City, Kansas, "before any officer authorized to administer an oath, that may be agreed upon by contestant and T. H. McDowell, attorney for contestee * * * * * waiving all irregularities in the manner in which said depositions shall be taken and filed." Mr. McDougal was represented by his attorney. The testimony of said witnesses was taken without objection on his part, as was also that of three of Fierce's witnesses. While it does not appear that there was any express agreement designating Morris as the person to take the testimony, yet under such circumstances it must be held that he waived any objection to the evidence being taken by him under the stipulation.

The doctrine of estoppel will apply to him in such case in all its rigor. He will not be permitted to appear, conduct an examination of witnesses, offer his own proof, raise no objection to the proceedings, and when the testimony is offered on the trial, for the first time make an objection of this technical character. No complaint is made that the evidence of the witnesses was not taken by Mr. Morris as given, or that Mr. McDougal did not have an equal opportunity with his adversary to examine the witnesses produced at the hearing, on the contrary, it would appear that Mr. Fierce represented his own case against the attorney of McDougal, hence, it would seem that he has no ground of complaint on that score.

This testimony was not transmitted by mail, but was delivered to the local officers by contestant, and subsequently he and Bain, attorney for contestee, signed an agreement, reciting that whereas the testimony of Hayes, Anderson and Reed on behalf of contestee and of Wood and McFadden on behalf of contestant was taken before said Morris, a justice of the peace, and was not transmitted by mail, but delivered to the local officers by said contestant: "Now, therefore, the undersigned contestant, and contestee hereby waive any and all objections to the irregularity that may exist in thus transmitting said depositions, and the same shall be treated in all respects as if they had been regularly transmitted by the United States mail."

I find no denial of the authority of said attorneys to act for and to bind the contestee by their said agreements, nor is there any denial that said agreements were signed by counsel as above set forth. It is my judg-

ment that the action of the local office on these preliminary motions was justified. As to the merits of the case, it appears that this entry was made February 23, 1874, eleven years before the contest was filed. The testimony shows that the entryman, by his agent, planted the ten acres required by law with seeds and cuttings, during the first five years of the entry, but they failed to grow, and he continued to replant ten acres each year from 1878 to 1885, except two years, when no work was done, but at the date of the hearing no trees of any size or age were growing on the claim, except a few straggling sprouts from old roots, and the land on which the seeds and cuttings were planted was then overgrown with weeds and grass. The failure of the cuttings and seeds to grow is accounted for by the witnesses for the contestee by reason of excessive drought, and they swear that the seeds and cuttings did not even sprout on account of the dry weather, and, hence, there was no necessity for cultivation. But it is shown by the testimony that crops on the adjacent farms were abundant during these years, and that tree culture was successful on other claims in that locality during the same period. Even the witnesses for the contestee admit that during those years there were good seasons part of the time, and that the land had not been properly cultivated, while the testimony of the witnesses introduced by contestant shows that the soil on this claim is fertile and that if the planting and cultivation had been done in the proper manner, trees could have been successfully planted and grown.

Considering all of the testimony, there is sufficient in it to warrant the finding of the local office and of your office that the entryman could have secured a growth of timber by the exercise of ordinary care in planting and cultivation, and failing in this his entry must be canceled.

Your decision is affirmed.

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### RAILROAD GRANT—WITHDRAWAL—UNSURVEYED LAND.

OLNEY *v.* HASTINGS AND DAKOTA RY. CO. (On Review).

A withdrawal in aid of a railroad grant takes effect upon unsurveyed, as well as surveyed land.

The status of land at date of definite location determines whether it is subject to the grant, irrespective of any subsequent order of withdrawal.

A plea that a withdrawal cannot take effect before the company accepts the conditions imposed by the State in conferring the grant upon the company, if effective for any purpose, can only be set up on behalf of one who has been induced, by such condition of affairs to go upon land otherwise subject to said withdrawal.

*Secretary Noble to the Commissioner of the General Land Office, August 19, 1890.*

The attorney for Frank P. Olney has filed a motion for reconsideration and revocation of departmental decision of February 10, 1890 (10 L. D., 136) in the case of Olney *v.* Hastings and Dakota Ry. Co. involving the NW. ¼ of Sec. 15, T. 120 N., R. 43 W., Marshall (formerly Benson) land district Minnesota.

This land is within the primary limits of the grant of July 4, 1866 (14 Stat., 87) to the State of Minnesota to aid in the construction of a railroad from Houston to the western boundary of the State, as shown by the map of definite location filed June 26, 1867. On April 22, 1868, a withdrawal of all lands within the limits of the grant was ordered, notice thereof being received at the local office May 11, 1868. On April 12, 1870, the plat of survey of this township was filed and on September 9, 1870, one Augustus E. Field filed pre-emption declaratory statement for said tract alleging settlement June 10, 1869. On November 14, 1887, Olney applied to make homestead entry for said land which application was rejected by the local officers because of the grant to the company. Upon appeal to your office the decision of the local officers was reversed upon the theory that prior to February 14, 1871, it had been the uniform holding that "withdrawals were not effective on unsurveyed lands until the plat thereof was filed and that settlements made prior thereto were allowed to be perfected" and that Field's settlement existing at the date of the filing of the township plat served to except the land from the grant. Upon appeal to this Department that decision was reversed by the decision now sought by the motion under consideration to be revoked.

In support of said motion it is alleged that the following errors appear in said decision—

(1) Error in holding the withdrawal for the benefit of the railroad company was effective upon unsurveyed lands.

(2) Error in holding withdrawal made for land opposite portions of the road not completed within the time limited in granting act and before date of acceptance of act of legislature of Minnesota of February 8, 1878, could be effective for any purpose.

(3) Error in holding the withdrawal made opposite this land April 22, 1868, and the only withdrawal made, was effective, although made before the railroad company accepted the act of the legislature of Minnesota, dated March 7, 1867, which conferred the grant upon the company.

(4) Error in holding the grant took effect upon the land in controversy although at date of definite location it was unsurveyed and prior to and at date of survey it was occupied by an actual settler under the pre-emption law.

(5) Error in holding the land was not absolutely excepted from the grant.

(6) Error in rejecting the application of Olney to enter the land.

(7) Error in holding that Olney is not entitled to relief under the act of April 21, 1876.

It is not seriously contended that a withdrawal does not under the present ruling, take effect before survey. The change in the rulings of Department was made about the time indicated in the Commissioner's decision above referred to and it is admitted by all that since then it has been held that such withdrawals operate as to unsurveyed as well as surveyed land. This disposes of the first allegation of error adversely to the motion.

The second and third allegations may be considered and disposed of together. The plea that the withdrawal could not take effect before the acceptance by the railroad company of the conditions of the act of the

State legislature conferring the benefits of the grant upon the company or that the company had failed to formally signify its acceptance of such act if available for any purpose could only be in behalf of one who was induced by the condition of affairs to go on such land and not in behalf of one who like Olney went on the land after the conditions of the grant had been accepted and complied with. There is no sufficient reason advanced in these two allegations for the action asked by this motion. The case of Hastings and Dakota Ry. Co. *v.* Bailey (2 L. D., 540) cited does not sustain the contention of counsel, for in that case the Department refused to decide what effect a withdrawal made before the grant was conferred upon the company would have as to land upon which an entry was allowed before the date of the act of the State legislature conferring the grant upon the company.

The question as to whether this land was or was not excepted from the order of withdrawal is of little importance in this case. The right of the State is determined by the condition of the land at the date of the filing of the map of definite location of the road in aid of the construction of which the land is to be appropriated. This land was vacant unappropriated public land at the date this grant attached and must be held to have passed thereunder.

What might have been the effect of Field's claim, it having been allowed in accordance with the rulings of the Department then in force, if he had not abandoned it but were here asserting rights thereunder it is unnecessary to decide. No right is being asserted by Field or any one claiming through him. Certainly Olney can not be allowed to plead with success, that because there was at one time a claim that would have been entitled to protection because made in accordance with certain rulings his claim initiated years after a change in such rulings is entitled to the same protection. The fourth allegation of error can not be sustained.

The fifth and sixth allegations are merely formal and need not be considered apart from the others.

It is insisted that it was error to hold that Olney was not entitled to relief under the act of April 21, 1876, but it is not specifically stated which section of that act applies to his case. In the brief filed in support of this motion, after reciting the class of claims covered by each of the three sections the following language is used:

> It is not clear that Field's case would fall within any of these classes. If it is held the grant and the withdrawal could be effective upon unsurveyed land, then it would not, as Field's settlement and filing was after notice was received at the local office.

Again after referring to a large number of cases decided under said act, it is said:

> These cases are referred to for the purpose of showing that, if it is intended to hold Field if applying, might be relieved under the act of April 21, 1876, but that no one else could if applying under him, it is not in harmony with previous rulings of the Department.

It was not however intended to hold in the decision complained of that Field would have been entitled to relief under said act. The only section of that act that could by any possible construction have application to Field's case is section one, and it was said in the decision under consideration—"In the first place section one of the act of April 21, 1876, has no bearing on this case." It is thus seen that the hypothesis upon which all those cases are referred to has no existence. Olney's claim does not fall within the provisions of said act. He did not assert any claim to said land before notice of withdrawal reached the local office, and therefore does not come within the provisions of the first section of said act. No valid pre-emption or homestead claim existed for this land at the date of the withdrawal and therefore the second section does not apply. Olney has not been allowed to make an entry and he does not therefore come within the provisions of the third section.

In addition it may be said that in each of the cases cited in behalf of Olney there was at the date notice of the withdrawal reached the local office as to the land involved in existence a valid claim and in that material particular those cases differ from this case of Olney. This motion can not be sustained upon the ground that Olney is entitled to relief under the act of April 21, 1876. After a careful review and reconsideration of this case in the light of the argument filed and the cases cited in support of the motion to revoke and rescind the decision heretofore rendered, I find no sufficient reason for such action. Said motion is therefore over-ruled and the decision heretofore rendered is adhered to.

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### TIMBER-CULTURE CONTEST—BREAKING—GOOD FAITH.

### HARRISON *v.* SCHLAGENHAUF.

Failure to break the full amount of acreage required by statute does not call for cancellation, where good faith is manifest, and the default is cured when discovered.

Acts performed in compliance with law after contest is filed, but prior to service of notice, may be accepted as indicative of good faith, if not induced by actual notice of the pending contest.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August* 19, 1890.

Jacob Schlagenhauf made timber-culture entry of the NW. ¼ Sec. 30, T. 12 S., R. 23 W., Wa Keeney, Kansas, December 18, 1883, and on December 19, 1885, William S. Harrison filed affidavit of contest against said entry, alleging failure "to break, plow, or cultivate the second five acres during the second year, or at any time since date of entry."

Service of said notice of contest was made by publication, the first notice appearing January 7, 1886.

Upon the hearing had thereon, the local officers found that the preponderance of testimony is in favor of the contestant, and that the entry should be canceled. Upon appeal therefrom, your office reversed said finding and held that the law had been substantially complied with, and dismissed the contest. From said decision the contestant appealed.

Prior to October, 1885, about five acres of the tract had been broken and cropped to oats one year, and during that month said five acres were planted to trees and tree seeds. On December 22, and 23, 1885, the second breaking was done, but upon actual measurement of both tracts the entire quantity of land broken was found to contain a fraction less than ten acres.

The only questions involved in this case are, whether the failure to break the full quantity of ten acres was such a default as to work a forfeiture of the claim, and, if not, whether the breaking of said quantity of land after contest and prior to service of notice will defeat it.

One of the witnesses introduced by the contestant testified that he is a competent surveyor, and upon actual measurement of the tract found it to contain nine acres and one hundred and twenty-eight rods, while one of the witnesses introduced by contestee, who is also a surveyor, testified that by the survey made by him he found it to contain nine acres and thirteen sixteenths of an acre. It is shown by the testimony of the agent of the entryman who did the last breaking, that he supposed when he finished plowing that he had broken over ten acres with the land first broken. The failure to break the full quantity of ten acres, lacking only a small fraction of an acre, was clearly the result of a mere error of judgment, and is not such a failure to comply with the law as to warrant the forfeiture of the claim.

It is contended by contestant that the entryman had notice of said contest prior to January 7, 1886, from the admission of Warner, the agent who did the last breaking, that he knew the second plowing was done on the 22d and 23d of December, 1885, because he caught Harrison and Ferris surveying the land on the 21st, and marked it in an almanac. This does not prove that either the agent or the entryman knew at the time that a contest had been filed against the entry, and although an attempt to cure a default after a contest has been filed, but before service, can not be accepted as evidence of good faith, if such action is induced by the contest, yet the default may be cured, if the action was not induced by actual notice of the pendency of the contest.

Besides, in this case Warner, the agent, testified that he supposed from information received from Reddick, who did the first breaking, that eleven acres had been broken, and the entryman swears from information received by him he believed the full quantity of land had been broken, as he paid Reddick for breaking that quantity, and, although this is denied by Reddick, it is confirmed by the letter of Reddick to J. T. Buck. He swears that the first intimation he had of the deficiency

was obtained from a letter written by Warner, his agent, which he received between the 19th and 23d of December, 1885. "A timber culture entry will not be canceled for failure to break the requisite number of acres, where the entryman honestly supposed that he had complied with the law, and made good the deficiency as soon as practicable after its discovery." Purmort *v.* Zerfing (9 L. D., 180).

The decision of your office is affirmed.

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PRACTICE—APPLICATION—APPEAL—POSSESSION.

MASSEY *v.* MALACHI.

The rights of an applicant for public land should not be prejudiced by mistake of the local office.

The failure of an applicant to appeal from the rejection of his application, does not impair his claim, if he is not advised of his right of appeal to the Commissioner.

When an application is rejected by the local office, the date of its presentation, and the reason for the rejection should be noted thereon.

One who goes upon land covered by the open and notorious occupancy and possession of another is bound to take notice of any rights that may exist in the prior occupant.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August* 19, 1890.

I have considered the case of Robert J. Massey *v.* Lindsey Malachi on appeal by the former from your decision of February 23, 1889, dismissing his contest against the homestead entry of the latter, for the E. ½ NW. ¼ and W. ½ NE. ¼ of Sec. 30, T. 18 S., R. 2 W., Montgomery, Alabama land district.

Malachi made homestead entry for said land on October 30, 1886, and on February 26, 1887, Massey filed affidavit of contest against the same alleging:

That he had resided upon the land since 1881; that the said Lindsey Malachi knew that the contestant resided upon said land at the time he entered the tract; that said tract is not settled upon and cultivated by said party as required by law, and that contestant is the only person, with his family, who resides upon said tract, and that he has resided on said tract and improved and cultivated the same since January or February 1881, and that he had applied to enter the same several times before the same was entered by said Lindsey Malachi, and that his applications have been rejected by the register of the local office and his money returned to his attorney, E. K. Fulton.

Notice of contest was given, and the hearing set for May 10, 1887, on which day Massey appeared with counsel and witnesses. Malachi appeared and asked continuance because of the absence of his attorney. A continuance was denied and the testimony taken, and upon consideration of the same the register and receiver held the entry of Malachi for cancellation, from which order he appealed to your office, and on February 23, 1889, you reversed said decision and dismissed said contest, from which judgment Massey appealed to this office.

Counsel for Malachi has filed a demurrer, motion and answer to the specifications of error assigned in the appeal. I have considered each objection, and am of opinion that they are not well taken. In my judgment the specifications are sufficient in law and substantially true in fact.

The record shows that in 1881, Massey applied to enter the tract in controversy, but his application was rejected because the local officers believed it was listed as coal land. The books of your office do not show that said tract in question was ever reported as mineral or coal land, but on the contrary that the same was subject to entry as agricultural land.

In 1885, he again applied to make homestead entry of the tract, and on August 24, 1885, the local officers notified him of the rejection of his application, saying—"The application is not allowed because, upon examination of the mineral list on file in this office, I find that the land mentioned has been classed coal, and is not subject to H'd entry." Massey was not advised of his right of appeal, and in each case he did what he could to place an entry on record. The local officers through a mistake, rejected his applications through no fault of his, and he should not be prejudiced by the error of the register and receiver.

Now turning to the evidence in the case, from an examination of the testimony, I think it substantially establishes the allegations of the affidavit of contest. It shows that the contestant made settlement upon the land in February 1881; that he erected a house with kitchen attached, built a corn-crib, two stables, a barn, and cleared between twenty and twenty-three acres of land which he fenced and cultivated until after the entry of Malachi. During the time from 1881 till 1887, he resided with his family on the land, with the exception of a short time when his family were absent so that his children could attend school; during this time, his stock and property except some household goods were kept on the tract and he made his home there and cultivated the land during their absence.

In the spring of 1887, Malachi went upon the land and erected a board box house, twelve by fourteen feet, without any chimney; he made no other improvement; he moved some household goods into the house and stayed there a part of the time,—he says his wife's health was such he could not move his family into the house.

In your decision you give much prominence to the fact that Massey did not appeal from the action of the local officers rejecting his application, and because no appeal was taken within thirty days, you say he can not now be heard to allege that he has the superior right to enter said land. It is sufficient to say he was not advised "of his right of appeal to the Commissioner" as required by paragraph 2 of rule 66, of Practice.

It may be further noted that the local officers failed to indorse upon said application either the date when presented, or their reasons for rejecting it as required by paragraph 1, of same rule.

Again you reject his claim because adverse rights have intervened; but when Malachi went upon this land, Massey had his improvements thereon, as well as his stock and property; his fields were enclosed, and he had been for five years in open notorious possession, of all of which Malachi had full knowledge when he went upon the tract. It is quite clear that Massey was prior in time, in making settlement upon the land and in filing his application to enter the same, and the testimony does not show any abandonment of his claim to make entry and make his home upon the land. Aside from this, the equity of the case is with Massey. It was not his fault that his entry was not allowed, his improvements are lasting and valuable, while those of Malachi are very meagre. It seems that both the law and equity would allow the claim of Massey.

Your decision is reversed. Massey will be allowed thirty days from notice of this decision within which to complete his entry by payment of fees, etc. Malachi's entry will, in the meantime, be suspended and in the event that Massey completes his, Malachi's entry will be canceled, otherwise it will remain intact.

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CONTEST—PROCEEDINGS BY THE GOVERNMENT.

LOUIS *v.* TAYLOR.

No rights can be acquired under an affidavit of contest filed during the pendency of an order on the entryman to show cause why his entry should not be canceled for failure to submit final proof within the statutory period.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August* 19, 1890.

On June 20, 1888, William A. Louis filed an affidavit of contest (alleging abandonment) against the homestead entry made by John W. Taylor August 15, 1879, for the SE. ¼ Sec. 8, T. 11 S., R. 32 W., (Hays City series) Wa Keeney, Kansas.

The said affidavit was, as shown by endorsement, rejected at the local office for the reason that "the government has already taken steps to procure the cancellation of this entry." This action on appeal by Louis was affirmed by your office decision of September 18, 1888. Louis appeals.

It appears that your office, by letter dated January 6, 1888, instructed the local officers to "advise Taylor that the statutory period within which proof is required to be submitted had expired, and to cite him to show cause within thirty days why his entry should not be declared forfeited and canceled for non-compliance with said legal requirement;" that notice of said order was sent to Louis by registered letters, which were "returned uncalled for," and that so far as the record discloses the proceeding referred to is still pending.

The case at bar is in all material respects similar to that of Dean *v.* Peterson (11 L. D., 102), involving land in the same district, wherein the Department held that no rights could be acquired under an affidavit of contest filed during the pendency of proceedings by the government against the entry. See also Canning *v.* Fail (10 L. D., 657); Drury *v.* Shetterly (9 L. D., 211); Arthur B. Cornish (Id., 569).

The decision appealed from is in accordance with the foregoing and is hereby affirmed.

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MOTION FOR REVIEW—TRANSFEREE.

OTTO SOLDAN.

A transferee who desires to be heard on review must set up facts sufficient to show that he is entitled to such hearing.

*Secretary Noble to the Commissioner of the General Land Office, August 19, 1890.*

The attorney for D. Rhomberg claiming to be the assignee of the mortgage of Otto Soldan has filed a motion for review of departmental decision of October 23, 1888, rejecting Soldan's commutation proof under his homestead entry for the E. ½ of the SE. ¼ Sec. 21 and the W. ½ of the SW. ¼ of Sec. 22, T. 113 N., R. 61 W., Huron South Dakota land district.

In support of this motion for review the following allegations are made:—

First: Said decision is not in accordance with the law, as construed by the Department in many decisions.

Second: That the rule of law as established in the decisions of the Honorable Secretary of the Interior, was ignored and not applied to the case herein. We ask that the case be reviewed in the light of the established rule of law.

This motion was not however filed until February 20, 1890, a year and four months after the rendition of the decision complained of.

In support of his right to appear in the case Rhomberg files his affidavit dated February 13, 1890, as follows:—

I, D. Rhomberg being duly sworn depose and say that said Otto Soldan, executed a mortgage to F. T. Walker, that said mortgage was duly assigned to affiant; that this affiant has had no notice of the decision of the Hon. Secretary, from the local land office at Huron S. D., but only learned of said decision indirectly.

That affiant is informed and believes such information to be true, that the claimant Otto Soldan is dead; that it will be impossible for that reason to comply with the said decision requiring new proof to be made; that affiant is now the owner and assignee of the said mortgage.

The facts presented by this affidavit are not sufficient to show the right of this party to be heard. It is not stated when this mortgage was executed or when the petitioner here became the owner thereof by assignment. One or both of these events may have occurred after the

time prescribed for the filing of motions of this character had expired. Again it is not shown that the petitioner ever filed in the local office a statement showing his interest in the entry as is required to entitle him to notice of any action had in regard thereto. John J. Dean (10 L. D., 446). If he purchased after the decision complained of was rendered or if he failed to take such action as was necessary to entitle him to receive notice, he can not be heard to complain of not receiving notice of that decision. He fails to state when he came to a knowledge of the decision complained of or that the motion now presented was within a reasonable time thereafter.

On account of the failure to set up such facts as show he is entitled to be now heard the motion for review must be and is hereby denied.

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### RAILROAD GRANT—PRE-EMPTION FILING.

### CENTRAL PACIFIC R. R. Co.

A prima facie valid pre-emption filing of record, at the date when the grant becomes effective, excepts the land covered thereby from the operation of the grant.

Under the pre-emption act of March 3, 1843, a filing for unoffered land protected the claim of the settler until the commencement of public sale, and this protection was not modified until the passage of the acts of July 14, 1870, and March 3, 1871.

*Secretary Noble to the Commissioner of the General Land Office, August* 19, 1890.

I have considered the appeal of the Central Pacific railroad company from your office decision of March 12, 1889, affirming the action of the local officers in rejecting list 25, embracing the SE. ¼ Sec. 33, T. 12 N., R. 7 E., M. D. M., Sacramento, California.

The tract is within the limits of the grant for said company as shown by the map designating the route of the road, filed June 30, 1862, upon which a withdrawal was ordered August 2, 1862, and as shown by the map of definite location filed March 26, 1864.

The township plat was filed in the local office in the year 1856. It appears from the records that on May 28, 1857, one H. H. Jones filed declaratory statement for the tract, alleging settlement on January 16, 1854.

On September 12, 1885, the company offered testimony before the local officers to show that Jones had never actually made settlement on the tract and those officers decided that he had never lived on the land. The papers were forwarded, and your office on January 23, 1886, held that Jones' filing subsisting at the date the company's rights attached excepted the tract from the grant. On appeal that decision was affirmed by the Department July 17, 1888, on the authority of the case of Malone *v.* Union Pacific Railroad Company (7 L. D., 13). Notice of this decis-

ion was given the company on August 27, 1887. It appears that on August 28, 1888, one Frank C. Taylor made homestead entry for the tract which on July 1, 1889, he commuted to cash entry. On January 14, 1889, the company presented said list 25 to the local officers. It embraced only the land in question, and was rejected on the authority of the decision of the Department, *supra.*

On this appeal the attorney for the company states that on March 28, 1889, he discovered that this tract was proclaimed for sale by the President's proclamation of June 30, 1858, and urges that as Jones had not made proof and payment on the date fixed for the opening of the sales, February 14, 1859, his filing was thereafter invalid.

While it is true that the proclamation included said township 12 N., of range 7 E., it also declared that—

> No '*mineral lands*', or tracts containing mineral deposits are to be offered at the public sales, such mineral lands being hereby expressly excepted and excluded from sale or other disposal, pursuant to the requirements of the act of Congress approved March 3, 1853.

Pursuant to this direction the local officers withheld from offering and sale all of said section 33, as appears by their report dated March 18, 1859. After stating all the offerings and sales made in said township and range, the report concludes, "All the balance of the township reserved, mineral lands." All of section 33 was so reserved.

It thus appears that the tract in question remained in the category of unoffered lands, and was not proclaimed for sale. The pre-emption act of March 3, 1843 (5 Stat., 620), provided that the settler on unoffered land might make proof and payment at any time before the commencement of the public sale, which should embrace his land. Until such time arrived the filing protected the claim of the settler. This was the status of the law at the time said company's rights attached, and it so continued until modified by the act of July 14, 1870 (16 Stat. 279), which provided that—

> All claimants of pre-emption rights shall hereafter, when no shorter period of time is now prescribed by law, make the proper proof and payment for the lands claimed, within eighteen months after the date prescribed for filing their declaratory notices shall have expired: *Provided*, That where said date shall have elapsed before the passage of this act, said pre-emptors shall have one year after the passage hereof in which to make such proof and payment.

By joint resolution of March 3, 1871 (Ibid. 601), the time was still further extended twelve months, making in all the thirty months now incorporated in section 2267 of the Revised Statutes.

From this it appears that the filing in question did not expire by limitation until July 14, 1872. As it was of record and *prima facie* valid at the date the company's rights attached it served to except the tract from the operation of the grant, under the ruling announced in the Malone case *supra.* See also Northern Pacific R. R. Co. *v.* Stovenour (10 L. D., 645).

Other questions are suggested by the record in the case, but this disposition renders it unnecessary to consider them.

The decision appealed from is affirmed.

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### HOMESTEAD CONTEST—SETTLEMENT RIGHTS.

### POOL *v.* MOLOUGHNEY.

A settlement claim on land covered by the entry of another attaches instantly on the cancellation of such entry.

No rights are secured as against the government by settlement on land withdrawn from entry, but, as between two claimants for such land priority of settlement may be considered.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 20, 1890.*

I have considered the case of Joseph Pool *v.* Patrick Moloughney, involving the S. ½ of the SE. ¼, the NW. ¼ of the SE. ¼, and the NE. ¼ of the SW. ¼, of Sec. 9, T. 26 S., R. 10 E., San Francisco land district, California.

Moloughney made soldier's homestead entry of tract described on May 24, 1886—the same day upon which it was restored to the public domain from a reservation theretofore made for the benefit of the Atlantic and Pacific Railroad.

On July 23, 1886—within two months after the tract had been restored to the public domain—Joseph Pool filed his homestead application, accompanied by the proper affidavits, alleging settlement May 14, 1886.

The local office issued notice to Moloughney, summoning him to appear, on October 11th ensuing, before the county clerk of the county in which the land was situated, and show cause why his entry should not be canceled, and Pool be allowed to make entry of said land.

Testimony in the case was taken at the time and place mentioned in the notice, both parties appearing in person and by counsel. The testimony shows that in 1885 Pool's brother rented the land from a third party who owned the improvements thereon; that Pool and his brother cultivated crops thereon in partnership; that in October, 1885, the brother bought the improvements, and sold them to Pool on May 14, 1886; that said improvements consisted of a four-room dwelling-house, a barn, and about sixty-five acres under fence—the most of which was under cultivation; that when Moloughney made his entry, Pool had twenty-five acres of barley and twelve acres of wheat on the land; that after the date when Pool purchased the improvements of his brother, and before Moloughney's entry, Pool had been much of the time employed on the tract, cutting hay and doing other farm work—although he did not establish actual residence thereon until June 10, 1886, for the reason that his brother could not sooner vacate the house, because of sickness in his family.

As to Moloughney, it appeared that he never saw the tract until some time in August, 1886; and that he established residence thereon in September of the same year.

The notice of the hearing failed to fix a time for a final hearing before the local officers; but they rendered judgment January 21, 1887, in favor of Pool. If there were any irregularities in the mode of procedure, no objection was made thereto at the time.

Your office, on January 24, 1889, rendered a decision affirming the judgment of the local officers.

From your decision Moloughney appeals on the following grounds:

(1) The decision is contrary to the law and the evidence.

(2) The original notice addressed to Moloughney, fixed no time for a hearing before the register and receiver; and the informality or want of such notice was not waived by Moloughney.

(3) The soldier's homestead entry, No. 7533, filed by Patrick Moloughney on May 24, 1886, was the only legal filing upon the land in question, as the land was only restored to the public domain on the 24th of May, 1886, and prior to that date could not have been located upon as public land.

The appeal does not question the finding of your office as to facts.

The first allegation is so general in its nature—failing to "clearly and concisely designate the error" complained of—that it requires no notice (Rule 88 of Practice).

The second objection is raised for the first time on the appeal from your office. As Moloughney appeared in obedience to the notice at the time and place fixed therein, without protest or objection, and in his appeal from the decision of the local office to your office still omitted to make any protest or objection as to the sufficiency of the notice, he must be held to have waived such objection, and it is too late to raise it now. As said in Gumaer *v.* Carine (9 L. D., 643), "this is too well settled to require the citation of authorities."

The third objection, if literally true, does not necessarily carry with it a decision in favor of Moloughney. While it may be conceded that Moloughney's homestead was the only legal "filing" on the land (on May 24, 1886), it by no means follows that such filing constituted the only legal claim. The Department has repeatedly held that, where land had been covered by a homestead or other entry that was afterward canceled, settlement upon the tract prior to such cancellation, especially if attended by the possession and ownership of valuable improvements, whether made or purchased, was sufficient to constitute a legal claim, that would attach to the land the instant it become again a part of the public domain. See McAvinney *v.* McNamara (3 L. D., 552); Millis *v.* Burge (4 L. D., 446); Cathran *v.* Davis (5 L. D., 249); Wiley *v.* Raymond (6 L. D., 246); Kruger *v.* Dumbolton (7 L. D., 212). The same rule has been applied where land has been withdrawn for the benefit of a railroad company. See Peterson *v.* Kitchen (2, C. L. O., 181); Houf *v.* Gilbert (5 L. D., 239).

Furthermore, the Department has repeatedly held that while no party could secure any right as against the United States, by virtue of a settlement made upon a tract withdrawn from entry, still as between two claimants the question of priority of settlement can properly be considered in determining their rights to the tract in contest. See Geer *v.* Farrington (4 L. D., 410); Gudmunson *v.* Morgan (5 L. D., 147); Rothwell *v.* Crockett (9 L. D., 89); Wiley *v.* Raymond (6 L. D., 246); Tarr *v.* Burnham (6 L. D., 709).

Your decision is affirmed.

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TIMBER CULTURE CONTEST—SECOND CONTEST—NOTICE.

BURDICK *v.* ROBINSON.

The right to proceed under a contest, held in abeyance pending final action on the prior suit of another against the same entry, matures on the withdrawal of the prior contest.

The failure of the local office to act on an application to contest will not defeat the right of the contestant thereunder.

An application to enter is not essential to the validity of a timber culture contest.

Questions affecting the sufficiency of notice can only be raised by the defendant, or those claiming under him.

Where the Commissioner directs the taking of additional testimony, his authority to render a decision on the whole record as finally presented, is not affected by the action of the local office on the evidence submitted at the rehearing.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August* 21, 1890.

The appeal of Maggie J. Burdick from your office decision of January 14, 1889, in the case of Maggie J. Burdick *v.* Charles C. Robinson, has been considered.

May 28, 1878, Peter C. Johnson made timber-culture entry No. 912 for the SW. ¼ of Sec. 32, T. 103, R. 53, Mitchell, Dakota.

Many contests were initiated and withdrawn, or abandoned, which will not be noticed, here, because they are not necessary to the determination of the rights of the parties in this case. For my purpose the record shows that on January 30, 1883, Elizabeth A. Cooper filed affidavit of contest against said entry, and on February 12, 1883, the defendant Robinson likewise left at the local office an affidavit for the purpose of contesting said entry, and asked that said affidavit be filed and notice issued, but the filing was delayed until the 27th day of February, 1883, for the reasons hereinafter set out.

February 27, 1883, Maggie J. Burdick initiated a contest against said entry, and on the 12th day of June, 1883, she moved the register and receiver to dismiss the Robinson contest because of her priority of right to contest the entry by the filing of the affidavit. This motion was sustained at the ex-parte hearing, July 25, 1883, and her affidavit

(of contest) allowed on the same day, from which decision Robinson appealed to the Commissiner of the General Land Office, and the only question presented by the record is, whether Robinson or Burdick is the prior *bona fide* contestant, Robinson having procured the withdrawal of the Cooper contest prior to filing his own, and the abandonment and default of the entryman, Johnson, being conceded.

The evidence accompanying the record above noted shows that this matter has been twice considered by the local officers: first in 1883 by William Letcher, register, and Hiram Barber, Jr., receiver; second, in 1886 by George B. Everitt, register, and T. F. Singiser, receiver. The last investigation was ordered by the Commissioner on examination of the record presented by the appeal of Charles C. Robinson from the decision of the first-named officers, dismissing his contest on motion of Maggie J. Burdick. The reasons assigned by the register and receiver for dismissing the Robinson contest on the motion of Burdick are, that there was no sufficient affidavit to authorize service by publication, and that in his application to enter, accompanying said affidavit, he incorrectly describes the land contested. The defect in the affidavit was failure to show diligence to secure personal service. The defect in the application to enter was in describing the land as in range 54, instead of range 53. The receiver also found that Burdick's contest was entitled to priority. The rehearing was had January 4, 1886, on which the register and receiver awarded the right of contest to Robinson. Burdick appealed from their decision to the Commissioner, who affirmed the decision of the local officers, and Burdick now appeals therefrom to this Department. The evidence on rehearing shows that on the 12th of February, 1883, Robinson left with the contest clerk of the land office at Mitchell, an affidavit of contest against Johnson's entry, and that the clerk refused to file it, because Elizabeth H. Cooper had a contest on file against the same entry. He, however, retained the papers to await the Cooper contest. On February 20, 1887, Robinson by the payment of fifty dollars to Cooper procured the withdrawal of her contest, and on the same day presented the same to the clerk and asked that notice be issued thereon. The clerk, one Crennan, informed him that his papers were lost and that he would make further search for them, and, if he could not find them, he would notify Robinson and he would be allowed to file other papers; that on February 26, 1887, Tiffany, attorney for Robinson, presented to Crennan a new set of papers, but Crennan rejected them, for the reason that he had not searched sufficiently for the original one; that on the 27th day of February, 1887, the papers were accepted and notice issued to Robinson. This evidence is contained in the affidavit of D. C. Tiffany, attorney for Robinson, and is corroborated by Robinson. J. P. Crennan, the clerk, also subscribes to an affidavit admitting the tender of the Robinson contest on February 20, 1887.

These affidavits were filed at the first hearing, July, 1883, and are in the main corroborated by the testimony taken in January, 1886 The preponderance of the evidence also clearly shows that the Burdick contest was offered and accepted by the sa me clerk, Crennan, on the morning of February 27, 1883, a few moments prior to the final reception of the duplicate application of Robinson as sworn to by Tiffany.

The fact is undisputed that on the 20th of February, 1883, Robinson presented the withdrawal of the Cooper contest to the clerk, Crennan. This left the entry open to his contest, in virtue of the affidavit which he left with the clerk on February 12th to be filed, but was not then filed or accepted on account of the pendency of the Cooper contest. His rights should be held to have attached at the date of withdrawal of Cooper's contest. It is undisputed that he then asked to have his contest accepted; this was not done, because the clerk had lost or mislaid the papers. This was not the fault of Robinson, and it would not be right to make him suffer for the laches of an officer. His application, therefore, to contest, proffered on February 20, 1833, must be regarded, so far as his rights are concerned, as if it had been accepted and made of record. (Dunn *v.* Shepherd, 10 L. D., 139; Baird *v.* Chapman's Heirs *et al.*, 10 L. D., 210; Hawkins *et al. v.* Lamm, 9 L. D., 18). This saves all inquiry as to his application of the 26th February following, or as to who first secured the ear and favor of the clerk on the morning of the 27th, and as Burdick's affidavit of contest was not filed until the 27th, Robinson was prior in point of time. But it is insisted by counsel for appellant that, granting that the Robinson contest was prior to Burdick's still it should have been dismissed at the hearing, because, first, the application accompanying it described the land as in range 54, while the entry contested was in range 53, and, second, because the officers obtained no jurisdiction of the person of claimant, Johnson, by reason of the affidavit being insufficient to authorize notice by publication.

Section 2 of the act of May 14, 1880 (21 Stat., 140), provides that a successful contestant shall be allowed thirty days after notice of cancelation in which to "enter said lands."

This act, unaided by any regulation of the Department, does away with the necessity of accompanying the contest with an application to enter, as by the terms of the law thirty days after cancellation are allowed in which to make such application, and, although the circular of the Department construing this section was not promulgated until 1887 (6 L. D., 284), the law has been in force since its passage in 1880, and the rule in Bundy *v.* Livingston (1 L. D., 152), was eliminated by the act itself, and the circular of 1887 was simply declaratory thereof.

Robinson's contest having been initiated since the act of 1880 referred to, no application to enter was required to be filed with his affidavit of contest. It follows then that a defective application to enter will not defeat the right of contest, for the law allows a successful contestant thirty days after cancellation of the entry in which to file a proper application to enter.

The second point, namely: insufficient affidavit to authorize notice by publication, can only be invoked by the entryman, or those claiming under him. The service of notice on the defendant was a condition subsequent to the filing of a contest, and default therein can not affect the priority of the filing. If the notice to the claimant was insufficient, it was the duty of the register and receiver to cause a proper notice to be issued, and if this was not done, then the judgment of cancellation is irregular, and this fact may be shown by the entryman or waived by him, and can not affect the priorities of opposing contestants. (Hopkins *v.* Daniels *et al.*, 4 L. D., 126).

The objection that there is no jurat to the affidavit of Robinson, filed as ex-parte testimony in support of his contest, can have no bearing on the question of priority. This is a matter affecting only the rights of the entryman, and his default in cultivation, etc., abundantly appears from the testimony.

The only other objection of counsel for appellant, not of a general nature, is that "no decision has ever been rendered on the appeal of Robinson from the action of the register and receiver in dismissing his contest."

While the letter of the Commissioner to the register and receiver directing further testimony to be taken is not among the papers accompanying the appeal, it sufficiently appears from the record that such other testimony was ordered to aid the Commissioner in the determination of the appeal of Robinson, and while the local officers might have reported the testimony so taken without appending thereto their conclusions in the form of a decision, such action on their part does not preclude the Commissioner from rendering his decision on the whole record as presented.

I find nothing in the record impeaching the bona fides of Robinson, and it is unnecessary to inquire into that of Burdick.

The decision of your office is accordingly affirmed.

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16 L.D. 225

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NOTICE—ATTORNEY—PREFERENCE RIGHT OF ENTRY.

KINSINGER *v.* PECK.

Notice of the cancellation of an entry given the attorney of the successful contestant is notice to said contestant, and his failure to assert the preference right of entry, within thirty days after such notice, defeats the exercise of such right thereafter.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August* 22, 1890.

I have considered the case of Christian M. Kinsinger *v.* Charles H. Peck on appeal by the former from your office decision of April 20, 1890, rejecting his application to make timber culture entry of the SW. ¼ NE. ¼, SE. ¼ NW. ¼, NE. ¼ SW. ¼ and NW. ¼ SE. ¼, Sec. 1, T. 5 N., R. 33 W., 6th P. M. McCook, Nebraska.

It appears that Kinsinger brought contest against the timber culture entry of one Tacke covering said tract and procured the cancellation of the same. Notice of the cancellation was given his attorney on December 20, 1887.

On January 30, 1888, Peck made timber culture entry for the tract. On March 2, 1888, Kinsinger applied to enter the land under the timber culture law, but his application was rejected on account of Peck's prior entry. Kinsinger claimed to be entitled to the preference right of entry, and your office ordered a hearing in the premises. It appeared from the testimony that Kinsinger's attorney in the Tacke case made a charge of $10 for his services therein. This Kinsinger refused to pay, claiming that the amount was unreasonably large. As the attorney had not received his fee when he was notified of the cancellation of the entry, he failed and refused to send notice to Kinsinger. He claims that his connection with the case was terminated by Kinsinger's refusal, prior thereto, to pay the fee.

Whatever may be the merits of that controversy, it is clear that notice was properly sent to the attorney of record. Service upon the attorney is service upon the client. Under the law Kinsinger was obliged to make entry within thirty days from such service, in order to secure his preference right. The officers of the government having done their full duty are in no manner responsible for Kinsinger's default, and the interests of the present entryman can not be prejudiced by any misunderstanding that may exist between Kinsinger and his attorney.

The decision appealed from is affirmed.

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PEIRANO ET AL. *v.* PENDOLA.

Motion for review of departmental decision rendered May 3, 1890, 10 L. D., 536, dismissed by Secretary Noble, August 22, 1890.

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PRIVATE CLAIM—WESTERN BOUNDARY OF TEXAS.

SANGRE DE CHRISTO GRANT.

At the date of the confirmatory act the land embraced within this claim belonged to the United States, if not to the grantees, and it was therefore competent for Congress to confirm the title thereto in the grantees, either by confirming the grant made by the Mexican government, or by a grant *de novo*.

The duty of the Commissioner to direct the survey of private grants, made by competent authority, and to issue patent thereon, is not limited to grants covered by the treaty of Guadalupe Hidalgo.

Suit to vacate the patent issued under this grant not advised.

*Secretary Noble to the Commissioner of the General Land Office, August 22, 1890.*

On May 9, 1890, Mr. O. P. McMains presented to this Department a communication, in relation to the Sangre de Christo grant, which was referred to you, and your report, of July 22, 1890, upon the subject matter thereof, is now before me.

Claiming to represent certain "homestead and pre-emption settlers" within the limits of the said grant, Mr. McMains urges that this Department recommend to the Attorney General that he institute suit to vacate the patent heretofore issued to the confirmee of said grant, "because the survey as set forth in said alleged patent is without authority of law."

The grounds upon which this application is made as set forth in the communication are to the effect, that the land embraced within said grant, being situated east of the Rio Grande River, was, in 1843, the date of the grant thereof by the Mexican authorities, within the limits of the then Republic of Texas, whose independence, with the Rio Grande river to its source as its western boundary, was acknowledged by Mexico in 1836. Thereupon, it is urged the Mexican authorities had no right to make an extra-territorial grant, and such grant is not protected by the law of nations, nor the treaty of Guadalupe Hidalgo, whereby the rights of private property within the territory ceded by Mexico to the United States are secured and guaranteed.

The grant in question was made in 1843 by Don Manuel Armijo, political governor and military commander of the department of New Mexico. It was examined and reported upon favorably, under section 8 of the act of July 22, 1854 (10 Stat., 308), by the surveyor general of New Mexico, which report was transmitted to Congress, and the grant was confirmed by that body, as claim No. 4, on June 21, 1860 (12 Stat., 71).

The validity of this confirmation, its effect and the extent thereof came before the supreme court in the case of Tameling *v.* United States Freehold, etc., Company (93 U. S., 644). On page 663, the court say:

> the surveyor-general reaches the conclusion that the grant is a good and valid one, and that a legal title vests in Charles Beaubien to the land embraced within the limits contained in the petition. The grant was approved and recommended for confirmation by Congress. Congress acted upon the claim 'as recommended for confirmation by the surveyor-general.' The confirmation being absolute and unconditional, without any limitation as to quantity, we must regard it as effectual and operative for the entire tract . . . . . In Ryan *et al. v.* Carter *et al.*, *supra*, p. 78, we recognized and enforced as the settled doctrine of this court, that such an act passes the title of the United States as effectually as if it contained in terms a grant *de novo*, and that a grant may be made by a law as well as by a patent pursuant to law.

On page 82 of the opinion, in the Ryan case referred to, speaking of the act of Congress of 1812, confirming certain land claims in Missouri, the court say:—

> It (the act) does not require the production of proofs before any commission or other tribunal established for that special purpose, but confirms, *proprio vigore*, the rights, titles, and claims to the lands embraced by it, and operates as a grant to all intents and purposes. Repeated decisions of this court have declared that such a statute passes the title of the United States as effectually as if it contained in terms a grant *de novo*, and that a grant may be made by law, as well as by a patent pursuant to law.

In view of these decisions it is not necessary to express a definite opinion as to whether or not the Sangre de Christo Rancho was within

the borders of Texas at the date of its grant by the Mexican authorities. That Texas claimed the Rio Grande river, to its source, as its western boundary, and that, to some extent, the claim was recognized by the Mexican authorities is apparent from the treaty of May 1836, whereby Santa Anna, the President of Mexico, recognized the independence of the Republic of Texas. After Texas was admitted to the Union, she seems to have re-asserted her claim to the Rio Grande, as her western boundary, to its source. Whilst this claim does not appear to have been entirely acquiesced in, the United States, in 1850, purchased and Texas ceded any claim she might have to territory north of the thirty-second degree of north latitude, west of the one hundred and third meridian west from Greenwich. For this cession the United States paid $10,000,000, and the much larger portion of the ceded territory was made a part of the Territory of New Mexico as then organized. See act of September 9, 1850 (9 Stat., 446).

It thus results that, whether the lands embraced within the lines of the Sangre de Christo grant were, at the date thereof, within the department of New Mexico, where the Mexican governor had authority to make such a grant, or within the Republic of Texas which was not subject to his jurisdiction, it is clear that at the date of the passage of the act of June 21, 1860, *supra*, confirming said grant as claim No. 4, the land in question belonged to the United States, if not to the grantees; and it was entirely competent for Congress to grant or confirm it to Beaubien; such grant or confirmation operating, as was intended, to secure to the confirmee all the estate of the United States in the premises, whether by confirming the grant made by the former government, or by making a grant *de novo* where none existed before.

The grant having thus been made by competent authority, it became the duty of the Commissioner of the General Land Office to cause a survey to be made and patent to issue thereon; his supervision and duty in this respect, as to private grants, not being limited, as intimated, to grants covered by the treaty of Guadalupe Hidalgo.

It is fair to assume that the matters now urged were considered by Congress, before making the grant referred to. The question of the western boundary of Texas was exhaustively debated by the eminent statesmen of that day, before the compromise of 1850 was made, whereby Texas released her claim to the territory in question; and it is not to be supposed that a matter which had theretofore been so fully discussed would be ignored when the propriety of confirming the grant was before Congress, or its committees.

On a review of the whole subject I see no sufficient reason for interposing, and therefore decline to recommend that suit be brought to cancel the patent, as requested.

Herewith is sent to you the communication of Mr. McMains, for record, and you will advise him of the conclusion herein arrived at.

### DESERT LAND ENTRY—CHARACTER OF LAND.

SIMS *v.* PHALEN.

Land bordering on a stream of water, and that produces a natural growth of grass in paying quantities, is not subject to desert entry.

The fact that the entry embraces land not subject thereto does not necessarily make the entire entry fraudulent.

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

I have considered the respective appeals of John Phalen and John Sims, Jr., from your decision of January 21, 1889, Phalan appeals from your order holding for cancellation the N. ½ of SE. ¼ of his entry, and Sims appeals from so much of your judgment as allows the S. ½ of the NE. ¼ thereof to stand.

The record shows that Phalen made desert land entry No. 1844, on June 11, 1886, for the N. ½ of SE. ¼ and the S. ½ of NE. ¼ of Sec. 12, T. 6 N., R. 7 E., Salt Lake, Utah.

On October 18, 1886, Sims filed a complaint alleging that the entry of Phalen was fraudulent, for the reason that the land embraced therein was not desert land, especially the N. ½ of the SE. ¼. Thereupon, a hearing was ordered and set for December 1, 1886. Both parties appeared and submitted their testimony, and while it is conflicting, yet I think it is clear that a portion of the N. ½ of SE. ¼ is a "bog," that a stream of water, fed by springs passes through the tract, and that a better crop would be produced if the land was drained than if irrigated, that for several years a crop of hay has been cut on said land. The evidence is, however, irreconcilable as to the amount of hay cut, the value of the crop, and as to the number of acres of "boggy" land. The contestant and his witnesses assert that there is from forty to fifty acres of this character of land, while the witnesses for the claimant place the amount at from eight to fifteen acres.

The fact that parties were anxious year after year to secure the crop is evidence that the same was considered remunerative.

Under the established ruling of the Department, I am of the opinion that the N. ½ of SE. ¼ is not desert land, and that the entry for said eighty acres must be canceled. Keys *v.* Rumsey (10 L. D., 558).

As for the S. ½ of NE. ¼, I do not think the charge that the entry thereof is fraudulent should be entertained. There is no evidence whatever to show that it is not desert land, and the fact that the entryman included in his entry land that was not subject thereto, does not necessarily make the entire entry fraudulent. The presumption is that he acted in good faith and I do not find sufficient evidence either direct or circumstantial to justify me in concluding that bad faith actuated the claimant in making this entry as to the last named tract.

Your decision is therefore, affirmed.

### HOMESTEAD ENTRY—RESIDENCE—HUSBAND AND WIFE.

### JOHN O. AND MINERVA C. GARNER.

A husband and wife, while living together in such relation, cannot maintain separate residence at the same time, in a house built across the line between two settlement claims, so that each can secure a claim by virtue of such residence.

In such a case, where residence has been thus maintained, the claimants may elect which tract they will retain.

The case of Maria Good, 5 L. D., 196, cited and distinguished.

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

On July 5, 1886, John Q. Garner made homestead entry for N. ½ SE. ¼ and SE. ¼ NE. ¼ Sec. 7, and on the same day Minerva C. Martin made homestead entry for W. ½ SE. ¼ Sec. 6, and W. ½ NE. ¼ Sec. 7, all in T. 20 S., R. 26 W., Wa Keeney, Kansas. The claims are adjoining.

On August 29, 1886, the claimants were married, and on June 16, 1888 made commutation proof. It showed that they took up their residence in a house built across the line dividing the claims, on November 22, 1886, and so continued to reside until date of proof. At that time they had one child.

The local officers rejected both proofs. Your office on February 5, 1889, held that "married residence cannot be maintained on separate tracts," and directed that claimants be required "to elect which one of said entries they will retain, after which election, the other will be canceled."

Claimants appealed, urging that their acts in the premises have been entirely lawful. This contention is not in harmony with the decisions of this Department: "A husband and wife while living together in such relation cannot maintain separate residence at the same time, in a house built across the line between two settlement claims, so that each can secure a claim by virtue of such residence." Thomas E. Henderson, 10 L. D., 266; L. A. Tavener, 9 L. D., 426.

Inasmuch as these parties have maintained residence in a house built across the line dividing the claims, I find nothing inconsistent in their claiming residence on either one of the tracts.

They urge that they have been misled in the premises by certain letters from your office. I find from the records thereof that John C. Garner, by letter of October 30, 1886, inquired of your office in substance whether a woman who makes a homestead entry forfeits her right by marrying thereafter, and that you responded that she did not, provided she continued to reside upon and cultivate the land for the prescribed period. It will be noticed that this letter was written after both entries had been made. Furthermore, an examination of the letter discloses that while Garner stated he had married Miss Martin, who had made a homestead entry, he did not state that he had made such an entry. The

issue here presented therefore was not submitted to your office at all. It is true that in the case of Maria Good (5 L. D., 196), it was held that the right acquired by the original homestead entry of a single woman is not affected by her marriage prior to final proof, but in that case it did not appear that the husband and wife claimed separate homestead residences while living as one family. Herein lies the essential difference between the cases.

Said decision is accordingly affirmed.

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PREFERENCE RIGHT OF ENTRY—ADVERSE CLAIM—FILING.

DALLAS *v.* LYTTLE.

The failure of a successful contestant to exercise the preference right of entry within the period accorded, defeats his subsequent right of entry in the presence of a valid intervening adverse claim; and this is true though such contestant may have believed that his entry was in fact of record, and, acting upon such belief, proceeded thereafter to cultivate the land as required by the timber culture law.

A pre-emption filing, defective for want of previous settlement, is made good by subsequent settlement, in the absence of any intervening adverse claim.

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

I have considered the case of Green W. Dallas *v.* Rachel Lyttle, on appeal of the former from your office decision of March 11, 1889, in which it appears from the record that June 25, 1884, Rachel Lyttle filed her declaratory statement No. 2525, for lots 3 and 4, and S. ½ of NW. ¼ Sec. 3, T 30 N., R. 2 E., B. M., Lewiston, Idaho. October 9, 1886, she gave due notice that she would make her final proof on November 22, 1886.

On November 8, 1886 [4], Dallas made timber culture entry No. 693 of the same land, and on November 22, 1886, the day fixed for hearing the final proof of Lyttle, he filed objections, verified by his affidavit, against the allowance of the proof, alleging that he had made timber culture entry for the same tract some years prior thereto, the date of which he did not know, that defendant's settlement was made long after her filing, and that she had failed to comply with the requirements of the pre-emption law, and asked that testimony might be taken on his said affidavit at Mount Idaho, it being more convenient for the witnesses.

The register and receiver took the final proof of the defendant, and then ordered that further testimony, as requested by Dallas, should be taken at Mount Idaho, before the deputy clerk of the United States district court, on January 20, 1887, which was done, and from the evidence taken, the local officers on February 24, 1887, recommended that her final proof be allowed, and that Dallas' timber culture entry be canceled. From this action he appealed to your office, where, reviewing the evidence you approved the finding of the register and receiver, and he now appeals to this Department.

He bases his claim to the land on the following facts:

Some time prior to June 29, 1880, Cornelius J. Curtain made timber culture entry for the same tract, and on said last date Dallas filed his affidavit of contest (unaccompanied by any application to enter), against the entry of Curtain. The contest was successful, and on May 10, 1881, as appears from the register's letter book, he was notified of the cancellation of Curtain's entry, and allowed sixty days to make entry of the land.

It appears that he mistook this notice for a receiver's duplicate receipt, and believing that his entry had been allowed, he failed to exercise his right to enter within the prescribed time. Under the belief that he had complied with the law and that his entry was of record, in 1882, he plowed and planted to tree seeds five acres of the land, and thereafter to some extent cultivated and replanted the same up to the date of defendant's settlement and filing in 1884. Some time during 1884, and a short time previous to his entry he, for the first time, discovered that there was no record of his ever having exercised his preference right, or that he had at any time entered or applied to enter the land. In his testimony he states that, on the day his contest against the entry of Curtain was heard and sustained, he applied to enter the land, and left the necessary fees and commissions with the officers for that purpose, and that when he received the notice above referred to he did not examine it, but took it for granted that it was the receiver's receipt as aforesaid, and left it with a neighbor to keep for him, but it was burned when his house was destroyed by fire in June, 1884. His neighbor (Bartley), who was the custodian of this paper, says that when looking for his own timber culture receipt one day, he "got hold of" Dallas' paper and read it down to where his name occurred, and so far he "didn't see any difference in his and mine." This is all the evidence offered, going to show that Dallas ever applied to enter the tract prior to November 8, 1884, and the evidence of these two witnesses is materially weakened on cross-examination.

The evidence tends almost irresistibly to the conclusion that Dallas inadvertently failed to exercise his right of preference, and that his first entry or application to enter was that of November 8, 1884, subsequent to the filing of Lyttle.

There is abundant evidence as to the good faith of Mrs. Lyttle in her residence upon and cultivation of the tract. It shows that she has built a house, with a kitchen attachment, which, though not expensive, is comfortable and suitably furnished; that she has fenced and cultivated to crop three acres, planted a garden, and dug a well; that she is a widow with two children, and she has constantly resided on the tract ever since her settlement, except when absent nursing to support herself and children, and with the exception of two or three months in the winter of 1884–5, before her house was quite finished; that, in March, 1885, she, with the money she had earned through the winter by nurs-

ing, finished her house; that all her absences have been of short duration and caused by her occupation as nurse. This is clearly shown by the testimony of her neighbors.

It is true, her settlement on the land did not actually occur until July 3, 1884, eight days subsequent to her filing, but as no adverse claim intervened between the filing and settlement, the default in the latter was cured. (Gray *v.* Nye, 6 L. D., 232). While this conclusion may work a hardship to Mr. Dallas on account of his sleeping upon his supposed entry, and on account of the loss of his labor and improvements as a result thereof, yet, all this is brought upon him by his inattention to the contents of his notice. Mrs. Lyttle having made entry of the tract when it was subject to appropriation and free from adverse claim, she cannot be sacrificed to avoid a disaster to Dallas which might with ordinary prudence and care, have been avoided.

The decision of your office, dismissing his contest and cancelling his timber-culture entry, is accordingly affirmed.

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CONTEST—RELINQUISHMENT—PREFERENCE RIGHT.

OSBORNE *v.* CROW.

A relinquishment filed during the pendency of a contest is presumed to be the result of the contest, but such presumption is not conclusive, and on proof that the relinquishment is not the result of the contest, the right of the contestant must depend upon his ability to sustain the charge against the entry.

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

On February 2, 1887, Clarence H. Osborne filed a contest against the timber-culture entry of Francis M. Crow, for the NE. ¼ Sec. 13, T. 3 N., R. 39 W., McCook, Nebraska, alleging that the claimant failed to break or plow five acres on said tract at any time prior to that date.

From the testimony taken at the hearing ordered upon this contest, the local officers found that in view of the good faith of the entryman, the contest should be dismissed. This decision was affirmed by your office on December 21, 1888.

It appears from the evidence that the entryman paid for breaking five acres of land, but upon actual measurement it was found to contain a little more than four acres, but in view of his good faith, and there being reasons for believing that the contest was speculative because the contestant had offered to discontinue the case on payment of $50, you sustained the entry and dismissed the contest.

On January 15, 1889, the local officers referring to said decision, informed your office that the entryman filed a relinquishment of his entry October 21, 1888, prior to said decision, and Susan Sage made timber culture entry for the tract; that Osborne was, on October 27, 1888, notified of the filing of said relinquishment and of his preference right

of entry; that although the decision of the local office was against him his appeal therefrom preserved his right and the relinquishment closed the case in his favor. On November 9, 1888, Osborne filed declaratory statement for said tract. They also reported that no notice of the decision of December 21, 1888, had been given to Osborne.

On February 8, 1889, your office held that as the case was tried upon its merits and the contest dismissed, the relinquishment could not be the result of said contest, and the contestant had therefore no preference right of entry; that he must depend upon his case and if no appeal was taken from it, the judgment would become final and the entry of Sage would be allowed to stand. The local officers were then directed to notify Osborne of the decision dismissing his contest and of his right of appeal therefrom.

Notice was given to Osborne accordingly and on May 7, 1889, the local officers transmitted his appeal from the decision of the Commissioner of February 8, 1889, alleging substantially that the Commissioner erred in holding that he was not a successful contestant, and that the relinquishment was not presumed to be the result of his contest; that he erred in deciding the case upon the testimony without reference to the filing of the relinquishment, and in holding the contestant, in order to secure the preference right must prosecute his case successfully to a close on the testimony presented.

No appeal was filed from the decision of your office holding that the contestant had not sustained his charges, and that the contest should be dismissed, and his failure to appeal therefrom may be taken as an admission of the correctness of said ruling.

It is true that at the date of the decision of your office, the entry had been relinquished, but the decision of the local officers being adverse to the contestant it was necessary to render a decision to determine the rights of the contestant. The affirmance of the decision of the local officers was in effect a ruling that the relinquishment did not inure to the benefit of the contestant, and that he had no preference right by virtue of his contest. The effect of this decision could only have been avoided by securing its reversal upon appeal to the Secretary.

The rule that a relinquishment filed pending a contest is presumed to be the result of the contest is founded upon the theory that the entryman by filing the relinquishment has admitted the truth of the charge, but when the charge is not sustained no such presumption can attach. It has therefore been held that while a relinquishment filed pending a contest is presumed to be the result of the contest, such presumption is not conclusive, and upon proof that the relinquishment was not the result of the contest, the contestant must depend upon his ability to sustain the charge. Mitchell *v.* Robinson (3 L. D., 546); McClellan *v.* Biggerstaff (7 L. D., 442); Kurtz *v.* Summers (Ib., 46); Sorensen *v.* Becker (8 L. D., 357); Loughrey *v.* Webb (9 L. D., 440).

The decision of your office is affirmed.

## LANDS WITHDRAWN FOR RESERVOIR PURPOSES—CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., July 22, 1890.*

*Registers and Receivers of the United States Land Offices*
*at Ashland, Eau Claire, and Wausau, Wisconsin,*
*and St. Cloud and Taylor's Falls, Minnesota:*

GENTLEMEN: The act of Congress approved June 20, 1890, entitled "An act to authorize the President of the United States to cause certain lands heretofore withdrawn from market for reservoir purposes to be restored to the public domain subject to entry under the homestead law with certain restrictions," a copy of which is hereto attached, makes provision for the entry of the lands so restored.

You will observe that the statute, by its terms, does not take effect until December 20, 1890. No entry for, or settlement upon, said lands will be allowed until the expiration of that time, and the lands are made subject to entry under the homestead law only.

Any person applying to enter or file for a homestead on said lands will be required first to make affidavit, in addition to other requirements, that he did not violate the law by entering upon and occupying any portion of said lands prior to December 20, 1890, the affidavit to accompany your returns for the entry allowed. Blank forms for said affidavit will be transmitted to you in due time.

No comment upon the provisions of the second section of the act appears to be necessary, as the records of your office should show all disposals of land therein mentioned, and it is presumed that parties desiring to enter any of the restored lands will have knowledge of the reservation by the government of the rights, and the denial of right to compensation, therein mentioned.

Very respectfully,

LEWIS A. GROFF,
*Commissioner.*

Approved:
JOHN W. NOBLE,
*Secretary.*

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[PUBLIC—No. 170.]

AN ACT to authorize the President of the United States to cause certain lands heretofore withdrawn from market for reservoir purposes to be restored to the public domain subject to entry under the homestead law, with certain restrictions.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:* That there is hereby restored to the public domain all the lands described in certain proclamations of the President of the United States, dated March twenty-second, eighteen hundred and eighty, Executive Document numbered eight hundred and fifty-nine; also, April fifth, eighteen hundred and eighty-one, Executive Document numbered eight hundred and sixty-eight; also, February twentieth, eight-

een hundred and eighty-two, Executive Document numbered eight hundred and seventy-four, withdrawing and withholding certain lands from market or entry and reserving the same to aid in the construction of certain reservoirs to be built at the headwaters of the Mississippi and Saint Croix Rivers, in the States of Minnesota and Wisconsin, and of the Chippewa and Wisconsin Rivers, in the State of Wisconsin; and that these lands, when so restored, shall be subject to homestead entry only.

SEC. 2. That in all cases where any of the lands restored to the public domain by the first section of this act have heretofore been sold or disposed of by the proper officers of the United States under color of the public land laws, and the consideration received therefor is still retained by the government, the title of the purchasers may be confirmed if in the opinion of the Secretary of the Interior justice requires it; but all the lands by said first section restored shall at all times remain subject to the right of the United States to construct and maintain dams for the purpose of creating reservoirs in aid of navigation; and no claim or right to compensation shall accrue from the overflowing of said lands on account of the construction and maintenance of such dams and reservoirs.

SEC. 3. That no right of any kind shall attach by reason of settlement or squatting upon any of the lands hereinbefore described before the day on which such lands shall be subject to homestead entry at the several land offices, and until said lands are opened for settlement no person shall enter upon and occupy the same, and any person violating this provision shall never be permitted to enter any of said lands or acquire any title thereto. This act shall take effect six months after its approval by the President of the United States.

Approved June 20, 1890.

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## MINERAL APPLICATION—CONFLICTING RIGHTS.

### J. B. RICE.

An application to make mineral entry duly presented at the local office, but held without action during the absence of the register, operates to reserve the land covered thereby until final action thereon.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 28, 1890.*

The application of J. B. Rice for patent to the Snow Flake placer claim, for thirty acres in the Sacramento, California, land district, embraced also the twenty acres included in a like application by Enoch Redding for the "Enoch Redding" placer claim.

It appears that on July 30, 1888, Redding's application was duly presented at the local office, and, it being the register's custom to personally examine such applications "before allowing filing or order of publication," the clerk in charge inclosed said application in a package, endorsed "presented for filing July 30, 1888, and not filed by reason of the absence of the register;" that at his attorney's request Rice's application was on July 31, 1888, taken by a clerk in the local office and presented to the register at his residence; and the register then instructed the clerk to file Rice's papers as of July 31, 1888; that on August 2, 1888, the attorneys for Redding filed a petition asking that all procedings under the Rice application be vacated, and that the Red-

ding application be filed as of July 30, 1888. This petition, after argument by counsel for the respective parties, was granted by the local office, and Rice appealed.

On February 5, 1889, your office finding the Redding petition to be first in time, held the Rice application for "rejection and cancellation . . . . . to the extent of the conflict and allowed Redding's application to stand. Rice again appeals.

Redding's application was pending in the local office when that of Rice was made of record, hence, Redding being first in point of time his application operated to reserve the land from any other disposition until final action was taken thereon. Griffin *v.* Pettigrew, 10 L. D., 510, and cases cited. Indeed I think his application should be treated as filed when it was presented and so left with said clerk for that purpose. Rice's application has, therefore, been properly rejected.

The action of your office in this regard and in allowing the application of Redding is accordingly affirmed.

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MINING CLAIM—HEARING—PRACTICE—SPECIFICATION OF ERROR.

DEVEREUX ET AL. *v.* HUNTER ET AL.

In case of protest against a mineral application the local office is authorized to order a hearing to determine the character of the claim, and whether there has been due compliance with the mining law.

Specifications of error should clearly and concisely designate the alleged errors.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August* 28, 1890.

I have considered the appeal of G. W. Hunter *et al.*, claimants for the Mount Yale placer claim, survey No. 3976, application No. 3185, filed July 10, 1885, in the Leadville, Colorado, land office, from your office decision of February 13, 1889, rejecting said application and holding the same for cancellation.

The record shows that on July 10, 1885, G. W. Hunter *et al.*, filed in the local land office at Leadville, Colorado, a plat, as required by law, of their claim upon the Mount Yale placer, containing 144.5 acres. Notice of application for a patent was published from July 11, to Septem 13, 1885. No adverse claim was filed. On the 27th day of August, 1885, Thomas G. and John J. Devereux filed in the local office their protest against the application, alleging that the claim is not placer land, and that it embraces within its boundaries a portion of a number of known lode claims, among which are the Inez, Big Missouri, St. John and Albert Emerald, upon all of which the assessment work has been done from year to year according to law, and the same verified by affidavit of record in the recorder's office of the proper county. No action was taken upon this protest. On the 9th day of March, 1886. G. W.

Hunter *et al.* made their application to purchase the tract in controversy, and on the 10th day of March said protestants filed in the local office a second protest, in which they re-affirm the grounds alleged in the first, and allege three other grounds, in effect, alleging that all the ground embraced within said placer mining claim is strictly lode mining ground, inaccessible to water, and that neither the sum of $500, nor any other sum whatever, has been expended upon said pretended placer claim, or for its benefit, for the purpose of working or developing the same as placer mining ground. And that said pretended placer claim was located, has been held, and is now sought to be entered by applicants solely for the valuable lode mineral deposits which underlie it, and for no other purpose. And upon these facts protestants base the charge that said placer claim is fraudulent and the allowance of the entry and issuance of a patent would be a fraud upon the government and upon the protestants. On the 11th day of March, 1886, the protestants filed in the local office the affidavits of Adam Paterson and Robert Berry, corroborating their protest, in so far as the character of the ground included in the boundaries of the placer not being placer ground and that the placer survey is intersected with lode mining claims. Thereupon, a hearing was ordered by and had before the local officers, at which both parties appeared and introduced testimony.

Upon the evidence introduced before them, the register and receiver did not agree, and rendered opinions accordingly, the receiver in favor of the entry, and the register against it. From their decisions the parties, respectively, appeal to your office, and thereupon your office, on the 13th day of February, 1889, found that the lands involved are not placer lands, subject to entry under the mining laws, and rejected the application and held it for cancellation. From your decision the applicants for patent appeal.

The appellant assigns several grounds of alleged error. One of the errors urged and relied on is, that the local officers had no authority to order a hearing, and that the Department of the Interior has no jurisdiction in the premises.

The order for a hearing was properly made by the local officers. The jurisdiction of the land department to order a hearing to determine whether there has been due compliance with the mining law is too well settled to admit of extended discussion. Sweeney *v.* Wilson, 10 L. D., 157; Bodie Tunnel and Mining Company *v.* Bechtel Consolidated Mining Company, 1 L. D., 584; Alice Placer Mine, 4 L. D., 314.

The fourth, fifth and sixth errors assigned by appellant are largely in the nature of reasons or arguments, and, in my judgment, present immaterial questions, when viewed in the light of the record in the case. The seventh and last assignment of error is: "Because of the manifest errors in the conclusions of law and fact arrived at by the Commissioner in making the decision appealed from." This specification is too indefinite to present any question.

Rule of Practice 88 requires a specification of errors, "which shall clearly and concisely designate the errors of which he complains."

After carefully examining all of the evidence in the case, I find therefrom the facts to be substantially as found by your office, which are set out in said decision, and are hereby referred to as fully as if set out herein. I find no reason for disturbing the decision appealed from, and it is accordingly affirmed.

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### PRIVATE CASH ENTRY—NON-MINERAL AFFIDAVIT.

GEORGE S. BUSH.

A non-mineral affidavit is properly required to accompany an application to make private cash entry.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 27, 1890.*

This is an appeal by George S. Bush from your office decision of March 29, 1889, affirming the action of the local office in rejecting his several applicatians to make private cash entries for certain described (offered) tracts in T. 30 N., R. 5 W., Seattle, Washington, "because no non-mineral affidavit accompanies the same."

The tracts involved, if "valuable for minerals," are reserved from sale (Sec. 2318 R. S.), and consequently not subject to private entry. The non-mineral affidavit is simply the means adopted by the Department for ascertaining the character of land so applied for, and consequently by requiring it the Department neither adds to nor subtracts (as appellant contends) from the statute. By your office letter of September 24, 1872, such affidavit was made a requisite to "all entries under the agricultural land laws" in the Olympia, now Seattle, land district. The pending applications were therefore properly rejected for failure to file the same.

The decision appealed from is affirmed.

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### OSAGE LAND—ACTUAL SETTLEMENT.

UNITED STATES *v.* SWEENEY.

Actual settlement must be shown by residence following the alleged act of settlement, and the proof required to establish the fact of such settlement under the act of May 28, 1880, is no less in degree than the proof required under the pre-emption law.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 29, 1890.*

I have considered the appeal of S. S. Singer, transferee from the decision of your office cancelling Osage cash entry made by Dennis Sweeney for the W. ½ SE. ¼ Sec. 19, T. 33 S., R. 5 W., 6th P. M. Wichita series, Topeka, Kansas.

This entry was held for cancellation as fraudulent upon the report of Special Agent Drew, but afterwards a hearing was ordered before the local officers and thereat M. C. McLain, Esq., appeared as attorney for A. E. Lee and S. S. Singer transferees. Upon the testimony taken on the trial the local officers found that said entry was fraudulent for want of residence, improvement and cultivation, and recommended the cancellation of the entry. From this decision no appeal was filed, and on October 27, 1888, your office declared said decision final for failure to appeal therefrom, and canceled the entry.

On February 12, 1889, the local officers transmitted to your office an appeal from the judgment of your office, which you declined to entertain for the reason that said parties received due notice of the decision of the local office, and failed to appeal within the prescribed time. Whereupon appellant applied for a writ of *certiorari* which was granted, and said appeal is now before me.

In his final proof the claimant states that he first made settlement and established actual residence on the land the 18th day of May, 1881, and yet his final proof was made June 2, 1881, having remained on the land only fifteen days from the date of settlement to date of final proof. No declaratory statement was filed until June 9th—seven days after making final proof and the day his cash entry was allowed.

Considering the fact that his final proof was submitted within fifteen days from the date of his alleged settlement, in connection with the testimony taken on the hearing, which shows that he left the claim shortly afterwards, having mortgaged it to secure a loan of one hundred and twenty-five dollars, negotiated with B. F. Lee as agent, who was also the husband of A. E. Lee, who afterwards purchased the land, it shows that he never established a *bona fide* settlement and residence upon the land, as contemplated by the act. The improvements with the exception of an acre or two of plowed land, were made by a former settler, and the assignees failed to show that the entryman ever occupied the dug-out a single night. The local officers found that Sweeney never occupied the house and never had a residence upon the land. This finding is, in my judgment, amply supported by the evidence.

The main allegation of error in the appeal of Singer from the decision of your office is, in holding that the law governing Osage entries requires residence, improvement and cultivation, that it only requires that he shall be an actual settler on the land at date of entry, having the qualification of an pre-emptor. Such is not the rule of this Department. Actual settlement must be shown by residence following the alleged act of settlement, and the proof required to establish the fact of actual settlement under the act of May 28, 1880, (21 Stats., 143), governing Osage entries, is no less in degree than the proof required under the pre-emption law. United States *v.* Atterbery, (10 L. D., 36); United States *v.* Jones (Ib. 23).

The decision of your office is affirmed.

PRACTICE—AFFIDAVIT OF CONTEST.

HANES *v.* BEATTY.

Where a contestant presents at the local office an affidavit of contest properly prepared for signature, and ready for the administration of the oath thereto by himself and corroborating witnesses, it is the duty of one of the local officers, if called upon so to do, to administer said oath to said contestant and his witnesses, preparatory to filing such affidavit; and the failure or refusal of the local office to take such action will not defeat the contestant's right of priority.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August* 29, 1890.

I have considered the case of Abram C. Hanes *v.* Robert M. Beatty, on appeal by Hanes from your office decision of February 8, 1889, sustaining the action of the local officers, and awarding to Beatty a prior right to contest the homestead entry made by James L. Plummer, December 19, 1879, for the SW. ¼ Sec. 28, T. 22 S., R. 34 W., Garden City, Kansas.

The evidence shows that on the morning of June 21, 1888, the said Beatty, accompanied by two corroborating witnesses, appeared at the "filing window" of the local office, with the intention of initiating contest against said Plummer's homestead entry. As a basis for such contest, one of Beatty's corroborating witnesses, David F. Speare, presented to the filing clerk of the office, Mr. W.W. Glasscock, an affidavit that had previously been prepared, except that the names of the contestant and of his corroborating witnesses were not written on the face of the paper, and they had not signed the same; and he requested that the oath be administered to the three (Beatty and his two witnesses) then and there present. What then occurred is thus stated by Mr. Speare in his testimony taken at the hearing:

I was the first man at the window of the land office. Robert M. Beatty, contestant, and Charles G. Lindgren, were by my side when I handed the papers to Glasscock. He looked at the papers, put the number, '16,162,' on the affidavit, and said I would have to go before a notary public and be sworn. I told him the contestant and corroborating witnesses were in readiness to sign the affidavit and be sworn—which I had seen done before at the window of the land office. He said he would not do it.

The same witness further states that Mr. Cleary, special examiner of your office, informed him that the contest papers could be signed at the window and sworn to by the register or receiver of the land office.

Contestant, Hanes, in his testimony at the hearing, says:

There was another party at the door at the time the door opened. The other party, a little in advance, put his papers in the window. The clerk looked at the papers. Said he, "They are not dated nor sworn to; they are worthless." I think those are about the words he used, as near as I can recollect.

The filing clerk, Glasscock, testifying upon the same point, says: "The papers being incomplete, I told the person presenting said papers to go and have them fixed up."

Being asked in what respect the papers were incomplete, the witness said: "The contestant had not been sworn to the affidavit of contest, and no corroborating witnesses appeared on the corroborating affidavit;" but he does not state that he made this explanation to the person presenting the affidavit.

Beatty and his corroborating witnesses went to the nearest notary's office, where the oath was administered to them and the blanks that had before existed in the contest affidavit were filled, and within half an hour they returned to the land office, and again tendered said affidavit.

In the meantime, however, Hanes had offered his affidavit of contest, which had been received and noted. Upon Beatty's return, and the (second) presentation of his affidavit, the receiver inquired into the facts of the case, and upon being informed thereof, directed that Beatty's contest be held as having been filed prior to that of Hanes. Upon consideration of the testimony taken at the hearing (the substance of which has been hereinbefore given), the register and receiver found the rights of Beatty to be superior to those of Hanes. Thereupon Hanes appealed to your office, which affirmed the judgment of the local officers. Hanes now appeals to the Department.

In my opinion, the objections made by the filing clerk to the affidavit of contest, whether those stated by himself or those stated by the contestant, are insufficient and unsatisfactory. It was the duty of one of the local officers, when called upon to do so, to administer the oath to the contestant and his witnesses. It was the duty of the witnesses to subscribe the affidavits in his presence, and the law presumes that they did. After the affidavits were subscribed and the oath administered it was the duty of the officer administering the oath to add in the jurat the date when the affidavit was "subscribed and sworn to before" him.

The affidavits were in a proper condition to sign and have the oath administered when presented. The contestant did all he could or was required under the law to do. If neither of the local officers were present, the applicant to contest ought not to lose his rights because of their neglect. (Lytle *v.* State of Arkansas, 9 How., 333). Beatty had substantially complied with the requirements of the law; and your decision awarding to him the prior right of contest is affirmed.

## ARID LANDS—CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., August 9, 1890.*

*Registers and Receivers, United States Land Offices.*

GENTLEMEN: On the 5th of August, 1889, 9 L. D., 282, a circular was addressed to you by direction of the Hon. Secretary of the Interior, calling your attention to the provisions of the act of October 2, 1888, 25 Stat., 526, relative to the lands in the arid regions of the United States and instructing you thereunder, which reads as follows, viz:

Information having reached this Department that parties are endeavoring to make filings on arid lands reserved for reservoirs, irrigating ditches, and canals, and for the purpose of controlling the waters of lakes and rivers and their tributaries in the arid regions, I am directed by the Hon. Secretary of the Interior to call your special attention to the act of Congress approved October 2, 1888, U. S. Statutes at Large, vol. 25, page 526, as follows:

"For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, and to make the necessary maps, including the pay of employés in field and in office, the cost of all instruments, apparatus, and materials, and all other necessary expenses connected therewith, the work to be performed by the Geological Survey, under the direction of the Secretary of the Interior, the sum of one hundred thousand dollars or so much thereof as may be necessary. And the Director of the Geological Survey, under the supervision of the Secretary of the Interior, shall make a report to Congress on the first Monday in December of each year, showing how the said money has been expended, the amount used for actual survey and engineer work in the field in locating sites for reservoirs, and an itemized account of the expenditures under this appropriation. And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches, or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches, or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act to entry, settlement or occupation until further provided by law: *Provided*, that the President at any time in his discretion, by proclamation, may open any portion or all of the lands reserved by this provision to settlement under the homestead laws."

The object sought to be accomplished by the foregoing provision is unmistakable. The water sources and the arid lands that may be irrigated by the system of national irrigation are now reserved to be hereafter, when redeemed to agriculture, transferred to the people of the Territories in which they are situated for homesteads. The act of Congress and common justice require that they should be faithfully preserved for these declared purposes.

The statute provides that all lands which may hereafter be designated or selected by the Geological Survey as sites for reservoirs, ditches, or canals for irrigating purposes, and all lands made susceptible of irrigation by such reservoirs, ditches, or canals are since the passage of said act absolutely reserved from sale as property of the United States, and shall not be subject after the passage of the act to entry, settlement, or occupation until further provided by law, or the President, by proclamation, may open said lands to settlement.

Neither individuals nor corporations have the right to make filings upon any lands thus reserved, nor can they be permitted to obtain control of the lakes and streams that are susceptible of uses for irrigating purposes.

You will, therefore, immediately cancel all filings made since October 2, 1888, on such sites for reservoirs, ditches, or canals for irrigating purposes and all lands that may be susceptible of irrigation by such reservoirs, ditches, or canals, whether made by individuals or corporations, and you will hereafter receive no filings upon any such lands.

This order you will carry into effect without delay.

It is found that, notwithstanding said act and the instructions given thereunder by said circular, numerous filings and entries of lands within the arid regions appear to have been permitted to be made, subsequent to October 2, 1888, the date of the passage of the act. These entries and filings were made at the risk of the parties.

Under date of the 2d of April, 1890, the matter of the proper course of proceeding under said act was submitted by this office to the Hon. Secretary of the Interior with a request for instructions therein. It appears that the subject was laid by the Secretary before the Hon. Attorney-General for his opinion, who, under date of the 27th of May, 1890, gave an opinion from which the following is an extract, viz:

The object of the act is manifest. It was to prevent the entry upon and the settlement and sale of all that part of the arid region of the public lands of the United States which could be improved by general system of irrigation, and all lands which might be designated or selected by the United States surveys as sites for the reservoirs, ditches, or canals in such systems. Unquestionably it would seriously interfere with the operation and purpose of the act if the sites necessary for reservoirs in such plan of irrigation could be entered upon by homestead settlers. So, too, it would be obviously unjust if pending the survey made with a view to their segregation for improvement by irrigation these lands should be entered upon and settled as arid lands of the United States. It was, therefore, the purpose of Congress by this act to suspend all rights of entry upon any lands which would come within the improving operation of the plans of irrigation to be reported by the Director of the Geological Survey under this act. Language could hardly be stronger than are the words of the act in expressing this intention.

All the lands which may hereafter be designated or selected, etc., are from this time henceforth hereby reserved from sale, etc., and shall not be subject after the passage of this act to entry, etc., until further provided by law.

There can be no question that if an entry was made upon land which was thereafter designated in a United States survey as a site for a reservoir, or which was by such reservoir made susceptible of irrigation, the entry would be invalid, and the land so entered upon would remain the property of the United States, the reservation thereof dating back to the passage of this act.

The far-reaching effect of this construction cannot deprive the words of the act of their ordinary and necessary meaning. The proviso that "the President at any time in his discretion, by proclamation, may open any portion or all of the lands so reserved," was the legislative mode of modifying and avoiding the far-reaching effect of the act, whenever it should appear to the Executive to have too wide an operation. Entries should not be permitted, therefore, upon any part of the arid regions which might possibly come within the operation of this act.

These proceedings having consumed some time, I am now in receipt of the Secretary's letter of the 4th instant, in which, after alluding to

previous correspondence and the opinion of the Attorney-General from which an extract is above quoted, he directs that this office shall proceed to carry the law "into effect, according to the terms and instructions already existing from the Secretary," referring to the instructions contained in circular of August 5, 1889, above given.

I have to call your special and particular attention to the foregoing order from the head of the Department, and to direct in reference to the subject matter that you proceed strictly in accordance therewith. Although, in any case, there be at the time no designation of the land involved therein as a selection for a site or sites for reservoirs, ditches, or canals for irrigation purposes, or as land thereby made susceptible of irrigation, that fact is not to be considered as showing that the land is open to entry, as, although not yet so selected, it may be liable to such selection, under said act, which is held to withdraw all lands so liable from disposal. You will, therefore, permit no entry or filing of any lands lying within the arid regions that may be included in your land district, on any condition whatever, but will promptly reject any application that may be made for such an entry or filing, with the usual right of appeal. You will take any necessary action to ascertain the proper limits of the arid regions, and whether any lands in your districts are included therein, and if you have any doubt thereof, you may submit the question to this office for specific instructions.

Any entries or filings of lands within the arid regions which may have already been allowed, subsequent to the passage of the act of October 2, 1888, and reported to this office, will be taken up and acted upon according to the principles indicated herein, as soon as practicable in the course of official business.

Very respectfully,

LEWIS A. GROFF,
*Commissioner.*

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### SWAMP LAND INDEMNITY CLAIM.

### STATE OF ILLINOIS, (LIVINGSTON COUNTY).

In the investigation of claims under the swamp grant the proceedings of the special agent should be in accordance with departmental regulations.

*Secretary Noble to the Commissioner of the General Land Office, August 30, 1890.*

The State of Illinois has appealed from your office decision of May 14, 1887, rejecting its application for cash indemnity for certain lands in Livingston county, in said State, alleged to be swamp and overflowed, and if so, inuring to the State under the acts of September 28, 1850 (9 Stat., 519), and March 2, 1855 (10 Stat., 634).

In the investigation of the claimed swamp-lands of this county, according to the record transmitted, there appears to have been no pre-

tense even, on the part of the special agent of your office (Mr. W. F. Elliott), of complying with the rules and regulations of the Department relative to the taking of proofs in cases of swamp-land indemnity claims (Copp's Land Laws, Ed. of 1882, Vol. 2, 1042).

(1) Under these rules, the agent is requested to secure such reliable information as he can obtain from personal examination and observation. The agent reports that he made a "personal examination"; the State agent asserts that the agent of your office "described the selections simply as he saw them while driving hurriedly by them in a buggy"—furnishing no proof of this, however, beyond his own assertion. Whether the assertion be true or not is a matter of no importance, in view of other facts disclosed by the record.

(2) The departmental rules require that the agent shall obtain "a knowledge of the land during a series of years extending as near to the date of the grant as possible." Instead of this, the agent reports the condition of the land as he found it. There are affidavits of five persons, who have resided in said county from sixteen to thirty-seven years, to the effect that the season of 1886—when agent Elliott made his examination—was one of the driest ever known in that vicinity. A comparison of Agent Elliott's report with that of Special Agent Walker, of your office, relative to some of the same tracts, would seem to corroborate this statement, and show that his report, if correct, must have shown the condition of the tracts referred to in a very exceptional year.

(3) The departmental rules require that the agent shall inform himself of the character of the land not alone by personal examination and observation, but "by inquiry of the owner or resident, if any there be, and of persons residing in the vicinity having personal knowledge of the past and present character of the land." In all properly conducted examinations, the affidavits of such owners, residents, or persons residing in the vicinity, are taken, and transmitted with the record; but nothing of the kind appears in this case. On the contrary, the special agent says (see last page of his report):

In this embarrassing case I had to act *solely on my own judgment* as to the correctness of my position on any tract of land.

(4) Upon the completion of this examination, at least thirty days notice shall be given the State, or claimants under the State, of the time and place when and where testimony will be received touching the character of the lands described. Agent Elliott gave no such notice (according to the twelfth assignment of error herewith); he makes no record of any such notice; on the contrary he mentions as a matter of dissatisfaction the fact that the State Agent (Mr. Hitt), or his deputy (Mr. Lewis), "have one or both been here all the time," and complains of it as "a source of annoyance." (See bottom of first page of Report.) He seems not to have had the least idea that they were his appointed co-workers, whose duty it was to assist in the task of determining what land belonged to the State and what to the United States government.

(5) Having been properly notified, the State should be given opportunity to offer "the testimony of at least two respectable and disinterested witnesses who have personal and exact knowledge of the condition of the land during a series of years." In all properly conducted examinations, the affidavits of such witnesses on the part of the State are taken, and transmitted with the record. But no such testimony appears in this case; and as matter of fact none was taken.

It will be seen that in several important respects the examination in the case at bar has failed to comply with the requirements of the departmental regulations. The facts furnished in the report of the agent of your office are wholly insufficient to serve as a basis for action by your office or the Department, either in accepting or rejecting the claim of the State. As was said by the Department in the case of Hardin County, Iowa (5 L. D., 236):

> The evidence already presented as to the claim under consideration certainly does not bind your office or the Department to a final adjudication. . . . . To hold that it does would be contrary to reason, and would, in effect, lead to the final adjudication, certification, and passing of rights and titles in violation of law—which, as to claims of the class here in question, requires *due proof* before the Commissioner of the General Land Office.

It being clear that, in the case at bar, "due proof" of the character of the lands in question has not been given, you are directed to cause a re-examination thereof to be made in accordance with departmental regulations for such causes made and provided.

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### RAILROAD GRANT—PRE-EMPTION FILING.

### UNION PACIFIC RY. CO. *v.* HAINES. (ON REVIEW).

The existence of a *prima facie* valid pre-emption filing of record at the date when the grant grant becomes effective, raises a presumption of settlement as alleged, and of the actual existence of the claim, which is conclusive as against the grant, in the absence of an allegation that said filing was void *ab initio*.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September* 1, 1890.

On November 30, 1889, I rendered a decision in the case of Union Pacific Railroad Company affirming the decision of your office rejecting the claim of said company for the NW. ¼ of SE. ¼ Sec. 3, T. 3 S., R. 70 W., Denver Colorado, upon the ground that the tract was excepted from the operation of the grant by reason of the unexpired filing (declaratory statement No. 3180) of Fred Shumph, made March 7, 1867, appearing of record at date of definite location.

Before the promulgation of said decision by your office, counsel for the railway company filed an application to have said decision recalled upon the ground that the case was considered by the Department without having the whole record before it. It is alleged in said application

that the pre-emption claimant whose filing appeared of record at date of definite location, was Fred Schnauffer and not Fred Shumph as stated in the decision of your office and of the Department, and that the files and records of your office show that a hearing was had in the case of The Denver Pacific Railroad Company against Henry Moore and Fred Schnauffer involving the right to the NW. ¼ of SE. ¼ of said section 3, and other lands, and upon the testimony presented at said hearing, the local officers found that said Moore and Schnauffer never resided upon or improved or cultivated the land, and recommended the cancellation of the declaratory statements 1526 and 3180, which was affirmed by your office June 4, 1874, holding that by reason thereof the land was not excepted from the grant to the company and that as their old filings had then expired, the case was closed.

In view of said allegation, I recalled said decision by letter of December 28, 1889, and on January 8, 1890 you returned the papers and also submitted therewith the record of the hearing and a copy of the decision of your office of June 4, 1874, referred to in the application of counsel for the railroad company.

The records of your office show that declaratory statement 3180 filed March 7, 1867 for the NW. ¼ of SE. ¼ Sec. 3 T. 3 S., R. 70 W., Denver, Colorado, was filed by Fred Schnauffer and it does not appear that any filing for said tract was ever made by Fred Shumph or by any other person except the one above mentioned.

It also appears that a hearing was had in the case of the Denver Pacific Railroad Company *v.* Henry Moore and Fred Schnauffer, involving the right to the NW. ¼ of SE. ¼ of Sec. 3, and other lands, said NW. ¼ being embraced only in declaratory statement 3180 of Schnauffer; that upon the testimony taken at said hearing the local officers found that said Moore and Schnauffer never resided upon, improved or cultivated said tract, and on June 4, 1874, your office in passing upon said case held as follows:—

> The testimony submitted shows that neither Moore or Schnauffer have ever resided upon or had any improvements on the land in contest. I am therefore of the opinion that at the date of the railroad right attaching, there was no valid subsisting claim to the land which excepted it from the operation of the grant.
>
> The filings of Moore and Schnauffer having long since expired by limitation, the case has been closed.

But at the date of the definite location of the road this tract was covered by a *prima facie* valid pre-emption filing of record, and said filing not having expired at that date excepted the land from the operation of the grant for all time. The question as to whether the pre-emptor under such filing inhabited, cultivated and improved the tract, or made settlement thereon, can not be raised by the company. Such a filing raises a presumption of settlement as alleged, and of the actual existence of the claim, in the absence of allegations that it was void *ab initio*, which is conclusive as against the grant. Northern Pacific Railroad Company

*v.* Stovenour, 10 L. D., 645; Northern Pacific Railroad Company *v.* Fugelli, ib., 288; Randall *v.* St. Paul and Sioux City Railroad Company, ib., 54.

The mere fact that the Commissioner, upon an *ex parte* hearing ordered upon the application of the company, has held that Schnauffer never resided upon the land, and that therefore there was no valid subsisting claim to the land which excepted it from the operation of the grant will not prevent the Department from re-adjudicating that question at any time prior to certification, and if the lands so excepted had been certified or patented, it would be the duty of this Department, under the act of March 3, 1887 (24 Stat., 556), to demand of the company a reconveyance of the land, and upon refusal of the company to reconvey, to transmit the papers to the Attorney General that proceedings might be instituted for the recovery of the title. (Boyer *v.* Union Pacific Ry. Co. 10 L. D. 568).

The additional record submitted with your letter of January 8, 1890, presents no grounds for reversing the decision of the Department of November 30, 1889, and it is therefore affirmed.

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PRIVATE CLAIM—APPEAL—ACT OF FEBRUARY 25, 1869.

HEIRS OF ALFRED BENT.

The provisions of section 1, act of February 25, 1869, do not authorize an appeal from the decision of the local officers on claims presented under the Vigil and St. Vrain grant.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September* 1, 1890.

I have considered the appeal of George Thompson from your office decision of October 17, 1888, refusing to consider the appeal of the heirs of Alfred Bent from the judgment of the register and receiver at Pueblo, Colorado, dated February 23, 1874, rejecting their claim to a portion of the land embraced within the limits of the private land claim of Cornelio Vigil and Ceran St. Vrain, known as the Las Animas grant.

Thompson is the present owner of the derivative claim of the heirs of Alfred Bent, under the Vigil and St. Vrain grant.

The facts in connection with this claim are fully set forth in the various letters from your office addressed to the local officers at Pueblo, and to the attorneys in the case.

The only question to be determined at this time is, should the appeal of the heirs of Alfred Bent from the decision of the register and receiver, dated February 23, 1874, rejecting their claim under said grant, be taken up and considered and decided upon its merits.

The first section of the act of February 25, 1869 (15 Stat., 275), provides that claimants under the Vigil and St. Vrain grant may establish their claims to the satisfaction of the register and receiver, but the

act is silent as to the right of appeal from the decision of said officers. Your office, however, held that the right of appeal to the Commissioner, and from his decision to the Secretary, existed, and Secretary Delano, under dates of October 27, 1874, and January 23, 1875, affirmed said judgment.

Soon after the last mentioned date, William Craig, one of the derivative claimants under the grant, who contended that the right of appeal did not exist, made application to the President of the United States for an order directing the surveyor-general of Colorado to issue to him a plat of the land awarded to him by the register and receiver. The President referred the question involved to the Attorney General for an expression of his opinion. In this opinion, rendered May 15, 1876 (15 Opinions Attorney-General, 94), the Attorney General, after full consideration of the question, held that no appeal could be entertained by the Land Department from the decision of the register and receiver. Acting upon this opinion, the President directed that plats of the land awarded to Craig by the register and receiver issue to him, thus holding that the decision rendered by those officers was final.

On July 3, 1877, the supreme court of the District of Columbia, upon the application of Thomas Leitensdorfer for a writ of mandamus to compel the Commissioner of the General Land Office to proceed with the hearing of his appeal from the decision of the register and receiver in a case similar to the one now under consideration, denied said application holding that no appeal lay in such a case, and in the case of Craig *v.* Leitensdorfer, decided at the October term, 1887 (123 U. S., 189), the supreme court declined to express any opinion on that question.

The Department is thus left without the guidance of a decision by the highest judicial tribunal on this important question. In view, however, of the opinion of the Attorney General, the action of the President of the United States, and the decision of the supreme court of the District of Columbia, I do not feel that I would be justified, at this time, in holding to an opinion contrary to that expressed by these high officers of the government, and the judicial tribunal named.

I am confirmed in this opinion by the action of Secretary Teller, in the case of Rafael Chacon (2 L. D., 590), and by the further fact that approved plats of survey, of the land awarded by the register and receiver, have been delivered to the claimants, as evidence of title, for all the land confirmed to Vigil and St. Vrain by the act of June 1, 1860 (12 Stat. 71), with the exception of 3042 acres, and of this amount 3006 acres were awarded to different claimants by the register and receiver, and the claims are now awaiting adjustment by the Land Department.

The government has thus parted with all the title it possessed to nearly all the land confirmed, and the remaining portion of the land embraced within the exterior limits of the grant has been declared subject to settlement and entry under the public land laws.

Your decision is therefore affirmed.

SWAMP LAND CLAIM—WAIVER.

STATE OF ILLINOIS (MOULTRIE COUNTY).

The claim of the State, while pending on adjustment, should not be considered as "waived," in the absence of a formal waiver, filed with the record, and signed by the agent of the State, or his duly authorized deputy.

*Secretary Noble to the Commissioner of the General Land Office, August 30, 1890.*

The State of Illinois has appealed from your office decision of January 22, 1886, rejecting its application for cash indemnity for certain lands in Moultrie county, in said State, alleged to be swamp and overflowed, and if so, inuring to the State under the acts of September 28, 1850 (9 Stat., 519), and March 2, 1855 (10 Stat., 634).

There are eight allegations of error, which are word for word the same as the first eight allegations of error in the case of Champaign county, Illinois (10 L. D., 121); and the case at bar, being in all essential respects similiar to the Champaign county case, will be reconsidered and disposed of by your office in accordance with the rules laid down therein.

The special agent of your office (Mr. A. B. Evans), in his report, has written opposite a considerable number of descriptions, "State waives," and attached to your office decision appealed from is a memorandum, reading: "The State offered no proof on any of the tracts held for rejection, and waived its claim." It would seem that if the State had waived its claim to all the tracts held for rejection by your office, it would not appeal from your office decision holding the same for rejection; but in the record I find a certified copy of the following resolution passed by the board of supervisors of Moultrie county, on the 14th day of September, 1886:

*Resolved*, That the State Agent, Isaac R. Hitt, be requested to appeal from the decision of the Commissioner of the General Land Office to the Secretary of the Interior, in the matter of the claim of Moultrie county, Illinois, *v.* The United States, growing out of the swamp-land grant.

This is but one of several cases, in the investigation of claims for swamp-land indemnity by the State of Illinois, where the special agent has alleged that the State had waived its claim, but where the county authorities (acting for the State), or the State agent, denied having made any waiver. The only safe rule to follow in this respect is that laid down in the case of Dallas county, Iowa (decided by the Department February 14, 1890—not reported):

You will consider a claim as waived only where a formal waiver, signed by the State agent or his duly authorized deputy, is to be found on file in the record.

## RAILROAD LANDS—ACT OF MARCH 3, 1887.

### INSTRUCTIONS.

The right of purchase from the government, conferred by section 5, act of March 3, 1887, is not limited to the immediate purchaser from the company, but may be exercised by any *bona fide* purchaser of the land who has the requisite qualification in the matter of citizenship; and if the applicant is not the original purchaser from the company it is immaterial what the qualifications of his immediate grantor, or the intervening purchasers may have been.

*Secretary Noble to the Commissioner of the General Land Office, August 30, 1890.*

I am in receipt of your communication of August 1, 1890, relating to the act of March 3, 1887 (24 Stat., 556), and the departmental circular of instructions issued thereunder February 13, 1889 (8 L. D., 348), based upon the case of Samuel L. Campbell (id., 27). You call attention to the fifth section of the act, and to that part of the circular applicable thereto.

This section provides:

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

The circular prescribes that applicants to purchase under this section must submit proof showing, among other things—

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

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

You state that—

Under the instructions, either the original purchaser, or his transferee, may purchase under this section, and in the event that the applicant be the transferee of the original purchaser, he is only required to show that *he* is, or has declared his intention to become, a citizen of the United States.

Commenting thereon you further say—

A reading of the act will show that only such sales as had been made by the company to a citizen, or person having declared his intention to become such, were to be respected; in other words, it was to defeat purchases by foreigners, and the section required the *bona fide* purchaser of the company to make payment to the United States. As the instructions stand, if the purchaser from the company was a foreigner, and he sold to a citizen, the citizen might make proof, and thus the intention of the statute is indirectly defeated.

You thereupon express the opinion "that the statute contemplated the purchase to be made by or through the original purchaser of the company, and that it is necessary to be shown that *he* is such a person as is contemplated by the act;" and you recommend that the instructions be amended accordingly.

Your construction of the act seems to be based upon the theory that the transferee of the immediate purchaser from the company must necessarily occupy the same position, as regards his right to purchase from the government, as that of his immediate grantor; in other words, if the original purchaser from the company is for any reason not qualified to purchase from the government, no grantee of such original purchaser whether otherwise qualified or not, can become a purchaser under the act.

I do not think this construction is sound. The section in question was evidently intended by Congress for the benefit of citizens of the United States, or persons having declared their intention to become such, who in good faith, shall have purchased lands within the limits of railroad grants and coterminous with constructed parts of the roads, with the *bona fide* belief that the company had title thereto. It can make no difference, in my judgment, whether the applicant is the immediate purchaser from the company, or a purchaser one or more degrees removed. If he is a *bona fide* purchaser of the land, and has the required qualifications as to citizenship, he is within the intendment of the statute, and if he be not the original purchaser from the company it is immaterial what the qualifications of his immediate grantor, or the intervening purchasers may have been. If his immediate grantor was a foreigner, and his purchase was simply for the purpose of acquiring title from the government for the benefit of the foreigner, he would not be a *bona fide* purchaser, and would not therefore come within the terms of the act.

It was not in any sense, the intention of Congress to confirm sales made by the company, but rather to afford to citizens, or persons having declared their intention to become such, who were *bona fide* purchasers of lands to which the company had no title, a means of acquiring title from the government, to the exclusion of settlers or purchasers under the general land laws.

I am of the opinion that the instructions in question are sufficiently explicit, and that they properly declare the law.

## SIOUX INDIAN LANDS—HOMESTEAD.

### RICHARD GRIFFIN.

A homestead entry erroneously allowed for land within the Sioux Indian reservation, may remain intact, on the release of said land from such reservation, and take effect as of the date when the land was opened to settlement.

Agricultural lands, formerly within said reservation, and opened to settlement under the act of March 2, 1889, are subject to disposition only under the homestead law.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 2, 1890.*

I have considered the appeal of Richard Griffin from the decision of your office, dated June 9, 1887, holding for cancellation his homestead entry No. 14,821, of the SE. ¼ of Sec. 21, T. 104 N., R. 69 W., and also his timber culture entry, No. 11,182, of the SW. ¼ of said section, township and range, Mitchell land district, South Dakota, both dated November 26, 1880, because said entries were "within the limits of the Sioux Indian reservation in Dakota Territory."

It appears that one of the boundaries of said reservation was not clearly defined by the first survey thereof, so that settlers were liable to locate upon the reserved lands; that it was generally understood that American creek was the boundary of "the Crow creek reserve" on the south; that said creek was in fact the southern boundary of said reservation, so far as it had any well defined channel east to the range line, between the ranges Nos. 69 and 70 W.; that in 1882 the southern boundary was fixed by a survey, which showed that the land covered by said entries was within the Indian reservation.

In an affidavit, dated May 19, 1886, and duly corroborated, Mr. Griffin swears that he commenced residing upon his said homestead about May 1, 1881, and has continuously lived upon and improved said tract until the date of said affidavit; that he came to the local office to make final proof in support of his homestead claim, when he learned, for the first time, that his entry had been suspended by your office, on November 14, 1882; that when he entered said tract he received from said local office a plat which showed that all of township 104, range 69, south of the American creek, was subject to entry and no part of the Indian reservation; that by a subsequent survey all of the land in said township, north of the south line of affiant's said homestead falls within the reservation; that he made said entry in good faith; that he "contested the timber entry on the west," adjoining his homestead, and upon the cancellation thereof, made said timber culture entry, upon which he had broken nearly eleven acres; that in view of the foregoing facts, said Griffin requested that his said entries "be allowed to stand until such time as the Indian reservation bill, now before Congress, shall be finally passed upon."

Your office denied said application on June 9, 1887, and held said entries for cancellation, as aforesaid.

The appeal and specification of errors are defective in being too general, and might be dismissed for that reason. But, in view of the subsequent legislation of Congress by which a portion of said reservation, including the land in question, was opened to settlement, I have concluded to examine the record in this case.

By the act of March 2, 1889 (25 Stat., 888), the Sioux reservation was divided into separate reservations, with distinct boundaries, and the residue, including the land in question, was released to the United States.

There does not appear to be any question of the good faith of the applicant, and I see no good reason why his said homestead entry should not be allowed to remain intact, and take effect from the date when the land covered thereby became subject to settlement under the provisions of said act of 1889, and the claimant allowed to perfect his entry under the requirements of said act.

Inasmuch as section 12 of the act expressly provides "that all lands adapted to agriculture, with or without irrigation, so sold or released to the United States by any Indian tribe, shall be held by the United States for the sole purpose of securing homes to actual and *bona fide* settlers only, in tracts not exceeding one hundred and sixty acres to any one person," etc., it is apparent that Mr. Griffin can not acquire title to the land covered by his timber culture entry, under the provisions of the timber culture act, for the reason this land is only subject to homestead entry. His said timber culture entry must therefore be canceled.

The decision of your office is modified accordingly.

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### PRACTICE—RES JUDICATA.

### MARY C. STEPHENSON.

A decision of the Department, long acquiesced in, will not be reconsidered on the mere allegation of error in construing the law.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September 2, 1890.*

I have before me a motion filed on the 24th ult. for review of the decision of the Department, dated December 3, 1886, affirming the action of your office in inserting in a soldiers' additional homestead certificate issued to Mary C. Stephenson, widow of Alexander C. Stephenson, a clause requiring her to furnish at date of entry, evidence "that she is still the widow of A. C. Stephenson." With the record is a letter from A. A. Hosmer, the attorney in the case, requesting that the motion "be considered as a petition for the exercise of the supervisory jurisdiction of the Secretary and that he will direct the issue of a new certificate of

Mrs. Stephenson's right, omitting therefrom the clause interpolated in the one previously issued requiring her to submit to the district land office proof at the date of filing her application for an additional entry, that she is still living and has not remarried—thus making the certificate conform to the rules and practice adhered to in all other like cases.

It appears that on March 15, 1883, Mrs. Stephenson made application to your office for a certificate of her right, as widow of said Alexander C., to make soldiers' additional homestead entry of one hundred and twenty acres. On May 11, 1885, your office issued a certificate of the right but with the clause above described inserted. It appears the attorney protested and thereupon, by decision of October 19, 1885, Commissioner Sparks formally refused to eliminate said clause from the certificate (5 L. D., 264). Appeal was taken and on December 3, 1886, the action of your office was affirmed by the Department. From that time the matter has rested.

Section 2304 of the Revised Statutes, describes the classes of soldiers and sailors who are entitled under section 2306 to make additional homestead entry. The latter section provides that

> Every person entitled under the provisions of section 2304 to enter a homestead, who may have heretofore entered under the homestead law a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

Section 2307 provides

> In case of the death of any person who would be entitled to a homestead under the provisions of section 23 4, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvement therein contained.

In his said decision the Commissioner, after setting out these enactments, said:

> Any one can see by a glance at the statutes referred to, that Mrs. Stephenson's right to additional entry depends upon her continuing to be the widow of A. C. Stephenson; that if she has since remarried, or died, the right belongs to minor orphan children, if any, or ceases altogether, as a claim against the United States . . . . . I regard all cases of the kind as properly subject to the same rule. I am not aware that any certificate has been issued in disregard thereof since my attention was called to the point, in the Stephenson case, and if any has been, it has resulted from inadvertence.

There are no new facts presented with this application. The question is the same that was passed on by the Department in 1886, the issue being that the regulations of the Department did not authorize the insertion of said clause. This issue was presented to the Secretary and by him decided against the claimant. In this decision claimant has acquiesced for almost four years. In the meantime no attempt has been made to secure another examination of the case, and no reason is assigned for the delay. Under these circumstances, the Department

can not undertake to re-open the case on a mere allegation that the decision was erroneous. The amount of routine work is already great, the claims of those who are here in regular order are pressing, and to open this case and re-examine it on its merits would be to invite applications for re-examination of all cases decided since 1886, in which errors of law might be alleged. Such an undertaking can not be assumed. The Department has repeatedly refused such applications. State of Kansas (5 L. D., 243); A. T. Lamphere (8 L. D., 134). See also State of Oregon (9 L. D., 360).

The attorney urges that the decision of the Department was inadvertent. There is no proof of this allegation, and the presumption is to the contrary. Furthermore, the record shows the issue was clearly presented.

The application is accordingly dismissed. This disposition of the case renders it unnecessary to consider the cases cited by applicant as at variance with the decision of 1886, *supra*.

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### MINING CLAIM—EQUITABLE ADJUDICATION.

### SILVER KING QUARTZ MINE.

A mineral entry may be referred to the board of equitable adjudication where the published notice of application is not as explicit in the matter of description as the notice posted on the claim.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September 3, 1890.*

In the matter of mineral entry No. 59, made July 20, 1887, for the "Silver King Quartz Mine," lot 37, T. 10 N., R. 1 E., Los Angeles, California, the Oro Grande Mining Company appeals from your office decision of December 12, 1888, requiring republication (and posting) of the application for patent to said claim.

The order appealed from was made for the reason that in the published notice of the application, upon which the said entry was allowed, the description of the course and distance of the line (shown by the survey), connecting the claim with the public surveys, had been omitted.

It appears that on September 21, 1885, Charles T. Bradley and others filed an application for patent for said Silver King mine and also for the adjoining Calico Queen claim; that the latter was, on November 19, 1885, "adversed;" and said application, so far as it related to the Calico Queen), was withdrawn June 18, 1887; that during the fall of 1885 notice of the Silver King application, showing the exterior boundaries and location of said claim, with reference to those adjoining, was duly published, and was posted in the local office, together with the official plat showing said connecting line, on the claim.

In the similar case of Mimbres Mining Company (8 L. D., 457), where a description of the line connecting the claim with the public surveys had been omitted from the published notice of application, the Department held that, if the same is not as explicit in the matter of description as the notice posted on the claim, such defect is properly chargeable to the register, and may be cured by reference to the board of equitable adjudication. The case at bar is in my opinion clearly within the rule stated. The entry in question will therefore be so referred.

The decision appealed from is modified accordingly.

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HOMESTEAD ENTRY—COMMUTATION—EQUITABLE ADJUDICATION.

SUSIE COREY.

The right of commutation depends upon prior compliance with the homestead law.

Where a homesteader in good faith cultivates and improves his land, but dies without having established residence thereon, the widow may submit proof showing her residence on the land, and connection with the claim, after the death of the entryman, with the view to an equitable confirmation of the entry.

An appeal regularly taken under the rules of practice should not be dismissed.

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

I have considered the case of Susie Corey, on appeal from your office decision of February 16, 1889, dismissing her appeal from the decision of the local officers rejecting her final proof of homestead entry for SW. ¼, Sec. 12, T. 138 N., R. 78 W., Bismarck, North Dakota, land district.

Her late husband, Emer N. Corey, deceased, made homestead entry for this land on June 8, 1883. He died December 12, 1886, and the claimant as his widow, offered final proof on October 2, 1888, which was rejected by the local officers, from which decision she appealed and your office on February 16, 1889, dismissed her appeal from which decision she again appealed.

It appears from the record that her appeal was regularly taken in accordance with the rules of practice; there was no motion to dismiss it and the decision dismissing it was erroneously made.

The testimony shows, that Corey in his lifetime, made said entry while he was holding the office of clerk of the United States district court for the sixth judicial district of Dakota Territory; that he went upon the land in 1883 and caused valuable improvements to be made thereon and cultivated the land each year up to his death; that he intended to make his residence on the land, and his improvements and cultivation were to that end, but he retained his residence in Bismarck until his death.

In April, 1887, the claimant Susie Corey moved with her children onto the land and has since made her residence thereon. Emer N. Corey was a private in Co. A, 179th Ohio Volunteer Infantry, but the evidence does not show the length of time for which he is entitled to credit by reason of military service.

While your decision dismissed her appeal, you passed upon the merits of the case and allowed her to commute the entry under section 2301, U. S. Revised Statutes.

By the uniform decisions of this Department—"The right of commutation depends upon prior compliance with the homestead law." Saml. H. Vandivoort (7 L. D., 86); Greenwood *v.* Peters (4 L. D., 237). Frank W. Hewitt, 8 L. D., 566.

It is quite clear that the entryman during his lifetime did not make a legal residence upon the land, and his improvements, though valuable are not the equivalent of residence. His widow, however, established, and has maintained a residence since April, 1887.

Considering all the circumstances of the case, the apparent good faith of the entryman and this claimant, the fact that she is entitled to some credit for the military service of her late husband, and the neglect to show the length of time for which such credit should be given, there being no adverse claim, the claimant will be allowed ninety days from notice hereof within which to make further proof, showing all the facts as to her connection with the land since October, 1888, also the length of time for which she is entitled to credit by reason of the military service of her late husband, and if such additional proof, with that on file, shows a substantial compliance with law, the proof, in the absence of protest or adverse claim, will be accepted, certificate issued, and the entry referred to the board of Equitable Adjudication for its consideration under the appropriate rule. See E. M. Dronberger (10 L. D., 88), also Rule 33—Rules of board of Equitable Adjudication (10 L. D., 503).

Your decision is modified accordingly.

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MINING CLAIM—SURVEY—CIRCULAR OF DECEMBER 4, 1884.

PLEVNA LODE.

The surface right is an adjunct of the lode claim, and cannot extend beyond the point where the lode intersects the exterior line of a senior location.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September 3, 1890.*

This is an appeal by the Ontario Silver Mining Company from your office decision of December 10, 1887, requiring the survey under which the Ontario Silver Mining Company made mineral entry No. 1,161, November 17, 1885 for the Plevna lode mining claim situated in

the Ontah mining district, Summit county, Salt Lake City land district, Utah to be amended. The "Plevna" claim was located May 19, 1885, surveyed May 21, 1885, and the survey approved June 9th following. Application for patent therefor was filed July 27, 1885, and publication began five days thereafter. Said survey overlaps on its easterly end the "Clara" lode claim, which was located June 28, 1872.

You held that in making said survey, the principle announced in circular "N," approved December 4, 1884, (3 L. D., 540, had been disregarded, and directed that "within that portion of the 'Plevna' survey, to which the claimant's rights are restricted by said circular, it must have a new survey of its claim made, the end lines of which must be parallel."

Section one of said circular provides that the rights granted to locators are restricted to locations on veins, lodes, or ledges, situated on the public domain, and directs that when the survey conflicts with a prior valid lode claim or entry, and the ground in conflict is excluded, the claimant's right to the lode claimed terminates where the lode in its onward course or strike intersects the exterior boundary of such excluded ground and passes within it." Section two of said circular provides further, that "the end lines of survey should not, therefore, be established beyond such intersection, unless it should be necessary so to do for the purpose of including ground held and claimed under a location, which was made upon public land and valid at the time it was made."

In the present case no part of the space in conflict is embraced in the "Plevna" application or entry, but said space is expressly excluded therefrom. From the survey as it now stands, the lode, which is presumably in the center of the claim, strikes the exterior line of the "Clara" lode claim, at a point westerly of the line surveyed as its easterly end line.

As was held in the similar case of the Engineer Mining and Developing Company (8 L. D., 361), the surface right, being simply an adjunct to the lode claim, could not extend beyond the termination of such claim, to wit: the point where the lode intersects the exterior line of the senior location.

It was, therefore, proper to require the end lines of the survey to be re-adjusted, so as to accord with the requirement of the circular referred to.

The decision appealed from is affirmed.

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## LARGEY ET AL. *v.* BLACK.

Motion for review of departmental decision rendered February 13, 1890, 10 L. D., 156, denied by Acting Secretary Chandler, September 4, 1890.

PRACTICE—CERTIORARI—RULE 84.

PETERSON *v.* FORT.

An application for certiorari will be denied if not made under oath.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September* 4, 1890.

Catherine Peterson by her attorney has filed an application for an order directing your office to certify to this Department the record of proceedings in the case of Catherine Peterson *v.* George W. Fort, involving homestead entry No. 11,800 made by Minnie F. Conrad (nee Fort) for the E. ½ of NW. ¼, NW. ¼ of NW. ¼ Sec. 20 and NE. ¼ of NE. ¼ Sec. 19 T. 32 N., R. 15 W., Niobrara, Nebraska land district. She sets forth in said application that she filed in your office a good and sufficient appeal from a certain decision rendered by you adversely to her in said case, and that you denied said appeal because not filed in time.

Rule 83, rules of practice, provides that parties may apply to the Secretary for an order directing the Commissioner to certify proceeding to him, in certain cases and rule 84, provides that:—

> 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.

The application before me is not made "under oath" and can not therefore be considered as the basis for the writ of certiorari asked for.

The application is therefore denied.

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RAILROAD GRANT—MINERAL LAND.

CENTRAL PACIFIC R. R. CO. ET AL. *v.* VALENTINE.

The discovery of the mineral character of land at any time prior to the issuance of patent therefor, or certification where patent is not required, effectually excludes such land from a railroad grant which contains a provision excepting all mineral lands therefrom.

*Secretary Noble to the Commissioner of the General Land Office, August* 30, 1890.

The lands involved in this case are described as lots 1, 2, 3 and 4, and the SE¼ of the SE¼, Sec. 33 T. 15 N., R. 9 E., Sacremento, California.

The tracts are within the primary limits of the grant to the Central Pacific Railroad Company, under the acts of July 1, 1862, (12 Stats., 489), and July 2, 1864 (13 Stats., 356), being situated less than five miles from the line of said company's road as definitely located and constructed. The public surveys were extended over them in 1865. The official survey of the township was approved by the surveyor-general December 26, 1865, and the township plat was filed in the local office

March 29, 1866. The tracts in question were designated on the plat as agricultural lands. The map of definite location of the company's road opposite thereto, was filed October 27, 1866, although the road appears to have been constructed as early as September, 1865.

In March, 1866, the "Rising Sun" lode claim, running from a point near the northeast corner, to a point near the southwest corner of the SE. ¼ of said section 33, was located by one Neff, and on May 11, 1870, patent was issued therefor without protest or objection by the railroad company. A segregation survey of this claim was made prior to patent, and thus was rendered necessary the "lotting" of the lands in the quarter section not included in such claim, except as to the SE. ¼ thereof, which was left intact. In 1866, a lode claim, then called the "Milford Claim," was located immediately south of and adjoining the "Rising Sun." This claim was relocated in July, 1883, by Phillip Nicholas and Joseph Werry, under the name of the "Big Oak Tree" quartz claim. Other lode claims were located immediately adjoining the "Rising Sun," as follows: "The Golden Eagle," to the north and east, in August, 1883; the "Werry Claim," to the west, in January, 1884, and the "Little Pine Tree," to the south and west in July, 1883.

On August 18, 1885, the railroad company applied to the local office for a hearing to determine the character of certain lands, including the tracts here in question. The hearing was accordingly had, but for some unexplained reason, no evidence was introduced thereat relative to these tracts. Your office thereupon held, on November 11, 1886, that the return of the surveyor-general as to the character thereof was unchanged by the testimony, but erroneously stated the return to be that the lands were mineral in character.

The lands were listed by the railroad company on December 3, 1885, as having inured to it under its said grant, but they have never been certified or patented to the company.

On January 28, 1888, your office, upon the petition of the defendant, S. D. Valentine, directed that a hearing be had to ascertain the character of said lands, with a view to determining the rights of the contending claimants relative thereto. The hearing took place in March, 1888, all the parties interested being present, either in person or by attorney. The material facts disclosed by the testimony, in the main undisputed, are as follows: Subsequently to the entry of the "Rising Sun" claim, its owners purchased the "Milford Claim" from the original locators thereof, and continued to do assessment work thereon for some years thereafter. After the same was relocated in 1883, as already stated, by Nicholas and Werry, as the "Big Oak Tree" claim, the defendant, S. D. Valentine, purchased it from said relocators, and now claims to be the rightful owner thereof. In 1886, Marie A. Valentine, who was a creditor of the company which owned and operated the "Rising Sun" claim, purchased from the railroad company, through her attorney, B. E. Valentine, the intervenor herein, all the lands in

controversy. This purchase was made with full knowledge that the lands, in part, at least, were valuable for minerals. The company refused to convey them with warranty of title, but gave simply a deed without covenants, conveying such title only as it had.

It was not known at the date of the grant to the company, nor at the date (December 26, 1865) of the approval by the surveyor-general of the official survey of the township in which the lands lie, that they, or any part thereof were valuable for minerals. Subsequently to those dates, however, the "Rising Sun" mineral claim has been located and patented, as stated, and other mineral locations have been made, adjoining the "Rising Sun" claim, as hereinbefore mentioned; and in each of these locations quartz, or veins bearing gold have been discovered of sufficient promise to justify the development of the same. About $30,000 have already been mined from the "Big Oak Tree" claim; about $1,500 have been expended in work and improvements on the "Werry Claim," and smaller amounts have been likewise expended, respectively, upon the "Golden Eagle" and "Little Pine Tree" claims.

Upon the facts thus proven the local officers rendered dissenting opinions. The register held, in effect, (1) that the title to the lands in question became vested in the railroad company under its grant as of the date thereof; (2) that at that date none of the lands were within any of the exceptions from the grant "by reason of any status as mineral lands;" (3) that the subsequent discovery of mineral therein cannot affect the rights of the railroad company or its grantees, and (4) that the company is entitled to patent for all the lands in controversy.

The receiver held, in effect, (1) that all the lands embraced in the mineral locations known as the "Big Oak Tree," "The Little Pine Tree," the "Werry Claim," and the "Golden Eagle," are mineral lands, and that the railroad company acquired no rights thereto under its grant; (2) that the residue of the lands in said quarter section are agricultural in character, and (3) that a survey should be ordered for the purpose of segregating the mineral from the agricultural lands.

On March 18, 1889, your office affirmed the decision of the receiver, and thereby, in effect, rejected the claim of the railroad company to the lands embraced in the mineral locations aforesaid. From this decision the company, and B. E. Valentine, on behalf of the intervening purchaser, Marie A. Valentine, have jointly appealed.

Two questions are presented by the appeal:

I. It is contended that the grant to the railroad company is a grant *in presenti*, and that, thereby, the title to the lands in question became vested in the company, upon the approval of the official survey thereof, as of the date of the grant, and that the subsequent discovery of mineral thereon cannot operate to divest such title or in any way affect the rights of the company.

II. It is further contended that the facts proven do not show the lands embraced in the mineral locations known as the "Little Pine Tree," the

"Werry Claim," and the "Golden Eagle," to be "mineral lands" within the meaning of that term as used in the granting act.

In answer to these contentions, it is urged by counsel for the defendant, appellee; I. That if the mineral character of lands within the limits of the grant to the railroad company be discovered at any time prior to patent, or certification, such discovery establishes the non-patentability of the land and operates to defeat the claim of the company thereto; and that such has been the uniform ruling of the Department for many years. II. That under the facts proven all the lands embraced in the several mineral locations involved herein, are clearly mineral in character.

It is not denied that the lands covered by the "Big Oak Tree" claim are mineral lands. The undisputed facts relative to the other claims in question are that mineral has been discovered in each of them of sufficient promise to justify the expenditure of large sums of money, as much as $1,500 on one of them, and a smaller amount on each of the others, with a view to their development, respectively, as mining claims. The evidence is sufficient, in my judgment, to warrant the finding of the receiver that the lands are "mineral lands" within the meaning of that term as used in the granting act; and your office having affirmed that finding, and no good reason being furnished for disturbing it, the same is sustained.

But did these lands pass to the railroad company under its grant? As we have seen, their mineral character was not known until after the company's road opposite thereto had been definitely located and constructed, nor until after the official survey, on the plat of which they were designated as agricultural lands, had been approved by the surveyor-general. In other words, they were not known to be "mineral lands" until after the right of the company had attached under its grant.

The grant to the company by the act of 1862, is in the following language:

> That there be, and is hereby, granted to said company, . . . . every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of, . . . . at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act. (Section 3, act, 1862).

The act of 1864, which was amendatory of the act of 1862, enlarged the grant from five to ten sections per mile on each side of said road, and provided, among other things, that the term "mineral land" whenever used therein, or in the original act, should not be construed to include "coal and iron land," and that no lands granted by that or the original act, should include any mineral lands (Sec. 4, act 1864).

It will be observed that by the terms of the grant itself all "mineral lands," other than "coal and iron," are expressly excepted from its

operation. It would seem, therefore, that no such lands were granted or intended to be granted to the railroad company.

The appellants contend, however, that the exception stated includes only such lands as were either *returned* as mineral by the surveyor-general, or were *known* to be mineral at the date when the grant acquired precision, and title vested thereunder; that the requisite precision was acquired, as touching the lands in question, by the completion and approval of the public survey thereof, the definite line of the company's road having been located prior to such survey; and that title thereupon vested, by relation, as of the date of the granting act. In other words, the contention is that the exception should be construed to mean only lands returned as mineral, or known to be mineral, at the date when the grant acquired precision; in this case the date of the approval of the official survey.

There can be no question that the grant to the railroad company is a grant *in præsenti*, passing a present title to all lands intended to be granted thereby, or, in other words, coming within its descriptive terms, only to be defeated by reason of failure, on the part of the company to perform the stipulated conditions subsequent. In the case of Leavenworth, Lawrence and Galveston R. R. Co *v.* United States (92 U. S. 741), the supreme court said of the words "there be and is hereby granted," quoted from the grant under consideration in that case, that they "are words of absolute donation, and import a grant *in præsenti*. This court has held that they can have no other meaning; and the land department, in this interpretation of them, has uniformly administered every previous similar grant;" citing Railroad Company *v.* Smith, 9 Wall., 95; Schulenburg *v.* Harriman, 21 Id., 60; 1 Lester 513; 8 Opins. 257; 11 Id. 47. See also Mining Company *v.* Mining Company, (102 U. S., 167); Van Wyck *v.* Knevals (106 U. S., 360). It is fully conceded, therefore, that as to all the lands *subject to the grant* now under consideration, the title, when it became vested related back to the date of the granting act.

But the effect of the contention of the appellants is that mineral lands are subject to and pass under the grant, if their character as such be not known, and they are not returned as mineral, at the date when the company's title vests; and that the subsequent discovery of their mineral character, though prior to patent, or certification where patent is not required, cannot affect the claim of the railroad company thereto.

I cannot agree that this contention is sound. The exception from the grant is explicit, unequivocal and absolute. It is "that all mineral lands shall be excepted from the operation of this act." There can be no reasonable question about the interpretation of this language. It clearly means that no "mineral lands" were granted or intended to be granted by the act. The discovery of the mineral character of lands within the lateral limits of the grant, after the date when it acquired precision, only proves that such lands were always mineral lands, and

serves to bring them clearly within the excepting clause of the grant. They are, and were, no less "mineral lands" because not *known* to be such, at the date of the grant, or at the date when it acquired precision.

It is not questioned that the Land Department has jurisdiction until patent, or certification, as the case may be, to the company, to determine whether any of the lands within the lateral limits of the grant had been, at the time the line of the road was definitely fixed, "sold, reserved, or otherwise disposed of," or was subject to "a pre-emption or homestead claim," and therefore excepted from the grant. That such jurisdiction exists, there can be no doubt, and I am unable to perceive upon what principle of logic or process of reasoning it can be claimed that a like jurisdiction does not exist, for the purpose of determining whether the lands are mineral, and for that reason, excepted from the grant. Manifestly, the jurisdiction to determine the exception is the same, whether the inquiry is instituted as to the character of the land, or as to its particular status, at the date when the rights of the company attached under the grant. If, in the prosecution of the inquiry, the lands are discovered to be mineral, or if, prior to patent, or certification where patent is not required, such discovery is otherwise made, and brought to the attention of the Land Department, in either event, the discovery proves the lands to have been mineral at the date mentioned, and serves to bring them within the excepting clause of the grant. No date is fixed in the grant at which the mineral character of the lands must be known, in order to bring them within the exception. If in fact mineral, they are within the exception, according to the plain terms thereof, whether their mineral character is known at the time of definite location or approval of survey, or not.

The counsel for appellants, among the many authorities cited in support of their contention, rely specially upon the cases of Abraham L. Miner (9 L. D., 408); Francouer *v.* Newhouse (40 Fed. Rep., 618); and Wright *v.* Roseberry (121 U. S., 488).

It is proper that these authorities should be briefly noticed. The case of Abraham L. Miner involved construction of the act of March 3, 1853 (10 Stats., 244), which, among other things, made a grant to the State of California, of sections sixteen and thirty-six of every township, for public school purposes. The question arose in that case as to when the title of the State vested under the grant, and it was held by the Department that such title vested, if at all, at the date of the completion of the official survey; and that if the land was in fact mineral, though not known to be such at that date, the subsequent discovery of its mineral character would not divest the State's title which had already passed. It is to be observed however, that the California school grant, was a grant without any express exception of mineral lands. Such being the case, the Miner decision should be understood as going no further than to hold that under the construction given to that grant by the prior decisions of the Department and of the supreme court of the United

States, the title to the State school lands vests, if at all, at the date of survey, and if the land is in fact mineral, though not then known to be such, the subsequent discovery of its mineral character will not divest the title which has already passed. This was the only point in that case. It was ex parte and only one side of the question was presented, and its authority must be confined to the question therein presented for decision.

In Cohens *v.* the State of Virginia, 6 Wheat., 264–399, Chief-Justice Marshall said:

> It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which they are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

So, in Carroll *v.* Carroll, 16 How., 275–287, the supreme court, referring to the last-cited case, said:

> Therefore this court, and other courts, organized under the common law, has never held itself bound by any part of an opinion in any case, which was not needful to the ascertainment of the right, or title in question between the parties.

Under this rule, statements, illustrations and arguments, not necessary to the decision of the precise question before the court in the Miner case, are not necessarily binding on the Department. The allusions in that case to the Colorado case (7 L. D., 490), and the Spong case (5 L. D., 193), and the conclusion sought to be drawn therefrom, were wholly unnecessary to a decision of the question therein considered, and cannot therefore be quoted as authority.

But the reasoning of the Miner case, giving it its full force, would not apply to railroad grants, as they specially except mineral lands and also except lands for other reasons. All the lands within the primary limits of a railroad grant do not necessarily pass to the railroad, but only such as are not within the exceptions named in the grant, and the Secretary of the Interior is clothed with the authority of determining in the first instance which lands pass by the grant and which do not pass, and this he does by approving lists for certification or patent. Such is not the practice with reference to sections sixteen and thirty-six granted to the States for school purposes.

The case of Francouer *v.* Newhouse was decided by the circuit court of the Northern District of California, in December, 1889. It was a case in all material respects similar to this one, and involved a construction of the same grant. In that case it was said by Judge Sawyer, who delivered the opinion of the court, that:

> The parties to this grant, both the United States and the grantee, must be presumed to have contemplated a grant in view of the condition of the lands as they

were known, or appeared to be, at the time the grant took effect. In the exception of 'mineral lands' from the grant, Congress must have meant not only lands mineral in fact, but lands known to be mineral, or, at most, such as were apparently mineral and generally recognized as such.

And the court thereupon held that the exception of "mineral lands" in the grant in question only extends to lands *known* to be mineral, or apparently mineral, at the time when the grant attached; and that the discovery of mineral in the land after that date does not defeat the company's title. In other words, the effect of the decision in that case is, that the exception must be construed as if it had been written "lands known to be mineral, or, at least, apparently mineral, at the date when the grant attached." Such a construction requires the importation of words into the statute in order to change its meaning. This, there is no authority to do. Newhall *v.* Sanger (92 U. S., 765). It may be further said that the Francouer case is not binding, but is rather only persuasive authority, so far as this Department is concerned. I do not think it sufficiently persuasive, however, to warrant a departure from what has been the uniform practice of the land department for many years, namely, to withhold patents for mineral lands within railroad grants, without reference to the time when their mineral character may have been discovered. Moreover, it is my judgment that the cases cited from the supreme court by Judge Sawyer, namely, the Colorado Coal Company *v.* United States (123 U. S., 307), and Deffeback *v.* Hawke (115 U. S., 392), do not sustain the text of his opinion. These were cases which arose under the pre-emption and town-site laws of the United States, and were determined solely with reference to principles applicable to the administration of those laws, and did not, in any sense, involve the construction of land grants to railroads. The mineral exception in the pre-emption act is of "lands on which are situated any *known* mines." In the Colorado Coal Company case, the court, construing said act, held that in order to bring lands within the exception stated, their character as mineral must be known at the date of the sale. In Deffeback *v.* Hawke, the question at issue involved the exception of mineral lands from the operation of the town-site laws, which is that

> 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; . . . . that no title shall be acquired under . . . . this chapter, to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim, or possession held under existing laws. (See sections 2386 and 2392 R. S.).

The court, in construing this exception, held that it included only such lands as were known to be mineral at the date of sale. It is thus seen that those cases are in no material sense similar to the Francouer case, or the case at bar.

The case of Wright *v.* Roseberry, *supra*, which involved the construction of the swamp-land grant of September 28, 1850, is cited to show

that patents issued under legislative grants, *in præsenti*, do not operate to vest the title, but are intended to define or identify the land, and *evidence* the title vested by the grant. But all this may be freely admitted, without aid, in my judgment, to the contention that mineral lands passed by the grant, if their character was not known at the date when the grant acquired precision. The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the Land Department, and it continues, as we have seen until the lands have been either patented or certified to, or for the use of, the railroad company. By reason of this jurisdiction it has been the practice of that department, for many years past, to refuse to issue patents to railroad companies for lands found to be mineral in character, at any time before the date of the patent. Moreover, I am informed by the officers in charge of the Mineral Division of the Land Department, that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent, or certification, where patent is not required. This practice, having been uniformly followed and generally accepted for so long a time, there should be, in my judgment, the clearest evidence of error, as well as the strongest reasons of policy and justice controlling, before a departure from it should be sanctioned. It has, in effect, become a rule of property.

I am, therefore, constrained to hold, in view of the foregoing, that there is no error in the conclusion of your said office decision, and the same is hereby affirmed.

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CONTEST—FAILURE OF CHARGE—FINAL DESERT PROOF.

GILKISON *v.* COUGHANHOUR.

If the charge as laid against the entry is not supported by the evidence, and good faith is apparent on the part of the entryman, though his compliance with law is not satisfactorily shown, the contest may be dismissed, and the entryman permitted to submit supplemental proof in support of his entry.

The final proof under a desert entry should definitely show what proportion of each legal sub-division has been irrigated.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September* 5, 1890.

With your letter of July 25, 1889, you transmit the appeal of J. M. Gilkison from your office decision of February 14, 1889, dismissing his

contest against desert land entry No. 75, made by William A. Coughanhour, on March 2, 1883, on Sec. 20, T. 6 S., R. 39 E., La Grande, Oregon.

Final proof was offered on said tract March 1, 1886. Before the register and receiver had passed upon the sufficiency of the same, James M. Gilkison, Harrison Wicks, Socrates Mann, and William M. Dixon filed their several contest affidavits against said entry, as to the NW.¼, the SW.¼, the NE.¼, and the SE.¼ of said section, respectively.

Notices were issued on these affidavits fixing hearings for September 1, 2, 3, and 4, 1886, respectively.

On September 1, the hearing was begun in the case of Gilkison *v.* Coughanhour, and the same was concluded November 23, 1886.

By stipulations, duly entered of record, it was agreed by Wicks, Mann and Dixon, respectively, that the lands in controversy in their several contests were of the same character, as to being desert or non-desert lands, as the land embraced in Gilkison's case; that the facts were the same, and that their cases should be heard and decided by the Department upon the evidence taken in the Gilkison case.

The several contestants filed substantially the same charges against the entry, namely:—

1. That the land embraced in said entry is not desert land within the meaning of the statute.

2. That claimant has not reclaimed the lands within the time provided by Congress to make final proof, thereby forfeiting the entry.

At the hearing there was no testimony taken as to the reclamation of the land, it being entirely directed to the issue as to whether the land was desert or non-desert in character.

The register and receiver dismissed the contest, but held that claimant failed in getting water on the land as required by law. Both parties prosecuted appeals from this judgment, and by your said office decision you held the land desert in character within the meaning of the law, and, also, that the final proof shows that the land has been reclaimed.

I have carefully examined the testimony, and fully agree with you that a preponderance of the same is to the effect, that the land in controversy will not produce a remunerative crop in a season of ordinary rainfall, and that the land is essentially desert in character within the meaning of the statute.

The proof was made two days before the expiration of the three years allowed to reclaim the land. Claimant appears to have the right to the use of sufficient water to irrigate the land.

The only question, therefore, is, whether the proof is sufficient to show the land reclaimed.

In claimant's testimony, which in the main is corroborated, I find the following:—

I have made a ditch and am now prepared to thoroughly irrigate the entire tract. I have raised no crops. In 1883 water was conducted on the land in May, and was spread over the land by flooding, though not in sufficient quantity to thoroughly ir-

rigate all the land; the ditch was completed late last fall, but not in time to thoroughly irrigate the land. I have a ditch constructed now which will carry a sufficient amount of water to thoroughly irrigate the entire tract; but as the ditch was only finished late last fall, and the freezing weather has prevented my bringing the water on to the land, except for a short time in November, I could not construct the ditch and run the water in the ditch at the same time, and there is only about five months in each year that work can be prosecuted or carried on successfully in that part of the country. I failed to get water on the land in sufficient quantity in time to complete my proof within the time, and that the ditch has been filled with snow and ice during the winter, which has prevented my compliance, and further that I have used all proper diligence in trying to get the water on the land.

One of the witnesses, Hagan, testifies that in no season has there been sufficient water conveyed upon the land to irrigate the entire tract; that during May, 1883, there was conveyed to the land about one inch of water, but there were then no small ditches to distribute it. It was then irrigated by flooding, and it spread over "the most of it." It was then turned off to enlarge the ditch. In 1883 the ditch was four and a half miles long, sixteen inches deep and three feet wide. In the fall of 1885 the ditch was enlarged and extended. It is now thirteen and a half miles long, and for the greater part four and a half feet wide and sixteen inches deep, and lateral ditches have been constructed to convey the water to every part of the land.

It is shown also that the construction of the ditch was delayed by reason of one Young disputing the right to run it through his homestead, which seems to have been entered subsequent to the desert entry. The ditch had then been partly constructed, and by reason of this difficulty new surveys had to be made and changed from former location—running around Young's homestead—requiring more time and expense, and subjecting claimant to annoyance and delay, so that the ditch was not completed until November, 1885, and the freezing up of the water prevented the land being thoroughly irrigated.

It will thus be seen that claimant has acted in apparent good faith; he has expended a large sum of money to reclaim the tract; but the proof of the reclamation is not satisfactory. It does not affirmatively appear what proportion of each legal subdivision has been irrigated. The water may have been brought to the land in sufficient quantities to reclaim it. Possibly, but for the freezing weather in the winter of 1885–'86, the water would have been running over and through each subdivision of the land; but the incident of the freezing weather and the consequent failure to irrigate the land, can not excuse claimant from showing its reclamation. In all cases "satisfactory proof" must be made.

As the contestants have failed to sustain their several charges that the land is non-desert in character, and have introduced no testimony whatever that the land was not reclaimed within the time prescribed by law; and since claimant should not be held responsible by reason of the circumstances attending his efforts to reclaim this tract, as above

set out, the several contests should be, and they are hereby, dismissed. But as this proof fails to show definitely what proportion of each legal subdivision has been irrigated, supplementary proof will be required to supply this deficiency. Sixty days from due notice hereof will be allowed for compliance with this requirement. Your decision is accordingly modified.

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PRACTICE-NOTICE OF APPEAL.

BRAKE *v.* CALIFORNIA AND OREGON R. R. CO.

An appeal will not be considered in the absence of proper service of notice thereof on the opposite party.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September* 8, 1890.

On September 24, 1883, Lillie R. Brake made private cash entry for lots 1 and 2, Sec. 3, T. 39 S., R. 1 W., W. P. M., Roseburg land district, Oregon.

March 27, 1884, your office informed the local office that said tracts were within the granted limits of the Oregon and California Railroad Company, under the grant of July 25, 1866, (14 Stats., 239); that said road was definitely located opposite said tracts September 4, 1883; that the odd numbered sections in the twenty and thirty mile limits were withdrawn from market October 27, notice of which was filed in the local office November 7, 1883, and on account thereof, said entry was held for cancellation.

She appealed from that portion of your decision holding for cancellation her entry for lot 2, alleging that said lot was offered for sale October 13, 1862, and was subject to sale when she made her entry, and that no approved map or plats of said railroad were filed in the local office until fourteen days after her right had attached. She asked that her entry for lot 2 be allowed to stand and that the money paid for lot 1 be refunded.

Accompanying her appeal she filed her own affidavit in which she alleged "I have this day deposited in the post-office at Ashland, Oregon, a true copy of the foregoing notice, and this affidavit directed to Henry Villard, President of the Oregon and California Railroad, at New York City, New York, where I am informed and believe the said President of the said railroad post-office address now is, and that I paid the postage on the same."

Rule 93 requires that a copy of the notice of appeal, specification of errors, and all arguments of either party, shall be served on the opposite party within the time allowed for filing the same.

Rule 94.—Such service shall be made personally or by registered letter, and Rule 95,—Proof of personal service shall be the written

acknowledgment of the party served or the affidavit of the person making the service attached to the papers served, and stating time, place, and manner of service.

Notice of this appeal has not been properly given the railroad company, and the same will not, under the rules and the decisions in Huntoon *v.* Devereux (10 L. D., 408), and Bundy *v.* Fremont Townsite (10 L. D., 595), be considered, but must be and is hereby dismissed.

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MINING CLAIM—SURVEY—CIRCULAR OF DECEMBER 4, 1884.

CONSOLIDATED MINING CO.

In the survey of a lode claim that conflicts with a prior valid claim, that is excepted from the application, the applicant's right does not extend beyond an end line passing through the point where the lode intersects the exterior line of the senior location.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September* 8, 1890.

I have considered the appeal of the Consolidated Mining Company from your decision of December 27, 1888, holding the survey of the "Eighth of January" lode claim lot No. 158, Ophir mining district of Salt Lake City, Utah land district, to be in violation of circular of December 4, 1884, and directing a new survey thereof.

This claim was located January 8, 1884 and surveyed June 23, and 24, 1885. An inspection of the plat and field notes of the survey shows that the lode line, from the point of "discovery" bears N. 8° 35′ W., and intersects the southern boundary (side-line) of the "Chicago No. 2" lot 44, and crosses said lot and also the "Trafalgar," lot 49, "Red Pine" lot 69, enters the "Sacramento" lot 81, and terminates within the last named claim.

These several lots lie contiguous so that the said lode line after entering the first named lot does not pass over any land not embraced by these various claims all of which were located prior to the location of the "Eighth of January" claim, and each of which is excepted from this application.

The last sentence of first paragraph of circular of December 4, 1884, 3 L. D., 540, says:

His right to the lode claimed terminates when the lode in its onward course or strike intersects the exterior boundary of such excluded ground and passes within it.

The first sentence of the second paragraph says:

The end-line of his survey should not, therefore, be established beyond such intersection, unless it should be necessary so to do for the purpose of including ground held and claimed under a location which was made upon public land and valid at the time it was made.

In the case at bar, we have seen that there was no ground that could be held and claimed under this location, lying between the point where the lode intersected the south line of the "Chicago No. 2" and passed within the boundary of the excluded ground and the point of terminus of said lode line.

The case is similar to that of the Engineer Mining and Developement Company (8 L. D., 361), in which case the survey over-lapped on its southerly end the "B. F. Requa" lode claim which had been previously located. After discussing the case and section 2336 R. S., the Secretary said:

> In the case at bar the survey over-laps but does not cross or intersect the prior location. It can not therefore be held to come with in the purview of section 2336. . . . . From the survey as it now stands the lode appears to strike the exterior line of the "B. F. Requa" lode claim at a point north of the line surveyed as the southerly end-line of the "Eldorado." The appellant's right does not extend beyond a southerly end-line (parallel with the north line) through the point where the lode intersects the exterior line of the said senior location.

In following this ruling I may say the appellant's right does not extend beyond a northerly end-line (parallel to the south line) through the point where the lode intersects the exterior line of the said senior location ("Chicago No. 2"). It was therefore proper to require the end-lines of the survey to be re-adjusted, so as to accord with the requirements of the law and regulations.

Your decision is affirmed, and a new survey required accordingly.

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CONTEST—PREFERENCE RIGHT OF ENTRY—RELINQUISHMENT.

COMLEY *v.* MILLS.

In a hearing ordered between two settlers to test a question of alleged priority a "preference right of entry" is not acquired as under a contest.

Where the entryman, during the pendency of such litigation, files a relinquishment the question at issue abates; and such entryman has thereafter no interest in the case nor right of appeal.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 8, 1890.*

Your office by letter of July 25, 1889, transmitted to this Department the papers in the case of A. M. Comley *v.* R. S. Mills, upon the appeal of the latter from your decision of March 30, 1889 "awarding the preference right of entry to the former, for the NW. ¼ of Sec. 29, T. 107 N., R. 57 W., Mitchell, South Dakota, land district.

The record shows that Mills on November 20, 1886, made homestead entry for this land in lieu of his pre-emption filing of October 21, of same year.

On February 16, 1887, Comley made application to file pre-emption declaratory statement for the same tract, alleging settlement November 20, 1886, this being the day on which Mills had made homestead entry, the register and receiver ordered a hearing to determine which of the parties had the prior right thereto, and upon considering the testimony in the case they decided, on May 19, 1887, that Mills had such right, and rejected the application of Comley.

From this decision he appealed, and on March 30, 1889, your office, passing upon the case, found that Comley made settlement November 20, 1886; and made valuable improvements upon the land, and gave him the preference right.

In your decision, referring to the record in the case, you say, that on December 2, 1887, Mills' homestead entry was canceled on relinquishment, and that on same day one Delano made homestead entry for the tract and that said cancellation had been noted in your office on December 16, 1887, and you say:

> I believe further that his settlement and contest directly brought about the aforesaid cancellation in your office, hence, I award to A. M. Comley, contestant, the preference right of entry to this tract and close the case.

There had been no contest initiated by Comley against any entry and there was no question of "preference right of entry" in the case, but only the question of priority between the settlement of Comley and the homestead right of Mills, hence, when Mills relinquished his rights and his entry was canceled, there was nothing left for you to try or determine. These parties must stand on their settlement rights, and Mills, having relinquished his claim under his entry, ceased to have any interest in the case and, therefore, has no right of appeal.

The attempted appeal is dismissed.

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### TIMBER CULTURE CONTEST—INFANT HEIR—NOTICE.

### FANSEY *v.* TORGERSEN.

If good faith is apparent, failure to fully comply with the requirements of the timber culture law may be excused, where such failure is the result of mistake, and an effort is made to cure the default prior to the initiation of the contest.

In a contest against the claim of a deceased entryman it must clearly and affirmatively appear that the proceedings are regular, and that the entryman or his legal representatives have failed to comply with the requirements of the law.

Notice of the proceedings in such a case should be given the infant (sole) heir, and the guardian be made a party thereto in accordance with local procedure.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September* 8, 1890.

I have considered the case of Louis M. Fansey *v.* Caroline Torgersen, sole heir at law of Christ Torgersen, deceased, as presented by the ap-

peal, filed by "A. S. Baldwin, attorney for the claimant," from the decision of your office, dated October 22, 1885, holding for cancellation timber culture entry No. 1559 of the NW. ¼ of Sec. 9, T. 14 N., R. 22 W., made by Christ Torgersen on May 29, 1880, at the North Platte land office, in the State of Nebraska.

The record shows that said Fansey, on October 22, 1884, filed in said local land office his contest affidavit, alleging that he was well acquainted with said entry, and knew the present condition of the land covered thereby; "that the said Christ Torgersen died February, 1882, and left, surviving him, one child, whose name is Caroline Torgersen, and who is his sole heir; that said Christ Torgersen failed to break five acres of said tract in 1881; that said heir has failed to break or cause to be broken ten acres of said tract, and has failed to plant to trees, seeds, nuts, or cuttings, ten acres of said tract or cause the same to be done; that said heir has failed to cultivate ten acres of said tract in 1883 and 1884. Notice issued on the same day, summoning the contestant and said heir to appear at said local office on December 18, 1884, at nine A. M., and also that 'Depositions in said cause will be taken before R. B. Pierce, county judge of Dawson county, at his office in Plum Creek, on the 11th day of December, 1884.'" The depositions were taken as directed and filed in the local office on December 17, 1884, and the hearing was had before the local officers on December 18, same year. It nowhere appears that notice was served upon said heir, but it is shown that witnesses were examined by said county judge in support of said entry.

The local officers found, and so state in their decision, "that the requisite amount of breaking was done, but, by mistake, a portion of the same was done upon an adjoining quarter section; the mistake was learned in April, 1884, there being at least two and a half acres of the same;" that "the entryman should not suffer for this honest error. But, upon learning said mistake, there seems to have been no effort made on the part of the entryman or his (her) representatives to cure said defect;" that the testimony showed that there had been only seven acres planted in trees, including that part which was planted by mistake on another adjoining tract; that the law requires strict compliance, which was not shown in the case at bar, and the local officers, therefore, recommended the cancellation of said entry.

From this decision an appeal was taken in the name of said heir. Your office, on October 22, 1885, found that the entryman died in the month of February, 1882; that prior to his death he broke ten acres, of which only six or seven acres were upon the land covered by his said entry; that since the discovery of said defect "no effort has been made to cure the same."

The grounds alleged in the appeal, taken in the name of said minor heir, are, that the decision is contrary to the law and the evidence, and that the heir, who was a young child, was helpless, until a guardian

had been appointed; that her guardian "did all in his power to remedy the default, if any existed, before suit brought, and thereafter."

The evidence in the case shows, that the entryman in his lifetime broke the required amount on what he supposed was the tract entered by him, but by mistake a part of the breaking was on an adjoining tract; that said entryman died in February, 1882, and that H. J. Kolbo, on November 12, 1884, was duly appointed guardian of Caroline Torgersen, who was the sole heir of said deceased entryman; that said contest affidavit was filed and notice issued to said heir on October 22, 1884. One of the witnesses for the contestant, Vanantwerp, testified that it was not discovered until April, 1884, that the breaking was not all upon the right claim; that the first five acres were planted in timber in 1883, but about two and a half acres of the planting were on the adjoining claim; that the trees on the adjoining claim were transplanted upon the tract in question in the spring of 1884, after the discovery of the mistake, and some cuttings set out, making between five and six acres altogether, and only seven acres of breaking then upon the tract, without the fireguards.

Another witness, Shelden, states (Evidence, p. 15), that he assisted in making a survey of the land broken on the tract in question, about a week before giving his evidence, and there were "between nine and ten acres"; that there were planted between five and six acres on said tract in seeds, trees, nuts, or cuttings, prior to October 22, 1884; that about an acre and a half were broken "the past summer" on the south side of the tract; that during the summer of 1884 and prior to the initiation of said contest there were planted upon said tract between "three and four acres;" that, including the two and a half acres planted on the adjoining claim, there were planted "between seven and eight acres." On the part of the claimant, witness Bainbridge (Evidence, p. 19) testified that five acres, supposed to be on the claim, were planted in trees in 1883; that four thousand trees were planted in 1884, "and the balance of it was planted to box elder seeds," about three acres in the opinion of the witness, although he did not measure it; that in the spring of 1884 a little over six acres were marked off for the purpose of planting to trees, but this piece was not planted, because of the division of the section which cut off said piece from the land entered; that a portion of the fireguard, about forty-four rods, was planted by witness in box elder seeds; that witness planted all of the old ground found by the survey to be on the tract entered and the balance of the fireguards not then planted. On cross examination witness testified, that he was the stepfather of the claimant; that he replanted some of the trees from the adjoining tract to the land in question; that the ground for the second planting was plowed between the 10th and 15th of April, 1884, and marked off the second day afterwards; that there were one acre and sixteen rods of new breaking done upon the tract in 1884; that the reason more land was not broken was because of the

severe drouth, which caused the land to become so dry that witness could not break any more; that the claimant was only ten years old the November preceding; that said breaking in 1884 was done in the month of September.

The testimony of said witness is corroborated by the uncle of claimant, who also testified that the entryman died on February 15, 1882, that there has been no administrator of his estate; that his widow remarried in the spring of 1883, and that about a month prior to the date of taking said evidence, Hans J. Kolbo was appointed guardian of said heir. Said Kolbo also testified in behalf of the claimant, corroborating her other witnesses, relative to the breaking and planting of trees upon the said tract. He also testified that he was appointed guardian of said claimant on November 12, 1884; that prior to said date no guardian had been appointed. On cross examination, witness stated that prior to May 1, 1884, the season was such that the ground could be properly prepared for planting to trees; that the trees on the adjoining claim were transplanted about May 1st to the tract in question; that the application to have witness appointed guardian of said heir was filed in September 1884, and that as her guardian he "intends to do what the law requires. . . . . about the tract;" that he knew he would be appointed guardian of said heir prior to the issuance of letters, from a letter received from the judge of said court.

From the foregoing it is apparent that said entry ought not to be canceled. The local officers did not have the witnesses before them, and their statement, concurred in by your office, that "no effort has been made by the entryman or his representatives to cure the defect" in the breaking and planting since the discovery of the mistake of the entryman in his plowing and planting is not sustained by the weight of evidence submitted in the case.

It is clear that the requisite amount of land would have been duly planted in 1883 had it not been for the mistake of the entryman, conceded to have been honestly made, and some effort was made to remedy the defect prior to the filing of said contest affidavit.

The circumstances of this case are such, in my judgment, that they furnish a sufficient excuse for the default, and there is an entire want of evidence of any bad faith on the part of the entryman in his lifetime, and, certainly, none can be imputed to a minor child only ten years of age. So that upon the merits of the case there has been no sufficient showing made of failure to comply with the requirements of the timber culture act.

But, independently of the foregoing, said contest could be dismissed because the suit is not brought and continued against the proper parties.

The code of civil procedure for the State of Nebraska (Ed. 1867, p. 307, Sec. 38), provides that "the defense of an infant must be by a guardian for the suit, who may be appointed by the court in which the action is prosecuted, or by the judge thereof, or by the probate judge."

Said code also provides that "When the defendant is a minor under the age of fourteen years, the service must be made upon him, and upon his guardian or father, or, if neither of these can be found, then upon his mother, or the person having the care or control of the infant, or with whom he lives." (Id., p. 404–5, Sec. 76.)

The record does not affirmatively show that said notice was served upon said infant, or upon her parent or guardian as required by law, and her guardian was not at any time made a party to the proceedings.

While it is true that, as a general rule, a strict compliance with the requirements of the timber culture law must be shown by claimants, especially when making final proof in support of their claims, yet, it is also essential that, in a case like this, when the contestant seeks to cancel an entry which will deprive a sole heir, only ten years of age, of her inheritance, it must be clearly and affirmatively shown that the proceedings have been regular, and that the entryman or his legal representatives, in case of his decease, have failed to comply with the requirements of the law; and, when a reasonable excuse is given for any apparent omission, the entry will not be canceled.

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

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### FINAL PROOF PROCEEDINGS.—OSAGE FILING.

### WILLS *v.* BACHMAN.

Final proof should not be submitted during the pendency of adverse proceedings instituted by another to secure title to the land involved.

The time within which an Osage filing is required to be made will not run where the local office is closed, and the Commissioner directs that during such period time will not run as against applicants for public land.

During the pendency of a contest the entryman must continue to comply with the requirements of the law.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September* 8, 1890.

I have considered the case of Henry Wills *v.* Abraham L. Bachman, as presented by the appeal of the latter from the decision of your office, dated February 17, 1887, rejecting his proof and holding for cancellation his Osage declaratory statement No. 9191, filed in the Larned, Kansas, land office on October 1, 1885, for the SW. ¼ of Sec. 21, T. 34 S., R. 18 W., alleging settlement thereon March 1, same year, and awarding said land to said Wills.

The record shows that said Wills filed his Osage declatory statement for said tract on October 12, 1885, alleging settlement the day previous; that Bachman, after due notice, made final proof in support of his claim, and upon a protest of said Wills alleging a valid adverse claim, a hearing was duly ordered on March 13, 1886, and had on April 19, same

year, to determine the rights of said parties to said tracts; that said hearing was continued from day to day until April 21, 1886, when the case was continued until August 26, same year, to enable parties to take depositions, and the case was closed on August 27, 1886; and that on April 19, 1886, Wills made final proof before the register of said office. The local officers found that Bachman was first seen upon the tract in question on the last of February or first of March, 1885, when he commenced to build a dug-out eight by twelve feet, with a dirt roof; that he had fourteen acres of breaking, a well eighteen feet deep, without any water, but had cultivated no crop on said land prior to his final proof; that Wills settled on said land about August 11, 1885, and that Bachman's improvements then consisted of said dug-out, and one-third of an acre plowed; that no one was then living in said dug-out, and it looked from its general appearance as if the tract had been abandoned; that Bachman only lived in his dugout about ten days, while his brother's family lived with him until they were driven out by a heavy rain; that Wills resided upon said tract from August 13, 1885, and up to the time of said hearing he was not absent more than ten days; that after submitting a part of his testimony in the case, he abandoned said tract and went back to the State of Missouri; which indicates bad faith. The local officers therefore held for rejection the final proof of each of said parties.

On appeal, your office found that they were qualified pre-emptors and were actual settlers upon said tract at the dates their respective proofs were made; that by the failure of Bachman, who was the prior settler, to file his declaratory statement within the period required by law, and before the intervention of the valid adverse right of Wills, he lost the benefit of his prior settlement and his entry was barred by the statute; that at the date Wills made his final proof he was an actual settler upon the land in question and had resided thereon for more than six months next preceding said date, and the land must be awarded to him.

On May 10, 1887, the local office transmitted an application by Bachman's attorney for a modification of said decision, or for a new trial, service of which upon the attorneys of Wills, without objection as to time, was acknowledged on April 28, same year. The grounds of said application are that the decision of your office overlooked the fact apparent in the record, that said Wills was not an actual resident of said tract at the date of his proof and entry, but was more than one hundred miles distant, on his way to Missouri, and that said Bachman was there and had been ever since his settlement, actually residing on said land; that if said facts are not shown by the record, said Bachman, by his attorney, N. B. Freeland, asks that time be given to show the same by affidavits. Said application concludes with a statement made under oath by said Freeland that he had that day received a letter from said Bachman stating that his former counsel in said case had removed to Colorado; also that said Freeland was informed and believed that the

allegations in said application were true; that the time for appeal had so nearly expired that there was not time to have said application verified by the defendant, which was the only reason why said counsel verified said application.

On August 1, 1887, the local office transmitted another application of said Bachman, by his said attorney, asking that your said office decision be reversed, because the same was an oversight for the reason that said land office was closed on account of fire from May 27, 1885, until October 1, same year, and hence Bachman could not have filed for said land during the time the office was closed.

Your office, on October 8, 1887, refused to modify said decision because said motion was not filed in time, it appearing that the parties were duly notified of your office decision on February 23, 1887, and the application did not allege any newly-discovered evidence. Notice of said decision of your office was duly given to the attorney of said Bachman, and on October 31, 1887, the local officers transmitted the appeal from said decision of February 17, 1887, filed in their office on October 15, same year, which was transmitted by your office to the Department on November 29, following.

The errors alleged are that your office rejected appellant's claim because he did not file in time, when the fact was that the delay in filing was caused by the closing of said local office from May 27, to October 1, 1885, on account of the destruction of its records by fire; and he insists that your office should have corrected the decision as soon as the error was indicated. It is also alleged that the attorney of record for said Bachman at said hearing had removed to Colorado prior to said decision of February 17, 1887, and had abandoned all practice before said local office, and, in consequence thereof, said appellant's attorney received no notice of said decision until a very few days prior to the filing of said application for said reconsideration, which was made within thirty days from the time the same was received either by appellant or his present counsel who was his counsel at that time. With said appeal is filed a duly certified copy of a letter from your office dated June 13, 1885, to the register and receiver of said office instructing them to "advise settlers, desiring to place their claims of record, that the time during which the office is closed for general business will not run against them."

On the part of Wills, it is insisted that said application for review came too late, and that the decision of your office has become final, and has passed in *rem judicatam*.

The record shows many irregularities. In the first place, Wills should not have been permitted to make final proof while the right of Bachman to said tract was still pending. Wills had protested against the allowance of Bachman's proof, alleging his own adverse claim to the land, and until the right of Bachman to the tract was finally determined, no further action could be taken by the local officers or the land depart-

ment. Rules of Practice, No. 53 (4 L. D., 43); Chicago, Rock Island & Pac. R. R. *v.* Easton (id., 265); Stroud *v.* De Wolf (id., 394); Bailey *v.* Townsend (5 L. D., 176); Wade *v.* Sweeney (6 L. D., 234); Lewis Peterson (8 L. D., 121); Laffoon *v* Artis (9 L. D., 279).

The decision of your office adverse to Bachman is based upon his failure to file within the *time required* by law. If the allegations of the appellant be true, then it is apparent that he did file in time, for, by the express direction of your office, the time did not run while the local office was closed, which the attorney for appellant swears was until October 1, 1885. Moreover, the attorney for Bachman also swears that the counsel of record for appellant at the date of said hearing had removed to Colorado prior to said decision of February 17, 1885, and that the application for modification was filed in due time after the appellant or the attorney who filed said application had received notice of said decision. But, conceding that upon a strict construction of the rules of practice said motion was not filed within the time required, yet, since your office has allowed the appeal, and it is alleged that said Wills abandoned said tract pending said contest, I am of the opinion that the case should be considered by this Department.

It is well settled that, pending a contest, the entryman must continue to comply with the requirements of the law. Byrne *v.* Dorward (5 L D., 104); Taschi *v.* Lester (6 L. D., 27).

The tract in question is a part of the Osage Indian trust and diminished reserve lands, and is disposed of under the provisions of the act of Congress approved May 28, 1880 (21 Stats., 143), which require the applicant to purchase to become an actual settler at the date of the entry. United States *v.* Atterbery et al. (8 L. D., 173); Hessong *v.* Burgan, (9 L. D., 353); United States *v.* Jones (10 L. D., 23).

In view of the allegations made by the appellant relative to the closing of said office, the abandonment of said tract by Wills prior to the final determination of said contest, and his own continued residence upon said land, I am of the opinion that the case should be remanded to the local office for further proceedings after due notice to said parties of the time and place thereof, at which appellant will have an opportunity to submit testimony relative to the closing of said land office, the absence of said Wills from said tract, and any other facts tending to show his good faith in the premises. Wills should also be allowed to controvert the testimony submitted by Bachman, and furnish any additional testimony he may choose tending to show his superior right to the land.

The decision of your office is modified accordingly.

PRACTICE—APPEAL—REHEARING—CERTIORARI.

WITTER *v.* OSTROSKI

An appeal should be taken from the original decision, and not from the refusal to grant a rehearing.

The Commissioner's discretion in the matter of ordering a rehearing will not be controlled by the Department in the absence of any apparent abuse of such discretionary authority.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September* 9, 1890.

By letter of April 12, 1890, you transmitted the petition for certiorari filed by the attorney of George F. Witter Jr., in the case of said Witter *v.* John Ostroski, involving the latter's homestead entry for the N. ½ of SE. ¼ of Sec. 8 T. 22 N., R. 5 E., Wausau, Wisconsin, land district.

It seems from said petition and the copy of your office decision made a part thereof, that Ostroski's homestead entry was attacked by Witter on the charge that it was fraudulently and illegally made; that the local officers decided in favor of the contestant and overruled a motion for a rehearing; that the entryman appealed to your office; and that you by decision of March 2, 1890 dismissed said appeal, upon motion of the contestant, for the reason that it contained no specifications of error, but then proceeded to take jurisdiction of the case under rule 48 of rules of practice without specifying under which subdivision of said rule said action was warranted, decided that a motion for a rehearing should have been granted, and remanded the case for a new trial.

Thereupon the motion now under consideration was filed.

Counsel for Witter seem to be at a loss to know what became of the appeal from the refusal to grant a rehearing. There was really but one appeal, and that from the decision of the case. See John R. Nickel (9 L. D., 388).

Your dismissal of the appeal seems to have been proper, but I do not find anything in the record before me that brings the case within either of the four subdivisions of rule 48 of rules of practice.

Counsel for the applicant has discussed rule 48 very fully, but he seems to have overlooked the fact that rule 83 on which he bases his application for a writ, provides for certiorari when the Commissioner "shall formally decide that a party has no right of appeal to the Secretary."

In the case at bar no appeal was taken and no decision formal or otherwise was rendered denying the same. It may be said that the decision was merely an interlocutory order and as no appeal would lie from it, none need be offered. The Department will not review on certiorari an interlocutory order of the Commissioner, unless good cause is shown for such action. Olney *v.* Shyrock (9 L. D., 633).

The case is similar to that of Gibson *v.* Van Gilder (9 L. D., 626), in which it was said:—

> Under this rule (72) the Commissioner may grant a rehearing . . . . and he may also in the exercise of his discretion order a further investigation or hearing when necessary to enable him to render an intelligent decision in the case, although no motion for a rehearing is filed, and the Department will not control the Commissioner in the exercise of this discretion unless there is an apparent abuse of it . . . .
>
> The remanding of this case for further hearing does not violate rule 48 because that rule must be considered in connection with rule 72, which allows the Commissioner in his discretion to make further investigation and to have additional testimony before him, before passing upon the merits of the case, or passing upon the decision of the local officers.

I do not find in the case at bar any abuse of discretion, nor do I find that the petitioner will suffer any material injury by the order made.

The application is therefore refused.

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NOTICE—PUBLICATION—ACT OF JUNE 15, 1880.

JONES *v.* DE HAAN.

Notice of a decision given by unregistered letter is not sufficient evidence of service; nor do the rules of practice provide for verbal notice in such a case.

In an affidavit, filed as the basis for an order of publication, which sets forth that the defendant is not a resident of the State, and personal service can not be made, it is not necessary to show what efforts have been made to secure personal service on the defendant.

The initiation of a contest suspends the right of purchase under the act of June 15, 1880.

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

I have considered the appeal of Adam De Haan from your office decision of October 3, 1888, in which the record shows that De Haan made homestead entry No. 2936 February 28, 1879, of the E. ½ of the NE. ¼, Sec. 4, T. 11, R. 30 W., Wa Keeney, Kansas, and additional homestead entry No. 2992, under the act of March 3, 1879 (20 Stat., 472), of the west half of the same quarter section.

May 19, 1885, John H. Jones initiated contest, charging abandonment of both said entries. Notice of contest was made by publication on the affidavit of Jones that defendant, De Haan, was not a resident of the State of Kansas, and that personal service can not be obtained. At the hearing, July 7, 1885, defendant made default, and plaintiff appeared and submitted testimony in support of his charge of abandonment.

September 23, 1885, before a decision was rendered on the contest, defendant applied to purchase said tracts under the act of June 15, 1880 (21 Stat., 237), which application was granted by the register and receiver, and he was permitted to make cash entry No. 1122, and the

contest was dismissed. Jones did not appeal from the action of the register and receiver in dismissing his contest until December 8, 1886. The reasons for such delay are set forth in your office decision (letter "H" to register and receiver), and are as follows:

> The case was first brought to the notice of this office by plaintiff's letter, dated February 8, 1886, inquiring as to the status of the same. As the result of such letter, and in reply to office letter of August 16, 1886, you transmitted the record in the case August 19, 1886, with report that though notified of your decision dismissing the contest, plaintiff took no further action in the premises. October 18, 1886, you reported, in response to office letter of October 4, 1886, that, although you had no evidence in your office showing that plaintiff received notice of your several actions in dismissing his contest and allowing defendant to purchase land, yet such notice was evidently sent to him at his post office address, Grinnell, Kansas, inasmuch as it was the invariable custom of your office to so notify contestants. Upon this you were directed by office letter of October 30, 1886, to notify plaintiff that if he could show by his own affidavit and that of his attorney of record that he never received official notice of your decision, he would be entitled to file an appeal therefrom. October 28, 1887, you transmitted said affidavits, together with the appeal of plaintiff, and the counter affidavits submitted by defendant in support of his motion for the dismissal of the appeal. In plaintiff's affidavit and the affidavit of his attorney it is set forth by each that he never received any notice from your office of the dismissal of the contest. In the affidavits submitted by defendants two show that it was the invariable custom of your office to notify contestants of the dismissal of their contests on purchases like the one in question, and two set forth that immediately after the dismissal and purchase herein, the plaintiff was personally and verbally advised by one McGraw and the local officers of the said decision of your office. Such a notice both he and his attorney swear as aforesaid they never received, and as before shown there is nothing in the record disproving their claim.

Upon this evidence you held that the appeal was properly before you. You also held that the proof of abandonment was sufficiently shown, and canceled both homestead entries and held defendant's cash entry subject to contestant's preference right.

From this decision Catherine L. V. Davis, third transferee from the original entryman, now appeals to this Department.

Comparing the statement of facts as set forth in your office decision with the record before me, I find it is substantially correct, with this exception: instead of *two* affidavits setting forth personal and verbal notice to plaintiff, I find but one, and that was made by E. A. McMath (instead of McGraw), and stated in substance: "That contestant, shortly after the dismissal of his contest, had told affiant that he had been informed by his attorney that his contest had been dismissed, and that he had then gone to the local office, and the receiver had also informed him of this fact; affiant also states that on the day the cash entry was allowed, he, affiant, informed contestant's attorney of the dismissal of the contest and allowance of the entry."

From this it satisfactorily appears that no notice of the dismissal of his contest was ever properly served upon him. Practice Rule 44 requires such notice to be in writing, and to be served personally or by registered letter through the mail. Notice sent by unregistered letter

is insufficient evidence of service. (Johnson *v.* Miller, 8 L. D., 477; English *v.* Noteboom, 7 L. D., 335). The case cited by appellant (New Orleans Canal and Banking Co. *v.* State, 5 L. D., 479) is not in point. In that case notice was sent by unregistered letter to the counsel of the bank, and it was held to be sufficient, for the reason that he admitted that he received it. There is no such admission in this case; on the contrary, both contestant and his attorney deny ever receiving any kind of notice, and the only evidence tending to show that notice was sent to contestant is the affidavits referred to, showing that it was the invariable custom of the office to send such notice through the mail, by unregistered letter. Notice verbally given, as testified to by McMath, can not be held sufficient, as the Practice Rules nowhere provide for verbal notice, nor should they. The appeal was therefore properly before the Commissioner.

The next point insisted on by counsel for appellant is that—

No personal service of notice of contest was ever made, and no sufficient affidavit was made for constructive service by publication, the affidavit making no showing of any effort to make personal service, as required by rule eleven (11).

This objection goes to the root of the whole matter, for if it is sustained, the local office had no jurisdiction, in other words there was no contest pending and the cash entry was properly allowed. That part of the affidavit of contest which has relation to service is as follows: "That said De Haan is not a resident of the State of Kansas, that personal service can not be obtained."

Counsel for appellant contends that this is insufficient to authorize service by publication, because the affidavit does not show thereby that he made any effort to procure personal service on the defendant, as required by rule 11 (rule 12 then in force). This rule is as follows:

Notice may be given by publication alone only when it is shown by affidavit of contestant and by such other evidence as the register and receiver may require, that due diligence has been used, and that personal service can not be made. The party will be required to state what effort has been made to get personal service.

It is quite plain that this rule contemplates two classes of cases:

1st. Notice by publication to the entryman when he is a non-resident of the State.

2nd. When the entryman is within the State but absconds, or so conceals himself that personal service can not be made upon him. Under this rule, in the latter case, before the contestant is justified in resorting to service by publication, he must set out the facts showing what effort has been made to obtain personal service, so the register and receiver may determine whether or not he has used due diligence in such a degree as to justify them in allowing him to proceed to obtain service by publication.

It will be observed that the "diligence" used, and the "effort" made, which must be shown, are "to get personal service." If the party is not a resident of the State, no diligence or effort can "get personal service." The rules of practice pertaining to the same matter must,

like different sections of the same statute, be construed together, so as to give effect to all, if it is possible to do so.

Rule 9 (then rule 10) is as follows:

> Personal service shall be made in all cases when possible, if the party to be served is *resident in the State or Territory* in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served.

From this rule it is equally plain that personal service is not required to be made, if the party to be served is not a resident of the State or Territory; why, then, should diligence be shown to make personal service where such service is not *required* to be made.

I think these two rules can be reconciled to this construction. Rule 9 provides for personal service, when possible, on residents of the State or Territory. Rule 10 provides for the execution of such notice.

Rule 11 provides for a different method of service when personal service is impossible, i. e., by reason of non-residence or because the party can not by diligence be found. Its meaning will be readily understood, if we prefix the following, to aid in its construction, to wit: *Though personal service is required when possible on all persons resident of the State or Territory*, yet notice may be given by publication, etc. Numerous decisions of this Department have been made in which it is held, that an affidavit alleging that after diligent search the residence or whereabouts of defendant can not be found or ascertained, or that personal service can not be made upon the defendant, and many other allegations to the same effect, are insufficient, that the plaintiff must show, as required in rule 11, what efforts he has made to get personal service, but no decision has come under my observation, after careful research, in which it is held, when the affidavit contained the positive allegation, as in this case, that the defendant is not a *resident of the State*, that plaintiff must also set forth what effort he has made to obtain personal service. Such a requirement would seem absurd, for, as said before, whence the necessity to show an endeavor to do something not required to be done. The allegation "that the defendant is not a resident of the State," is the statement of a fact, and the reasons why the contestant knows it is so need not, in my judgment, be stated. It adds nothing to the strength of the statement of fact. In Bone *v.* Dickerson's heirs (8 L. D., 452), the affidavit was that "J. Frank Dickerson has failed and his heirs or legal representatives have failed to plant or cause to be planted five acres of trees, tree seeds, etc., . . . . . and that the said Frank Dickerson *has been dead* for at least two years last past. Upon this affidavit notice was issued by publication to the heirs of J. Frank Dickerson. Ernest C. Dickerson, testamentary devisee, appeared by counsel and moved the dismissal of the contest for want of notice. The local officers overruled the motion, and found for contestant. On appeal to your office, their decision was affirmed on the ground that the defendant *being* a non-resident, the notice was sufficient.

On appeal to this Department the decision of your office was reversed,

and one of the reasons stated in such reversal is, because the affidavit did not show that "due diligence had been used, and that personal service could not be made."

It will be observed that the *affidavit* in this case does not, as in the case at bar, state that "defendant is not a resident of the State," therefore, as it did not show that contestant had used due diligence to make personal service, it was clearly not sufficient to authorize notice by publication, and the fact as found by the Commissioner, that the defendant was *actually* a non-resident, did not cure the error, for, as has been repeatedly held by this Department, the affidavit must show *on its face* all the facts necessary to authorize the service of notice by publication, or no jurisdiction will be conferred upon the local officers.

In Allen *v.* Leet (6 L. D., 669), cited in the foregoing case, the affidavit alleged that "he had made due and diligent search for Dexter Leet and that he can not be found nor heard of, and that personal service of notice of this contest can not be made on said defendant in the State of Nebraska." All of which might be true and still the defendant be a resident of the State of Nebraska, for he might have absconded or concealed himself so that personal service could not be had upon him. This affidavit is therefore not equivalent to an allegation of non-residence, and it was properly held to be defective.

I find therefore that the affidavit in this case was a compliance with the rule, and was sufficient to authorize publication of notice of contest. The record also satisfactorily shows that contestant mailed a copy of the notice by registered letter to the last known address of claimant at least thirty days before the hearing, and that a like copy was posted in a conspicuous place on the land for at least two weeks prior to the day set for hearing, and as the provision requiring the same to be posted in the register's office during the period of publication was not in force at the time the contest was initiated, all the requirements of the law necessary to give jurisdiction to the register and receiver seem to have been complied with. The contest, then, having been properly initiated prior to the cash entry of De Haan, such entry was improperly allowed, under the act of June 15, 1880 (21 Stat., 237).

As this case had not been finally adjudicated at the rendition of the decision of the case of Friese *v.* Hobson (4 L. D., 580), it falls within the purview of that decision, which is again followed by Roberts *v.* Mahl, 6 L. D., 446, and Arnold *v.* Hildreth, 7 L. D., 500.

The evidence abundantly shows that at the time of the initiation of the contest the defendant had abandoned his entry, and taken up his permanent residence in Oregon, many hundred miles distant. The good faith of contestant is clearly shown by continued residence on the land and improvements, amounting to more than fifteen hundred dollars. The contest will therefore be sustained, and cash entry No. 1122 will be suspended to await final action on contestant's application to exercise his preference right.

The decision of your office is affirmed.

FINAL PROOF PROCEEDINGS—TRANSFEREE.

ELLIS M. BROWN ET AL.

When final proof is not taken before the officer designated, but is otherwise satisfactory, and the entryman refuses to respond to further requirements, the transferee may cure the defect by procuring a certificate both from the officer designated to take the proof, and the one taking the same, that no protest was at any time filed against the entry.

If such certificates can not be obtained, the proof may be accepted as made, after republication and in the absence of protest.

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

I have considered the case of Ellis M. Brown on appeal by the Security Mortgage and Investment Company, mortgagee, from your decision of February 15, 1889, requiring new final proof on the pre-emption cash entry made by Brown for the NW. ¼ of Sec. 25, T. 115 N., R. 76 W., Huron, South Dakota, land district.

On February 28, 1884, Brown made settlement on said land, on March 1st following he filed a pre-emption declaratory statement therefor, and made actual residence thereon on March 8th, same year.

On July 26, 1884, he gave notice by publication that he would make final proof "before the clerk of the district court in and for Sully county, at Clifton, Dakota Ter., on Saturday the 6th day of September 1884," and on said day at the said town he made final proof before Merit Sweny, probate judge of Sully county Dakota Territory, and the same was accepted by the local officers, final certificate was issued September 16th following, and he paid to the receiver $200, taking his receipt therefor.

On February 21, 1887, your office, by letter "G" of that date notified the register and receiver at Huron D. T. that said claimant would be required to make new publication and new proof, because the proof was not taken as stated in the published notice.

It appears that Brown was notified of your said letter "G" by registered letter, and that he gave it no attention and on June 14, 1888, by your letter "G" of that date the local officers were directed to notify him that his entry was held for cancellation, subject to appeal.

It appears from the records and evidence that Brown, after receiving said final certificate mortgaged said land to the Security Mortgage and Investment Company, and sold the equity of redemption to one Davidson Steel. On February 15, 1889, you notified Steel by letter of that date that the final proof in said case had been rejected by your office that new proof had been required; that none having been made the entry was held for cancellation and that the Department recognized the right of the transferee to cure irregularities and show compliance with law by the entryman where he could not be found or refused to comply

with the requirements made. The Security Mortgage and Investment Co. were also notified that new proof was required under new publication, thereupon said company appealed, and for grounds of error claim that the proof was satisfactory as to residence and improvement, and that all that should have been required was new publication and posting and a certificate of no protest.

It also claims that it does not appear that any service of notice of suspension of the entry was ever made upon Brown. It files the affidavit of its President, Wm. P. Baird, setting forth that it is a corporation duly organized under the laws of the Territory of Dakota, that it made a loan of money to Brown and took a mortgage on the land in controversy; that it has no other security; that Brown is insolvent and has gone to parts to it unknown.

Davidson Steel files a statement (not under oath) that he purchased said land subject to said mortgage and has been paying interest on $330 to said company; that Brown has left Dakota and now lives in Illinois and is unable to bear the expense of making new proof, if he desired to do so.

The testimony in final proof shows that Brown built a house eight by twenty feet and moved, with his wife and child, into it on March 8, 1884, and that he lived there continuously until after making final proof. During the spring he broke twenty acres of land and cultivated fifteen acres to corn, potatoes and vegetables; during the summer he built a crib and made some other slight improvements.

The entryman having mortgaged the land after receiving his final certificate, and having sold the equity of redemption, seems to have lost his interest in it, and if it is not patented these parties must of course suffer. In the case of Eberhard Querbach (10 L. D., 142), it was held that the sale of the tract after making final proof, which satisfactorily showed full compliance with the law, did not afford ground for cancellation of the entry.

In the case at bar the proof shows full compliance with the law, and in view of this fact, and the fact that the entryman refuses to comply with the requirements of your office as to furnishing new proof, the grantee of the entryman will be allowed to furnish the official certificate of both the officer advertised to take such proof, and the officer taking the same, that no protest was at any time filed before him against said entry, as per rule 5—rules on final proof—approved July 17, 1889 ( 9 L. D., 123), and upon such certificates being furnished the final proof may be accepted.

If for any reason such certificates can not be obtained, the said grantee will cause new notice to be published for the submission of final proof, and if no protest or objection is filed on the day fixed for hearing, the proof heretofore made may be accepted as final, otherwise the final proof will be re-taken.

The decision is modified accordingly.

### OSAGE LAND—SETTLEMENT RIGHTS.

R. H. SMITH.

Settlement and occupancy of Osage land do not secure the right of purchase, if it appears that such occupancy was not with the intention of taking the land for a home.

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

On February 3, 1883, R. H. Smith made Osage cash entry of the N. ½ of SW. ¼, SE. ¼ of SW. ¼ and SW. ¼ of SE. ¼, Sec. 22, T., 30 S., R. 13 W., Larned, Kansas.

On March 28, 1883, a special agent reported that said entry was made for grazing purposes, but without recommendation. A hearing was however had thereon, and at said hearing the defendant asked that the government be required to open the case, which was refused by the local officers, and the defendant having excepted to said ruling, then submitted his testimony. The local officers found that the defendant did not make a *bone fide* settlement on the tract, and held his entry for cancellation, which decision was affirmed by your office. From this decision defendant appealed, alleging, substantially as error, (1) In holding that the overruling of defendant's motion to require the government to open the case, which was excepted to at the time, was not sufficient to reverse the decision of the local officers; (2) In holding that the settlement of defendant was not *bona fide*, or to make a home, but to get the land for grazing—the land only being suitable for grazing—and in not holding that the defendant was an actual settler having the qualifications of a pre-emptor at the date of tendering final proof, which are the only requirements to entitle him to the land.

The motion to require the government to open the case was improperly overruled, and the defendant could have refused to submit testimony, and might have relied upon having the error corrected on appeal; but having offered himself as a witness, and it being shown from his own testimony that he had failed to comply with the law, a correction of the error could not avail him. While the overruling of the defendant's motion denied to him a right, yet by reason of his own action in the conduct of the case, it can not now be repaired by a reversal of that decision.

The testimony of the claimant shows that he owned a farm adjoining the tract in controversy, upon which he resided with his family prior to his alleged settlement; that the tract is composed of canons, bluffs, breaks and ravines, and is not fit for agricultural purposes, but only for grazing; that the land is of no value to any one not owning adjoining land, and that because he owned the adjoining farm he wanted it for grazing purposes. He states that when he bought the adjoining farm, he also bought the house on the tract in controversy from the

same person; that his wife resided with him on said tract for about a month and a half, and then returned to the house on the adjoining farm, which was from twenty-three to thirty rods from the other house, but that he and his son remained on the place until he proved up, which was exactly six months from date of filing, when he returned to the house on the adjoining tract, and afterwards used the house on the land in controversy for a stable. He states that when he moved with his family from Illinois to Kansas, they divided their household goods and put part on the tract in controversy and part on the adjoining land; that his wife came to the claim at times to cook their meals, and when she did not, he and his son went to the house on the adjoining tract to eat; that he filed for the land to make it a home in connection with his other land adjoining.

While the testimony shows that the claimant occupied the tract with his son for six months, yet considering all the facts and circumstances as detailed by his own testimony, I am satisfied that such occupancy did not constitute him an actual settler upon the land within the meaning of that term, as defined by the decision of the Department in the cases of United States *v.* Jones, 10 L. D., 23, and United States *v.* Atterberry, id., 36, in which it is held that the proof required to establish the fact of an actual settlement on Osage lands, is no less in degree than the proof required under the pre-emption law. While it is true the claimant settled upon and occupied the land for six months, yet it is shown by the proof that he did not occupy it for the purpose of making it his home, but solely to add to his adjoining land, which was in fact his home, and to which he removed as soon as he made proof.

Your decision is affirmed, and the papers are herewith returned.

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### PRACTICE—NOTICE OF CONTEST—OFFICIAL SIGNATURE.

### LUNDQUIST *v.* FENTON.

The mere omission of the register to affix to his signature, on a notice of contest, his official designation does not invalidate the process; nor can a defendant who admits the service of such notice, and appears generally, without allegation of prejudice, take advantage of such defect.

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

On June 2, 1885, Eusibus M. Fenton made homestead entry upon the NW. ¼, Sec. 14, T. 127 N., R. 46 W., Fergus Falls, Minnesota.

On May 18, 1886, Erik A. Lundquist filed his affidavit of contest against said entry, charging abandonment, change of residence, and no cultivation of the tract.

The hearing was set for July 9, 1886, at nine A. M. Near the hour fixed for the hearing, the register, T. F. Cowing, received a telegram

from the defendant, dated at Burnesville, Minnesota, which reads as follows:

"Please hold open my contest until 10:15 to-day."

The case was called a few minutes after ten o'clock, both parties being present with counsel, when Fenton objected to the service of notice of contest, on the grounds that neither the notice nor the copy thereof left with him had the word "register" written after the signature of the person issuing such notice. The local officers overruled this objection; whereupon Fenton, with his counsel, withdrew from the trial. The evidence was then heard, and the register and receiver recommended the cancellation of the entry.

On appeal by your office letter of December 19, 1888, you vacate that judgment and reverse the action of the local office, sustaining Fenton's objection to service, and direct that a new notice be issued to the parties in interest, fixing a day for a hearing anew the charges in contestant's affidavit.

From this action Lundquist brings this appeal, alleging the following grounds of error:

1. In holding that plaintiff had not made due and legal service upon defendant to the trial had in the local land office.
2. In directing the local land office to order a new hearing.

There is no question as to the defendant's being served with a notice of this hearing this was done both by a copy and by a notice sent through the mail. The latter notice he acknowledged receiving, when served with a copy of the original notice. Moreover, his telegram to the register, above set out, showed he had notice of the hearing.

The sole question is, whether the defendant can take advantage of the absence of the word "register" on the notice to respond and furnish testimony concerning an alleged failure to comply with the law, after he has acknowledged, both verbally and by telegram, that he has been notified of such hearing.

The notice which defendant received on June 4, 1886, thirty-five days before the hearing, was dated at "U. S. Land Office, Fergus Falls, Minn., May 18, 1886."

The notice bore on its face the name of the office whence it came.

The register and receiver (or one of them) are the only persons authorized by law to sign such notice; the name of the register was duly signed to the same, and the mere omission of the official designation in the term "register" did not invalidate the process.

Rule 8 of the Rules of Practice of this Department requires that the notice of contest be signed by the "register and receiver, or by both of them."

As a matter of fact the register did sign both the notice and the copy thereof, and it would have been better practice had he designated his official character, by writing the same after his name, on both notice and copy. But the absence of such designation can not excuse de-

fendant after he has appeared generally and asked that his "contest" be held open until he could reach the place of trial. A technical omission in the process, under such circumstances, and upon such an appearance can not be taken advantage of by him. In this case the entryman had thirty-five days to prepare for this hearing. He voluntarily refused to respond to the charges against his entry, or to furnish testimony to establish his good faith. He does not claim that he was mislead or in any way prejudiced by the failure of the register to designate his official character in the process.

Your order vacating the judgment of the local office is reversed; and I herewith return the papers, with directions that you pass upon the merits of the case as disclosed by record.

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### RAILROAD GRANT—SELECTION—SETTLEMENT RIGHT.

### IOWA RAILROAD LAND CO. *v.* NOURSE.

The right of the railroad company, under the act of June 2, 1864, to even sections within the six mile limits of the grant of 1856, does not attach until selection, and the right of selection cannot be exercised until after definite location of the modified line of road.

The right of selection under said act of 1864, can not be exercised if at the date of selection a right of homestead settlement covers the tract involved.

The failure of a homestead settler to make entry within three months after settlement does not operate to the advantage of the railroad company.

The consent of the company to a judicial decree recognizing the validity of an entry under which settlement rights are alleged, is an abandonment of the company's pending selection so far as the right of the settler is concerned.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September* 9, 1890.

This appeal is filed by the Iowa Railroad Land Company, successors in interest to the Cedar Rapids and Missouri River Railroad Company, from the decision of your office holding for cancellation the selection made by said company of the NW. ¼ of Sec. 2, T. 85 N., R. 43 W., Des Moines, Iowa, and allowing Horace D. Nourse to make homestead entry of the same.

The tract in controversy is an even numbered section, lying within the six mile limits of the line of the Iowa Air Line, now Cedar Rapids and Missouri River Railroad Company, as originally located under the act of May 15, 1856 (11 Stat., 9), and was selected by the company December 31, 1884, under the act of June 2, 1864, (13 Stat., 95).

The right of the company to the even sections within said limits attaches only from the date of selection, and no right of selection could be exercised until the modified line was definitely located. See Iowa Railroad Land Company *v.* Ertel, 10 L. D., 176.

The records of your office show that Simeon Lightfoot made homestead entry of this tract October 31, 1870, which was canceled July 25, 1884, for failure to make proof within seven years from date of entry.

Prior to the cancellation of the entry, the railroad company brought suit against Lightfoot to determine the right of possession and the validity of his entry, and in this suit Nourse was joined as a co-defendant. The suit was pending at the date of the cancellation of the entry of Lightfoot, and also at the date when the company selected the tract.

After the decision of the supreme court of the United States, in the case of Cedar Rapids, etc., Railroad Company *v.* Herring *et al.* (110 U. S., 27), which held that the right of the company to the even sections within said limits attached only from date of selection, and after the company had made selection of the tract, it allowed the following consent decree to be entered up in the suit against Lightfoot and Nourse:

It is ordered, adjudged and decreed as upon a full hearing upon the merits that the entry under which defendants claim is legal and valid, and that the petition of plaintiffs be dismissed for want of equity.

Your office held that this act of the company disposed of its claim to the land, while the company, in its appeal from said ruling, contends that the only question settled by said decree was that Lightfoot's entry was valid and legal, and that so long as that entry remained of record, rights acquired under and by force of it could not be called in question by the company. But at the date of said decree, the entry of Lightfoot had been canceled, and the company had made selection of the tract. Nourse was then the only defendant claiming the land. While the decree did not so dispose of the claim of the company, as to prevent it from afterwards asserting its right to select the tract, if it should be found free from any other claim, it was such a recognition of the settlement right of Nourse then existing as to estop them from afterwards asserting any claim under its selection of December 31, 1884, as against the validity of his claim. The recognition of the claim of Nourse was practically an abandonment of its selection, so far as it conflicted with his settlement right. But, independently of this, the tract was not subject to selection, if, at the date of selection, a right of homestead settlement had attached thereto.

The act of July 2, 1864, *supra*, provides that—

The Secretary of the Interior shall reserve and cause to be certified and conveyed to said company from time to time, as the work progresses on the main line, out of any public lands now belonging to the United States, not sold, reserved, or otherwise disposed of, or to which a pre-emption right *or right of homestead settlement* has not attached, and on which a *bona fide* settlement and improvement has not been made under color of title derived from the United States or from the State of Iowa.

Nourse's right to make homestead entry of this tract as against the right of the company is therefore not dependent upon the decree, if he is a qualified homesteader, and was at the date of selection a settler

upon the tract, occupying and improving it, with the intention of entering it under the homestead law.

It appears from the record that on July 23, 1887, Nourse applied to make final proof on the entry of Lightfoot, or to make entry of the land under the homestead law, which was rejected by the local officers. On August 27, 1887, he again applied to enter the land under the homestead law, which was also refused, because of conflict with the company, and from both refusals he appealed. With his first application he filed a corroborated affidavit, in which he states that in 1873 he purchased the relinquishment of Lightfoot, and went into possession of the tract and has been living on it continuously ever since; that he had cultivated the land, built a dwelling house, and made other permanent and valuable improvements, valued at about $1,000, and has occupied it for the purpose of making a home thereon under the homestead law. While he could claim no right whatever under the entry of Lightfoot, or under his purchase of the relinquishment, as against the government, yet he was a settler upon the land at the date of selection, occupying and cultivating it with the intention of acquiring title to it as a home under the homestead laws; and these allegations are not denied by the company. At that time he could initiate a claim to the land under the homestead laws by mere settlement, and his failure to make entry within three months of his settlement could not be taken advantage of by the railroad company, but only as in settlements under the pre-emption laws by the next settler who perfected his claim in time.

The decision of your office is therefore affirmed, and the application of Nourse to make homestead entry of the tract will be allowed.

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### FINAL PROOF PROCEEDINGS—PROTEST—HEARING.

### WILDER *v.* PARKER.

The Department will not interfere with the Commissioner's discretion, in refusing to order a hearing on a protest filed against final proof, unless there is such an abuse thereof as to work an injustice, or the inequitable denial of a legal right.

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

I have considered the case of John Wilder *v.* Moses H. Parker on appeal of the former from your decision of May 27, 1889, dismissing his protest against the final proof of the latter on his pre-emption cash entry for the NW. ¼ of Sec. 18, T. 6 S., R. 65 W., Denver, Colorado land district.

On August 27, 1888, Parker made pre-emption proof and on same day Wilder filed protest against the same averring in his affidavit that he had made some discoveries of gold in the land and that it was valuable as a placer mine. This affidavit was written by the officer taking the final proof, and with it was also taken the affidavit of Parker corrobo-

rated by five witnesses who say they know the land and the parties; they contradict the statements of Wilder as to the character of the land, determining its character to be agricultural rather than mineral. These affidavits were returned to the local office with the final proof.

On considering the testimony the local officers accepted the final proof and rejected the protest, from which decision Wilder appealed. Pending said appeal, he filed an additional affidavit, repeating many of the statements of the former, and adding the charge that Parker had made final proof on homestead entry for a tract of land in the same section and had resided upon it and that he believed he owned it when he made settlement on the tract in controversy. This affidavit was corroborated by two witnesses. A copy of it was served on Parker and he filed counter affidavits, one by himself, denying specifically and positively the charge that he had moved off of land owned by him, and denying that he owned any land when he made settlement. Another by Mr. Rowley relating to the character of the land, and this affidavit corroborated by three witnesses contradicted the statements of Wilder as to the mineral character of the land. He also filed in addition to these, the joint affidavit of seven witnesses, who say that they are familiar with the land in controversy and with the efforts of prospectors to find gold in paying quantities on it; that Wilder has lived on said land and in its immediate vicinity since 1882, and has been engaged in working at carpentering and in the poultry business and working for others by the day; that in 1883 he did some prospecting on the tract, and since that has done no mining or prospecting on it except to dig a well on the land; that said land is of no value as mineral land, but is valuable for agricultural and grazing purposes.

After considering the case as presented by the final proof and these several affidavits, you declined to order an investigation and Wilder appealed to this Department.

A careful examination of the entire record, the testimony and said affidavits satisfies me that your conclusion should not be disturbed.

Wilder had known this land, and claimant (Parker) many years, and in his protest filed on August 28, 1888, which covers nine large pages of closely written matter, he did not mention the matter of Parker moving off of land that he owned when he settled on the tract in controversy, and when he does mention it later, he alleges it as his belief only.

It will be observed that so far as the character of the land is concerned, Wilder nowhere states that it is more valuable for mineral than for agricultural purposes. The allegations in this affidavit are too general and vague to justify this Department in interfering with your discretion in declining to order a hearing. Unless there is such an abuse thereof as to work injustice or the inequitable denial of a legal right, this Department will not interfere with you in the exercise of your discretionary authority. There is nothing in the record in this case which will justify its being prolonged. Your decision is accordingly affirmed.

OSAGE LAND—FILING—FINAL PROOF.

RICKS *v.* CURTIS.

Where two claimants for Osage land are both in default, either as to filing, or making final proof and payment within the prescribed period, the superior right must be accorded to the one who first submits final proof thereafter.

The right to purchase Osage land cannot be exercised by one who is not an actual settler thereon.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September* 11, 1890.

Wilbur F. Curtis filed Osage declaratory statement for the SW. ¼ Sec. 33, T. 28 S., R. 15 W., Larned, Kansas, April 24, 1884, alleging settlement April 22, 1884, and made final proof May 23, 1885.

James Ricks filed declaratory statement for said tract May 13, 1885, alleging settlement November 22, 1884, and made final proof July 11, 1885.

A hearing was ordered and upon the testimony submitted the local officers found in favor of Curtis and recommended the cancellation of Rick's filing, which was affirmed by your office. From this decision Ricks appealed.

Both parties were in default, Curtis by failing to make final proof within six months after filing, and Ricks by failing to file within three months after settlement, and his final proof was submitted less than three months after filing. Conceding that both parties had complied with the law as to settlement and residence, the claim of Curtis must prevail, for the reason that where both parties are in default, either as to filing or making final proof and payment within the prescribed period, the superior right must be accorded to the one who first submits final proof thereafter. Boyd *v.* Smith (11 L. D., 62); Hessong *v.* Burgan (9 L. D., 353), and cases therein cited.

But another question presented in this case is, whether Curtis ever made a bona fide settlement and residence on the land, and, if so, whether such residence was maintained as required by law.

It appears from the testimony that Curtis, a few days after his alleged settlement left the tract in controversy and went to Ottawa county, 160 miles from the claim, and lived with his mother, attending to some hogs and also to the care and harvesting of crops in which he had a joint interest with his brother, and remained there until December 1884. The testimony shows that he came to the tract in controversy about November 24th, with a wagon and horse belonging to himself, but this was a mere visit, as he only remained about a day and two nights and then returned to Ottawa county with his team.

It is shown by the testimony of defendant and his witnesses that he was a joint owner with his brother and father of a house twelve by twenty-two feet which was placed in the center of the section so as to

cover the three quarter sections claimed by them respectively, and which was used by all of them in proving up their respective claims, but it is admitted that there was no door to that part of the house covering the claim of the defendant; that he did not assist in building the house, and it is very uncertain from the testimony whether any part of said house was on his claim.

It is also shown by the testimony that S. Y. Curtis, the father of defendant, claimed all of said house as being on his tract in making his final proof, which was made after the time that defendant says the house was moved on the tract claimed by him. The cultivation of the land was done by his father and brother. The defendant himself testifies that he did not do the cultivating. He explains his absence by reason of an injury received within two weeks after he went to Ottawa, which caused him to remain there several months under the care of a physician, but there is abundant evidence to show that during this time he was at work in the harvest field, and through the greater period of his absence, at least, he was able to work and did work on the place he was then living upon.

Furthermore, while he was on the stand, counsel for Ricks offered in evidence a certificate from the county clerk of Ottawa county, certifying that W. F. Curtis is registered as one of the voters at a general election, held in Culver township in Ottawa county, November 4, 1884, and when asked if he voted at such time and place, as set forth in said certificate, he answered, "I don't recollect whether I voted or not."

Another significant fact—as testified to by Ludden, one of defendant's witness—is that witness George Curtis and Fremont Curtis were going across the claim, about November 22, 1884, and passed Ricks, who was on the land, and shortly afterward George Curtis came up to where they were at work, and said: "Wilbur Curtis' claim was jumped," and the defendant in his testimony admits that after he returned to Ottawa county, in November, 1884, he received a letter from his brother that Ricks had gone on the land, and he came right back.

Taking into consideration all the testimony, I am satisfied that Curtis was not an "actual settler" on the land, as contemplated by law, and the evidence tends strongly to show that he was induced to return to the tract from the fact that Ricks had made settlement upon it, after the time had expired in which by law he was required to submit final proof, and his entry should therefore be canceled.

It is shown by all the witnesses that Ricks has resided continuously on the tract with his family from November 22, 1884, to November 5, 1885, the date of hearing, and has improved the tract and fulfilled all the requirements of the law. At the date of his settlement the land was subject to settlement by any qualified settler, his entry should therefore be allowed.

Your decision is reversed.

BICKEL ET AL. *v.* IRVINE.

Motion for review of departmental decision rendered February 20, 1890, 10 L. D., 205, denied by Acting Secretary Chandler, September 11, 1890.

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DESERT LAND ENTRY—NON-IRRIGABLE LAND.

WILLIAM CRUSEN.

A desert land entry will not be defeated or disturbed for the sole reason that the larger portion of each smallest sub-division is not susceptible of irrigation, if the proof of reclamation is otherwise satisfactory, the good faith of the entryman apparent, and no question as to the desert character of the land embraced in the entry.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September* 11, 1890.

The appeal of William Crusen from your decision of May 13, 1889, is before me, and from the record it appears that September 11, 1884, the claimant made desert land entry No. 63 for the SE. ¼ of the NE. ¼ and the NE. ¼ of the SE. ¼ of Sec. 19, T. 1 S., R. 19 E., Boise meridian, Hailey, Idaho. Final proof and payment were made and final certificate issued April 19, 1887.

On presentation of the record at your office, you held said entry for cancellation, for the reason that the final proof showed that "only some ten (10) acres of the 80 have been or can be irrigated; the balance of the tract being waste, hilly and impossible to get water upon it."

From an examination of the final proof it appears that only ten acres, five acres in each legal subdivision, are susceptible of irrigation; the remaining portion of the land is described by both claimant's witnesses as "waste, hilly and impossible to get water upon." Both witnesses also state that "all the land is fenced." The evidence as to supply of water, character of ditches, and all other requirements pertaining to the reclamation of the ten acres appears to be satisfactory.

The ruling of this Department, as appears from the later decisions, notably David Gilchrist, 8 L. D., 48, Andrew Leslie, 9 L. D., 204, and Martha W. Fisher, 9 L. D., 430, is to the effect that a desert land entry will not be defeated or disturbed for the sole reason that the larger portion of each smallest subdivision of the entry is not susceptible of irrigation, if the proof of reclamation is otherwise satisfactory and the good faith of the entryman is made apparent, and there is no question as to the desert character of the land embraced in the entry.

While none of the cases that have heretofore come before the Department have embraced so large a proportion of non-irrigable land as the one under consideration, no reason is perceived why an entryman should not be allowed to pay for a legal subdivision of desert land, if

he chooses to do so in good faith, in order that he may utilize a part of it.

The fact, however, in itself that the claimant in this case knowingly made entry and paid for eighty acres, only ten of which can be made productive, is to some extent suggestive of bad faith, and the suggestion is strengthened by the further fact that while it appears from the evidence submitted in the final proof that but ten acres are in use or can be used for any purpose, yet the whole tract is *fenced.*

The question very naturally arises, why should the claimant go to the expense of fencing seventy acres of waste and worthless land?

In view of all the circumstances attending this entry, I am of the opinion that an investigation should be had of the character of the land embraced in this entry, and therefore direct that an examination be made by a special agent of your office and that he be instructed to make a full and careful investigation as to the character of the land entered, whether the same is desert, and how much is susceptible of irrigation, and whether the same has been fully reclaimed, and whether the reclaimed land is on one forty acre tract, with notice to the claimant, and that he make a report in writing to your office clearly setting forth the facts so found by him. That on examination of such report, you will take such action in the premises as to you shall seem proper, ordering a hearing with notice, if the report should be adverse to the entry.

Your decision is accordingly modified.

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CONTEST—PREFERENCE RIGHT—PROCEEDINGS ON REPORT OF SPECIAL AGENT.

JOHNSON *v.* WALTON.

One who files an affidavit of contest against an entry, and pays or deposits the requisite fees, acquires under the act of May 14, 1880, a right that can not be defeated by subsequent proceedings instituted against such entry on behalf of the government.

An order of cancellation based on the report of a special agent cannot be treated as final, if the record fails to show notice of such action duly served on the entryman in accordance with the circular provisions of July 31, 1885.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September* 12, 1890.

I have considered the case of John S. Johnson *v.* Richard Walton and Charles H. Cowan on appeal by Johnson from your office decision of May 6, 1889, rejecting his application to make homestead entry for the E. ½ of the NW. ¼ and the W. ½ of the NE. ¼ of Sec. 21, T. 8 S., R. 3 W., New Orleans, Louisiana land district.

On December 18, 1884, Walton made homestead entry for said land, and on June 23, 1886, Johnson filed affidavit of contest against the same, alleging that Walton never resided on said land or cultivated or

improved the same. It was further alleged "affiant has made personal inquiry and caused inquiry to be made at Jennings, entryman's last known place of residence in this State, and after due diligence personal service can not be had within this State where the tract of land is situated." Johnson at the same time deposited the fees required of contestants.

A hearing was ordered and set for September 2, 1886, and a notice issued bearing date July 19, 1886. This notice was subsequently (date not shown) returned to the land office with the following endorsement thereon:

> Richard Walton is not to be found in the county. Don't reside on said land.
>
> A. D. McFARLAIN,
> *Deputy Sheriff.*

Afterwards by virtue of a commission issued by the local officers on July 26, 1886, the statements of two witnesses were taken and forwarded to the local office, and filed there August 9. No further steps seem ever to have been taken in the matter of this contest. Pending these proceedings the attorney for the contestant called the attention of a special agent of the government to the condition of this entry and afterwards accompanied him to the land. This attorney states in an affidavit subsequently filed that believing that his client would, in the event of the cancellation of said entry as a result of the investigation by the special agent, be entitled, under the rulings of your office in a letter of December 5, 1885, to James W. Cone, Kirkwood, Dakota (12 C. L. O. 238), to a preference right of entry, left the contest in abeyance pending such investigation. The local officers it seems took no further steps in the contest upon the theory as expressed in the receiver's letter of April 5, 1889, "that the action of the government, through special agent Waggaman was paramount to the contest of an individual" and advised the contestant not to prosecute his claim further.

Under date of November 5, 1886, special agent Waggaman made his report upon said entry showing the land to be entirely abandoned and that Walton had never resided upon it. Your office on February 2, 1887, held the entry for cancellation and directed that the entryman be notified thereof in accordance with the provisions of circular of July 31, 1885 (4 L. D., 503).

There is nothing in the papers now before me to show that such notice was ever given. On February 25, 1889, Walton's entry was finally canceled by your office.

On March 2, 1889, Cowan applied to make homestead entry for said land which application was rejected by the local officers on the ground that Johnson was entitled to a preference right of entry.

On March 7, 1889, the local officers gave notice of the cancellation of Walton's entry to Johnson who on March 26th applied to make homestead entry for said land. Cowan having in the meantime appealed from the rejection of his application, all the papers were transmitted to

your office where it was held that Johnson was not entitled to a preference right of entry and the local officers were directed to accept Cowan's application.

While it is true that one by simply furnishing to the government information upon which an entry is subsequently canceled, does not thereby become entitled to a preference right of entry, yet it is equally true that one who has filed an affidavit of contest and paid or deposited the fees as required by the act of May 14, 1880, can not be deprived of the benefits conferred by that act by the institution on behalf of the government of an investigation of such entry.

Johnson has evidently acted in entire good faith throughout this transaction, and he should not be made to suffer by reason of the erroneous advice of the local officers, especially in view of the fact that such advice was fully justified by the instructions of your office contained in the letter referred to.

If it appears from the records of your office or those of the local office that notice of the action of your office holding Walton's entry for cancellation was duly given in accordance with the regulations governing such matters, then it would seem unnecessary to interfere with the order of cancellation heretofore made, but Johnson's application should be allowed. If no notice ever issued in accordance with the provisions of the circular of July 31, 1885, then the cancellation heretofore made should be set aside and the case should be returned to the local office with instructions to allow Johnson to proceed with his contest after securing service upon the entryman by publication or otherwise, as may be necessary.

The decision of your office is modified in accordance with the views herein expressed.

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### HOMESTEAD ENTRY—EMPLOYÉ OF THE LOCAL OFFICE.

### UNITED STATES *v.* ROSE.

A homestead entry made by one who has accepted an appointment in the local office, but has not yet entered upon the duties of the position, is in violation of the spirit of the law which prohibits employés of the land office from becoming interested in the purchase of any of the public lands.

One who enters land knowing that his official employment will prevent his residence thereon, cannot plead such employment as an excuse for failure to comply with the law in the matter of residence.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September* 12, 1890.

I have considered the case of United States *v.* David E. Rose on appeal by the latter from your decision of May 13, 1889, rejecting his final proof on homestead entry, commuted to cash entry, for the NW. ¼ Sec. 21, T. 125 N., R. 65 W., Aberdeen, South Dakota, land district.

The record shows that: he made homestead entry for this tract on November 29, 1882, and on March 1st, 1884, made commutation final proof which was accepted by the register and receiver he paying $200 and taking receipt therefor. January 22, 1885, your office rejected said proof for non-compliance with law in regard to residence. March 2nd, following he filed his affidavit and application for a review and a reversal of said decision and on the 9th of said month your office found that—"the reason for rejecting his final proof no longer exists," and said, "my letter of January 22, 1885, is modified accordingly. You will notify the claimant of the fact, and that his entry will be approved for patent."

On November 3rd, 1885, Special Agent Augustus High was directed by your office to investigate this entry and to report to your office, which he did on the 23rd of same month, giving in detail the facts in the case but making no recommendation. This report was accompanied by a statement from Rose which was made a part thereof. Upon receiving this, your office on March 17, 1886, held the entry for cancellation subject to appeal or a hearing if Rose should apply for a hearing within sixty days.

On June 8th, Rose, by his attorney W. J. Johnson appealed from said decision, and on September 3rd, 1886, he made application to the Secretary for a certification of the papers to this Department and on the 15th of said month your office was directed to transmit the papers to this Department, which was accordingly done and on February 15, 1887, the same came on for consideration and the Secretary thereupon ordered that a hearing be had "to the end that a thorough investigation may be had as to all the facts connected with the case from the beginning to the end and especially whether said Rose was not under engagement to enter the public service before he made entry for the land in question." In pursuance of this direction a hearing was ordered before the local office at Aberdeen to be held on December 1st, 1887, and on said day the same was continued to April 23, 1888. Special Agent John W. Daniel was directed to appear on behalf of the government, and on the adjourned day of hearing he appeared and submitted the original proof and the statement of claimant and there being no further testimony offered, the local officers found that the government has failed to make out a case, and recommended that the entry remain intact.

On May 13, 1889, the entire matter came before you for consideration and you find that the entryman has failed to comply with the law in the matter of residence and you find that his good faith, by reason of wrong advice from the local officers saves his entry from forfeiture, and you therefore follow the Thomas Nash case (5 L. D., 608), and reject the final proof now under consideration and allow him upon proper compliance with law, especially in the matter of residence to submit new proof during the life of his homestead entry.

From this decision he appealed.

The testimony in the case consists principally of the statements of

the claimant and his witnesses. On June 16, 1886, he in an affidavit made in Michigan says: "I am a resident of Grand Haven, Michigan, and have resided here since 1861; less two years and six months during which time I lived at or near Aberdeen, Dakota."

He says he went to Dakota in August, 1882, to select some land, the land office being temporarily closed he went home. In November Register Duncombe wrote him soliciting him to accept a position as clerk in his office, which position he accepted and went to Aberdeen November 26, 1882. On the 29th of November, on advice of Duncombe he entered the NW. ¼–21–125–65– as his homestead. He says:

"He (Duncombe) advised me that inasmuch as I was to be employed in the U. S. land office the requirement as to residence upon my land would not be required of me." On December 1st, following he entered upon his duties as clerk in the land office, and remained until May 1st, 1883, when he resigned. During the summer he built a small house on the land, had some breaking done and cultivated some of the land. He put some household furniture in the house and slept there a few nights but never established his residence on the land, but went back to Michigan and stayed some time, when he returned and stayed at Aberdeen, until September 12, 1883, when he was re-appointed as clerk in the land office and remained until March 23, 1885. He had a wife and four children residing in Michigan—they never lived in Dakota. He occasionally visited the land while in Aberdeen and had some thirty acres cropped each year—he voted once or twice in the precinct in which the land is situate.

This case is, as to the question of residence somewhat similar to that of Henry W. Lord (11 L. D., 18), who, it was found made his settlement in anticipation of his appointment as register. In the decision it was said:

> If the settlement is made, as in this case, merely for the purpose of securing the land as a gratuity, without fulfilling the consideration of residence required by statute, and knowing at the time that the duties of the office would prevent the maintenance of residence on the land, such settlement is not *bona fide* within the meaning of the statute, or of the character contemplated by it.

In the case at bar the claimant went to Dakota from Michigan, leaving his family at his home in the latter State, to accept the office of clerk in a land office. He knew he could not make a homestead entry, being an employé in the land office, so he evaded the strict letter of the law by making entry, first, and then, entering upon the duties of the office to which he had been appointed. He knew he could not, and did not intend to comply with the law in the matter of residence, his family were in Michigan and intended to remain, and in fact have remained there during all the time, never living in Dakota.

The entry is clearly in violation of the spirit of the law which prohibits employees of the land office from becoming interested in the purchase of any of the public lands.

Herbert McMicken *et al.*, 10 L. D., 97.

For this reason it is my judgment that the case of Thomas Nash, 5 L. D., 608, has no bearing on the case at bar.

The final proof is rejected and the entry must be canceled. Your decision is modified accordingly.

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REPAYMENT—MORTGAGEE—ASSIGNEE.

ALONZO W. GRAVES.

A mortgagee, whose claim is merely a lien on the land, is not an assignee of the entryman, and as such entitled to repayment.

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

I have considered the appeal of Alonzo W. Graves from your office decision of May 31, 1889, refusing the return of the purchase money to him as the mortgagee of Joseph A. Patten, who made cash entry No. 13,661, commuted from homestead entry No. 1285, Mitchell land office, Dakota.

It appears that final receipt for $200 was issued to Patten on February 28, 1885, in payment for the NE. ¼ of Sec. 20, T. 103 N., R. 55 W., Mitchell, Dakota, land office, and that on February 20, 1885, Patten executed a mortgage on said land in favor of Graves for the sum of $325.50.

It is alleged that this money was used by Patten in payment of the purchase price of the land. It nowhere appears, however, when the debt became due, for which the mortgage was given. Patten's entry was canceled upon his relinquishment, and subsequently Graves applied, as mortgagee of Patten, for the purchase money of the tract.

Section 2362 of the Revised Statutes provides as follows:—

The Secretary of the Interior is authorized, upon proof being made to his satisfaction that any tract of land has been erroneously sold by the United States, so that from any cause the sale can not be confirmed, to repay to the purchaser or his legal representatives or assigns the sum of money which was paid therefor, out of any money in the treasury, not otherwise appropriated.

"Assignees within the meaning of the statute now under consideration are purchasers who purchase the land after entry and take assignments of the title under such entry." General Circular, approved March 1, 1884, p. 39.

It is well settled in this Department that the giving of a mortgage to secure the purchase money for government land is not a sale of the land; nor is it an agreement or contract by which the title inures to the benefit of another. Larson *v.* Weisbecker, 1 L. D., 409; Young *v.* Arnold, 5 L. D., 701; William H. Ray, 6 L. D., 340; Mudgett *v.* Dubuque & Sioux City Railroad Company, 8 L. D., 243.

The Dakota Code of 1883 (Vol. 2, Sec. 1722,) defines a mortgage as follows:

"Mortgage is a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession."

The code further provides, that to entitle any party to make foreclosure, "it shall be requisite that some default in a condition of such mortgage shall have accrued, by which the power to sell has become operative." Sec. 598, Vol. 1.

Section 607 provides, that the property sold may be redeemed within one year from the day of sale, and section 609 provides that it shall be the duty of the officer making such sale to complete the same by executing a deed of the premises so sold to the original purchaser, "if such mortgaged premises be not redeemed."

So, that a mortgage in Dakota, prior to a decree and sale of the land thereunder, is not an assignee within the meaning of the statute.

In this case, it appearing that Graves was only a mortgagee, his mortgage being merely a lien on the land to secure a debt, he is not in any sense an assignee of the purchaser, and therefore his application for repayment was properly refused.

Your said decision is accordingly affirmed.

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RESIDENCE—TENANT—SETTLEMENT RIGHTS.

HALL *v.* LEVY.

One who is residing on land as the tenant of another may, on the termination of such relation, acquire a valid settlement right to said land by remaining thereon, cultivating and improving the same, with the intent to make it a permanent home.

Settlement on land covered by an entry confers no right as against the record entryman, but as between subsequent claimants the settlement first in time is entitled to the highest consideration on cancellation of the existing entry.

Residence is not acquired or maintained by occasional visits to the land.

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

I have considered the appeal of John W. Hall from the decision of your office dated January 30, 1889, in the case of said Hall *v.* Louis Levy, approving the latter's final commutation proof for lots 1 and 2 and the S. ½ NE. ¼ Sec. 6, T. 37 N., R. 3 W., Lewiston land district, Idaho, and holding for cancellation Hall's pre-emption declaratory statement for the said tract.

August 23, 1882, one Stephen A. Moon, made timber culture entry for said tract, and on October 6, 1885, his entry was canceled for relinquishment and Lizzie Levy made her entry for the tract under the timber culture law, November 27, 1885, her entry was canceled for relinquishment and on the same day Louis Levy made his entry for the tract under the homestead law.

December 17, 1885, John W. Hall, made application to file his pre-emption declaratory statement for the tract alleging settlement and residence thereon October 6, 1885; his application was rejected and Hall appealed.

May 21, 1886, your office directed that Hall's declaratory statement "should be received because of his alleged residence on the land," and on June 17, 1886, his declaratory statement was filed in the local office.

January 20, 1887, Levy offered final commutation proof, and on the same day Hall filed a protest against the acceptance of said proof.

Hearing was ordered and had, and on March 25, 1887, the local officers filed dissenting opinions and transmitted the case to your office for decision thereon.

Both parties appealed.

January 30, 1889, your office decided in favor of Levy's entry, and held Hall's declaratory statement for cancellation, whereupon Hall appealed.

The evidence adduced shows that during the last week in September 1883, Stephen A. Moon, rented the tract in dispute to John W. Hall for the term of one year, with the agreed understanding that Hall was to prepare and crop all of the previously broken land, and as compensation for so doing he was to have two thirds of all such crop, and the use of a dwelling house on the premises; and Moon was to receive as rental one-third of the grain.

Shortly afterwards Moon further agreed that if Hall broke any new land he was to have the right to raise two crops on such new breaking as compensation for his labor.

September 1884, Moon again rented the premises to Hall on the same conditions for another year, and the second lease expired in September 1885, except as to the use of about twelve acres of the new breaking from which Hall had not raised a second crop. During said period Moon permitted Hall to erect certain out buildings and fences on the land at Hall's expense, with the right in Hall to remove the same whenever he quit the premises. Moon frequently tried to sell the tract to Hall, but wanted as payment for his relinquishment the sum of $2,000, which amount Hall thought was too much, besides he had not the money and declined to buy.

Hall testified that during the last week in September 1885 Mr. A. Levy, a merchant of Genesee, and father of Louis Levy, came to his house and told him that he

> Had now had got Moon to agree to let him (Levy) have the improvements on this timber culture entry, as settling the debt between him and Moon and now says he . . . . you have been wanting this place for a home, and now is your time. Will you take these improvements off my hands? I have jewed him down $600. On what conditions, Mr. Levy, I says, will you let me have them? For fourteen hundred dollars, he says, at ten per cent. and all the time you want. Says I, I will take them. What security will you give me, he says. I told him I would give him a mortgage on my two wagons and two teams. He says, all right, the place is yours. Though one more thing, what right will you use on this land at Moon's relinquishment? I replied, my pre-emption right. One thing, he says, do you know when you give me

a mortgage on this property you cannot sell, or trade or dispose of it, and when you prove up on this land and get the deed, will you renew the mortgage by giving me a mortgage on it? I says, yes sir, I will. All right, all right, says he, the place is yours. In ten days from today you, Mr. Moon and I will meet in Lewiston and fix this matter all up.

Hall also testified that Mr. Levy told him that he and his son Louis had rights but it would not suit either one of them to use it on this land, and that he wanted some one to take it off his hands.

This was when I told him I would put my pre-emption on. On the ninth day I went to Genesee to the store and asked him if everything was in readiness for tomorrow concerning the trade? He says, no, I have taken that place in myself. He did not tell me his daughter Lizzie had a timber culture, I found it out by hearing several saying she had.

Hall further testified that he was a widower with nine children, five of whom lived with him on the land continuously since September 1883; that on and prior to October 6, 1885, he owned and had on the land the following improvements, viz: A wagon shed, a hog corral, a granary, also another granary partly built, with material on the land to finish it, about a quarter of a mile of fencing—posts and rails—twenty-five acres of newly broken ground and about twenty-two acres plowed; that he occupied Moon's house until the latter part of December 1885, when he removed into a new house which he had built on the land. In 1886, he raised a crop of barley on twenty-five acres and a crop of wheat on twenty-two acres, besides a supply of garden vegetables.

Louis Levy testified that on November 25, 1885, he purchased from his sister the improvements on the tract, and procured a relinquishment of her entry for which he agreed to pay her $1500; that he presented her relinquishment at the local office December 27th, and the same was filed and her entry canceled, and he thereupon made his homestead entry for the land.

December 3, 1885, I spoke to Mr. Hall and told him that I would like to have possession of my house. I said I would'nt push him toward going out, that I would give him two weeks and if required a few days over. I would'nt press him. He said Louis, I am to have the use of twelve acres for another season, that is all the claim I have against that land. He wanted to know whether I would'nt allow him to live in the house with me. In reply I said I wanted to occupy the house alone and furthermore I told him that I didn't want to see him lose a cent and that I would pay for the use of what he claimed that he had of this twelve acres. On or about the 22d or 23d of December 1885, he gave up possession to my house, peaceably, after which time I moved in . . . . . I think that is all the conversation I had with him. I got a bill of sale of the improvements. (Bill of sale offered in evidence marked exhibit "A".)

On his cross examination Levy testified that he had been a farmer a little over six months and a half; he built a barn hauled hay, straw and grain, and helped to thresh; he did not know how many days he was occupied. He proved up on a pre-emption claim, and owned three hundred and twenty-five acres besides the pre-empted tract; that when he made his homestead entry he incurred a debt of five hundred dollars,

and not having any means to pay the same, or make improvements on his homestead, he continued in the employ of his father as a clerk in his store, as well as assisting him in his duties as postmaster; he did so in order to earn money to pay the indebtedness and make improvements on the homestead. He made actual settlement on the homestead in the latter part of January or beginning of February 1886, by putting up a stove and bedstead and fixing up two seats and making a table. From the date of his settlement up to July 14th he went to his claim almost every Saturday evening, he usually remained during Sunday, returning to Genesee Sunday evening.

About July 14, 1886, he quit his father's employ and went to work on his homestead and resided there continuously thereafter, his absences not exceeding a few times, and then only on business.

Question. "What improvements have you placed on this land since November 27, 1885, other than the household effects you placed in the house? Answer.—A small barn, a chicken house. I intended to improve the place more, but I had so much money invested in the purchase of the improvements that I concluded before making other improvements to wait until the final decision.

He admitted that the material for the barn was already on the ground at the time he purchased the improvements, and that the material used in the construction of the chicken house was all that he had taken to the claim. He had a considerable portion of the homestead tract prepared and cropped by one Lewis Clark in the season of 1886, and a short time before this hearing he purchased a wagon, harrow and plow to use on his claim.

On his redirect examination he testified that owing to his indebtedness it was necessary for him to work away from the homestead; that he had no team, wagon harness or farming implements, and did not wish to go in debt for them; that Hall built his house on the tract in dispute about December 22, 1883.

On his re-cross examination he admitted that he paid $2100 for three quarter sections of land besides the amounts he paid for his pre-empted tract and for the improvements on the homestead; that he had a dwelling house and barn on his pre-empted land, the whole tract was fenced, eighty-five acres were under cultivation; and the premises were leased by him to a tenant.

Hall testified in rebuttal that he denied Louis Levy's right to possession December 5, 1885, and told him at the time that the land was in his Hall's possession, and he thought that Levy knew it. He denied that he was occupying the land October 6, 1885, as Moon's tenant.

The record herein shows that at the time Levy's father called upon Hall and agreed to sell him the improvements Moon had already sold and disposed of his interests in said improvements, and had virtually disposed of his interests in the land; and that when A. Levy agreed with Hall to sell him the improvements, Hall's tenancy with Moon had in fact ceased, and Hall with the best of good faith on his part and

with the understanding and approval of A. Levy, and believing that the improvements as well as the land belonged to him under said agreement, made a valid legal settlement on the land as a pre-emptor by continuing to reside thereon, cultivating and improving the land; intending to make it a permanent home. Clark *v.* Martin (11 L. D., 72).

It is a well established rule that as between a settler and a record entryman no superior right can be acquired; but as between subsequent claimants "the settlement first made in point of time is entitled to the highest consideration," as soon as the record entryman's claim is relinquished. Geer *v.* Farrington (4 L. D., 410).

As Hall offered to file for the land within the proper time after Moon's relinquishment, and has honestly endeavored to comply with the requirements of the law since the date of his settlement, and as the evidence shows that Levy failed to establish his actual residence on the tract in dispute within six months from the date of his entry, to the exclusion of one elsewhere, Swain *v.* Call (9 L. D., 22); Redding *v.* Riley (Ib., 523), and as his Sunday visits to the land were made merely to keep up the fiction of residence and can not constitute compliance with the law, Henry St. George L. Hopkins (10 L. D., 472), his entry should be canceled and Hall's declaratory statement allowed to stand intact, subject to future compliance with the requirements of the pre-emption law. The decision appealed from is accordingly reversed.

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### SOLDIERS' HOMESTEAD DECLARATORY STATEMENT.

W. H. H. KELLOGG.

If a soldier's declaratory statement is illegal because filed while the claimant is residing on land claimed under the pre-emption law, such illegality may be considered as cured by subsequent entry under such filing, after the submission of pre-emption final proof, and in the absence of any intervening right.

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

On June 1, 1887, W. H. H. Kellogg filed declaratory statement for SW. ¼, Sec. 32, T. 5 S., R. 53 W. Denver, Colorado, and made proof and cash entry for the same on January 12, 1888.

Meanwhile on August 1, 1887, he filed soldiers' declaratory statement for SE. ¼, Sec. 31, same township and range.

On January 16, 1888, he applied to make homestead entry for said last described tract which was rejected by the local officers. On appeal your office by letter of June 23, 1888, affirmed that action on the ground that when claimant filed soldiers' declaratory statement "he was not qualified to do so as he was living on the land embraced in his pre-emption filing, it being a well recognized ruling that a pre-emption and homestead claim cannot be held by the same party at the same time."

Claimant appealed.

In the case of Robinson *v.* Packard (7 L. D., 225), it was held (syllabus), that "If a soldier's declaratory statement is illegal because filed when the claimant is residing on a tract claimed under the pre-emption law, such illegality may be considered as cured by subsequent entry under such filing, after the submission of pre-emption final proof, and in absence of any intervening right."

That decision seems to rule the case at bar, as there is no adverse claim presented by the record.

The decision appealed from is accordingly reversed.

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TIMBER CULTURE CONTEST—AGENT—PLANTING.

OLSEN *v.* WARFORD.

The default of the entryman's agent in performing the requisite acts in compliance with law is the default of the entryman.

Sowing tree seeds when the ground is frozen, and partly covered with snow, can not be accepted as compliance with law, especially where it appears that the entryman might have done the planting seasonably and in good order.

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

I have considered the appeal of Franklin M. Warford from your office decision of February 5, 1889, holding for cancellation his timber culture entry, No. 6563, made March 9, 1882, for the NW. ¼ of Sec. 28, T. 148, R. 59 W., Fargo, Dakota.

On March 15, 1886, Hans H. Olsen filed his contest affidavit against said entry, charging failure to plant five acres the third year, and also to plant five acres the fourth year of entry.

Hearing was duly had, and the register and receiver recommended the cancellation of the entry, and on appeal you affirm that judgment.

The facts are substantially set forth in your said office decision.

The fourth year of the entry expired March 9, 1886. On the 6th and 7th days of March, of that year, four bushels of seed (box elder) were dropped on top of the ground, in lines eight feet apart, crosswise of the plowing. The ground was then frozen, and partly covered with snow. Ten acres of the ground were thus planted, the five acres planted to seeds the third year having produced but few trees. It appears that the work of planting the seeds was entrusted to an agent, who permitted the planting season to pass without doing the necessary work; and when he did plant or sow the seeds, it was confessedly done at the particular time to avoid running beyond the limit of the fourth year, during which the law required the planting to be done. His default is that of his principal.

The government looks to the entryman only, and if the requirements of the law are not complied with, the entry must be canceled, though such non-compliance may be through the entryman's agent. Danford *v.* Ellsworth, 10 L. D., 341.

Sowing seeds on the frozen ground, partly covered with snow, can not be regarded as a compliance with law, especially when the evidence shows that the entryman could have put the seeds or cuttings in the ground in good order, and at a seasonable time.

It may be possible that the entryman acted in good faith, but it does not seem probable or reasonable, especially so in the face of the concurring opinions of the local and your office. Under such circumstances, I do not feel justified in disturbing your judgment, hence, it must be found that the charge that the entryman failed to plant to seeds or cuttings five acres the fourth year of entry is sustained by the evidence, and your said office decision cancelling the entry is, therefore, affirmed.

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### PRE-EMPTION ENTRY—COMPLIANCE WITH LAW AFTER ENTRY.

### ARTHUR H. LUPFER.

If the pre-emptor has failed to comply with the law in the matter of settlement and residence prior to entry such default can not be cured by acts performed subsequently. Acts performed after entry are only considered for the purpose of determining the good faith of the claimant during the period covered by his final proof.

An entry made without the prerequisite acts in compliance with law is illegal; the pre-emptor exhausts his right thereby, and cannot make a second entry on new proof, though it may show compliance with law after the period covered by the first entry.

The requirements of the pre-emption law as to settlement, cultivation, residence, and improvement are applicable to lands formerly embraced in the Fort Larned military reservation and restored to entry by the act of August 4, 1882.

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

Arthur H. Lupfer filed his declaratory statement November 17, 1883, for lots 9, 10, and 11, N. ½ of NE. ¼, NE. ¼ of NW. ¼, Sec. 7, T. 22 S., R. 17 W., 6th P. M., Larned Kansas, alleging settlement November 14, and submitted final proof therefor October 25, 1884. Payment and cash entry were not made for said tract until March 2, 1885, when he filed an affidavit, stating that at the date of making final proof he was unable to raise the money to pay for the lands; that he has not been able to procure it until the present time, and that his residence upon the tract had been continuous up to that date. In his final proof he stated that his residence upon the tract had been continuous from the date he first made settlement in December, 1883.

The final proof also showed that the improvements consisted of a sod house, eight by ten feet, a well, about three or four acres of breaking, some sorghum planted, and that the land was used principally for grazing.

The entry was held for cancellation April 13, 1885, upon the report

of a special agent, and from the testimony taken at the hearing, had December 24, 1886, it was shown that the improvements on the land at date of final proof consisted of a small dug-out, about seven by nine, in which claimant put a narrow bed, bedding, stove, coffee pot, and some dishes; he also had a well, and plowed some ground which was planted in sorghum. In the winter of 1883 and 1884, the claimant taught school, in a school house situated about two and a half miles from the dug-out on his claim, but from December, 1883, until about September 23, 1886, he lived with his father, and for the period covered by his final proof it is shown from his own testimony that he only visited the claim about once in thirty days. He stated that he first established residence December 3, 1883, and was again on the land the nights of December 14, and 15. In response to the question: "About how long after that was it that you stayed there again?" he answered, "I do not know. I made it a point to be there at least once in every thirty days. Some months I was there more and others I was not. I candidly thought a single man's continuous residence permitted him more freedom than a married man." He states that he can not recall the fact that he ever stayed on the land more than two nights in succession prior to March, 1885.

The testimony offered by the government shows that for the time covered by claimant's final proof there were no indications of any one residing on the tract, and one of his witnesses testified that claimant cultivated some wheat on his father's land not far from the tract in dispute. But it is also shown by the testimony that during the year 1886 claimant made substantial improvements on the land, and commenced to reside thereon with his family, having married in 1884, and has since September 23, 1886, maintained a continuous residence thereon. The claimant says that the last improvements were commenced in the spring of 1886, while some of his witnesses state that they were commenced in the fall, but there seems to be no controversy about the fact that his continuous residence on the tract did not commence until September, 1886. One of his own witnesses testified that claimant did not establish actual residence on the tract until the last of September, 1886. This was eighteen months after the final proof and seventeen months after his entry had been held for cancellation upon the report of a special agent that he had never made an actual residence on the claim.

The hearing had December 24, 1886, was ordered upon the application of claimant, and from the testimony taken at said hearing; the local officers decided that under the law the entry was illegal, and must be held for cancellation; but, in view of his now being an actual settler on the land, they recommended that he be allowed to make new proof and entry.

Before your office took action upon this decision, Lupfer submitted new final proof, made November 2, 1888, showing that he had made substantial improvements upon the tract, and had resided thereon with his family continuously from September 23, 1886.

In considering the testimony taken at said hearing of December 24, 1886, your office held that Lupfer failed to comply with the law as to residence, and that his proof was false, and showed that he did not act in good faith. His entry was therefore held for cancellation. From this decision he appealed.

It is clear from the testimony taken at the hearing that, at the date of claimant's entry, on March 2, 1885, he had not complied with the law as to residence, and it was shown that he never established an actual *bona fide* residence on the tract, or showed any reason for failure to do so. During the period covered by his entry he was for most of the time a single man, teaching school near the tract, and yet resided during all that period with his father, about a mile and a half from his claim, upon whose land he was farming, and making occasional visits to the tract of about once in every thirty days, acting as he states upon the theory that a single man was not required to stay upon his claim. Yet he married in 1884, and seems to have made no effort to improve the tract and move his family thereon, until September 23, 1886, eighteen months after making entry, and when his entry had been held for cancellation, because of his failure to establish a residence thereon.

If a claimant has failed to comply with the law, by making a *bona fide* settlement and residing thereon, prior to entry, that default can not be cured by an attempt to subsequently comply with the law by establishing residence, and while the Department will always consider the subsequent acts and conduct of the entryman, they can only be considered for the purpose of determining the question of his good faith, as to his acts and intention during the period covered by his entry.

In this case the record fails to show that his residence upon the tract, established and maintained subsequent to entry, was the continuation of a purpose honestly begun with his entry, but, on the contrary, shows that he was evidently moved to it by the action of the land office in canceling his entry, by reason of his failure to establish residence on the tract prior to entry. In his final proof he states, without qualification, that his residence was continuous upon the tract from December, 1883, when he claimed to have made his settlement, up to March 2, 1885, the date of his entry; and yet the proof taken at the hearing shows that this residence consisted of periodical visits to the land once a month; that he was teaching school in the neighborhood of the tract, and during this whole period was residing with his father.

The pre-emption entry of Lupfer was illegal, and he having thereby exhausted his right under the pre-emption law, a second pre-emption entry can not be made under the new proof, although it may show that he has continuously resided on the land in good faith since September 23, 1886.

It is also claimed by Lupfer in his appeal that the decision is not sustained by the law governing the disposition of the lands embraced in the Fort Larned military reservation, of which the tract in controversy is a part.

The act of August 4, 1882 (22 Stat., 217), restored the lands within said reservation to the public domain, and provided that said lands shall be surveyed and appraised, and after such appraisal, which shall be approved by the Secretary of the Interior, "the land shall be sold to actual settlers only, at the appraised price, and as nearly as may be in conformity to the provisions of the pre emption laws of the United States."

The requirements of the pre-emption laws as to settlement, cultivation, residence and improvement are applicable to lands restored to the public domain by the act aforesaid, and the entryman must show full compliance with the pre-emption law in that respect to entitle him to the land.

The decision of your office is affirmed.

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### AFFIDAVIT OF CONTEST—ADDITIONS THERETO BY ATTORNEY.

### PETTICREW *v.* MCDONALD.

An affidavit of contest is not invalidated by the attorney of the contestant adding thereto, at the request of the contestant, letters and figures that do not enlarge or modify the charge, but merely show matters of official record which it is the duty of the local office to embody in the notice issued.

The practice of attorneys making additions to affidavits of contest that have passed from the control and inspection of affiants, is discountenanced by the Department, and should not be allowed.

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

I have considered the appeal of Frank Petticrew from your decision of March 28, 1887, dismissing his contest against the timber culture entry of Donald McDonald, for the SE ¼ of Sec. 3, T. 102, R. 67 W., Mitchell, South Dakota.

Said entry was made March 4, 1882.

On April 9, 1886, the contestant, Petticrew, filed an affidavit (sworn to April 8th) alleging that the claimant had wholly abandoned said tract, that he had failed to plant the second five acres the fourth year after entry, that he had failed to replant the first five acres after the failure of the first planting to grow, that the claimant had used the entire ten acres for agricultural purposes and not for the purpose of growing trees, and that said failure still existed, and that there were no trees growing at date of said affidavit. Notice issued and hearing was set for June 7, 1886, and on the morning of said day the contestant appeared in person and with A. B. Hager, attorney, and the claimant appeared by Mr. Hardesty of the firm of Warren and Hardesty, before the register, and Hardesty moved to dismiss the contest on the ground that the affidavit of contest "was sworn to in blank as to the date and number of entry and full christian name of the contestee and said blanks were afterwards filled in by one D. A. Mizener, the attorney for said contestant, and by him filed in the said land office."

In this connection it is proper to state that no denial is made of the fact that said Mizener did write the letters "onald" after the letter D in the christian name of the claimant also the letters and figures "7788" and "4th" and "March."

The contestant has filed an affidavit in which he states that he knew that the christian name of the claimant commenced with the letter D but he did not know whether the name was Donald or Daniel, that he knew the entry was made in the year 1882 the early part of February or March, but did not know the day, and that he requested W. B. Hussey to write to Mizener and request him to insert in the affidavit the proper figures and words.

At the time Hardesty filed his motion to dismiss, Mr. Hager, who appeared for the contestant, stated that notice of contest with the return of service was in the safe of Mr. Mizener, who was out of town, but who would return at noon, when the same would be produced. Without taking action on the motion to dismiss, the register adjourned the case to one o'clock and at 12 o'clock, left the city on a leave of absence.

At one o'clock the contestant with his attorney Mizener and the claimant by Mr. Hardesty, appeared before the receiver and Mizener filed an affidavit made by the contestant stating in substance that the notice with the return of service had by mistake been sent to W. B. Hussey at White Lake, instead of to the land office, and asked a continuance to the next day in order to obtain the same. This application was granted.

On the next day, June 8, the parties appeared before the receiver and the contestant filed an affidavit stating in substance, that the notice had been served on the claimant at Sioux City, Iowa, by James F. Shanley, city marshal, more than thirty days previously, but that Shanley did not swear to his return or service but acknowledged it as his voluntary act and deed, also that in his return the marshal stated that he served the notice on D. McDonald instead of Donald McDonald and asked that thirty days be allowed in order to obtain the correct proof of service. Instead of granting this motion the receiver issued an order dismissing the motion filed by claimant's counsel June 7, to dismiss the contest, and allowed forty days for the contestant to amend his affidavit of contest to cover the defects specified in the motion to dismiss "in accordance with Rule 15 of the Rules of Practice the return to present service being held to be insufficient."

So far as the record shows both parties appear to have acquiesced in this order.

On his return, the register reviewed the case, and on July 6, 1886, rendered an opinion holding that the affidavit was sufficient and that trial should have taken place on the same.

Owing to this difference of opinion between the register and receiver no further action was taken in the case, but by letter of August 3, 1886, the papers were transmitted to your office. Among said papers is the statement or opinion of the receiver, dated August 2, 1886, in which he

charges D. A. Mizener, attorney, for contestant, with dishonorable and unprofessional conduct, alleging that he abstracted a paper from the record and changed the same etc.

I am satisfied from the evidence before me that this charge is not true. That as a matter of fact, the paper in question was presented to the receiver for his inspection and was retained by Mizener to be sent to the officer serving the notice in order that he might make the proper return of service, and when this was done the document was filed with the other papers in the case.

In the decision above referred to the receiver states that in his opinion the action of Mr. Hager in stating that the notice of contest was locked up in the safe of Mizener was an offense that should not be "condoned or lightly passed over."

From the evidence I am satisfied that Mr. Hager made such statement upon mistaken information given by those whom he had a right to rely upon for information, and that he had no intention of making a a misstatement. In fact under date of April 11, 1887, the receiver recommended that Hager be exonerated from the charge made.

Out of this difference of opinion between the register and receiver and the charges made against the attorneys, bitter charges, and counter charges, have arisen, of official, personal and professional misconduct on the part of the officers named, and the attorneys. In view of the fact, however, that neither the then register nor receiver are now in office, I do not deem it essential to refer to this feature of the case further than I have, as above.

On March 28, 1887, your office, after reciting the facts in the case, and without further investigation, accepted, as true, the charges made by the receiver against the attorneys Mizener and Hager, and summarily dismissed the contest.

In my opinion this action can not be sustained upon the ground of either reason or justice. No charge of bad faith or misconduct, is made against the contestant, and even admitting that the attorneys were guilty of misconduct, it does not follow that the contestant, acting in good faith should be deprived of his rights.

The question now arises, was the affidavit of contest filed in the local office, April 9, 1886, sufficient to justify the issue of notice, and to confer upon the local officers jurisdiction to determine the questions at issue? It must be so held unless the additions made by the attorney vitiated and annulled said affidavit, as the charges made were definite and specific and justified a hearing.

These additions were made at the written request of the party who sent the affidavit to Mizener to file, and as is shown by the subsequent affidavit of the contestant above referred to, were made at his request. They did not in any manner enlarge or modify the charges made, and only stated matters of official record which it was the duty of the local officers to embody in the notice issued.

In my opinion the affidavit was sufficient to justify the issue of the notice and a hearing. The record shows that due notice was served upon the claimant more than thirty days prior to the date set for trial.

Said affidavit is herewith returned with instructions to transmit the same to the local office with directions to proceed with the hearing, after due notice to all parties.

This case brings to the attention of the Department a practice which prevailed to a greater or less extent among attorneys in practice before the local officers, viz: that of inserting in affidavits of contest, after the same have been sworn to, certain facts or statements, such as the number and date of the entry and sometimes other statements. In my opinion this is bad practice, and should not be allowed.

If the items inserted are immaterial, and are mere facts that the local officers are required to ascertain from their records and embody in the notice, it is not absolutely necessary that they should appear in the affidavit. If what is inserted is material to the charge, no one has any right or authority to make such additions after the affidavit has been sworn to and has passed from the control and inspection of the party making the same. It is the duty of the contestant to ascertain all the material facts necessary to base the complaint upon, before the same is sworn to.

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ARID LANDS—CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., September* 5, 1890.

*Registers and Receivers, United States Land Offices.*

GENTLEMEN: I am directed by the Honorable Secretary of the Interior, by letter of September 4, 1890, to call your attention to the attached copy of that portion of the act of Congress, approved August 30, 1890, which repeals so much of the act of October 2, 1888 (25 Stat., 526), as withdraws the lands in the arid region of the United States from entry, occupation, and settlement, with the exception that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection. The circulars of this office of August 5, 1889, 9 L. D., 282, and August 9, 1890, 11 L. D., 220, are hereby rescinded.

Entries validated by this act will be acted upon in regular order, and all patents issued on entries made subsequent to this act and on entries so validated, west of the one hundredth meridian, will contain a clause reserving the right of way for ditches and canals constructed by authority of the United States.

Your particular attention is called to that portion of the law which

restricts the acquirement of title under the land laws to three hundred and twenty acres in the aggregate.

You will require from all applicants to file or enter under any of the land laws of the United States, an affidavit showing that since August 30, 1890, they had not filed upon or entered, under said laws, a quantity of land which would make, with the tracts applied for, more than three hundred and twenty acres. Or, provided the party should claim by virtue of the exception as to settlers prior to the act of August 30, 1890, you will require an affidavit establishing the fact.

As soon as practicable a blank form of affidavit will be furnished you.

Very respectfully,

LEWIS A. GROFF,
*Commissioner.*

For topographic surveys in various portions of the United States, three hundred and twenty-five thousand dollars, one-half of which sum shall be expended west of the one hundredth meridian; and so much of the act of October second, eighteen hundred and eighty-eight, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement, is validated by this act: *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States.

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## CIRCULAR—RENDITION OF ACCOUNTS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., September* 12, 1890.

*To Receivers and Disbursing Agents.*

GENTLEMEN: The circular of this office dated June 10, 1890, in relation to the rendition of accounts by receivers and disbursing agents, is hereby revoked; and from and after this date the accounts of receivers and disbursing agents will be rendered quarterly as heretofore. (See circular ("M" dated December 4, 1889, 9 L. D., 655.)

You will render to this office a quarterly account of detail cash sales on Form 4–106, and condensed quarterly account current on Form 4–104, and recapitulation of cash receipts, Form 4–157, and quarterly

disbursing accounts, Form 4–103. You will also render to this office a monthly account current, Form 4–105, and monthly fee statement, Form 4–119, and a monthly detailed account of fees received for reducing testimony to writing, Form 4–146, as required by sections 11 and 13 of circular "M," of December 4, 1889. The instructions contained in sections 13, 14, 15, 16, 18, 19, 20, and 21 of circular "M" dated December 4, 1889, relative to the preparation and transmission to this office of the accounts, will be observed in transmitting the above named accounts. All other abstracts and accounts formerly rendered in connection with your quarterly returns, viz: Detailed quarterly statements of original and final homestead and original and final timber culture receipts will be discontinued from and after the date of this circular.

Receivers will use great care in the preparation of their accounts. The monthly account current, Form 4–105, is practically a balance sheet, and receivers should balance their accounts at the close of each month. Any moneys on hand that have been shipped may be charged as *in transitu*. It is hoped that receivers and disbursing agents will have their returns in such a condition that they may be able to send them to this office, within three days after the close of the month, that the adjustment of their accounts may not be delayed.

Surveyors General, acting as disbursing agents, will render their "salaries," "contingent expenses," and "deposit by individual" accounts to this office quarterly as heretofore.

Forms 4–103, 4–104, 4–106, and 4–157, of receivers acting as disbursing agents, *will be sent to this office in a separate package with a special letter of transmission.* Advances to disbursing agents will be made as heretofore.

Receivers and disbursing agents will prepare and forward to this office at the close of the quarter ending September 30, 1890, new accounts as required above, for the entire quarter.

Monthly accounts (Forms 4-103, 4–104, 4–106, and 4–157), heretofore forwarded to this office by you for the months of July and August, will be destroyed by this office upon receipt of your quarterly returns.

This change is made to conform to "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1891, and for other purposes," which provides as follows:

> That hereafter all disbursing officers of the United States shall render their accounts quarterly, and the Secretary of the Senate shall render his accounts as heretofore; but the Secretary of the Treasury may direct any or all such accounts to be rendered more frequently when in his judgment the public interests may require.

Please acknowledge receipt of this circular.

Respectfully,

LEWIS A. GROFF,
*Commissioner.*

Approved September 16, 1890.

GEO. CHANDLER,
*Acting Secretary.*

FINAL PROOF PROCEEDINGS—EQUITABLE ADJUDICATION.

MILTON B. DESHONG.

An entry allowed on final proof in which the testimony of the witnesses is taken before an officer not authorized by statute to take such proof, may be referred to the board of equitable adjudication, if the proof is otherwise regular and shows due compliance with law.

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

I have considered the appeal of Milton B. DeShong from your decision of September 1, 1888, suspending his final certificate and directing that new advertisement and new proof be made on his homestead entry for the NW. ¼ Sec. 15 T. 128 N., R. 58 W., Watertown, South Dakota land district.

The entry was made November 23, 1883, and final proof submitted November 20, 1884.

His proof shows that he made settlement and residence July 6, 1883, and maintained continuous residence during one year four months and fourteen days, and that he is entitled to credit for military service for three years and nine months as you state. His improvements are entirely satisfactory. The final proof was made before the officer designated by the register, and at the time and place advertised, and the same was accepted by the local officers. Your office rejected it because it was not properly taken. It appears that the testimony of the two corroborating witnesses was taken before a notary public, the claimant having appeared in person before the register and receiver. It was the fault of the register that the testimony of the corroborating witnesses was taken before an officer not designated by law as an officer before whom final proof could be made. In the case of Sylvester Gardner (8 L. D., 483), a similar mistake was made,—that case came before the Department as this case has, and it was there held, that as the final proof showed a compliance with the law, and had been taken at the time and place and before the officer named in the advertisement, and the local officers having accepted the same, and there being no indications of bad faith on the part of the claimant, new proof should not be required, but the entry should be submitted to the board of equitable adjudication for consideration.

The proof in the case at bar fulfills all the above conditions and will be referred in like manner.

Your decision is reversed.

PRACTICE—APPEAL—TIMBER CULTURE ENTRY.

FARRIS *v.* MITCHELL.

In the absence of an appeal a decision of the local office is final as to the facts, and will not be disturbed by the Commissioner except under the provisions of rule 48 of practice.

The occupancy and possession of land by one who asserts no record claim thereto within the period provided by law does not exclude such land from entry under the timber culture law.

The case of Bender *v.* Voss cited and distinguished.

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

I have considered the case of John M. Farris *v.* John D. Mitchell, as presented by the appeal of the latter from the decision of your office holding for cancellation his timber culture entry, No. 142, of the S. ½ of the NE. ¼, the NW. ¼ of the NE. ¼, and the SE. ¼ of the NW. ¼ of Sec. 20, T. 20 S., R. 35 E., Lakeview, Oregon, made May 23, 1884.

The record shows that said Farris filed his affidavit of contest against said entry on July 16, 1886, alleging that said tract was not devoid of timber at the date of said entry, and contained at the date of said affidavit more than ten acres of timber; that said Mitchell had not broken five acres on said land, as required by law, and that he did not make said entry in good faith.

A hearing was duly had before the local office, on October 11, 1886, both parties appearing in person and were represented by counsel.

From the testimony submitted the local officers found, that said tract was devoid of timber; that the claimant had cultivated the land as required by law, and that said entry should not be canceled.

On appeal, your office found from the testimony that one Courtwright had settled upon said tract prior to the date of said entry, and erected a house thereon, twelve by fourteen feet, in which he was living at the date of said entry; that after Mitchell made said entry, said Farris on December 7, 1885, purchased Courtwright's improvements, and offered to make homestead entry of said tract, which being rejected by the local office, the contestant, on July 16, 1886, instituted said contest, as aforesaid. Your office also found that said land was devoid of timber, under the rulings of the Department then in force, that the claimant had complied with the requirements of the timber culture law as to breaking and cultivation, but that it appearing from the admission of Mitchell that said tract was in the occupancy and possession of Courtwright at the date of said entry, the land was not subject to timber culture entry, upon the authority of Bender *v.* Voss, 2 L. D., 269; that Farris having failed to appeal from the action of the local office rejecting his homestead application, he had waived his rights thereunder and must stand upon his rights as a contestant.

The appellant insists that your office erred, (1) in finding that the contestant appealed from the decision of the local office on November 19, 1886, or at any other time; (2) in reversing the decision of the local office, in the absence of bad faith apparent in the record; (3) in deciding the case upon points not raised in the record; (4) in not construing said admission of Mitchell to be in harmony with the preponderance of the testimony; and (5) in not confirming the decision of the local officers.

The record shows that your office and the local office were correct in finding that said tract was devoid of timber, and that said Mitchell had complied with the requirements of the timber culture law, as to breaking and cultivation. It, however, fails to show any proof of service of the so-called appeal from the decision of the local office, filed November 19, 1886, as required by Rule of Practice No. 46 (4 L. D., 42). But, in the absence of an appeal, the decision of the local office becomes final only as to the facts, and will be disturbed by your office only in accordance with the provisions of Rule of Practice No. 48 (idem., 42 and 43). It would, therefore, be the duty of your office to hold said entry for cancellation, if the record showed that the same was illegal.

But it fails to show that said entry was illegal.

The occupancy of the tract by Courtwright, who had failed to file for or enter said land in due time after settlement, rendered the land subject to the entry of any other qualified claimant.

I am aware that the Department used the expression, in Bender *v.* Voss (*supra*), that "timber culture entries should be made upon vacant, unimproved land, not upon cultivated land covered by the valuable improvements of another and in the possession of another," citing as authority for said statement Shadduck *v.* Horner (6 C. L. O., 113). In the latter case the decision was based upon the authority of the supreme court in Atherton *v.* Fowler (6 Otto, 513), and the Department found that Shadduck did not make his timber culture entry in good faith, and Horner had valuable improvements on the tract, which he claimed as his home. In both of said cases the timber culture entries were contested by claimants, who were in possession of the tracts, with valuable improvements thereon, and occupied the same as their homes, while in the case at bar the contestant is claiming rights by reason of the purchase of improvements of a prior occupant, after said entry, and who had failed to assert a claim of record in due time prior to said entry.

The occupancy of land by a pre-emptor, either with or without a filing, does not segregate the land. The entryman's right is subject to the claim of the prior pre-emptor. If he fails to file or prove up, for the land in due time, the subsequent entryman has the better right thereto. This has been the uniform ruling of the Department for a long time, and applies to timber culture entries as well as homestead.

In Lunney *v.* Darnell (2 L. D., 593), the Department expressly ruled that a pre-emptor who fails to make final proof within due time loses

his right to do so, after a valid adverse timber culture claim has attached. See also Hunt *v.* Lavin (3 L. D., 499); Turi O. Simle (5 L. D., 173).

In Moss *v.* Quincey (7 L. D., 373), it was held that, although land had been broken, yet, if it were devoid of timber, it could be entered under the timber culture act.

So in Mayfield *v.* Lee (8 L. D., 461), Secretary Noble decided that a timber culture entry, held for cancellation on account of conflict with the prior settlement right of another, might be allowed to remain intact on the subsequent abandonment of the settlement claim.

In Waller *v.* Davis (9 L. D., 262), it is decided that a settlement and filing are no bar to a timber culture entry of the land, but operated only as a notice of the pre-emptor's claim and preference right of purchase, citing and distinguishing said cases of Shadduck *v.* Horner and Bender *v.* Voss, and held that properly considered they were not in conflict with the correct rule as laid down by your office in the case of John A. Adamson (3 L. D., 152), namely, that—

> If there is a prior claim of record to the land applied for of a nature not to be a bar to an entry, and a timber culture entry is made of that land, the entryman takes his risk of final adjudication. . . . . If he makes entry of a tract of land upon which some other person is living and has improvements, although not having a claim of record, the fact of such occupation and improvement is notice, and the entry is made at the same risk as in case of a claim of record.

From the foregoing it is clear that the land in question was subject to entry at the date thereof, that the entryman has complied with the requirements of the timber culture law (20 Stat., 113), and, since said alleged pre-emptor failed to file for or make proof in support of any claim which he could have asserted to said tract, and has sold out to the contestant and abandoned the land, it is apparent that said entry is erroneously held for cancellation.

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

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### OSAGE LAND—RESIDENCE.

### DEEMER *v.* TILTON.

The requirement of showing a continuous residence of six months prior to final proof, is not applied with the same rigor to a settler on Osage land as to a pre-emptor of other land, but the settlement, residence, and other acts of said settler must be such as to clearly show an intention of making the land his home.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September* 17, 1890.

I have considered the case of John Deemer *v.* Carrie H. Tilton on appeal of the latter from your office decision of March 2, 1889.

The record shows that on February 16, 1885, Carrie H. Tilton made Osage declaratory statement No. 1039 for the SE. ¼ of Sec. 4, T. 27 S.,

R. 23 W., Garden City, Kansas, claiming settlement December 5, 1884.

July 11, 1885, John Deemer filed on the same tract alleging settlement June 20 of the same year.

October 19, 1885, Tilton offered her final proof before the clerk of the district court at Dodge City, Kansas, when Deemer appeared and protested against the allowance of the same, claiming that she had not complied with the law as to residence and improvements and at the same time asserting his own right to the land.

After the defendant had submitted her proof, plaintiff Deemer was allowed to cross-examine her and the subscribing witnesses, and to offer testimony impeaching her residence and good faith. Evidence in rebuttal of that so offered by Deemer was introduced by the defendant.

April 13, 1887, Deemer submitted his final proof for the same tract before the register and receiver of the land office at Garden City, Kansas.

March 31, 1887, the register and receiver recommended the allowance of Tilton's proof, finding that "she was an *actual settler* on the tract in dispute at the time of making final proof." Deemer appealed, and on examination of the record your office reversed the decision of the local officers and held the filing of Tilton for cancellation, and she now appeals to this Department.

The evidence submitted with the appeal warrants the decision of your office. The house in which Tilton claimed to have resided until three days before offering final proof, was a sod house and never habitable, the evidence on the part of plaintiff showing that all through the summer the floor was covered with water a "foot deep" and the defendant herself admits that the water came in "naturally" when the rain was from the north, and while she testifies to staying in it a few days and nights during each month of the summer prior to her making proof in October, 1885, it clearly appears that her actual residence during all that time was with her sons on an adjoining claim, and that she resorted to her sod house only as a pretense of residence. October 16, 1885, she moved a frame house from her sons' claim to the tract in question, which is the house described in her final proof. Her cultivation of the land was on a par with her residence. She planted about four acres of sorghum in a pasture to which her own and other cattle had free access, and in consequence the crop was entirely destroyed.

Counsel for defendant insist that she is entitled to the land because under the act of May 28, 1880 (21 Stats., 143), in relation to the purchase of Osage lands as construed in the case of the United States *v.* Woodbury *et al* (5 L. D., 303) "the only prerequisite to an entry of those lands is that the purchaser shall be an actual settler on the lands at the date of entry, with the qualifications of a pre-emptor," that under the statute as construed, by said case, it is not necessary that the pre-emptor should intend to use the land for purposes of a home or residence, but that the settler need only show at the time of submitting final proof that he has made permanent improvements on the land

"coupled with an intention of said party to purchase the land from the government, that such settlement and purchase may be made for the purpose of a home or for the purpose of selling it to another or for the purpose of using it for cultivation or *some* (meaning *any*) other purpose."

This is not the construction placed upon the act by this Department. Since the rendition of the case of the United States *v.* Woodbury (*supra*) this Department has in several cases defined "actual settler" as used in said act to be "one who goes upon the land specified by said act (Osage lands) with the intention of *making it his home* under the *settlement laws.*" (United States *v.* Atterbery et al. 8 L. D., 173; same case on review 10 L. D., 36; United States *v.* Jones, 10 L. D., 23; United States *v.* Sweeney, 11 L. D., 216).

While the settler on Osage lands is not held to the same rigor as a pre-emptor of other land, in showing continual residence for six months prior to proof, yet his settlement, residence and other acts must be such as to clearly show his intention of making the land his home, and a pretended or colorable residence, as in this case, evidently made for the purpose of securing title to the land, will not satisfy the requirements of the law as construed in the cases above cited.

The evidence on the part of Deemer shows that he settled upon the tract June 20, 1885, erected a comfortable frame house and had been living there and cultivating the land continuously from the date of his settlement to the time of offering his final proof, and I have no doubt from the evidence that his settlement, residence and cultivation were made in good faith and for the purpose of making his home on the claim.

The Osage declaratory statement No. 1039 of Carrie H. Tilton is therefore canceled, and Deemer will be allowed to make payment for the land.

The decision of your office is accordingly affirmed.

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### RAILROAD GRANT—INDIAN HOMESTEAD—ACT OF JULY 4, 1884.

### NORTHERN PACIFIC R. R. CO. *v.* TEQUDA.

The occupancy of public land by an Indian who has not abandoned the tribal relation confers no homestead right under the act of July 4, 1884, as against a railroad grant that becomes effective prior to the passage of said act.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September* 17, 1890.

The Northern Pacific Railroad Company appeals from your office decision of November 18, 1886, directing the allowance of the application of Peter TeQuda (an Indian) to make homestead entry for lot 10, Sec. 1, T. 20 N., R. 5 E., Olympia land district, in the State (then Territory) of Washington.

The tract in question contains 38.10 acres, and is within the primary limits of the grant to said company under the act of July 2, 1864 (13 Stats., 365), and the joint resolution of May 31, 1870 (16 Stats., 370), as shown by the map of general route of the branch line of its road, filed August 20, 1873, and by the map of definite location of said branch line, filed March 26, 1884. The record does not show any entry or filing therefor.

On March 31, 1886, TeQuda applied to make homestead entry for the tract under the act of July 4, 1884 (23 Stats., 96), and submitted in support of his application a certificate by the United States agent for the Muckleshoot tribe of Indians to which applicant belonged (as required by departmental circular of August 23, 1884, 3 L. D., 91), showing that he is an Indian of the age of twenty-one years, the head of a family, and not the subject of any foreign country; also his own affidavit, stating, among other things, that he has "improved and cultivated six acres of said tract for twenty-one years last past."

The local officers notified the company of the pendency of such application, and allowed it a specified time within which to appear and file objections thereto.

On May 11, 1886, the company appeared by its attorneys and filed objections to the allowance of the entry, whereupon the local officers transmitted all the papers in the case to your office for consideration.

Upon examination of the papers, your office held that "the affidavit of TeQuda, *prima facie*, shows the land applied for to be excepted from the grant to said company," and directed that he be allowed to make entry therefor. It was further stated that "the company will be required to take notice of his published intention to make final proof, and if it has, or claims to have any right thereto, to appear and assert the same."

It is provided by said act of July 4, 1884:

> That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States.

I think it is questionable whether the applicant has shown himself entitled to make entry under the provisions of said act. He does not in express terms claim to be "located" on the land, but simply alleges improvement and cultivation of a small portion thereof, which does not necessarily imply that he is "located" thereon. Aside from this question, however, I am unable to concur in the conclusion of your office that the record *prima facie* shows the land to have been excepted from the company's grant. The maps of general route and definite location, respectively, of the company's road, were filed, the former over ten year's and the latter over three months prior to the passage of said act of July 4, 1884. The company's rights finally attached on definite location, and at that date no provision had been made by which an Indian,

still retaining his tribal relations, could acquire any rights to the public lands, either by settling thereon, or by occupying the same for purposes of cultivation. It is true that by departmental regulation of February 11, 1870 (1 C. L. L., 283), and by the act of March 3, 1875 (18 Stats., 420), certain homestead privileges were extended to Indians. These privileges were allowed, however, only to such Indians as had wholly dissolved, or abandoned, their tribal relations, of which fact satisfactory proof was required. The Indian, TeQuda, had not abandoned his tribal relations, but still retained the same at the date when the company's right attached, and at the date of his application. He cannot, therefore, be held to have acquired any right to the land in question as against the company, by his improvement and cultivation of a portion thereof, as claimed. Whether such long continued improvement and cultivation, if by a citizen of the United States, would serve to except the land from the grant to the railroad company need not be here decided. It is sufficient for the purpose of this opinion to state that the facts alleged by TeQuda do not, for the reasons aforesaid, constitute such a claim to the land as served to except it from the grant, and it must be held, therefore, to have passed to the company thereunder.

Your office decision is accordingly reversed, and the application of TeQuda will be rejected.

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PRACTICE—DEATH OF PARTY—NOTICE.

ALLPHIN *v.* WADE.

Where a claimant dies during the pendency of adverse proceedings in the local office, such proceedings should be discontinued, and the heirs at law and successors in interest of the decedent duly notified of their right to appear and be heard in the premises.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September* 17, 1890.

The record in the case of Hattie Allphin *v.* John H. Wade is before me on appeal of the latter, and shows that on July 30, 1884, said Wade filed an Osage declaratory statement No. 4686 for the SW. ¼ Sec. 28, T. 28 S., R. 18 W., Larned, Kansas, alleging settlement May 27th of the same year.

September 2, 1884, said Allphin also filed declaratory statement No. 5154 for the same land, alleging settlement July 22d of the same year.

Final proof was offered by Wade December 15, 1884, and by Allphin March 5, 1885. Each claimant protested against the proof of the other, and after several continuances and other dilatory motions, the first testimony was taken July 18, 1885, when the hearing was continued by consent until September 14, same year, for the purpose of taking depo-

sitions and submitting other oral testimony. On said date the case was closed without additional testimony, for the reason that the defendant Wade failed to appear with his witnesses. November 24th 1885, the defendant moved to re-open the case which motion, as shown from the report of the register and receiver, was at first allowed and subsequently overruled, and on August 15, 1886, the local officers decided in favor of the plaintiff Allphin, holding that her settlement was prior to that of Wade. September 10, 1886, he filed an application for a rehearing, which was granted, and after several motions and continuances the rehearing was had March 10, and 11, 1887.

The evidence discloses that prior to the testimony taken March 10 and 11, 1887, on the re-opening of the case, to wit, September 17, 1886, Hattie Allphin died. Further proceedings should have been discontinued on her death and her heirs at law and successors in interest notified to appear and conduct her contest to a conclusion, if they so desired.

This was not done and so all proceedings subsequent to her death are irregular and erroneous. Arnold *v.* Hildreth (6 L.D., 779); Rohrbough *v.* Diggins (9 L. D., 308).

All procedings that occurred subsequent to September 17, 1886, are hereby set aside and the case remanded with directions to the register and receiver to proceed as above directed.

The decision of your office is modified accordingly.

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**PRE-EMPTION—ACT OF FEBRUARY 22, 1889—RESIDENCE—PROTEST.**

DAYTON *v.* DAYTON.

The pre-emption law, in the States admitted into the Union under the provisions of the act of February 22, 1890, is not repealed by section 17 of said act.

An absence from the land, occurring after settlement, does not effect the right of the pre-emptor, where he returns to the land prior to the intervention of any adverse claim, and resides thereon in due compliance with the rules and regulations.

The refusal of the Commissioner to order a hearing on a protest filed against final proof will not be disturbed, where such action does not amount to the denial of a right.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September* 18, 1890.

I have considered the case of Lyman C. Dayton *v.* James R. Dayton on appeal by the former from your decision of March 21, 1890, dismissing his protest against James R. Dayton's final pre-emption proof for the NE. ¼ of Sec. 23 T. 123 N., R. 64 W., Aberdeen, South Dakota land district.

This tract of land has been in dispute between these parties for a number of years, the validity of James R. Dayton's timber culture

entry having been finally affirmed by departmental decision of August 1, 1889 (9 L. D., 193). The former decisions in this matter are to be found in 4 L. D., 263 and 7 L. D., 542.

It appears now that after the decision of August 1, 1889, James R. Dayton on October 5, 1889, relinquished his rights under said timber culture entry and at the same time filed pre-emption declaratory statement for the same land alleging settlement thereon June 20, 1888. He afterwards gave notice that he would on November 19, 1889 submit final proof in support of his said pre-emption filing. On the day advertised the pre-emptor appeared with his witnesses and presented final proof. On the same day Lyman C. Dayton filed a protest against the acceptance of said final proof upon the following grounds:

First: Because the act admitting South Dakota to the Union, contains clauses which repeal the pre-emption law of the United States as far as the same affects the government land in the said State and no land can be taken under the provisions of the said pre-emption law since the passage of the said act by the Congress of the United States when the pre-emption proof of the claimant has not been made.

Second: Because the said pre-emption is speculative on the part of said J. R. Dayton. The whole of said tract has been surveyed into blocks, streets and alleys and platted by the said James R. Dayton for the purposes of sale, and not for a farm and home; that trees have been planted at the corners of each block and upon the line of the streets to indicate the same upon the whole tract and it is claimed that the blocks are subdivided into lots.

Third: Because after the filing of the pre-emption declaratory statement of the said J. R. Dayton he rented his house to Judge Crofoot until about May 1, 1889, and went to Washington D. C. while his wife boarded in the city of Aberdeen, S. D., away from the said tract.

Fourth: Because the said tract was entered under the timber culture laws of the United States, and the city limits of the city of Aberdeen South Dakota included the east eighty acres of the same; that an attempt was made to withdraw the said limits by a legislative enactment of the legislature of the Territory of Dakota, and by a resolution of the city council of the city of Aberdeen, S. D., so that the said J. R. Dayton could make entry of the tract under the pre-emption law; that the said act of the Legislature of the Territory of Dakota and the resolution of the said city council of the city of Aberdeen were each invalid and void, so that eighty acres of said tract are within the city limits of the city of Aberdeen, South Dakota, and can not be entered under the pre-emption laws of the United States.

Fifth: Because of the surrender of James R. Dayton of his rights under the timber culture laws of the United States, and his relinquishment of the said tract to the government of the United States, the rights of the said Lyman C. Dayton attached to the said tract prior to the pre-emption rights of the said James R. Dayton which were subject thereto.

Sixth: That the said Lyman C. Dayton has a homestead right which he can use upon the said tract and enter the same as a homestead under the homestead laws of the United States.

Seventh: That the said Lyman C. Dayton asks leave to file a homestead application for the said tract, in the event that the cancellation of his entry as a homestead of the SE. ¼ of section 14, Township 123 North of Range 64 West in Brown County, Aberdeen U. S. land district S. D-, is not set aside.

The local officers after considering this protest held that there was not a sufficient showing to justify them in ordering a hearing and that

James R. Dayton's final proof ought to be accepted. Upon appeal that decision was affirmed by you. In support of his appeal from your decision Lyman C. Dayton reiterates in substance the statements made in the protest hereinbefore quoted, urges that it was error in your office not to consider the matters presented by the second, fourth and fifth paragraphs of said protest, and asks a ruling on the question of law stated in the first allegation.

The question as to the effect of the act of February 22, 1889 (25 Stat., 681), upon the pre-emption law was heretofore presented to this Department and referred to the Assistant Attorney General for his opinion. The opinion rendered by him (Asst. Atty. Gen's. Op., book D, p. 125,) holding that said act did not repeal the pre-emption law as to those States whose admission into the Union was in said act provided for, the language of section 17 of the act of 1889 being held to refer to and effect only that part of the act of 1841 making a grant to the States for purposes of internal improvements, was adopted by this Department and transmitted to your office for its guidance. A further examination of the subject still further convinces me of the correctness of the views then adopted and expressed.

The allegation that this land had been laid out in town lots was made when the timber culture entry of James R. Dayton was under consideration and in the departmental decision of November 28, 1885 (4 L. D., 263), it was directed that this matter among others should be inquired into at the hearing therein ordered. As a result of that investigation it was decided that the allegation had not been sustained (7 L. D., 542).

The allegations now made and the history of the matter as set forth in the reply filed to James R. Dayton's answer to the appeal herein show that reference is had in this protest to the same transaction and alleged survey as was investigated by express instruction from this Department when James R. Dayton's timber culture entry was under consideration. No such new facts connected with the alleged survey as would demand a further investigation have been set forth or alleged to exist. Again this transaction occurred some time prior to the filing by James R. Dayton of his pre-emption declaratory statement or the date of his settlement as alleged therein and no allegation is made that he has taken any steps or action since that settlement, evincing an intention to make use of such survey or platting, if they had been made as alleged. This charge does not in view of the history of the controversy between these parties present such facts as demand investigation.

The third allegation in this protest does not present any fact necessarily derogatory to the pre-emptor's good faith and in fact simply sets up a fact as to his absence from the land that is stated in the final proof. The pre-emptor had not filed his declaratory statement at the time this absence occurred and did not file it until October 5, after his return to the land on May 1, 1889. While in his declaratory statement he alleges settle-

ment June 20, 1888, yet in his final proof he admits he was absent from the land from September 15, 1888, until May 1, 1889, his house during that time being occupied by a tenant. The final proof however shows the continuous actual presence of the pre-emptor upon the land for a period of more than six months next preceding the date of said proof, and this statement is not denied or tranversed by the protestant.

I must concur with you that his return to the land prior to the intervention of any adverse claim and subsequent actual, continuous residence thereon for a period exceeding that required in such cases by the rules and regulations, cured the default, if any existed.

It is difficult to determine just what is meant by the fourth ground of protest. The fact that a tract of land was once embraced in a timber culture entry, would not prevent its appropriation under the pre-emption law after such entry had been canceled. No application for this tract under the townsite law has been presented, nor is it alleged to have been occupied for the purposes of trade and business. Even if a part of this land were at one time included within the city limits of Aberdeen, it is clear, as appears from this protest itself, that it has been since excluded from those limits, and that no claim thereto is now being asserted by said city. This allegation presents no sufficient ground for a hearing.

It is claimed in the fifth allegation that upon the cancellation of James R. Dayton's timber culture entry the rights of Lyman C. Dayton attached, but it is not stated what those rights were. He had no application pending. Even if it were true that he has not exhausted his homestead right that would not affect this land unless he had in due time applied to make entry therefor.

In his seventh allegation, however, he shows that he then had a homestead entry on other land, and the records of this Department disclose the fact that the validity of such entry was not at the date of the cancellation of James R. Dayton's timber culture entry, and is not yet finally determined, the case being now pending in this Department. Said Lyman C. Dayton was not at the time this land was relieved of James R. Dayton's timber culture entry, and has not been at any time since then, in a position to assert a claim thereto under the homestead law.

Upon account of the importance of this case and the long continued and bitter controversy between these parties, the matters here presented have received an especially close and careful examination. As a result of such examination I have become satisfied that there is no occasion for interfering with the decision appealed from refusing to order a hearing and dismissing the protest, and the same is therefore affirmed.

PRACTICE—REHEARING—PROCEEDINGS ON REPORT OF SPECIAL AGENT.

UNITED STATES *v.* STINSON ET AL.

In proceedings by the government against an entry held by a transferee, where the entryman appears as a witness for the government, and sets up no rights under said entry, he is not entitled to a rehearing on the ground that he was not served with notice of such proceedings or the various orders made thereunder.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September* 19, 1890.

By letter of May 2, 1890, your office transmitted the applications of George C. Curtis, Van W. Chipman, Niels L. Weiberg and Charles M. Park, for review and rehearing in the case of United States *v.* Thomas D. Stinson and Hugh Park, transferees of Geo. W. Smith *et al.*, decided March 2, 1889.

These applicants are four of the original pre-emption entrymen whose claims were transferred to said Stinson and Park. The entries were made in the land office at Seattle, Washington Territory and are fully described in said decision to which reference is made.

The entries with others were held for cancellation by your office on May 19, 1886, on report of a special agent who alleged that all of said entries were made in the interest of said Stinson and Park, and that the claimants had failed to comply with the law. Notice of this action was sent to the entryman and transferees. On the application of the transferees a hearing under the circular of July 31, 1885 (4 L. D., 503), "to show cause why the entries should be sustained," was ordered and the cases were consolidated.

After a full hearing, at which these four applicants appeared and gave testimony, on the part of the government, the local officers found that the charges had been fully sustained, that claimants had failed to comply with the law, that the entries were made in the interest of said Stinson and Park, and recommended the cancellation of the same. Your office by letter of April 21, 1888, affirmed the action of the local office, and that action was affirmed by the Department in the decision now complained of.

Each of the applicants states on oath that he has never received official notice by registered letter or otherwise of the suspension of his said cash entry, or of his right to petition for a hearing; that he has never received official notice of the decision of the local officers, of your office, or of the Department. The applicants therefore ask that a hearing *de novo* be granted them, or that they be now duly notified of the decision of the local officers, and of their right of appeal from the same. They allege that they transferred their respective claims to said Stinson and Park by warranty deed, and claim to have an interest in the case to the extent of such warranty.

It appears from the records that notices were sent to said claimants of the action taken by your office on the special agent's report, but it is not shown that these notices reached them. Nor does it appear that any notice was sent them of the decision of the local office, of your office, or of the Department.

The real parties defendant in this case were said Stinson and Park. The present applicants appeared merely as witnesses for the government. At the time of the hearing they had transferred the lands by deed. If they desired to be made defendants and to contest the charges, it was incumbent on them to ask to be made parties. This they failed to do and stood by while cases in which they now claim to have been interested were tried and decided adversely to them. Having thus allowed their day in court to pass without intervention on their part, they are in no position to ask that these cases be tried *de novo*.

Said applications are accordingly dismissed.

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### HOMESTEAD ENTRY—COMMUTATION—SUPPLEMENTAL PROOF.

### GROVE H. COWLES.

If non-compliance with law defeats the right of a homesteader to make final entry under section 2291 R. S., it also defeats his right of commutation.

Permission to submit supplemental proof in the matter of residence may be accorded, where the final proof is otherwise satisfactory, and no adverse claim exists.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September* 20, 1890.

I have considered the appeal of Grove H. Cowles from your decision of April 28, 1889, rejecting his final proof on homestead entry for the S. E. ¼ Sec. 20, T. 137 N. R. 64 W., Fargo, North Dakota land district, dismissing his appeal and allowing him ninety days in which to commute entry in accordance with the rule in case of Peter Weber (7 L. D., 476).

Your opinion states the record and testimony fully and fairly, and it does not appear to me, upon careful review of the entire record including the supplemental affidavits that the final proof, as it stands, can under the law and departmental regulations be approved.

It is true the claimant has made very good improvements on the land, and the testimony shows that he has not neglected to cultivate portions of it each year, but continuous residence has not been satisfactorily shown. He has had household furniture in his house and has lived there at intervals during the entire time since his entry, which (counting his military service) makes over five years. He evidently thought, under the advice of lawyers, that he was complying with the law, and it is his misfortune that the advice was wrong.

You were in error in dismissing his appeal, it was properly taken.

Since your decision, (April 29, 1889, the departmental decision relied upon by you was, upon motion for review, revoked, (See Peter Weber, on review, 9 L. D., 150), and it was decided that the right of commutation depends upon prior compliance with the homestead law up to the date of commutation.

The proof is not satisfactory and can not be accepted as it stands, but in view of his improvements and cultivation of the land and the fact that there is no adverse claim or protest against his entry, he will be allowed to submit supplemental proof, within ninety days from notice of this decision, setting forth the facts as to his connection with the land since the date of his final proof and he will give such explanation as he may have of the conflicting statements in his final proof and his affidavit filed January 17, 1889, and upon his compliance herewith you will take such action in the case as shall be deemed proper.

Your decision is modified accordingly.

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### REPAYMENT—DESERT LAND ENTRY.

### SPENCER V. RAYMOND.

Repayment can not be allowed where a desert entry is canceled because made for speculative purposes and for land not desert in character.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September* 20, 1890.

I have considered the appeal of Spencer V. Raymond from the decision of your office rejecting his application for the repayment of purchase money paid upon desert land entry made by the said Raymond for Sec. 33, T. 5 N., R. 38, Blackfoot, Idaho.

This tract was entered by Raymond on January 6, 1883, under the desert land act and in making said entry he swore that the land was desert land within the meaning of the act of March 3, 1887, by personal observation and frequently passing over the same. It was subsequently determined that the land was not desert land and it had been laid off by claimant as a townsite. The entry was held for cancellation upon the report of a special agent, and claimant was allowed sixty days to show cause why his entry should not be canceled upon the ground that it was agricultural and timber land, and that the entry was not made in good faith but for speculative purposes. No cause was shown and the entry was canceled.

In his application for repayment claimant states that he with others desired to secure the land as a townsite and was advised by the local officers at Oxford, Idaho, that the only manner in which they could proceed would be for one of them to enter the tract under the desert land act, and that claimant was selected for that purpose and that the payment was divided *pro rata* among the several residents; that when he

was informed that the proceedings were irregular and several lots had been sold, again acting upon the advice of the local officers, relinquished the land. He states that the money was expended in good faith upon the advice of those whom they naturally depended for information. This statement however lacks confirmation by the officers whom he alleges gave him this advice.

When claimant made his entry he swore that the land was desert in character and that the entry was not made for the purpose of obtaining title to mineral land, timber land or agricultural land; but for the purpose of faithfully reclaiming the land by conducting water thereon.

I cannot from all the facts before me conclude that Raymond acted in good faith in making this entry, notwithstanding the advice that he claims to have acted upon. He admits that he entered the land for a townsite and for the purpose of sale and speculation, and yet he deliberately made an affidavit that it was entered for the purpose of faithfully reclaiming the land by conducting water thereon. Under such circumstances the money can not be repaid.

The decision of your office is affirmed.

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PRACTICE—RE-REVIEW—HOMESTEAD ENTRY.

FRANCEWAY ET AL. *v.* GRIFFITHS (ON REVIEW).

A petition for re-review will not be entertained unless it presents new matter for consideration.

The validity of a homestead entry is determined by the facts existing at the date thereof.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September* 20, 1890.

I am in receipt of a letter from Messrs. Britton and Gray, attorneys for the Granite Powder Company, asking that departmental decision of June 27, 1890, in the case of Ellen Franceway *et al. v.* Richard Griffiths, involving the latter's soldiers' additional homestead entry for lot 3, of Sec. 19, T. 2 N., R. 4 W., M. D. M., San Francisco land district, California, be recalled and that Griffiths' entry be confirmed and passed to patent.

The decision of June 27, 1890 (10 L. D., 691), having been rendered upon a motion for review, the present letter must be considered as a petition for re-review. The paper here presented does not come up to the requirements laid down by the decisions of this Department for such petitions. It is claimed that the ruling laid down in the decision on the motion for review is in opposition to the rule laid down by the supreme court in Durand *v.* Martin (120 U. S., 366). Thus the Department is asked to reconsider and again go over the same question that was presented and fully discussed upon the motion for review. This

alone would be sufficient grounds for refusing to consider this petition. The case cited, however, is not parallel with this and does not therefore control. The court there held that the right of a State under a school land indemnity selection is to be determined by the condition of the land at the time the selection is presented to the proper officer for certification. This does not affect the long and well established rule that the validity of an entry is to be determined by the facts existing at the date thereof.

The decision complained of follows the ruling in Fouts *v.* Thompson, on review (10 L. D., 649) and is adhered to.

The petition under consideration is denied.

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PRACTICE—NOTICE—PUBLICATION—SECOND CONTEST.

LUDWIG *v.* FAULKNER ET AL.

Publication of notice without an affidavit as the basis for such service confers no jurisdiction upon the local office.

Where a pending contest is attacked on the ground of fraud by one who makes application to contest the entry in question, notice should not issue on such application, but the case should be held for the final disposition of the prior contest.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September* 20, 1890.

I have considered the appeal of Ralph N. Wood from your office decision of April 26, 1889, holding that the local officers erred in ordering a hearing upon charges preferred in a contest affidavit filed by said Wood and ordering a re-hearing before the local officers on a contest initiated by Robert Ludwig *v.* Christopher Faulkner against timber-culture entry of said Faulkner, for the SE. ¼ of Sec. 1, T. 32 S., R. 42 W., Garden City, Kansas, land district.

The record shows that on July 3, 1885, Christopher Faulkner made timber culture entry of said land. On the 27th day of November, 1886, Robert Ludwig filed in the local office his affidavit of contest, alleging that said Faulkner, "Has wholly failed to break, plow or stir, five acres of said land during the first year of said entry and up to the date of this contest, but the same remains wild, unbroken prairie land void of timber or cultivation.

On December 1, 1886, said Ludwig filed his homestead application to enter said land and on the same day presented the statutory affidavit showing proper qualifications to make the entry.

A hearing was ordered on Ludwig's contest and on the 9th day of December, 188[illegible], notice thereof was published in a newspaper fixing June 3, 1887, as the time set for the hearing. No affidavit or other evidence was filed showing that personal service of notice could not be made upon Faulkner and no evidence of personal service of the notice upon him was presented.

On the 12th day of February, 1887, Ralph N. Wood filed in the local office his affidavit of contest against the entry of Faulkner, alleging that said "Faulkner has executed and sold a relinquishment to the United States of his said entry, to a party other than this affiant; that said Faulkner's entry was fraudulent and speculative at its inception."

At the time set for hearing June 3, 1887, Ludwig appeared and offered his evidence. Faulkner did not appear. On the same day but after Ludwig's testimony was taken Wood appeared before the local officers and filed his affidavit, stating

> That at the date of the initiation of said Ludwig's contest there were more than five acres broken on said tract of land; that for this reason affiant filed his complaint against said defendant entryman, alleging speculation and bad faith on the part of the said defendant. . . . That the allegations as contained in the complaint of the said Robert Ludwig are entirely false and untrue. . . . That he firmly believes said Ludwig's contest is speculative and fraudulent and is not being prosecuted in good faith.

Thereupon the local officers suspended any further action on Ludwig's contest, and ordered a hearing on the charges contained in Wood's complaint as against Ludwig's contest, which was before the local officers and on the 22nd day of June, they rendered their decision sustaining Ludwig's contest and allowing him the preference right to enter said land and dismissed Wood's contest, and recommended Faulkner's entry for cancellation. From this decision Wood appealed to your office.

On the 26th day of April, 1889, your office held that the local officers erred in directing a hearing on Wood's contest, and ordered a re-hearing between Ludwig and Faulkner on Ludwig's contest, (as the notice for publication was defective) and, upon the proper affidavit being filed, the local officers were directed to give notice by publication of the day fixed for hearing.

From your said decision Wood appeals.

Your office decision remanding the case and ordering a re-hearing is correct. Rule 9 of the Rules of Practice requires personal service of notice in all cases when possible and prescribes how such service shall be made. Rule 11 provides: "Notice may be given by publication alone only when it is shown by affidavit of the contestant, and by such other evidence as the register and receiver may require, that due diligence has been used and that personal service can not be made. The party will be required to state what effort has been made to get personal service."

The service of notice is required before the local officers obtain jurisdiction to proceed with the hearing. In order to serve by publication the rule requires a showing to be made that personal service can not be made. This showing is the primary foundation upon which the publication is based and where a service of notice by publication is substituted for personal service, a strict compliance with Rule 11, is requisite

to confer jurisdiction over the person of the defendant. Burgess *v.* Pope's Heirs (9 L. D., 218); Allen *v.* Leet (6 L. D., 669).

As there was no showing at all made as a basis for serving the notice by publication it follows that the local officers had no jurisdiction to hear and determine the contest, or to act upon the subject matters in controversy in such a manner as to bind Faulkner the entryman.

Without passing upon the sufficiency of the allegations of Wood's affidavit, I am clear that the local officers erred in ordering a hearing upon Wood's contest. Where a pending contest is attacked on the ground of fraud by one who makes due application to contest the entry in question, notice will not issue on such application, but the case will be held for the final disposition of the prior contest. Melcher *v.* Clark (4 L. D., 504); Eddy *v.* England (6 L. D., 530); Davisson *v.* Gabus *et al.* (10 L. D., 114).

The decision appealed from is affirmed.

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PRE-EMPTION—SECOND FILING.

MALONEY *v.* CHARLES.

A filing made in good faith by a minor, but abandoned when the fact of minority is discovered, is no bar to a second filing.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September* 22, 1890.

On November 27, 1885, William F. Charles filed his declaratory statement, No. 2742, upon the W. ½ of the NW. ¼ of Sec. 7, T. 2 N., R. 34., W., McCook, Nebraska, alleging settlement November 25, 1885. He gave notice of his intention to make final proof before the register and receiver, and that such proof would be made on May 30, 1887. This notice was duly published.

On November 2, 1886, James B. Maloney made homestead entry, No. 3983, upon said tract, and on April 25, 1887, he filed a protest against the allowance of Charles' final proof, charging failure to comply with the requirements of law as to residence, cultivation and improvements, and asked for a hearing.

On the day set for taking Charles' final proof, both parties, with their attorneys, appeared before the register and receiver, and Maloney filed an amendment to his former protest, charging that Charles was not a qualified pre-emptor, for the reason that he had theretofore exhausted his pre-emption right by filing a declaratory statement upon another tract, and that the filing upon which he proposed to make final proof was without authority of law.

Charles' final proof was made and the subscribing witnesses thereto were cross-examined, and other witnesses were called and examined.

At the conclusion of the hearing the register and receiver concurred in the following finding: "We are of the opinion that receiver's receipt should issue to said William F. Charles," and, on appeal, you affirm that judgment. Maloney brings this appeal.

The testimony at the hearing was mainly directed to the issue as to claimant's residence on the tract.

Charles admits, and so states in his notice of intention to submit final proof, that he had on February 4, 1884, made a declaratory statement for another tract of land in section 5, same town and range, believing at the time he was twenty-one years old, but that soon after making such filing he learned he was under twenty-one years of age. He had lived with one Nelson, his grandfather, from boyhood. Nelson swears that he told Charles prior to the first filing that he was twenty-one years old; that he arrived at this understanding from certain business transactions that took place at about the date claimant was born. After this filing was made, they again got to talking about claimant's age, and to be certain about it Nelson sent to Mount Vernon, Colorado, and obtained the Bible containing the record of Charles' birth. This record was made the day Charles was born, and showed that he was only twenty years old; thereupon he abandoned his claim, and when he became twenty-one filed on the land in controversy.

The premises considered, I do not think Charles was barred by section 2261 of the Revised Statutes from making a filing on the tract in controversy. His conduct was open and honest. Had he falsely and fraudulently stated that he was twenty-one years old, and thus sought to obtain the land, his pre-emptive right would have been exhausted and a second filing would not be permitted. Allen *v.* Baird (6 L. D., 298).

But, in view of his honest mistake, and his voluntary abandonment of his claim under the first filing, when he found he was not personally qualified to make it, I think he should again be permitted to exercise his pre-emption right. Ross *v.* Poole (4 L. D., 116); Arnold *v.* Langley (1 L. D., 439).

As to the question of residence and improvements, I do not deem it necessary to rehearse the testimony; the same is substantially set forth in your said office decision. It abundantly shows that the entryman has complied with the law and acted in good faith; his proof should be accepted and the entry allowed.

Your said office decision is affirmed.

PRACTICE—REHEARING—OSAGE LAND.

FINAN *v.* MEEKER.

When an order for rehearing is made the case is generally tried *de novo*, and the petitioner for rehearing cannot in such a case be heard to complain of former proceedings therein however defective they may be.

The right to purchase Osage land under the act of May 28, 1880, can only be exercised by one who has the qualifications of a pre-emptor and makes actual settlement on the land with the intention of making it a home.

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

I have considered the appeal of Elliott E. Meeker from your office decision of December 20, 1888, in which you hold for cancellation his Osage cash entry, made May 13, 1884, for the NW. ¼ NE. ¼, NE. ¼ NW. ¼, Sec. 28, and S. ½ SE. ¼ of Sec. 21, T. 27 S., R. 12 W., Larned, Kansas.

He filed Osage declaratory statement No. 2373 October 30, 1883, for said tract, alleging settlement October 23, 1883. He made his final proof on May 10, 1884, before the clerk of the district court of Pratt county, Kansas.

The proof appears regular in form; it showed continuous residence; also that the land was used for a farm; six acres broken; frame house fourteen by sixteen feet, and a well dug; improvements valued at $150. The full payment was made for the land and final certificate, No. 2,221, issued November 14, 1885.

Catherine E. Finan filed Osage declaratory statement No. 3584 for the SE. ¼, Sec. 21, T. 27 S., R. 12 W., Larned, Kansas, on May 2, 1884, alleging settlement February 15, 1884, being in conflict with Meeker's entry as to the S. ½ SE. ¼ of said section. She made final proof October 24, 1884, and on January 27, 1885, filed her affidavit of contest against Meeker's entry, alleging the same to be fraudulent, and that she had a superior right to the land. She also filed an affidavit explaining why she failed to protest at the time Meeker made his proof. This affidavit was forwarded to your office, and by your letter "G," dated July 8, 1885, a hearing was ordered, and all parties notified.

Orders and continuances were made from time to time, and case finally set for April 28, 1886, when defendant made default. Plaintiff introduced her testimony, and on October 23, 1886, the register and receiver held Meeker's entry for cancellation, subject to appeal, and attorneys were duly notified. On November 18, 1886, the defendant took an appeal to your office and on January 15, 1887, the decision of the register and receiver was affirmed by you. An application for rehearing was made on April 14, 1887, and by your office letter "G," dated April 23, 1887, the decision of January 15, 1887, was revoked, and the case remanded for rehearing, on the ground of defective notice.

The case was again set for July 11, 1887, and the plaintiff appeared and filed proof of personal service upon all parties in interest.

The case was again continued until July 18, 1887, when both parties appeared, and the testimony taken from day to day until the case was closed.

The register and receiver found in favor of Finan, and recommended the cancellation of Meeker's entry, and by your office decision you affirm that judgment.

The record in this case is very voluminous; there is much irrelevant and conflicting testimony.

It is insisted that Finan has no standing in this case, and is barred by reason of her laches in not protesting against Meeker's final proof. This is not well taken. Until patent issues for the public lands, you have jurisdiction to hear and determine any properly supported charges of bad faith against those seeking title to the public lands. Moreover, when an application for rehearing is made, as in this case, and the same is granted, the case will generally be tried *de novo*; and the petitioners for rehearing can not then be heard to complain of the former notices and proceedings, however defective they may be.

Besides it appears in this case that all the parties in interest—mortgagee, transferee and entryman—were duly served with notice of the time and place of the rehearing.

I have carefully examined the testimony and find it substantially as set forth in your said office decision.

The lands involved are a part of the Osage Indian trust and diminished reserve lands; and the rights of claimants thereto are determined under the act of May 28, 1880 (21 Stat., 143). The second section of that act provides:—

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

The entryman under this statute must be an actual settler on the land, and must have the qualification of a pre-emptor.

The principal inquiry, and the only one in this case, is, whether Meeker was an actual settler within the meaning of said act.

> An actual settler under the public land laws is one who in his own proper person goes upon a tract of the public land with the intention of remaining there and of acquiring title thereto, or, in other words, of making it his home. United States *v.* Atterbery *et al.*, 10 L. D. 36.

Meeker did not personally make any of the improvements on the land. The building put up on the land was moved off soon after proof was made, and used as a granary by one John Waldock, father-in-law of Meeker.

It appears that Meeker and his wife staid in the house one night, while it was on the land. But all the facts and circumstances set forth in this case abundantly show that he was not an actual settler upon the

land in the sense of the term as used by this Department. They further show that John Waldock is the real party in interest.

Finan settled on the land after Meeker's house was built. Her improvements were of small value; but the evidence shows she was an actual settler. Her house was torn down at the instigation of John Waldock, and she was otherwise badly treated. She appears to have built three different houses, and the proof shows they were all destroyed, and she could not remain in peace upon the land, and was obliged to leave it without any fault of her own.

Meeker's entry should be canceled. It is so ordered and your decision is affirmed.

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PRACTICE—TRANSFEREE—OSAGE LAND.

FINAN *v.* PALMER ET AL.

It is not necessary that the heirs and legal representatives of a deceased entryman should be made parties to a proceeding against an entry, where the entryman has disposed of his interest in the land and the transferees are served with due notice of such proceeding.

Concurring decisions of the local and general land offices as to questions of fact are generally accepted as conclusive by the Department where the evidence is conflicting.

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

I have considered the appeal of Eliza Woldock, transferee of William A. Palmer, deceased, from your decision of December 20, 1888, wherein you hold for cancellation said Palmer's Osage cash entry No. 1286, made January 27, 1885, for the S½ of the NE¼, and the N½ of SE¼ of Sec. 21, T. 27 S., R. 12, W., Larned, Kansas.

Palmer's alleged settlement was made January 1, 1884. He made final proof July 2, 1884, and first payment July 11, thereafter, he completed his payments January 27, 1885, and on that day obtained the register's final certificate.

The final proof is regular in form; it shows continuous residence from January 1, 1884, to date of final proof. The improvements consist of a sod house, fourteen by sixteen feet, with board roof; six acres broken, and the land used as a farm, valued at $100.

Catherine Finan filed Osage declaratory statement No. 3584 on May 2, 1884, for the SE ¼ of the same section, township and range, alleging settlement February 15, 1884. She made final proof and first payment October 24, 1884, and on January 28, 1885, filed her affidavit of contest against Palmer's entry, alleging that the same was fraudulent, and asserting her paramount right to the land as to the N ½ of the SE ¼.

By your letter "G" of January 29, 1886, a hearing was ordered. On this hearing, a decision was rendered adverse to the entry. Upon

appeal, you remanded the case for a rehearing, which was had July 12, 1887. The register and receiver again held that the entry of Palmer should be canceled, and the land awarded to Finan, and by your said office decision you affirm that judgment.

On August 13, 1884, Palmer conveyed the land by warranty deed to Julia E. Meeker; Meeker conveyed it to Addison De Puy by warranty deed, on July 18, 1885, and De Puy conveyed it by warranty deed to Eliza Waldock, November 2, 1885. Palmer died about January 1, 1885 (exact date not given).

This appeal is based upon lack of jurisdiction, and other errors, specifically set forth. It is insisted that no administrator of the estate of William A. Palmer and no guardian of his heirs having been made a party and served with notice, jurisdiction is not obtained.

At the time your office ordered a rehearing (January 21, 1887), Eliza Waldock claimed the land by mesne conveyances by warranty deed from the entryman, Palmer, who was dead; at the rehearing, therefore, she and the mortgagee were the only parties defendant who had any interest in the land, and they were both personally served with the notice of the rehearing. The complaint that the legal representatives and heirs of Palmer were not made parties to this proceeding has no force.

The death of the entryman prior to the day fixed for the hearing is no ground for the dismissal or suspension of proceedings against the entry, where said entryman has disposed of his interest in the land, and the transferee is made a party defendant and is present in court. Milum *v.* Johnson, 10 L. D., 624.

The facts in this case are substantially set forth in your said office decision, which affirms the register and receiver in holding that Palmer's entry was made for the use and benefit of one John Waldock, and not for the entryman's own use and benefit; also that Finan endeavored in good faith to comply with the law. Concurring decisions of the local and general land offices as to the questions of fact are generally accepted as conclusive by the Department where the evidence is conflicting, as in this case. (Conley *v.* Price, 9 L. D., 490.)

On a careful review of the testimony, I find no reason for disturbing your action, which is hereby affirmed.

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### PRE-EMPTIVE RIGHT—SECOND FILING—TRANSMUTATION.

### LENNIS *v.* SOUTHARD.

A pre-emption filing transmuted to a homestead entry, under which title is subsequently perfected, exhausts the pre-emptive right, notwithstanding the fact that such filing is made prior to the adoption of the Revised Statutes.

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

I have considered the case of Walter M. Lennis *v.* Walter J. Southard, as presented by the appeal of the latter from the decision of your office, dated April 24, 1889, rejecting his final proof in support of his

pre-emption claim, for the SE. ¼ of Sec. 18, T. 4 S., R. 22 W., Kirwin, Kansas, and holding for cancellation his pre-emption declaratory statement, No. 21,699, filed December 12, 1885, alleging settlement on said tract the same day.

The record shows that on December 17, 1886, said Lennis made homestead entry, No. 22,372, of said land, and on January 19, 1887, filed a protest against the allowance of Southard's final proof in support of his pre-emption claim, advertised to be made before the probate judge of Norton county, Kansas, on February 28, same year, alleging that said pre-emption claim was illegal, because the pre-emptor had made a former filing for another tract of land, which he subsequently transmuted to a homestead entry, upon which he made final proof and received final certificate therefor, and that he moved from land of his own in said State to settle upon the land in question.

A hearing was duly had before the local officers on April 19, 1887, and they rejected said proof and recommended the cancellation of said filing, for the reason that the pre-emptor, on November 14, 1871, filed his pre-emption declaratory statement for the SE. ¼ of Sec. 31, T. 4, R. 15, in said State, upon which he resided until April 13, 1874, when he filed his soldier's homestead declaratory statement thereon; that on November 13, 1874, he made homestead entry thereof, and made final proof on June 11, 1881, showing continuous residence on his homestead from October 27, 1871, to date of said final proof; that final certificate issued for said homestead, and, while said Southard was the owner of said homestead, he initiated a contest against a homestead entry covering the tract in question; that after the hearing of said contest, but before the cancellation of the contested entry by the Department, he and his wife conveyed their said homestead by warranty deed to the sister of Mrs. Southard, with the understanding that it should be reconveyed to Mrs. Southard when requested so to do by her husband; that said conveyance did not relieve said pre-emptor from the inhibition of section 2261 of the Revised Statutes of the United States, and that he was disqualified from making a pre-emption entry, as well as from making a second filing, because of his former filing.

On appeal, your office affirmed the decision of the local office, for the reason that under the provisions of said section 2261, said Southard exhausted his pre-emptive right when he filed his first pre-emption declaratory statement, and that, since his second filing was illegal, it was unnecessary to consider the second ground of objection to said proof.

It is strenuously insisted by counsel for appellant that said second filing having been made while the rules and regulations of the Department allowed the same, the first filing having been made prior to the adoption of the Revised Statutes of the United States, the rights of the pre-emptor became vested, and his proof should be allowed by the Department.

In support of said contention, counsel refers in his brief, filed in your office, in support of his appeal from the land office, and which has been considered, at his request, on appeal, to your office letter dated June 29, 1874, to the register and receiver, at Humboldt, California (1 C. L. O., 55), allowing a pre-emptor to make any number of filings for unoffered land, if he only makes proof in support of one claim; also the case of Southern Pacific Railroad Company *v.* Wiggins and Kellar (4 C. L. O., 123), and the case of California *v.* Pierce (1 L. D., 442), and insists that the rule announced in said decisions was promulgated and continued "up to a very recent date," when it was changed by the departmental ruling in the case of Jonathan House (4 L. D., 189), decided by Mr. Secretary Lamar, on October 10, 1885, which ruling, he alleges, was not known in the land district where said land is situated, until January, 1886.

In the case of William L. Phelps (8 C. L. O., 139), decided November 17, 1881, Mr. Secretary Kirkwood held that, in the absence of adverse rights, a party could file a second declaratory statement for the same tract. This decision was expressly overruled in the case of J. B. Raymond (2 L. D., 854), decided by Secretary Teller, on February 27, 1884, where the question was carefully and elaborately considered, and it was held that, under section 2261 of the Revised Statutes of the United States, a pre-emptor can file but one declaratory statement. In that case the claimant asked to be allowed to file for the same or another tract, and was refused. This decision, in effect, overruled the Pierce case, *supra*, and this was nearly two years prior to the second filing of Southard.

In the case of Jonathan House, decided October 10, 1885, more than two months prior to said second filing, the Department held that it made no difference that the first filing was made prior to the adoption of the Revised Statutes; that fact would not avoid the inhibition of said section 2261, citing Baldwin *v.* Stark (107 U. S., 403).

In the case of Bywater *v.* Hill (5 L. D., 15), decided July 22, 1886, the Department held that a pre-emption claim, based on the settlement and filing of one who had previously exhausted his pre-emption right, was illegal, and the transmutation thereof to a homestead entry would not exclude an intervening adverse claim. In this case the first filing was made in Minnesota, in June, 1873, and the second, which was held to be illegal, upon the authority of the Raymond case, in October, 1881.

In the case of Jose Maria Solaiza (6 L. D., 20), Acting Secretary Muldrow said: "The doctrine of the Pierce case, however, has been repeatedly overruled," citing the Raymond and House cases, *supra*. See also Orrin C. Rashaw (id., 570); James F. Bright (id. 602); Bridges *v.* Curran (7 L. D., 395); C. S. Curtis (10 L. D., 188).

It is clear that the second filing of Southard was illegal, and under the well-settled rulings of the Department he can not be permitted to enter the land in controversy.

It will be quite unnecessary to consider the good faith of the conveyance of said homestead, for, under the provisions of section 2261 of the U. S. Revised Statutes, which he is presumed to know, Southard is prohibited from making pre-emption entry of the land.

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

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AFFIDAVIT OF CONTEST—CORROBORATION.

REED *v.* ARNESON.

An affidavit filed as the basis of a contest does not justify a hearing thereon unless it sets forth clearly charges that will warrant cancellation if proven.

An affidavit of contest, if uncorroborated, may be properly rejected.

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

I have considered the case of Isaiah W. Reed *v.* Olena Arneson, involving the pre-emption cash entry made by the latter December 8, 1884, for the NE. ¼ of Sec. 32, T. 15 N., R. 42 E., Walla Walla land district, Washington.

Said Reed, on July 5, 1888 filed application to contest said entry, accompanying the same with an affidavit alleging insufficient residence and improvement. Your office, on November 3, 1888, denied the application, and returned the affidavit for amendment, "to specifically allege defect, if any, in residence and cultivation prior to date of making proof." On December 18, 1888, Reed filed amended affidavit and application. These also your office, by letter of January 12, 1880, rejected for the same reasons previously given. Thereupon Reed appeals to the Department.

Your office is clearly correct in holding both the original and the amended affidavit insufficient to justify a hearing. So much of the amended affidavit as refers to the entryman's failure to reside upon the tract since making final proof has (under the circumstances) no bearing upon the question. The list of improvements set forth does not indicate bad faith. The allegation that "the residence of said Olena Arneson on said tract prior to the date of proof thereon was not sufficient under the law to show good faith," is but the expression of affiant's opinion, the only fact stated in support thereof being that the contestant "passed the land frequently, and never saw claimant on the place at any time from the date of entry until proof was made." This negative statement might be true, and the testimony of the entryman and her witnesses on final proof not be false.

Moreover, the contest affidavit is practically uncorroborated. Attached thereto is the joint affidavit of two other witnesses, who certify to its correctness.

1. Excepting as to the contents thereof relative to the residence of said claimant Olena Arneson, on said land prior to final proof made thereon, concerning which fact of residence affiants were not in a position to know and therefore can not state.

Rules 2 and 3 of Practice say:

2. In every case of application for a hearing, an affidavit must be filed by the contestant with the register and receiver, fully setting forth the facts which constitute the grounds of contest.

3. Where an entry has been allowed and remains of record, the affidavit of the contestant must be accompanied by the affidavits of one or more witnesses in support of the allegations made.

In the case at bar, the only allegation made which has any bearing upon the question at issue is unsupported by the affidavit of any one except the contestant. (See Farmer *v.* Moreland *et al.*, 8 L. D., 446).

Your office decisions denying the application for a hearing are affirmed.

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APPLICATION TO MAKE ENTRY—AMENDMENT.

PATRICK KELLEY.

An application to make timber culture entry received, noted of record, but returned for amendment of the preliminary affidavit, effectually reserves the land as against a subsequent applicant therefor.

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

I have considered the appeal of Patrick Kelley from the decision of your office of April 12, 1889, rejecting his application to make timber culture entry of the W. ½ of the SW. ¼ and the NE. ¼ of the SW. ¼ and the SW. ¼ of the NW. ¼, Sec. 11, T. 149 N., R. 59 W., Grand Forks, Dakota.

The following appears of record:

March 27, 1882, George Hetherington made timber culture entry of the said tract. April 6, 1886, John Fitzgerald filed an affidavit of contest against said entry, accompanied with an application to enter the same.

Notice was issued, and June 8, 1886, set for hearing. On said day Hetherington did not appear, but made default. Fitzgerald, the contestant, appeared and submitted his own testimony in support of his affidavit of contest. No other witness was produced.

September 9, 1886, the register and receiver rendered their decision, as follows:

At the trial only one witness appeared, viz: the contestant himself, and we do not think his unsupported evidence sufficient to justify a declaration of forfeiture. We are therefore of the opinion that said contest should be dismissed.

No appeal was taken by Fitzgerald from this action of the local officers, but on January 7, 1889, (as appears from your office letter of April 12, 1889, now before me,) the entry of Hetherington was canceled by your office, "upon the contest of John Fitzgerald."

January 14, 1889, the cancellation was noted on the records of the local office, and on the same day contestant's attorney was notified by registered letter of such cancellation, but no action was taken thereon by the contestant or his said attorney.

Some time prior to the cancellation of Hetherington's entry (the exact date nowhere appearing of record), the local officers received by mail the application of Betsey Halvorson to enter said tract, under the timber culture law. Her entry papers were executed before a notary public, and dated December 20, 1888.

On receipt of this application, it was immediately returned to her, with a statement from the register that the land was covered by the entry of Hetherington. On the 2d of February, 1889, which was after the cancellation of the Hetherington entry, the same application was again received at the local office. On the same day it was again returned to the applicant, with the request that she make out new papers, as forty-three days had elapsed since the applicant had made affidavit to her qualifications to enter the land. This new application was not received until February 15th, same year. Both sets of papers were complete and regular in form and the necessary fee accompanied each application.

On February 9, 1889, six days prior to the receipt of the new papers of Halvorson, Kelley, the appellant herein, applied to make timber culture entry of the tract in question. This application was rejected by the register, because of the prior rights of Halvorson, as above set forth. From this ruling Kelley appealed to the Commissioner, who affirmed the judgment of the register, and he now appeals to this Department, claiming that, under the proceedings above set forth, he is the first legal applicant for the land, subsequent to the cancellation of the entry of Hetherington.

The application of Halvorson, made prior to the cancellation of Hetherington's entry, was properly rejected, because the land was then covered by an entry and her application was not accompanied with an affidavit of contest against the same. Drummond *v.* Reeve, 11 L. D., 179. Her application of February 2, 1889, was received when the land was subject to entry, because prior thereto (January 14, 1889), the entry of Hetherington had been canceled.

But it is insisted by counsel for appellant that this application should have been rejected by the register and receiver, because the affidavit as to character of the land and qualifications of the applicant was made more than forty days prior to the date of her application.

Had the local officers rejected her application outright, and she had appealed from such rejection, this question would then have been properly before me for consideration. But such was not their action, as presented by the record in this case. On receipt of her application they, on the same day, returned the papers to her (for new affidavit) and noted the same on the tract books. This was the status of the case when appellant, a week later, applied to make timber culture entry.

No rights of his were disturbed by such action of the local officers, for at that time he had none to prejudice. Moreover, when he applied to make entry, he was informed of the application of Halvorson and the action of the register and receiver thereon, so that his application was made with full knowledge of her equities.

It has been held by this Department that an "application to enter is equivalent to actual entry, so far as the rights of the applicant are concerned." Pfaff *v.* Williams, *et al.*, 4 L. D., 455.

While the affidavit of Halvorson, accompanying her application, was regarded by the local officers as defective as to the date when it was made, they, notwithstanding this defect, made it of record, where it remained at the time Kelley applied to enter.

While counsel for appellant complains of the laches of Halvorson, they are not apparent in the record. It is true that thirteen days intervened between the return of her first papers and the receipt of the new ones at the local office, but how far she resided from the notary before whom she executed the papers, or how much time was needed to comply with the directions of the register and receiver, does not appear, hence, I cannot find that she has been negligent.

Fitzgerald, who contested the entry of Hetherington, not having appealed from the decision of the register and receiver dismissing his contest, thereby forfeited his right of preference. Boos *v.* Whitcomb, 10 L. D., 584.

Halvorson, being the first applicant to enter after the cancellation of Hetherington's entry by the Commissioner, should be and is hereby allowed to make entry of the land.

The decision of your office rejecting the application of Kelly is accordingly affirmed.

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SCRIP LOCATION—CONTIGUITY OF TRACTS—RETURN OF SCRIP.

JOHN BROWN.

Where an application to locate scrip covers non-contiguous tracts and is allowed for one tract, and rejected as to the other on account of such non-contiguity, the entry allowed may be canceled, on request of the applicant, and the scrip returned, if by such action the government sustains no loss.

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

I have considered the appeal of John Brown from your decision of February 19, 1889, declining to cancel the entry for lot No. 4 in Sec. 18, T. 63N., R. 9 W., Duluth, Minnesota land district, containing 33.75 acres, and to return him his "special certificate of location E. 3", Valentine land scrip.

It appears from the record and testimony in the case that on September 8, 1887, he applied to locate said scrip on the land above described and on lot No. 1 in Sec. 13, T. 63 N., R. 10 W. (same district) containing 9.75

acres and tendered the price of the excess above forty acres, the amount said scrip called for.

The local officers required him to make two separate applications, one for each tract which he did, and delivered the certificate of location to them; they thereupon accepted the application for the tract first described and endorsed the other application—"Refused for the reason that the land applied for covers more than one legal subdivision, this being the second piece applied for—fees and excess tendered"—and notified him that he could appeal from their action, which he did, and on December 19, 1888, being advised that patent could not be issued for two non-contiguous tracts upon one certificate of location, he filed application for the return of his scrip, and on February 19, 1889, your predecessor passed upon the case and decided that as "there appears no obstacle on the part of the government to the issuing of title to the land in question, I must decline to cancel said location and return the scrip."

In March following a motion for review and reversal of said decision was made and the same was overruled, from which decision as well as from the judgment of February 19th he appealed.

The attorney who advised him that he could locate on both tracts, says in his brief that Brown chose this tract of land on being informed that he could not have both tracts. This is denied however. Brown in his affidavit says he made application for a location on both tracts "and tendered the fees and commissions" etc. He says he was required to make the two separate applications, one for each tract, and—

"My application was to enter both parcels of land with the said scrip and in case I am not allowed to do so, I would respectfully ask the return of the said piece of scrip" etc.

The local officers say—"Concerning the facts stated in his (Brown's) petition we would say that to the best of our knowledge the facts as stated by him are substantially true, and we recommend that his petition be allowed."

The proposition as made was an entirety and re-writing it on two papers, at the request of the local officers, did not change its legal effect.

The government's agent can not take this scrip and use it in paying for part of the land for which it was offered. While there is no obstacle in the way of a patent issuing for the tract first described, there is as to the second, and Brown did not propose to take the one without the other.

The testimony shows that he has not taken possession of the land nor in any way injured or interfered with it. This being so the government can be placed where it was when the entry was made, and as the local officers have joined in recommending that his petition be granted, and inasmuch as the government does not desire to drive hard bargains with its citizens, the petition of Brown will be granted, the entry canceled and his scrip No. E. 3, returned to him.

Your office decisions are reversed.

OKLAHOMA LANDS—SETTLEMENT RIGHTS—TOWNSITE.

TOWNSITE OF KINGFISHER *v.* WOOD ET AL.

The provisions of the act of March 2, 1889, opening to settlement and entry the Territory of Oklahoma, as limited by the third proviso of section 13 of said act, expressly prohibit any one from entering said Territory, prior to the hour fixed by the President's proclamation, with the intention of settlement on any part thereof.

No permission, or license to be within said Territory by virtue of special employment therein, can be granted as against the express terms of the statute, or used to defeat the equal operation thereof and the rights of others thereunder; and one who is permissibly within said Territory prior to the opening thereof, and seeks to take advantage of his presence therein has "entered and occupied" the same in violation of the statute, and is accordingly disqualified to enter any of said lands, or acquire any right thereto.

An actual settlement, followed by residence and improvement, confers a right of homestead that attaches from date of settlement, and such right is not impaired by the subsequent occupation of the land by townsite settlers on the day of such settlement.

A settlement not made in good faith for homestead purposes, but with a view to speculation, does not confer any rights under the homestead law.

*Secretary Noble to the Commissioner of the General Land Office, October 1, 1890.*

The controversy in this case involves the title to the N. ½ of Sec. 15, T. 16 N., R. 7 W., Kingfisher, Oklahoma. The record shows that on April 23, 1889, John H. Wood made homestead entry for the NE. ¼ and William D. Fossett for the NW. ¼ of said section; and on May 4, 1889, the occupants of the townsite of Kingfisher, by its mayor and others, made application at the local office to enter said tract for townsite purposes.

A hearing was ordered by your office to determine when said land was actually selected and occupied as a townsite.

The trial began July 25, 1889, was continued from time to time, and completed August 17, following.

Upon the evidence submitted, the register and receiver recommended the allowance of the townsite application, and the cancellation of the entries of Fossett and Wood. From this judgment they prosecuted separate appeals to your office, and, on March 6, 1890, the judgment appealed from was reversed, the entries held intact and the townsite application rejected.

The townsite applicants, in due time, filed a motion for review, which upon due consideration, on May 5, 1890, you overruled. The townsite applicants have appealed from your judgment to the Department.

Pending the appeal, the mayor of the city transmitted a petition to your office, asking its dismissal; but protests against such dismissal were also filed by parties claiming lots as occupants of said townsite.

The appeal and protests being of record, each will receive consideration.

There is practically little, if any, ground for controversy about the facts, either as found by the local office, or by yourself. They may fairly be resolved into the following statements:

First: Fossett, at the time of making his homestead entry, was a legally qualified homesteader.

Second: He settled upon the said NW. ¼ on April 22, 1889, and prior to the time that a townsite was actually taken

Third: Wood was within the Territory of Oklahoma, in charge of the military transportation train in the vicinity of the land in controversy at the time the territory was opened for settlement by the President's proclamation; but otherwise possessed the qualifications of a homesteader.

Fourth: Wood settled upon the said NE. ¼ April 22, 1889, and prior to the time that the townsite was actually taken.

Fifth: Prior to the time *entries* were made at the land office, and on the same day that Fossett and Wood *settled* upon these respective tracts, both quarter sections were occupied by townsite applicants for purposes of trade and commerce, and the lands surveyed into lots, blocks, streets and alleys for townsite purposes.

Upon this state of facts there can be no doubt that these entrymen would prevail over the townsite occupants, unless prohibited under the act of Congress and the proclamation of the President opening the territory. They were first on the ground, and this prior occupancy would have been notice, other things being equal, that the land had been legally appropriated and no longer subject to entry for townsite purposes.

First as to the rights of Mr. Wood. Great stress is laid by his counsel upon the fact that he was lawfully in the territory, in the government service, at and prior to the time said lands were opened to settlement, and that therefore no legal objection to his availing himself of the benefits of the homestead law for the tract claimed by him existed. In this connection, it is necessary to consider the act of Congress making the "Territory of Oklahoma" a part of the public domain, and the proclamation of the President opening the same for settlement.

Congress, by sections 12 and 13 of the act entitled, "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with the various Indian tribes," approved March 2, 1889 (25 Stats., 1004), provided for the extinguishment of the Seminole Indian title in and to certain lands ceded by Article III of the treaty between the United States and said nation of Indians, concluded June 14, 1866, and proclaimed August 16, same year, and upon survey ascertained to contain 2,037,414.62 acres. Section 13 provided, that "lands acquired by the United States under said agreement shall be a part of the public domain, to be disposed of only

as herein provided;" that of the lands sections 16 and 36 were reserved for school purposes; that the remainder of the lands should be disposed of to actual settlers under the homestead laws only, except as therein otherwise provided, except that section two thousand, three hundred and one of the Revised Statutes should not apply. This section, also, after providing that entries should be substantially in square form, and that no person should enter more than one quarter section, used the following language: "But until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same; and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto." The section also provided for entry of townsites.

The history of these lands and the circumstances under which the act was passed should be considered in connection with the language employed to arrive at a fair construction and a just determination of the legislative will.

The land had been an Indian reservation and ceded by the Indians under the treaty of 1866. Provision for the payment therefor by the government was made in the legislation above quoted. As long as it was an Indian reservation, it was not subject to the intrusion of white men. Yet repeated attempts had been made to take possession of and settle thereon. The military force of the United States had been required to protect the domain from illegal seizure. The whole tract was from the beginning of these attempts obviously insufficient to meet the demands of the great number of persons seeking to settle there, and the quality of the soil varying greatly, each one was desirous to obtain the best. To the ordinary desire for homes was added a fever of speculation. Townsite locations were sought for with extraordinary avidity, not only by those bent truly upon trade and commerce, but by many a pretended cultivator of the soil. On the first day of July, 1884, President Arthur issued his proclamation, reciting that certain persons had set on foot preparations for the organized and forcible possession of the Oklahoma lands, which were recognized "as Indian country, and, as such, subject to occupation by Indian tribes only." He recited that the laws of the United States provided for the removal of persons residing or found thereon without permission of the Indian Department, and proceeded to admonish and warn all persons intending or preparing to remove on said lands, or into said territory, against any attempt so to do, and to notify any and all such persons who should so offend that they would be speedily and immediately removed therefrom by the proper officers of the Interior Department, and, if necessary, by the aid and assistance of the military authorities of the United States.

The state of affairs described continued up to the passage of the act of March 2, 1889. In accordance with the provisions of this law, the President, on the 23rd day of March, 1889, issued his proclamation. It mentioned the cession by the Indians, and recited in full said section

13. It declared and made known that the lands (which were particularly described)

will, at and after the hour of twelve o'clock, noon, of the twenty-second day of April next, and not before, be opened for settlement under the terms of and subject to all the conditions, limitations, and restrictions contained in said act of Congress approved March second, eighteen hundred and eighty-nine, and the laws of the United States appliable thereto;

and it further gave express warning,

that no person entering upon and occupying said lands before said hour of twelve o'clock, noon, of the twenty-second day of April, A. D. one thousand eight hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto, and the officers of the United States will be required to strictly enforce the act of Congress to the above effect.

It will be observed that the proclamation quotes the law and that the warning is given in the exact terms of the statute.

While the act was pending in Congress and in anticipation of its passage, the excitement about Oklahoma greatly increased. Great numbers of persons approached the territory on all sides, so as to be ready to rush in at noon of the appointed day. The military force of the United States had to be used as a patrol and guard on the borders to hold back the pressing multitude. The firing of cannon at different points was agreed upon as signal that the hour of legal entry had arrived. Families in wagons, individuals on horseback, many a foot, and all in tense anticipation of the start, fringed long distances of the territorial borders. Some arranged to enter by the railroads. Many fleet horses were brought into requisition that their owners might outstrip their fellows in the race for lands and lots. But in all this multitude, coming from all quarters of our country, the north and south, east and west, and composed of as strong characters and varied dispositions as were ever before assembled, there was one marked and most estimable trait displayed—an obedience to law and authority. In the camps, that were formed awaiting the "opening," in the inclement weather, under the strain of great excitement, and with a knowledge that the small military force stretched out over these long lines might be easily evaded, there was among these citizens a complete confidence in and reliance upon the strength and fairness of the government to protect them from imposition and fraud, if they, themselves, would do right.

But there were others not so disposed. There were men there who, upon one pretence and another—one necessity or another—had been admitted within the border. The railroads required men to preserve the track and to run the trains; the military wagons were handled by civilians engaged for the purpose; there were the registers and receivers of the land offices, with their clerks, there were the United States marshals and their deputies; and there were many others that had evaded the troops and crept into the domain without pretence of right. Many, in each of these classes, that were in the territory *sooner* than the

law allowed for such designs of settlement, nevertheless intended to take advantage of their situation and anticipate and defeat the multitude on the borders. Their chief purpose was to get a quarter section or a town lot, and if they had an apparently special occupation there, the real cause of their presence was to get land. Many then, and more since, have avowed their position. They argued "True, it may be, that until said lands are opened to settlement by proclamation of the President, no person shall be permitted to enter and occupy the same; but we do not intend to enter or occupy any land until then; we are here, within the territory, but we are not entering and occupying any tract in particular just now; one may be standing on the north-east quarter of a section before noon, but, if he does not step upon the north-west quarter until after the signal, this north-west quarter he may keep, because he will not have occupied and entered *that*, until after the appointed time; the words of the law are technical, and even if the claimant is in the territory before noon, if he does not then claim the particular tract he has his eye on, and will seize immediately thereafter, he can hold it." Those in by stealth maintained this position without qualification; those in permissibly said, the point of entry being passed, they could entertain what purposes as to settlement they chose, without being affected by the statute. The citizens outside were deemed simply unfortunate not to have been selected for special duty, or very cowardly not to catch the nearest way.

The law was directly and forcibly construed to the contrary from the beginning. The presence of the military guard, that by order of the President appeared immediately after his proclamation; the advent of the United States marshal, with numerous assistants, instructed to keep the peace in connection with the military force; the very permits to enter the territory, which so many of these persons in the territory solicited or accepted, and thereby acknowledged to be requisite; the admirable obedience of the great mass of citizens, who good-humoredly waited for the word of permission from the constituted authorities;—these and many other acts of authority on the one hand, and self-denial on the other, *at the very time*, gave a construction to the law that was reasonable and just, and by which all persons equally were forbidden to enter upon and occupy the territory described in the law and proclamation before the appointed hour, for the *purpose* in whole or in part of claiming any part thereof for *settlement*.

The evident intention of Congress was to give to all persons desiring homes in Oklahoma an equal chance to obtain them. The territory was opened for homestead settlement to any qualified homesteader, but under the same conditions. No partiality was intended to be shown to any individual or class of individuals. Those who had been endeavoring for years to enter upon and occupy "Oklahoma" were confronted by the authorty of government. The statute meant to lay a heavy hand on any one who persisted in the unlawful purpose of entering

upon or occupying this territory for settlement. The law was meant to be superior to the spirit of agression so long prevalent:—the spirit that had gathered those bands about this Indian reservation, whose avowed purpose was to enter upon and occupy it, not under the land laws of the United States, nor by any law, but that of the armed hand, and to conform to no statute or treaty until future necessity might compel. The evil was apparent. The law was meant to meet it. It condemned the purpose, and intended to render it fruitless.

The words "enter upon and occupy" are used in their ordinary acceptation. "Enter" means to come or go into; and "occupy" to take in possession, or to fill up. The language carefully avoids the technical expressions of the homestead laws, under which titles are to be obtained. In them, to "enter" lands, means to make that particular declaration in writing at the land office that is called an "entry." It is a formal proceeding and somewhat technical. In such connection, the word "upon" is not used or appropriate. It is one thing to "enter" a piece of land, and a wholly different act to "enter *upon*" a great domain like Oklahoma. Evidently the latter expression was used to prevent the people from coming into the lands—the territory—and cannot reasonably be restricted to a technical "entry" of a specific tract. So also as to the word "occupy." These lands were formerly occupied by Indians; yet the individuals of the tribe did not have staked off separate holdings. One occupies a certain space when he excludes for the time being another therefrom. It does not require that he should continue in the same place to say he occupies a certain tract, whether a quarter section or a territory. This depends upon his purpose and his ability.

The language of the law was broad as it could be made, prohibiting any one from entering upon the lands for the purpose of settling the same. The end sought by the people was *settlement*. This it was that would produce title; convert the public domain into private property. The statute's chief purpose was to regulate settlement. Each act of the individual was induced by his desire to make settlement of a particular piece of land, and the statute declared that for this purpose no one should enter upon or occupy these lands—this territory—until they are opened for such "*settlement*" by proclamation of the President. It matters not whether it is read in the conjunctive or disjunctive; whether it is to be read as saying "enter upon *and* occupy" or "enter upon *or* occupy;" the evident purpose of the law was to prohibit one or another entering the territory before the proclaimed hour, *with a view and purpose of settlement of any part thereof*. No one could be there, legally with such purpose, in whole or in part. Whether there before the time by some permit or without it, the one who then entertained the intention of making a settlement and to use the advantage which his presence gave, to the exclusion of others, was violating the spirit of the law, and it destroyed his claim when attempted. If he had declared it before, he

should have been expelled; if he exhibited such pre-conceived purpose by his subsequent acts, he not only could not lawfully claim any particular tract, but forfeited all right to future acquisition. Any special license to be present must have been for another and entirely different purpose. No license could be granted against the statute, and no one could successfully pervert his license or special employment to defeat the equal and just operation of the statute upon all alike. The permit was exhausted in protecting its possessor; it could not be used as a weapon against others. The moment the possessor of such special privilege formed his purpose to take advantage of his position for the selection and seizure of a tract of land, his license was valueless, and he became a trespasser from that moment. To hold that the few with permits, or especially engaged within the limits of these lands any more than those there without license, could pick out their claims in advance of the hour of opening, and pounce upon them at the very moment the signal was given to the others to start on their long race, would be to support pretension and favoritism and punish honorable obedience to authority. It is neither the law nor the equity of the case, and will not be allowed. He, who, being within these lands by special authority as deputy, train-hand, wagon-master, or other, had the purpose to jump upon a particular tract, and who gave the evidence of his prior intent by his conduct immediately thereafter, violated the statute. Such persons had entered upon and occupied this territory for the purpose of settlement—before the hour fixed in the proclamation—whatever license they may hold up or self-indulgent and self-deceiving pretext they may now present. They were not licensed or employed thus to defeat the law and injure their neighbors.

Both classes were prohibited from acquiring rights to these lands: those who were in the territory at and before the hour designated in the proclamation without pretense or special license; and those who were there by special authority, or for a special purpose, but attempted to pervert their presence to secure claims before others held on the borders could arrive, even from the most distant parts thereof.

On the other hand, I do not think it was the intention of Congress that a man who happened to be legally in the territory, but did not use his position to his own advantage, or to the disadvantage of his fellow-citizens, should be forever prohibited from acquiring any rights in the territory. Each case must be determined upon its own merits and evidence: but it may be said generally, that the presence in the territory before the opening, under the proclamation, and the actual settlement and entry at the land office must be so widely and obviously separated in every detail and circumstance as to render it impossible to reasonably conclude that the one was the result of the other, or in any wise dependent upon it.

I think it clearly appears that Mr. Wood, though permissibly in the territory, in charge of the military transportation train, took advantage

of his position to seize upon the land in controversy, in anticipation of the advent of those who had been held back. The Kingfisher land office was already located on the north half of the section, the north-east quarter of which Wood claims, and it was then generally recognized that there would be a town located on this part of the section, as it since has been. Mr. Wood had been in Oklahoma some years; his home was near the military reservation, near Oklahoma City. He left Oklahoma April 16th, in charge of military transportation, and arrived at Guthrie April 19th. He then started with the train to a point at or near Kingfisher, and arrived on the evening of April 20th, and was hauling wood and working there until noon April 22nd, a mile east and somewhat north of Kingfisher United States land office. He was seen digging upon the quarter section he now claims in seven minutes and a half after the signal for the opening. He was in advance of any-one else. It was his previous presence undoubtedly that gained for him the advantage he now rests his claim to title upon.

Under the construction of the law herein given, Mr. Wood cannot be allowed to do this. He had entered upon and was occupying the territory for settlement. His engagement as wagoner, and his train, had become mere instruments and means by which he intended to secure, in an unjust way, a most valuable quarter section of land, before the others arrived. This he was disqualified to do, and his entry must be canceled.

In considering the case of Fossett, as he was the first settler upon the land, and his settlement was followed by residence and improvement, whatever rights he may have acquired were properly held by your office to have attached at the time of his actual settlement, and not on the following day, when he made his claim of record at the local office. His rights cannot, therefore, be impaired by the subsequent occupation, on the same day, of the land embraced in his entry by the townsite settlers, and had not the integrity of his entry been impeached by said protest, it is clear, that as found by your office, the same should remain intact.

I find, however, among the papers before me, an affidavit made July 23d, 1890, by J. P. Barnard, one of the said protestants against the withdrawal of the appeal here, which charges collusion between one Jillett (Fossett's attorney) the "said Fossett, and said mayor and council, and a few of the occupants of said quarter-section," and to which is annexed a paper purporting to be a certified copy of an agreement, made May 5th, 1890, by Fossett's said attorney and the "townsite occupants and inhabitants," upon the said north-west quarter, to the effect that the lots occupied by said parties would, upon the completion of Fossett's entry, for a specified price, be conveyed to him, "in case no appeal is taken" from the action of your office.

This introduces a new element into the case, indicating that Fossett did not make his settlement in good faith for homestead purposes, but for speculation, which should, in my opinion, be made the subject of

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

You are further directed to give notice of this decision to the parties and also to the trustees of the said townsite, who have been appointed in pursuance of the act of May 14, 1890, in order that they may appear as parties to this proceeding.

The said townsite application for said northwest quarter will, pending the investigation so ordered, stand suspended. The decision appealed from is modified accordingly.

The proof submitted June 12, 1890, by Fossett in commutation of his entry, and which is forwarded by your office letter of July 30, 1890, with the accompanying papers relating to the proceedings upon a protest by the townsite occupants against said proof, wherein it is also alleged, *inter alia*, that Fossett has agreed to sell a number of lots in said northwest quarter upon the completion of his entry, is returned for appropriate action by your office, after the hearing ordered is had and the matter determined.

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### PRE-EMPTION FINAL PROOF—MINING CLAIM—MILL SITE.

### SIERRA GRANDE MINING CO. *v.* CRAWFORD.

A pre-emptor who elects, in the presence of an adverse claim, to make final proof must abide the result thereof, and submit to an order of cancellation in the event that said proof fails to show compliance with law.

The use and occupancy of land for the maintenance of pumping works necessary to the operation of a lode mine is such a use as will authorize entry of the land as a mill site.

*First Assistant Secretary to the Commissioner of the General Land Office, September* 18, 1890.

I have considered the case of the Sierra Mining Company, claimant for Sierra Grande Mill Site No. 2, lot No. 532 B against James Crawford claimant under pre-emption declaratory statement No. 2102 on appeal by the former from your decision of May 2, 1889, rejecting its application for patent No. 272, embracing "Annie P." lode and the Sierra Grande mill site, and holding the same for cancellation to the extent of said mill site portion, and allowing the pre-emption declaratory statement of Crawford to stand, subject to his future compliance with the law in the matter of residence and improvement.

The facts are as follows: James Crawford filed pre-emption declaratory statement for the NE. ¼ of NW. ¼, N. ½ of NE. ¼ of Sec. 14, and SE. ¼ of SE. ¼ of Sec. 11 in T. 18 S., R. 7 W., N. M. M. Las Cruces N. M. land district, on April 8, 1885 (not on March 8 as stated by you), alleging settlement March 1st of same year.

On March 24, 1885, the Sierra Grande Mining Company located the said mill site No. 2, containing 4.9 acres survey "No. 532 A." situated in the SE. ¼ of SE. ¼ Sec. 11 same town and range in connection with the "Annie P" lode claim, located by said company in sections 20 and 29 same township and range. On July 3, 1885, said company filed application for patent for the "Annie P" lode claim and said mill site No. 2.

On September 1, 1885, James Crawford filed protest against said application for patent alleging his prior settlement as to said mill site, and asking that the issuance of patent be stayed until his right to the SE. ¼ of SE. ¼ of said section 11 shall have been determined. On the 15th of same month he gave notice that he would offer final proof on his declaratory statement on November 2d following, and on October 29th the said mining company filed protest against said declaratory statement, accompanying the same by affidavits and exhibits, relating to its mill site claim.

On November 2, 1885, final proof was offered by Crawford (on usual blank forms) and the hearing of the said protest of said company and the taking of further proof, and proof as to said mill site claim was continued until March 5, 1886, and on January 18th following said continuance, said company filed a contest against said declaratory statement of Crawford, as to the several tracts covered thereby, and on January 25th Crawford was served personally with notice thereof and that the charge alleged in said contest was "fraud and non-compliance with law."

On March 5, 1886, the parties appeared with witnesses and counsel and testimony relating to the several matters in issue (and covering 650 pages) was taken, and the local officers upon consideration of the record and testimony, found that the entryman, Crawford, had wholly failed by acts of settlement, residence or improvement to comply with the law, or manifest good faith and they recommend his entry for cancellation, and further that the mill site No. 2 be passed to patent, from which said decision Crawford appealed to your office, and on May 2, 1889, you passed upon said case and found from the testimony substantially the laches referred to by the local officers, and that the facts proven "are not such as entitle Crawford to make payment and entry," but you do not think that fraud or bad faith is proven, and as Crawford had been in this country only six months and had testified that he thought he was making a sufficient compliance with law, you held his filing subject to his future compliance with law in the matter of residence and improvement, and coming to the consideration of the claim

of Sierra Grande Mining Company on its application for patent No. 272, embracing the "Annie P." lode and the Sierra Grande Mill site No. 2, you found that—"There appears no use or occupation of the mill site tract as contemplated by the statutes, section 2337 R. S. The mill site is used solely for the purpose of supplying water, through pipes to the company's claims, the 'Annie P.' and others. This does not satisfy the statutes. Case of Charles Lenning (5 L. D., 190); Cyprus Mill Site (6 L. D., 706)" and rejected the application for patent and held it for cancellation to the extent of said mill site portion. From this decision the said company appealed to this Department.

The tract in controversy was included in the grant to the Texas Pacific Railroad Company by act of March 3, 1871, but by act of February 28, 1885, the grant was forfeited and the land restored to the public domain, subject to disposal under the general laws of the United States. Notice of this restoration was given by publication on March 25, 1885.

I shall consider first the claim of Crawford:

The testimony in relation to his pre-emption filing shows the following state of facts: He had been in this country about six months prior to March 4, 1885, and had lived with his half brother, Thomas Inglis, adjoining Sec. 14, and on said day he purchased of one Foster Cain his interests in the E. ½ of NW. ¼ and W. ½ of NE. ¼ of Sec. 14 in said township and range with the improvements thereon—paying $50 consideration, and taking a quit claim deed therefor. The improvements consisted of a box-house, a well, two acres of breaking and an uncertain interest in some line fence. The house was twelve by fourteen feet. It had a shingle roof, dirt floor, one door, but no window and no fireplace or chimney; the well was sixteen feet deep; the breaking had not been cultivated for several years, and the fence was in poor condition and claimed by Inglis. On March 5, (not March 1st as stated), Cain gave possession of the premises; he left in the house an old wire bed spring and some empty boxes, but carried away from the well the windlass, rope and bucket. Crawford, on taking possession, by way of repairs, leveled the dirt floor of the house a little, covered up the well to keep his cattle and those of Inglis from falling into it, set a few posts in the fence where they were down, straightened up the wires and drove a few staples. These are substantially all the improvements that he claims to have made on the land and constitute his acts of settlement.

In the matter of cultivation, he says that he re-plowed and sowed corn on the broken ground, but never cultivated it, and gathered no grain from it; it was uninclosed, and the cattle, that ran at large upon it destroyed the crop as it came up. In the matter of residence, the testimony as to his sleeping in the house is conflicting, but the preponderance shows that he only went to the house to sleep occasionally, generally taking some one with him, who would be convenient as a witness to testify that he had slept in the house. The carpenter who worked at Inglis' house, making repairs during a large part of May and

June 1885, says that Crawford lived there, sleeping, eating and conducting himself as one of the family. Crawford testifies that on some Sundays he took milk from Inglis and cold provisions, and went to the land and ate in the house, that he kept some canned meats, etc., there. He says he built one fire in the house, soon after he took possession, for the purpose of drying the floor and burning up the rubbish and shavings that Cain had left, but this is the only time that he ever built a fire in or about the house. He had no facilities for cooking, no stove or cooking utensils, no table or dishes, in fact no appliances for housekeeping. He claims to have kept his trunk and clothing at this house, but on April 2, when he wished to show his deed to the surveyor they went to Inglis' house and he there took it out of his trunk. The neighbors who visited Inglis' from time to time during the summer, testify that Crawford worked, ate and slept there, and in fact the testimony is overwhelming that he had no residence elsewhere.

Crawford and Inglis were partners in the cattle business. Inglis was to give him half the increase and furnish and keep him ("board and washing") and he was to have "a few dollars" as he wanted money, this to be taken into account at annual settlement. Crawford says:

> In November we started to brand the cattle and we sort o' disagreed in regard to the money he had given me, so he told me he would give me so much a month for the time I had worked and put in my board and washing into it, and I said all right.

They settled for the time from January 1885 on this basis, and Crawford continued to live at Inglis' working by the month. He gives his occupation as that of "cow-boy." Cain was a "prospector"; he was going away and wanted to sell his improvements on his tract. Inglis and Crawford had been herding on it, and needed it as an annex to Inglis' ranch, not as a home for Crawford. They bought the improvements, evidently to keep the land open for grazing; they allowed Cain to take away the fixtures to the well and they put timber and earth over the top of it, because it was useless to them, and they made no improvements on the house because it was not intended that Crawford should live there. This is one of the badges of fraud attaching to this claim.

The testimony shows that this settlement, such as it was, was on the E. ½ NW. ¼ and W. ½ NE. ¼ of Sec. 14, and not on the land in controversy. When he had the survey made on April 2, 1885, he included the SE. ¼ of SE. ¼ of Sec. 11 and NE. ¼ of NE. ¼ of Sec. 14, abandoning the south half of the land he bought of Cain. The NE. ¼ of NE. ¼ of Sec. 14, is very rough, stony, poor land, with the exception of a small parcel of it; and Crawford hesitated about including it in the survey until informed by the surveyor that the SE. ¼ of the SE. ¼ of Sec. 11 would not be considered contiguous to the NW. ¼ of NE. ¼ of Sec. 14, and that to cover the tract on which the pumps were situated, and which he wanted, he would have to take in the rough "40 acres"; and then it was that he concluded to include it in his declaratory statement

so that he could cover the tract on which were the pumps and buildings of the mining company.

After the land was restored and after the company had filed on the mill site, Crawford filed on his tract alleging settlement March 1st and it is very apparent that this was done to throw a cloud upon the mill-site claim. Crawford told a witness that he intended to hold it and get $20,000 from the company. Inglis did not testify in the case, he had evidently been using Crawford, as a mere tool to hold the Cain land for grazing purposes, and the changing of the tracts after the land was restored was a mere experiment, a matter of speculation purely, and this is another badge of fraud which attaches to the Crawford claim.

The well settled rule that "Ignorance of law will not excuse" can not be set aside in this case, besides "A pre-emptor who in the presence of an adverse claim elects to make final proof must abide the result thereof, and submit to an order of cancellation in the event that his proof fails to show compliance with the law." Hults *v.* Leppin (7 L. D, 483.)

This brings me to the consideration of the application for patent for the mill site and the protest of Crawford against the same. Crawford's declaratory statement having been disposed of the question of priority is settled, and it only remains to be seen whether under the statute and departmental regulations and rulings the Sierra Grande Mining Company is entitled to patent for the 4.9 acres of land located, surveyed and appropriated by it, as a mill site, in connection with the "Annie P." lode claim. There is no question as to the said company enjoying the use and occupation, for mining purposes, of a vein or lode, located, surveyed and called the "Annie P." lode, and that it has taken steps to obtain title thereto, and that the 4.9 acres fulfills the conditions of a mill site tract, if *used* as such in connection with said lode; but you decide that it is not being *used* as a mill site but "solely for the purpose of supplying water through pipes," etc. The company procured a deed from Dan Duncan for three acres of this land in 1881, and in that and following years, at a cost of $50,000 it placed thereon an engine and pump house, and placed a valuable engine and pumps therein, and erected houses for its engineers and pumpmen to live in, and surrounded the tract by a post and wire fence and from thence laid pipes to said "Annie P." mine, to carry water to it. It is shown that the water thus carried is absolutely necessary to the operation of said mine, being used to operate its mill since 1882. When the land was declared forfeited and restored to the public domain, its deed from Duncan was rendered invalid, and it immediately proceeded under statutory provisions and the departmental regulations to procure a title from the government to the three acres and an additional 1.9 acre, and it substantially complied with the requirements necessary to procure a patent, but the substance of the matter is the *use* to which it applied the land.

The Charles Lennig case, *supra*, was fully discussed and followed by

Acting Secretary Muldrow in the Cyprus Mill site case *supra*. I quote from the latter case—

> In the case of Charles Lennig (*supra*) this Department held that said section 2337 contemplated the actual use or occupation by improvement or otherwise, for mining or milling purposes of the land; that under the second clause of said act the right to a patent of a mill-site depends upon the existence on the land of a quartz mill or reduction works; that under the first clause of said section 'it is not necessary that the land be actually a mill-site; that the use or occupation of the land for mining or milling purposes is the only pre-requisite to a patent; that the use of the land 'for depositing tailings or storing ores, or for shops or houses for his workmen, or for collecting water to run his quartz mill, . . . . . would be using it for mining or milling purposes;' that the occupation for mining or milling purposes as distinguished from use, must be more than mere naked possession, and that such occupation must be shown by 'outward and visible signs of the applicant's good faith;' also that where the applicant is not actually using the land 'he must show such an occupation by improvements or otherwise as evidences an intended use of the tract in good faith for mining or milling purposes.'

In the Lennig case it will be observed that Lennig purchased "that certain water right and water privilege" by which grant the water of a certain spring could be conducted by a ditch to land other than that of the proprietor and there used. Lennig had no right to use or occupy the land except to cut and maintain the ditch, he could not erect any structure thereon, his right was a mere easement in the water and the right to flow it off the land, and it was held that this was not patentable as a mill-site. In the Cyprus mill-site case the Frisco Mining and Smelting Company took possession of a spring that had formerly supplied the inhabitants of the town of Bradshaw with water and dug it out, encased it with masonry, furnished it with a "two hand" pump and horse pump, and carried the water away to be used by its employes for domestic purposes in houses, stables etc. It was held that this use of the water "for mining purposes" was too remote, to entitle the company to a patent for the land as a mill-site. It is certainly very apparent that in the case at bar the claimant presents an entirely different state of facts than those presented in either of those cases. Here we find actual occupation of the land, with lasting and valuable improvements. It is true the company consumes only the water, but it occupies and *uses* the land in connection with its lode mine, and such *use* is necessary to the operating of the mine.

Having considered the record and testimony in the case, I conclude that the terms and conditions of the first clause of section 2337 R. S. are fully satisfied so far as the *use* to which this land is applied is in issue, and in so holding I am supported by the cases above mentioned as well as by the ruling in the case of Le Neve Mill Site (9 L. D., 460).

Your decision is accordingly reversed. The pre-emption filing of Crawford is canceled and his protest against said mill-site dismissed.

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### HOMESTEAD ENTRY—RELINQUISHMENT.

### CLEVELAND *v.* NORTH.

A relinquishment of an entry, framed in terms of absolute and unconditional surrender of all rights claimed thereunder, is not limited or modified in its operation by the written statement therein that such relinquishment is made for the purpose of making a new entry in lieu of the one relinquished.

Where the evidence is conflicting, concurring decisions of the local and general land offices, on questions of fact, are generally accepted as conclusive by the Department.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September* 26, 1890.

I have considered the case of Spencer I. Cleveland *v.* William North upon appeal by both parties from your office decision of February 12, 1889, holding for cancellation the pre-emption declaratory statement of said North, and denying the priority of said Cleveland's homestead claim and refusing to re-instate said homestead claim for the NE. ¼ of the NE. ¼ and the S. ½ of the NE. ¼, and the SE. ¼ of the NW. ¼, of Sec. 10, T. 10 S., R. 19 W., Wa Keeney, Kansas, land district.

The record shows that on the 15th day of September, 1884, William North filed his pre emption declaratory statement for said land and on the 20th day of October, 1884, Spencer I. Cleveland made homestead entry of the same tract which, on the 30th of January, 1885, was canceled by relinquishment.

On the 3d day of February, 1885, said Cleveland filed his affidavit of contest against said North's pre-emption claim, alleging as grounds:

I. That he, Cleveland, is in possession of and residing on said land and has valuable improvements thereon.

II. That at the time of his alleged settlement on said lands, to wit, September 11, 1884, North was not a qualified pre-emptor, that he was then residing on a tract, of school lands as a settler under the school lands of Kansas, and that he has since proved up and acquired title to said school lands.

III. That he fraudulently obtained a relinquishment from complainant of his said homestead No. 7078 which he avers is fraudulent and which was never delivered by affiant to North.

IV. That claiming said land as a pre-emptor he, North, had then forcible possession of it in violation of law. That his H'd claim is prior and superior to that of North's D. S., and asks permission to prove it.

This application was rejected by the local officers and upon the appeal of North to your office, you, after considering the case directed the local officers to order a hearing on said contest. This they did and set the hearing for March 18, 1886, at which both parties appeared and introduced their evidence. Considering the same the register and receiver found that North was not a qualified pre-emptor and that Cleveland's homestead right has been forfeited; first, by failure on his part to establish and maintain a residence on the land, second, by sale and relinquishment.

From their decision an appeal was taken to your office where on the 12th day of February, 1889, the decision appealed from was modified by holding that said contest "should not be dismissed, because of the interest of the government hearing." And your office further found that

while all of the allegations of the complaint have not been proven, a sufficient number have been to sustain it as against North. Cleveland is allowed no preference right of entry, however, because he deliberately relinquished all the right he had in said land. Your decision is, therefore, modified as above indicated. The declaratory statement of William North is hereby held for cancellation, the priority and superiority of Spencer I. Cleveland's homestead claim denied, and its re-instatement disallowed.

From your office decision both parties appeal.

In view of the conclusion I reach in the case, after examining the entire record, I do not deem it necessary to enter into a discussion of the several errors assigned by the respective parties; however, there is one which seems to require some discussion in order properly to meet the claims urged. It is the second error assigned by the appellant Cleveland, which is in effect: That your office erred in finding from the evidence that plaintiff ever made an *unconditional* relinquishment or ever delivered such relinquishment. All the witnesses agree that a relinquishment was made, but it is claimed and strenuously insisted upon by counsel for Cleveland, that it was conditional, and that the condition was struck out without the knowledge or consent of the maker. Said relinquishment was written upon the back of the receivers' duplicate receipt for Cleveland's entry and duly acknowledged. It was introduced in evidence and read as follows:

I hereby relinquish all my right, title, and interest in and to the within described tract of land to the government of the United States.

Then follows the following words through which a pen with red ink has been drawn: "For the purpose of making a new entry in lieu of his said homestead No. 7078."

With these words considered as a part of the relinquishment it is hard to conceive how it could have been framed in more absolute and unconditional terms. The language preceding the words so stricken out, clearly constitute an absolute and unconditional surrender of all right, title, and interest in and to the land.

The words stricken out do not in any way modify, suspend, defeat, or limit the relinquishment. On the contrary, they simply express the purpose, or intention to do something in the future, to wit, to make a new entry in lieu of the one relinquished. In no sense could the words stricken out be held to attach a condition to the relinquishment preceding them.

It is claimed that the relinquishment was never delivered by Cleveland, and therefore, was not binding on him; on this point the evidence is conflicting, the local officers and your office concurred in finding against him, such finding will be accepted as conclusive by the Department. Chichester *v.* Allen (9 L. D., 302); Conley *v.* Price (9 L. D., 490).

I have carefully examined all the evidence in the case, which is quite voluminous, and I find the facts to be substantially as stated in the decision appealed from and I find no reversible error in your conclusion, or reason for disturbing your judgment. It is, therefore, affirmed.

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PRACTICE—CERTIORARI—AMENDMENT.

PETERSON *v.* FORT.

An application for certiorari, denied on account of its informality, can not be amended but is no bar to a new application.

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

This Department is in receipt of a letter from John H. Hickox jr., transmitting an affidavit which he asks to have considered, *nunc pro tunc*, in connection with the application for certiorari, in the case of Catherine Peterson *v.* George W. Fort.

The decision of September 4, 1890 (11 L. D., 238), denying the application is not a bar to a new application as the petition was not considered on its merits. There is nothing, however, before this Department, whereof to make amendment. He will be allowed to file new application, and upon the same being filed, with proof of notice to the adverse party of the same, it will receive due consideration.

Please notify Mr. Hickox hereof.

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PRACTICE—AFFIDAVIT OF CONTEST—CONTINUANCE.

GEBHARD *v.* CONLON.

The dismissal of a contest is not warranted by the fact that the affidavit of contest is not dated.

The continuance of a case from day to day, with the knowledge and consent of the parties thereto, precludes subsequent objection to such action.

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

The record in the case of Henry D. Gebhard *v.* James Conlon shows that on April 18, 1881, Conlon made homestead entry of the NE. ¼, Sec. 2, T. 137, R. 55, Fargo, Dakota.

September 30, 1886, Gebhard initiated contest against the same, alleging that Conlon had wholly abandoned said tract; had changed his residence therefrom for more than six months since making the entry; that said tract was not settled upon and cultivated as required by law and that he had never established a *bona fide* residence on said land. This affidavit of contestant is without date.

The affidavit of the corroborating witness thereto is dated September 29, 1886. The notice to claimant bears date September 30, 1886, and is made returnable November 9th of the same year.

On said last date both parties appeared, attended by counsel, and defendant's attorney moved to dismiss the contest because the affidavit of Gebhard was not dated. This motion was overruled by the local officers, and exceptions taken thereto.

The record shows no further action in the case until November 12th, three days later, at which time the attorney for the defendant filed a motion to dismiss the contest for want of prosecution. This motion was overruled, and exceptions noted.

The testimony was then proceeded with, and, after plaintiff's witnesses had been examined, counsel for defendant moved to dismiss the contest, because the allegations thereof were not sustained by the testimony offered on the part of the plaintiff. This motion was also overruled, and exceptions duly taken by defendant.

The defendant's counsel chose to stand upon these three motions, and no witnesses were introduced nor testimony submitted by him.

Some time later (the exact date not appearing), the register and receiver recommended the cancellation of the entry. The parties in interest were notified of this decision February 7, 1887, and Conlon duly appealed, and your predecessor by his letter of February 13, 1889, reversed the action of the local officers and dismissed the contest, and now the plaintiff, Gebhard, appeals to this Department.

Your office decision is based upon the insufficiency of the testimony to support the allegations of contest and sustains the action of the register and receiver in overruling the first and second motions above set forth.

This action of the local officers was right. The objection that the affidavit of contest was not dated is purely technical and of no force.

The affidavit is in the nature of information to the register and receiver that the law is not being complied with, and is the basis of notice to the claimant in default. The notice is the warrant that "recites the offense," and informs the claimant of the charges against him, and gives jurisdiction to the local officers. Seitz *v.* Wallace, 6 L. D., 299. This notice was properly dated.

The motion to dismiss for want of prosecution was based on the following facts, as appears from report of the register and receiver:

On the return day of the complaint (November 1, 1886,) all parties herein appeared, with their counsel. The case of Henry Dratt *v.* John J. Conlon was pending before the local officers, and was set for hearing on the same day and at the same hour. For some reason, presumably by consent, the case of Dratt *v.* Conlon was taken up, and the trial occupied three days time, not being completed until the 12th of November. The attorneys for the defendant herein were also the attorneys for John J. Conlon, and were present in court attending to his interests in his

said trial, during which the case at bar was of necessity held in abeyance, awaiting the determination of the case of Dratt *v.* Conlon, which occupied the attention, not only of the officers, but of the lawyers as well, the same lawyers being employed in both cases. While the Dratt and Conlon case was thus being tried, no entry was made on the docket or trial record of the office in the case at bar, and because of the absence of an entry of continuance to a day fixed, or from day to day, during the pendency as aforesaid of the other case, the attorneys for Conlon in the Gebhard *v.* Conlon case, on the third day and during the progress of the Dratt-Conlon case, moved to dismiss the case at bar for "want of prosecution," because, I presume, the case had been set for the 9th of November, and the 12th of November had arrived and it had not yet been taken up for trial. The motion, considered in connection with the circumstances under which it was made was frivolous and did not deserve to be entertained by the officers. The attorneys who filed it had been in court during all the time the other case had been on trial, participating therein, and had raised no objection to the disposition made of the case at bar. No rights of the defendant were prejudiced thereby, and if it were necessary, under the circumstances, to note on the trial docket (which I do not hold it to be) such continuance from day to day, the fact that this was not noted is not the fault of contestant, and such continuance was had with the full knowledge and consent of defendant's attorneys, and they should not thereafter be heard to object. Smith *v.* Johnson, 9 L. D., 255.

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## CIRCULAR—ENTRY BY EMPLOYÉ OF THE GENERAL LAND OFFICE.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., September* 15, 1890.

*To the Officers and Employés of the Land Department.*

GENTLEMEN: Section 452 of the Revised Statutes provides that—

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

The Honorable Secretary of the Interior, in the case of Herbert McMicken *et al.* (10 L. D., 97; 11 L. D., 96), has decided that the disqualification to enter public lands, contained in said section, extends to officers, clerks, and employés in *any* of the branches of the public service under the control and supervision of the Commissioner of the General Land Office in the discharge of his duties relating to the survey and sale of the public lands.

In accordance with said decision, all officers, clerks, and employés in the offices of the surveyors-general, the local land offices, and the Gen-

eral Land Office, or any persons, wherever located, employed under the supervision of the Commissioner of the General Land Office, are, during such employment, prohibited from entering, or becoming interested, directly or indirectly, in any of the public lands of the United States.

Very respectfully,

LEWIS A. GROFF,
*Commissioner.*

Approved:

GEO. CHANDLER,
*Acting Secretary.*

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PRACTICE—PETITION FOR RE-REVIEW—APPLICATION FOR HEARING.

SPICER ET AL. *v.* NORTHERN PACIFIC R. R. CO.

A petition for re-review should present facts or questions of law not previously considered or involved in the case.

An application for a hearing addressed to the Secretary of the Interior calls for the exercise of his discretionary authority, and it is therefore just and proper that he should, in such a case, be fully informed as to all facts connected with the subject matter, and determine, after a consideration of the whole subject, whether such facts demand action.

*Secretary Noble to the Commissioner of the General Land Office, October 1, 1890.*

The attorney for Spicer *et al.* has filed a motion for review of departmental decision of July 17, 1890, in the case of R. E. Spicer *et al. v.* Northern Pacific R. R. Co. (11 L. D., 50) involving the NE. ¼ of Sec. 19, T. 25 N., R. 43 E., Spokane Falls, Washington.

The decision thus complained of was rendered upon a motion for review of departmental decision of April 12, 1890 (10 L. D., 440), and hence the present motion is in the nature of a petition for a re review.

Service of notice of the filing of this motion was not properly shown in accordance with the rules of practice requiring such service to be made personally or by registered letter, but inasmuch as the attorneys for the opposing parties have seen fit to oppose the granting of said motion on the ground that it is not authorized by the rules of practice, and of its insufficiency, without objection to the service, they have placed themselves within the jurisdiction of this Department, and waived the question as to the sufficiency of the notice.

This motion does not come up to the requirements prescribed for petitions for re-review as laid down in the case of Neff *v.* Cowhick (8 L. D., 111) and re-affirmed in numerous decisions, among which are Creswell Mining Co. *v.* Johnson (8 L. D., 440), Dayton *v.* Dayton (9 L. D., 93); Wenie *et al. v.* Frost (9 L. D., 588).

While this is true, yet in view of the peculiar circumstances in this case I have thought best to waive those requirements and to consider upon its merits the motion thus presented.

In answer to the first and second reasons urged in support of this motion it is sufficient to say that the original petition was addressed to the Secretary of the Interior and appealed to his discretionary power. For this reason it was not only proper, but necessary to a right and just exercise of that power that he should fully inform himself upon all points and facts connected with or touching upon the subject matter. In matters of this character it is the duty of this Department to determine after a careful consideration of the whole subject whether the facts demand action.

Attention was necessarily called to the interest alleged by the intervenors in the land involved in this controversy. It was then decided that they had such interest in the land as entitled them to be heard in opposition to the petition then under consideration, and no sufficient reason for a different conclusion is presented in the argument in support of the third reason in this motion. To set aside the title of those through whom these intervenors claim would be to render their title uncertain and depreciate their property. The action sought to be brought about by these petitioners would result in the divesting of these intervenors of the title now held by them and the substitution therefor of an equitable title, based upon occupation alone. They are certainly entitled to be heard in defense of the title now held by them.

The fourth reason alleged in support of this motion is based upon the theory that the statement of Enoch, the Indian, to the effect that he had not severed his tribal relations, was never properly executed inasmuch as the person before whom it purports to have been sworn to was not at that time qualified to administer oaths. It would be sufficient in reply to this to say that Enoch supposed he was making an affidavit before a proper officer, and that the effect of his statement thus made upon his credibility is the same as if such officer had been duly qualified. Besides this, however, the facts and circumstances presented show so conclusively that Enoch had not abandoned his tribal relations that his statements to the contrary would be successfully overcome had he made no contradictory statement.

In answer to the fifth allegation in this motion it is only necessary to say that the question to be determined was as to whether under all the facts the discretionary authority vested in the Secretary of the Interior should be exercised in ordering a hearing and that all facts relating to the matter in issue were properly to be considered. This answer applies also to the sixth and seventh allegations. All the papers mentioned in those allegations were necessarily considered in arriving at a conclusion in this matter.

It is true that the affidavits presented by the intervenors as to Enoch's tribal relations were not filed until on or about the day of the oral argument herein, but the petitioners had ample time between that date and the date of the decision to present any affidavits or other papers they desired and they did in fact on June 26th file with their

brief an affidavit by Enoch upon the very point mentioned in paragraph 8 of this motion. This paragraph then presents no good grounds for the action they now ask shall be had.

The oral argument was not restricted to the points mentioned in the ninth allegation, but included all the points presented by the petition of Spicer *et al.*, as well as the right of Glover *et al.*, to intervene. If the petitioners were taken by surprise by the matter presented in behalf of the intervenors, an application for further time to prepare to meet such matters should have been presented in due season. As a matter of fact though, as hereinbefore stated, ample time elapsed between the date of the presentation of the motion to intervene and the date of the rendition of the decision now complained of, to allow of the filing of affidavits or other matter by the original petitioners and was in fact utilized by them to the extent of filing the affidavit of Enoch. This ninth allegation then presents no good reason for granting this motion.

The tenth, eleventh, and twelfth allegations have been answered in effect in the discussion of the previous paragraphs. As hereinbefore said, Glover *et al.*, showed such interest in the question presented as clearly entitled them to be heard. In order to properly decide upon the original petition filed herein, it was necessary to take into consideration all the facts touching upon the matters in dispute.

After a careful consideration of the matters presented by this motion, each of which was fully presented by the papers and records in the case and the oral argument upon the motion for review and necessarily considered in arriving at a conclusion thereon, I perceive no good and sufficient reason for granting the prayer of this motion and the same is therefore denied.

On September 9th, the attorney for Spicer *et al.*, filed in this office a letter offering, in the event the decision complained of is revoked, to amend their petition to make it applicable to the east half alone of the tract in controversy thus relieving from all question the west half of said tract, upon which it is said all the improvements of the intervenors are situated. This action would not change the facts in the case or affect the conclusion heretofore reached, and the proposition can not be entertained.

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### COAL LAND DECLARATORY STATEMENT—SECOND FILING.

### WALTER DEARDEN.

A second coal declaratory statement cannot be filed, in the absence of a valid reason for failure to perfect title under the first.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 1, 1890.*

I have considered the appeal of Walter Dearden from your decision of July 18, 1889, rejecting his application to file coal declaratory statement for the NE. ¼ Sec. 35, T. 33 S., R. 66 W., Pueblo, Colorado, land district.

He made said application on January 22, 1889, and the same was rejected by the local officers for the reason that he had made a previous filing of like kind and had thereby exhausted his right of entry, from which action he appealed. Your office sustained the action of the local office, and he again appealed.

The record shows that on January 26, 1888, he filed a coal declaratory statement for the NE. ¼ of Sec. 25, same township and range, and that he relinquished the same January 14, 1889. He says he relinquished because unable to pay for the land.

This case is very similar to the case of Albert Eisemann (10 L. D., 539), and the claims of the attorneys are in substance identical, to wit: that a mere declaration of intention to purchase which is not consummated by actual entry should not, under the law of Congress, exhaust the right of entry.

In the case of Eisemann (*supra*), after discussing the question fully, it is said:—

> Eisemann does not present any excuse for not consummating his first filing, but base his claim to make a second filing solely upon the ground . . . . that a coal land filing unless completed and payment is made for the land embraced therein, does not exhaust the rights of the applicant . . . As we have seen, the regulations limit a party to one filing and this is not in conflict with the statute, but needful for carrying its provisions into effect.

Dearden gives no satisfactory excuse for not consummating his first filing, he held it almost a year, and relinquishing it, asks to make another filing, giving no assurance that he would not do the same with it, and then apply for a third, thus keeping a tract perpetually under a filing. As you say in your opinion it would be equivalent to giving an *option* to the entryman for one year for $3.00 and then allowing him to take another on another tract for a like sum, so on indefinitely. There can be no good reason for such a practice, it is certainly contrary to the intention of Congress when it enacted the law, and is in violation of the regulations relating to coal land entries.

Your decision is affirmed.

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### HOMESTEAD ENTRY—RELINQUISHMENT—PROTEST OF WIFE.

DODGE *v.* LOHNES.

The protest of the entryman's wife against the relinquishment of a homestead entry can not defeat the legal operation of such instrument.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October* 1, 1890.

James M. Dodge made homestead entry for the S½ of the NE¼ and S½ of the NW¼ of Sec. 35, T. 5 S., R. 20 W., Kirwin, Kansas, on September 27, 1882. He filed his relinquishment of the same in the local office on July 16, 1885. The entry was canceled, and on that day John

S. Lohnes made homestead entry for the same tract, having purchased the improvements thereon from the entryman.

Prior to the filing of the relinquishment, and before Lohnes made his entry, Emily E. Dodge made application at the local office to restrain her husband from relinquishing his homestead entry, and that she be allowed to retain the homestead in her own right and for the benefit of herself and children. It was urged in support of the motion, that the rights, equities and interests of the applicant in the homestead are fully recognized, guaranteed, and protected by section nine, Article fifteen, of the Constitution of the State of Kansas.

Corroborating witnesses to this petition, which was regarded in the nature of a contest, were not secured on that day. There is some controversy as to when the petition duly corroborated was filed; but the proof is clear that both Lohnes and the entryman, Dodge, knew that Emily E. Dodge opposed the sale of the improvements and the relinquishment of the entry before Lohnes made his entry of the land, and the latter made his entry with full knowledge of her disapproval.

Contestant's application was transmitted to your office on August 30, 1886, and you ordered a hearing to determine the matters alleged.

On February 26, 1887, the register and receiver dismissed the contest, and by your office decision of May 4, 1889, you affirmed that judgment, and contestant again appealed.

The evidence shows that contestant was married to James M. Dodge on November 12, 1875. She lived with him on the land from about the date of entry until he relinquished the same and sold the improvements. Both husband and wife expended means in improvements upon the land. The evidence, however, further shows that James M. Dodge was a drinking character, a gambler, profligate and given to raising disturbances. He was killed by one Frank Sims, a few days after making his relinquishment.

The first section of the act of May 14, 1880 (21 Stats., 140), 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.

When a relinquishment is filed in the local office, the entry should at once be canceled, and the land thereafter held open to settlement. (Sears *v.* Almy, 6 L. D., 1). An application to enter, accompanied by a relinquishment, is immediately effective on the filing of the relinquishment.

The constitutional provision invoked in behalf of contestant can have no relation whatever to the present case; it provides that:

> a homestead to the extent of one hundred and sixty acres of farming land, occupied as a residence by the family *of the owner*, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife when that relation exists.

Had contestant been a deserted wife and dependent upon her own resources for support, she would have been qualified to make homestead entry. (Wilber *v.* Goode, 10 L. D., 527).

The act approved June 8, 1880 (21 Stats., 166), provides that any person who may be legally authorized to act may make proof and payment for one who has initiated a claim, and afterwards becomes insane. But in this case, contestant was not a deserted wife; neither was her husband insane; he executed a written relinquishment of his homestead entry when he had a mere inchoate right to the land—having lived on his homestead less than three years. Prior to patent, the title to the public domain remains in the United States. (Frisbie *v.* Whitney, 9 Wall., 187). Hence the homesteader was not "the owner" when he signed the relinquishment, and therefore, the constitutional provision sought to be invoked has no relation to him nor to any one living on land prior to patent.

When the homesteader in this case relinquished his right, it may be conceded that his wife objected to it; also that Lohnes had notice of this and that contestant wanted to enter the land. It may be conceded that it worked a hardship upon her, but there is no law to prevent such hardships, and one who has initiated a claim for the public lands may relinquish that claim, and the land, *ipso facto*, is subject to entry by any qualified person.

Your said office decision is accordingly affirmed.

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### RAILROAD GRANT—SETTLEMENT RIGHT—ALIEN.

### CENTRAL PACIFIC R. R. CO. *v.* TAYLOR ET AL.

The settlement of an alien who has not declared his intention to become a citizen, existing at the date when a railroad grant becomes effective, does not except the land covered thereby from the operation of the grant; and the subsequent qualification of the settler will not relate back so as to defeat the grant.

*Secretary Noble to the Commissioner of the General Land Office, October 2, 1890.*

I have considered the case of the Central Pacific Railroad Company *v.* John A. Taylor and James Wadman, on appeal by the former from your office decision of April 22, 1887, rejecting its claim to the S. ½ NE. ¼ and lots 1 and 2, Sec. 3, T. 6 N., R. 2 W., Salt Lake City, Utah.

The tracts are within the limits of the grant for said company by act of July 1, 1862 (12 Stats., 489), enlarged by act of July 2, 1864 (13 Stats., 356), the rights of which attached on definite location October 20, 1868. See Central Pacific R. R. Co. (5 L. D., 661). On said date there was no claim of record adverse to that of the company.

It appears that on May 8, 1869, one Harvey Murdock filed declaratory statement for the tracts alleging settlement April 30, 1863, and that on May 14, 1869, James Wadman filed declaratory statement for the same, alleging settlement June 1, 1863. Neither of these claims was perfected.

On application by the company to list the tracts a hearing was ordered to clear the record of said filings. At the hearing, on February 2, 1885, John A. Taylor appeared and offered homestead entry for the land, alleging settlement in 1879. From the evidence taken it appears that Wadman lived on said land with his family from 1867 to 1871 with the intention of securing it under the public land laws, but that he did not declare his intention to become a citizen until October 27, 1868, seven days after the definite location. In 1871 Wadman sold his improvements to other parties who in 1879 sold to Taylor the present claimant. Taylor has maintained continuous residence on the tract with his family since 1879. He has enclosed it, divided it by fences into four fields and has a dwelling house and twenty-five acres in cultivation. His improvements are valued at $1500.00.

Your office held that the claim of Wadman excepted the land from the operation of the grant under the rule in the case of Marleyhan *v.* California & Oregon R. R. Co. (2 C. L. L., 930). That case, decided by Secretary Schurz on February 13, 1878, held that (syllabus), "naturalization has a retroactive effect, and makes the claim of a pre-emptor as valid as if he had been naturalized before settlement."

On May 13, 1881, in the case of McMurdie *v.* Central Pacific R. R. Co. (8 C. L. O., 36), it was held the settlement of one who has not declared his intention to become a citizen would not operate to except land from the grant. In Titamore *v.* Southern Pacific (10 L. D., 463), it was held that the settlement of an alien would not prevent selection by the company of an indemnity tract, and that "his subsequent qualifications could not relate back so as to defeat an intervening right," viz., the company's.

As Wadman did not declare his intention to become a citizen until after the rights of the road attached on definite location, I must hold, on the authority of these later decisions, that his claim was not sufficient to except said trust from the operation of the grant.

That decision appealed from is accordingly reversed.

TIMBER CULTURE ENTRY—HOMESTEAD RIGHT.

LINVILLE *v.* CLEARWATERS ET AL. (ON REVIEW).

The allowance of a timber culture entry segregates the land covered thereby, even though such entry may not be made of record; and the failure of the local office to place the entry of record will not affect the rights of the entryman thereunder.

The subsequent homestead entry of another for such land, without actual notice of the prior entry, or any claim thereunder, followed by due compliance with law, constitutes a legal claim that will attach on the relinquishment of the prior entry, and exclude the right of a contestant against said entry.

*Secretary Noble to the Commissioner of the General Land Office, October 1, 1890.*

This motion is filed by A. J. Linville for review of the decision of the Department in the above case, re-instating the homestead entry of J. W. Williams, for the NW. ¼, Sec. 15, T. 1 N., R. 3 E., Tucson, Arizona. (10 L. D., 59).

The material facts in this case as recited in said decision are as follows:

Clearwaters made timber culture entry of the tract in controversy July 18, 1878, but the local officers neglected to enter it upon the tract books of the office, and on April 25, 1883, Williams made homestead entry of the land, established residence with his family, and made valuable improvements thereon. Clearwaters made no effort to break or cultivate the land, and there was nothing upon the land to indicate to Williams that there was an adverse claim.

On September 22, 1885, you held Williams' entry for cancellation, because of conflict with the timber culture entry of Clearwaters, but the local officers, instead of notifying J. W. Williams, sent the notice to J. D. Williams, in consequence of which no appeal was taken, and on January 21, 1886, his entry was canceled.

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

This affidavit was corroborated by three persons, who lived near the land.

On July 29, 1886, A. J. Linville filed a contest against the timber culture entry of Clearwaters, and upon a hearing had thereon the local officers recommended the cancellation of Clearwaters' entry, and allowed

Linville the preference right of entry, subject to whatever intervening right Williams may have by reason of his application to re-instate his homestead entry.

Your office denied the application of Williams to have his homestead entry re-instated, but he was allowed thirty days in which to contest Clearwaters' entry. Williams was notified of this December 16, 1887, but he did not file contest affidavit until March 14, 1888, which was rejected by the local officers, because it was not filed in time. Upon appeal, your office held that as Williams was allowed thirty days after the decision of your office became final, he was allowed ninety days, at least, in which to file contest.

Upon the appeal of Linville from this decision, the Department in the decision now under review held that there was no rule or law of the Department that would give to Williams the preference right of contest, but that the rights of Williams are superior to those of Linville, for the reason that under the circumstances his entry was good against all persons, except Clearwaters, from the first, as the land was not at the time of his entry in reservation by reason of any act of Congress, nor settled upon, improved, and in the possession of another; nor was there upon the land any indication that any adverse claim existed.

Clearwaters relinquished his entry November 16, 1887.

A review of this decision is asked upon the following grounds:

1. Because Williams had exhausted his right to make homestead entry.

2. Because he had no right to settle upon the land, as it was at the time occupied and improved by Walter Hastings.

3. Because Williams' affidavit, stating that he had no notice of any conflicting claims, is disproved by the affidavit of Aversch, showing that at the time of his settlement thirty acres of the land were cultivated, a well dug, and a house erected, which was in possession of Walter Hastings, who claimed it as his home.

4. Because, while the entry of Clearwaters was not placed on the tract books, the number of said entry was marked upon the plat, which was open to the inspection of every one.

As to the issues presented in the first, second, and third grounds set forth in the motion for review, it is sufficient to say that they do not materially affect the real issue in this case, and it is unnecessary to consider them. If Williams is not qualified to make entry, or if there are adverse claims to the land, they can be presented in a contest against his entry.

The material question involved in this case is, whether Williams could initiate such a claim or right by settlement and entry, notwithstanding the land at the time was covered by a prior timber-culture entry, as would defeat the preference right of a third party who sought to contest the former entry. Upon this question the Department held that "A homestead entry made on land covered by the prior timber

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

It is contended, however, by contestant that the Department erred in holding that the timber culture entry of Clearwaters was not of record, because while it did not appear on the tract books, the number of the entry was marked upon the plat, which was open to the inspection of every one. This may be true, but it was not such a record of the entry as would charge Williams with notice in determining the question whether he acted in good faith in making his entry without first applying to contest the timber culture entry of Clearwaters.

The entry of Clearwaters having been allowed, segregated the land, even though it may not have been entered of record, and the failure to place it of record would not affect his rights; but from the fact that the entry was not placed of record on the tract books, and that Williams had no actual notice thereof, or notice of any assertion of claim by Clearwaters, and he having been allowed to make homestead entry of the land upon which he has resided continuously, with his family, and made valuable improvements thereon, relying upon the validity of said entry, it constituted a legal claim that would attach to the land the instant it became a part of the public domain. Pool *v.* Maloughny, 11 L. D., 197. Nor could the application of a third party to contest the entry of Clearwaters intervene to defeat this right. No one had a right to complain of the allowance of the entry of Williams, except Clearwaters and the government, and it was on this view that it was held that, "as to all parties, except Clearwaters, the land was public land at the date of Williams' entry."

The motion is denied.

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### RAILROAD GRANT—ACT OF MARCH 3, 1887.

### HAWORTH *v.* ST. JOSEPH AND DENVER CITY R. R. CO.

The Department has jurisdiction to entertain an application for the re-instatement of an entry under the act of March 3, 1887, if there has been no formal adjustment of the grant.

An applicant for the right of re-instatement under said act will not be heard to deny that he voluntarily abandoned his homestead entry where he has sold and transferred for a valuable consideration "all his estate, title, and interest" in and to the land covered thereby.

*Secretary Noble to the Commissioner of the General Land Office, October 2, 1890.*

By letter of September 7, 1887, your office transmitted the application of Ira Haworth for the re-instatement of his homestead entry for the W. ½ of the SW. ¼ and the SE. ¼ of the NW. ¼ of Sec. 19, T. 4 S., R. 4

E., Concordia, Kansas land district, and recommended that the St. Joseph and Denver City Railroad company, for whose benefit the land had been certified be called upon in accordance with the provisions of the second section of the act approved March 3, 1887 (24 Stat., 556), to relinquish or reconvey said land to the United States. By departmental letter of March 2, 1888, the papers were returned to your office with instructions to proceed as directed in departmental decision of February 21, 1888 in the case of the Winona and St. Peter R. R. Co. (6 L. D., 544).

By letter of June 19, 1890 you forwarded the papers in the case reporting that notice had been given to John B. Bloss, formerly attorney for the railroad company and to Clay, Robinson and Co., the reputed present owners of the land to show cause why proceedings under the act of March 3, 1887, should not be instituted. With these papers was a communication from Mr. Bloss stating, "I ceased to be attorney of said company on obtaining an adjustment of its land grant some years before the passage of said act of March 3, 1887, and consequently I herewith return your letter for service on whom it may concern." Mr. Bloss, however, proceeded to set up certain facts coming to his knowledge while acting as attorney for said company which as he claims, show this Department has no jurisdiction of the matter. By letter of June 30, 1890, you transmitted the reply of Clay, Robinson and Co., claiming to be the present owners of the land, the delay in the filing of which was, it is claimed, occasioned by a mistake in the notice first sent them, the land being described therein as in section *nine* instead of *nineteen*.

It is contended that the action contemplated should not be taken for various reasons in substance as follows:

1st. Because the grant to said company had been fully adjusted prior to the passage of the act of March 3, 1887.

2d. Because Haworth applied in 1878 to have his entry reinstated which application was rejected by which action his rights in the premises were fully adjudicated.

3rd. Haworth has executed and filed a relinquishment of all rights under his entry.

4th. Haworth is estopped from asking this relief because the present owners claim through him, he having entered into a contract to purchase said land from the railroad company, which contract he afterwards assigned and also executed a quit claim deed of his right in the land.

5th. That this application does not conform in any particular with the regulations of February 13, 1889 (8 L. D., 343), governing such applications.

This petition is not in conformity with the regulations prescribed, but since it was filed before any regulations to govern proceedings under the act in question had been formulated, consideration should not be denied it on this ground.

An inquiry at the railroad division of your office elicited the information that while the claims of said company under its grant have been virtually determined, yet there has been no formal adjustment of that grant. I am not inclined under these circumstances to decline to consider this petition on the ground of lack of jurisdiction in the Department under the act of March 3, 1887.

If Haworth comes within the provisions of this act of March 3, 1887, he can not be deprived of the benefits of such act by the fact that he had been denied the same relief under the provisions of the act of April 21, 1876. The object of the later act was to afford relief to those whose entries had been erroneously canceled, (Gale *v.* Northern Pacific R. R. Co. 10 L. D., 307), and it might be properly added that said later act is peculiarly applicable to those cases where relief is not afforded by any former remedial law.

One is not necessarily estopped from claiming the benefit of the provisions of this act by the fact that he has abandoned the land and executed a relinquishment of his rights under the entry sought to be re-instated, if such action was caused by a decision of the proper officers that the land passed to the railroad company under its grant. Harris *v.* Northern Pacific R. R. Co. (10 L. D., 264); Gale *v.* Northern Pacific R. R. Co. (10 L. D., 307).

In this case Haworth's entry was canceled in 1873, but his relinquishment was not executed until 1882, and then it was apparently made in furtherance of his application for the repayment of the fees and commission paid in making such entry, and upon the requirement of your office. Haworth had, however, in the meantime, on February 27, 1880, contracted to purchase said land from the railroad company, receiving a bond for a deed, and had on June 14, 1880, sold and conveyed by quit claim deed for the expressed consideration of $460, all his interest in said land; and had on June 23, 1880, assigned the bond for a deed. It is through the parties to whom Haworth thus transferred his claim to this land that the parties now opposing this petition for re-instatement of the homestead entry claim title. By this recognition of the title of the railroad company, and apparent abandonment of his claim to said land under the homestead law, Haworth induced these parties to invest their money in the purchase of this land, and he can not now in good conscience be heard to say to the injury of those parties that he did not voluntarily abandon his claim under the homestead entry. What might have been his standing here had no third parties been induced by him to invest money in this land, it is not now necessary to determine. Haworth will not, after this sale and transfer for a valuable consideration of "all his estate, title and interest" in and to said land be heard to say that he did not voluntarily abandon his claim thereto. Under the circumstances here presented I must decline to direct or recommend any further proceedings in this matter, and the petition under consideration is hereby denied.

FINAL PROOF—ACT OF MAY 26, 1890.

EDWARD BOWKER.

The purpose of the act of May 26, 1890, authorizing final proofs to be taken before "any commissioner of the United States circuit court" is to designate an additional or new officer before whom such proofs might be taken, and not to change in any manner existing provisions defining the place for taking such proofs.

The circular of June 25, 1890, issued under said act, must be construed to mean that said act does not authorize the making of the proofs and affidavits mentioned therein before said commissioner outside the county and State or district and territory in which the lands are situated, subject to the exception provided for in case the lands are within an unorganized county.

*Secretary Noble to the Commissionor of the General Land Office, October 2, 1890.*

I am in receipt of a letter from the attorney of E. P. Wells claiming as transferee of the NW. ¼ Sec. 25, T. 139 N, R. 63 W., Fargo, Dakota, by purchase from the entryman Edward Bowker, in which he states that said Bowker is now residing in the State of Nebraska and asks that the decision of the Department (10 L. D., 548), directing that said Bowker be allowed to submit final proof on his said homestead entry be so far modified as to allow said proof to be made in Nebraska.

The only question involved in this case is, the construction to be placed upon the act of May 26, 1890; that portion of which it is necessary to consider reads as follows:

> That the proof of settlement, residence, occupation, cultivation, irrigation, or reclamation, the affidavit of non-alienation, the oath of allegiance, and all other affidavits required to be made under the homestead, pre-emption, timber culture and desert land laws, may be made before any commissioner of the United States circuit court, or before the judge or clerk of any court of record of the county or parish in which the lands are situated; and the proof, affidavit, and oath, when so made and duly subscribed, shall have the same force and effect as if made before the register and receiver when transmitted to them, and with the fee and commissions allowed and required by law.

Was it the intent of Congress by this act to so far remove the submission of the final proof from the land desired to be entered as to allow it to be "made *before any* commissioner of the United States circuit court," in the United States no matter how remote he might reside from the land, or was it only the intent to provide an additional officer before whom proof might be submitted? It is not questioned that prior to the passage of this act, the law allowed such proof to be made only before the register or receiver, a judge, or in his absence, a clerk of a court of record in the county or state, district or territory in which the land is situated. General circular, January 1, 1889, page 15, and while the words of this act might seem at first view to authorize the making of proof, "before any commissioner of the United States circuit court" beyond the limits of the State or Territory within

which the land is situated, yet I have concluded after an analysis of the question that the act will not bear such interpretation.

It should be premised that from the beginning the pre-emption law has required proof to be made before the register or receiver. By act of June 9, 1880, (21 Stats., 169), pre-emptors were allowed to make the affidavit showing compliance with the law, before the clerk of the county court, or of any court of record "of the county and State or district and Territory in which the lands are situated," or in an adjacent county in the State or Territory if the lands were situated in an unorganized county. Until the passage of the act of March 3, 1877, (19 Stats., 403), homestead claimants were required to make proof before the register or receiver. That act authorized the making of such proof before the judge, or in his absence, before the clerk of any court of record of the county and State or district and Territory in which the lands are situate, with a provision similar to that above as to unorganized counties. The act of June 9, 1880, also authorized the making of the affidavit in commuted homestead cases as in pre-emption cases.

It thus appears that it has been the constant policy of the law to require claimants under these laws to go before the local officers in making proof or at least before a responsible officer of the county within which the land lies. The obvious purpose of this policy is to secure the proper and convenient examination of the matters submitted. An intention to abandon this policy should not be imputed to Congress unless the terms of the law admit of no other construction. Morton *v.* Nebraska (21 Wall., 660), State of Colorado (10 L. D., 222).

Section 627 R. S., authorizes each circuit court to appoint

in different parts of the district for which it is held so many discreet persons as it may deem necessary who shall be called "Commissioners of the circuit courts" and shall exercise the powers which are or may be expressly conferred by law upon commissioners of circuit courts.

If this statute in question authorizes a homestead claimant to make his proof before any such commissioner in any part of the United States, it reverses the settled policy of Congress in that regard. I find nothing in the history of the act to warrant this construction. There was no complaint that the law as it stood worked mischief, nor was any such remedy called for. The bill as reported from the committee of public lands of the House of Representatives contained the provision as enacted. In response to the question whether the bill changed the system of compensating registers and receivers, Mr. McRae, in charge of the bill, replied:

It makes no change whatever as to the compensation. It only provides that affidavits for these entries may be made before a *new officer*, who is named, to wit, the commissioner of the United States circuit court, and may be transmitted to the register and receiver. . . . The only thing left is the provision permitting, for the convenience of the settler, these affidavits to be made before a commissioner and transmitted by mail to the receiver, instead of requiring the settler to go in person to the land office.

This was the substance of the debate and the bill was so passed. The report of said committee defined the scope of the bill as follows:

> The purpose of the bill is to authorize all affidavits and depositions under the public land laws to be made before and certified by commissioners of the United States circuit court or clerks of a court of record for the county in which the land is situated, and to fix the fees for such work. It is for the convenience of the settlers and does not in any way change the fees of the register and receiver. Cong. Rec. 51st Cong. 1st Sess. Vol. 21 p. 2414.

The bill was passed in the Senate without debate, other than a statement from Senator Berry who reported it from the committee, and said:

> It is an amendment to the homestead law in regard to the manner of taking proof of homestead applications. (Idem. p. 3215).

From this history of the act I conclude that the purpose of this enactment was simply to designate an additional or "new officer" before whom such proofs could be taken, and not to change in any manner the provisions defining the place for taking such proofs.

By this construction the act harmonizes with the history, with the antecedent legislation on the same subject, and with itself. It would certainly be incongruous if a pre-emptor in California might make proof in Maine, and yet could not go before any judge in his own State outside of his own county.

By this construction the constant and evident object of the law that proof should be made in the vicinity of the land is preserved. In some instances the jurisdiction of a circuit court commissioner extends over an entire State. It is unreasonable to suppose, in the light of the examination herein made, that Congress intended to allow proof to be made in a part of the State distant from the land and thus deprive other interested parties of the ordinary right of appearing in the case and testing the claimant's compliance with law.

In the circular of June 25, 1890 (10 L. D., 687), calling the attention of local officers to the provisions of said act of May 26, 1890, the following appears:

> The third paragraph (of said act) refers to final proofs, and affidavits required to be made under the homestead, pre-emption, timber-culture and desert land laws, and provides that said proofs and affidavits may be made before any commissioner of the United States circuit court having jurisdiction over the county in which the lands are situated, or before the judge or clerk (not necessarily the clerk in the absence of the judge) of any court of record of the county or parish in which the lands are situated.

This must be read in the light of the more explicit interpretation now put upon the act and must be held to mean that the law does not authorize the making of such proofs and affidavits before such commissioner outside of the county and State or district and Territory in which the lands are situated, unless the lands are situated in an unorganized county, which case is otherwise fully provided for by law.

The application is accordingly denied.

HOMESTEAD ENTRY—COMMUTATION—ACT OF MARCH 2, 1889.

ELI M. HUTCHINSON.

One who submits final commutation proof for part of the land covered by his original homestead entry exhausts his rights under such entry, but may be permitted to make application for an additional entry under section 6, of the act of March 2, 1889.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 4, 1890.*

I have considered the case arising upon the appeal of Eli M. Hutchinson from your office decision of October 9, 1885, rejecting his final proof for the E. ½ of the NW. ¼ of Sec. 35, T. 28 N., R. 10 W., Ironton, Missouri, land district.

On November 22, 1882, Hutchinson made homestead entry embracing said tract and the W. ½ of the NE. ¼ of the same section. On April 30, 1884, he submitted final proof and made commutation cash entry for said W. ½ of the NE. ¼ of said section upon which patent was subsequently issued.

On January 17, 1885, he submitted homestead final proof for the other tract included in his original entry which proof the local officers approved and issued final certificate to the entryman. This proof was rejected by your office upon the theory that Hutchinson by making commutation proof for a part of the land embraced in the original entry exhausted his right under the homestead law. This case was heretofore considered and by departmental decision of September 5, 1890, it was held that under the law of March 2, 1889 (25 Stat., 854), such final proof might be accepted. Said decision was, however, recalled for further consideration.

The final proof is entirely satisfactory in every respect and indicates that Hutchinson has acted in good faith. He states that he was led to commute his entry as he did because he had lost his team and was unable to procure another and had an opportunity to sell the pine timber on that part of his entry; that before taking any steps however, he consulted with the register of the Ironton land office, who informed him he could commute on a part of his entry and afterwards make final homestead proof on the balance and get a patent for it. This advice was erroneous, however, and Hutchinson can not claim thereunder a right not given him by the law.

The rule that by commutation the original entry becomes merged in the cash entry, is well established. One who submits final commutation proof for a part of the land covered by his original homestead entry, exhausts his rights under such entry. Nathan T. Jennings (8 L. D., 53).

In the case now under consideration Hutchinson had consummated his original entry by acquiring title by way of a commutation cash entry to a part of the land and there was therefore no entry in existence

upon which to base the final certificate issued in January 1885. For these reasons your office decision rejecting the final proof now under consideration was correct and must be sustained, and the departmental decision of September 5, 1890 is hereby revoked and set aside.

While Hutchinson can not be allowed to take the land involved upon the proof heretofore submitted, yet the facts presented would seem to bring him within the provisions of section 6 of the act of March 2, 1889 (25 Stat., 854). In view of all the circumstances of this case and the apparent good faith of the claimant, he will be allowed ninety days from notice hereof within which to make application for an additional entry under said act, to cover the land in question.

The decision of your office is accordingly modified.

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PRACTICE—INTERVENOR—ATTORNEY.

JULIA E. QUIRONET.

If the sworn statement disclosing the interest of an intervenor can in any case be made by an attorney, it can only be on a full statement of his means of knowledge, and such facts as will show affirmatively and positively that the party seeking to intervene has a present interest in the subject-matter involved.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October* 4, 1890.

On May 12, 1884, Julia E. Quironet filed pre-emption declaratory statement for the SE. ¼ Sec. 27, T. 120 N., R. 77 W., Huron land district, South Dakota, alleging settlement May 11, 1884. November 12, 1884, she offered final proof before the clerk of the probate court of Potter county, D. T., and on December 12, same year, final cash certificate was issued thereon for the tract.

October 6, 1887, your office suspended said entry, rejected the final proof and required claimant to make new publication and new proof, and directed the local office to notify her of such action and that she would be allowed "ninety days in which to comply or appeal."

The register informed your office that notice of the decision was sent by registered mail to claimant's address May 9, 1888, but the same "was returned unclaimed;" that notice was also given to W. W. McDonald, mortgagee, by registered mail May 9, 1888.

July 9, 1888, one S. M. West, attorney on behalf of the Western Loan and Trust Company of Pierre, Dakota, filed an appeal from your said office decision, and on April 1, 1889, your office returned said appeal to the local office so "that the appellants may comply with rule 102, Rules of Practice."

August 29, 1889, the register informed your office that on April 10, 1889, S. M. West was duly notified of said requirement and that up to date no action had been taken by him. September 24, 1889, you trans-

mitted the case to this Department in accordance with the provisions of Rule 82 of the Rules of Practice, and the case is now before me.

The notice of appeal filed in this case purports to be signed by S. M. West as attorney for appellant named therein, and accompanying the same he filed the following statement, viz:—

I, S. M. West, being duly sworn depose and say that I am attorney for the Western Loan and Trust Company of Pierre, Dakota, and am authorized to appear and appeal the above case of J. E. Quironet, S. E. 27-120-77, on which said company have a purchase money mortgage; that said company has informed me, and I believe such information to be true, that the claimant has left the Territory and cannot be brought back to make new proof on the above land.

(signed) S. M. WEST.

Subscribed and sworn to before me this day of July 1888.

The foregoing statement appears not to have been executed before any person authorized to administer oaths, but if it had been duly executed it would not conform to the requirements of Rule 102 of the Rules of Practice, which provides that "No person not a party to the record shall intervene in a case without first disclosing on oath the nature of his interest."

Neither the company nor its alleged attorney were parties to the record in the case at bar, and it has been held that—

If an oath made by an attorney could be accepted in any case as a compliance with that rule (102) it could only be after a full statement of his means of knowledge, and of such facts as would show affirmatively and positively that the party seeking to intervene had at the time a present interest in the subject matter involved. Elmer E. Bush (9 L. D., 628).

For the reasons herein stated the appeal of said company is accordingly dismissed.

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### PRE-EMPTION ENTRY—MARRIED WOMAN—EQUITABLE ADJUDICATION.

MARGARET D. BAILEY.

A married woman may be permitted to make a pre-emption entry with a view to its equitable adjudication, where the proof shows that she had duly complied with the law in the matter of filing, residence, and improvements prior to her marriage.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October* 4, 1890.

I have considered the appeal of Margaret D. Bailey, formerly Wybrant, from your office decision of December 17, 1887, rejecting her final pre-emption proof for the SW.¼ Sec. 3, T. 20 S., R. 21 W., Wa Keeney, Kansas land district and holding for cancellation her pre-emption filing.

Margaret D. Wybrant filed pre-emption declaratory statement for said land August 7th, alleging settlement August 2, 1884, and on March 22, 1887, submitted final proof in support thereof under the name of Mar-

garet D. Bailey. This proof was rejected by the local officers upon the ground that being a married woman at the date of her final proof she was not then a qualified pre-emptor and that action was affirmed by your office.

The final proof shows that this claimant was at the time of her settlement and filing in August 1884, a qualified pre-emptor; that she then established her residence on said tract and had resided there coninously to date of final proof; that her improvements, consisting of a sod house, seventeen by forty feet with three doors and four windows, a sod stable eighteen by twenty-six feet, a corral, a well, fencing and seven acres of breaking were worth $420, and that she was married to James Bailey February 26, 1886.

It is not shown when the improvements were placed on this land, but inasmuch as the claimant had made her home there for a period of eighteen months prior to the date of her marriage, it is only fair to conclude that such of them as were necessary to meet the requirements of the law were made prior to that date.

The recital of the facts in this case shows that it is in every feature except that here the claimant had not prior to her marriage given notice of her intention to submit final proof, the same as the case of Mary E. Funk (9 L. D., 215), where the entry was allowed and submitted to the board of equitable adjudication for consideration. In the case of Emma McClurg (10 L. D., 629), after a reference to the Funk case among others, it was said—"I am unable to preceive that the fact that the pre-emptor has given notice of intention to make final proof can materially alter the case." The case now under consideration differs from the McClurg case only in the fact that here no money has been paid and no final, certificate issued.

This case clearly comes within the rule established by the decisions referred to and should be disposed of accordingly. The decision appealed trom is reversed and it is directed that Mrs. Bailey be allowed to complete her entry by making payment after which it will be referred board to the of equitable adjudication for consideration.

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### HOMESTEAD ENTRY—CONTIGUITY OF TRACTS ENTERED.

DOUGLAS RANDALL.

Tracts of land cornering on each other are not within the rule of contiguity required under a homestead entry.

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

I have considered the appeal of Douglas Randall, Sr., from the decision of your office dated June 14, 1889, affirming the action of the local office, rejecting his application to make final proof on his homestead entry for lots 3 and 4 Sec. 31, T. 33, R. 23, and E. ½ SE. ¼ of Sec. 25, T. 33, R. 24 W. Valentine land district, Nebraska.

March 1, 1884, he made homestead entry for said tract, and on March 4, 1889, he gave the usual notice of his intention to offer final proof, which was rejected and the following endorsed thereon, viz:

This application is rejected for the reason that the lands described are not contiguous. Lots 3 and 4 Sec. 31, T. 33, R. 23, only cornering with the E. ½ SE. ¼ Sec. 25, T. 33, R. 24.

(Signed) S. F. BURTCH, *Reg.*
SAM. G. GLOVER, *Rec.*

He appealed from this judgment, and on June 14, 1889, your office affirmed the action of the local officers and directed them to notify the claimant that he would be required

to surrender such tracts as are non-contiguous, as he may elect, with the right to amend his entry so as to embrace other contiguous land in lieu thereof, or if there is no contiguous land he can surrender his entry without prejudice to his rights to make a new one on any unappropriated land subject to homestead entry.

Claimant again appealed.

From examination of the record in this case, I am of the opinion that the decision of your office was proper and in accordance with law, and the decisions of this Department. Hugh Miller (5 L. D., 683); Svang *v.* Tofley (6 L. D., 621); C. P. Masterson (7 L. D., 172).

The decision is accordingly affirmed.

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### HOMESTEAD ENTRY—RESIDENCE—MILITARY SERVICE.

### GEORGE W. PETERSON.

In case a discrepancy appears between the proof of military service submitted, and the records of the War Department, the proper practice is to allow the claimant a reasonable time to explain the discrepancy, and if he is unable to do so, he should then be required to show sufficient actual residence on the land to complete the requisite period.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October* 6, 1890.

The appeal of George W. Peterson from your office decision of February 18, 1889, shows that on May 4, 1885, said Peterson made homestead entry of the SW. ¼ of Sec. 8, T. 16 N., R. 26 W., North Platte, Nebraska, and established residence thereon May 9, of the same year.

He submitted his final proof December 16, 1886, which was accepted by the register and receiver and final certificate, No. 1209, issued thereon. With said proof he submitted a copy of his discharge from Co. F., 51st Illinois Infantry, from which it appears that he entered the service *January* 2, 1862, and was discharged May 26, 1865, making his term of service three years, four months and twenty-four days, which, with his actual residence on the land, would make one day more than the required five years.

Accompanying the record is the certificate of R. C. Drum, Adjutant General, from which it appears that Peterson was enrolled on the 2d of

*June*, 1862, instead of the 2d of *January*, as shown by his discharge, thus making his residence five months less than the five years required.

Upon this showing your office suspended the entry, and required him to furnish supplemental proof, without publication, showing the full five years residence. He did not comply with this requirement, but has appealed to this Department.

The decision of your office was right. When a discrepancy appears between the proof of service submitted and the records of the War Department, it is the proper practice to allow the claimant a reasonable time to explain, if he can, the discrepancy (Thomas Graham, 3 C. L. O., 164), and if he is unable to do so, then he should be allowed to show sufficient actual residence on the land to complete the full five years.

An examination of the records of the War Department shows conclusively that Peterson was enrolled on the 2d of June, instead of January, 1862, and therefore his discharge, if a correct copy of it has been certified with the appeal, is wrong as to date of enrollment. The original muster roll of his company is on file in the War Department, and a personal examination of the same shows that the mistake is in the discharge and not in the certificate of the adjutant general.

The five years residence is an absolute requirement of the statute, and this Department has no authority to waive it. While final proof made a few days prior to the expiration of the five years required might be allowed on the maxim that the law does not regard trifles, this principle of law affords no warrant to excuse five months deficiency, especially when, as in this case, it is apparent that the applicant could not have been innocently mistaken as to his term of service, for it is not easy to conceive how a soldier can have honestly mistaken January for June as the date of his enlistment.

The claimant will be allowed sixty days from notice of this decision to comply with the requirement of your office, and your office decision is accordingly affirmed.

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### HEARINGS ORDERED BY THE DEPARTENMT—CIRCULAR OF MAY 15, 1889.

### UNITED STATES *v.* FAXON.

The circular instructions of May 15, 1889, issued to special agents by the General Land Office, directing the suspension of proceedings wherein it is believed that the government will not be able to sustain the charge made against the entry, is not applicable to hearings ordered by the Department.

*Secretary Noble to the Commissioner of the General Land Office, October 6, 1890.*

In the case of the United States *v.* Albert D. Faxon involving the latter's Osage cash entry for the W. ½ NE. ¼ and NE. ¼ NE. ¼, Sec. 22, T. 30 S., R. 12 W., Larned, Kansas, the Department on October 23, 1889, found that in a hearing ordered on report of a special agent to determine said entryman's compliance with law the local officers had failed

to consider certain testimony favorable to the entryman, and further found that certain testimony against the entryman's interest had been improperly introduced and considered. A rehearing was accordingly ordered.

A motion for review was filed by F. E. Tower, assignee, but the Department on May 21, 1890, overruled the same and adhered to its original order.

I am now in receipt of your letter of the 16th ult. transmitting a report dated September 5, from special agent Yost who gives it as his opinion, after examination, "that we would entail considerable expense by having a hearing with very little prospect of cancelling the entry." You accordingly ask authority to relieve the entry from suspension.

It appears the action of the agent was taken under your office circular letter of May 15, 1889, to special agents which was as follows:

> If, upon re-examination of a case reported by a former agent, or in any case, in which you have been directed to attend the hearing, you are convinced that the government will be unable to sustain the charges, you will continue the case, if date for trial has been set, and notify all parties in interest, in order that they need not be put to the trouble and expense of appearing at the local office.
>
> You will thereupon immediately report all the facts to this office, giving in full your reasons for believing that the government will be unable to make out a prima facie case; and await further instructions.

By letter of June 10, last you notified the special agent of the conclusion reached by the Department and directed him to "confer with the local officers and agree upon such a date for the re-hearing as will enable you to be in attendance and present testimony on the part of the government."

The special agent presents the affidavits of James Crouch, John H. Wheat and W. H. Slack. Wheat states that claimant settled on the tract in the spring of 1880 and lived thereon during the spring and summer, that he built a dug-out house, and a good sized sheep corral, and "stayed here about three years." Crouch corroborated these allegations. Both believe claimant acted in good faith. Slack says claimant never built a house or corral on the tract. Both Slack and Wheat were witnesses at the former hearing; the former for the government, the latter for the entry. The issue now made by their statements is the same as that on which the re-hearing was ordered. The issue of fact still remains. It is true the agent states he regrets to say that in his opinion Slack is not reliable, but this is a matter which should be a subject of cross-examination. Under these circumstances I am of opinion the hearing as ordered should proceed.

Moreover I do not think your office circular letter of May 15, 1889, *supra*, should be held to apply to hearings ordered by the Department. Such hearings ordered by your office are upon the *ex parte* reports of special agents, but those by the Department are after examination of the testimony. The same rule therefore should not be applied to both.

The hearing will proceed as ordered.

### TIMBER AND STONE ACT—MARRIED WOMAN.

### NANCY JANE HARRIS.

A married woman in the State of California is not disqualified to make a timber land entry under the act of June 3, 1878, by the fact that her husband has made an entry under said act and paid for the land with community money.

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

I have considered the appeal of Nancy Jane Harris from your decision of June 3, 1889, rejecting her application to purchase under the act of June 3, 1878, the SE. ¼ of NW. ¼, NE. ¼ of SW. ¼ and N. ½ of SE. ¼ of Sec. 9, T. 5 S. R. 21 E., Stockton, California.

On July 23, 1888, Nancy J. Harris, and her husband Reuben C. Harris, each made application to purchase one hundred and sixty acres of land under the provisions of said act.

The application of the husband was considered first, and his entry allowed, and payment for the land was made with community money.

The applicant, Mrs. Harris, swore that she made the entry in good faith for her own use and not for the use or benefit of any other person, also that no other person or firm or association has any interest in the entry, or in the land or timber thereon. She also swore that she is a native born citizen of the United States, and that she is possessed of separate property of her own, and that she intended to pay for said land with her own separate money.

Her application was rejected by the local office, and by your office, for the reason that her husband had already made entry for one hundred and sixty acres of land under the provisions of said act and made payment for the same with community property.

The theory upon which this action was based is set forth in the decision of your office in the case of Maggie Baxter (Copp's Land Owner, Vol. 14, page 288). In said decision it is stated "A husband and wife under said act are construed to come within the meaning of the term "association of persons" and any purchase made by either during coverture, with community property, would bar the other from making such an entry, because by the common interest that each would have in such an entry, they would have exhausted their rights under said act and therefore could not be allowed to make a second entry."

In California the property acquired by either husband or wife after marriage is community property except that acquired by either by gift, bequest, devise, or descent, hence your office assumed that the interest in any real estate purchased with community property enures to the wife to such an extent that she is prohibited by the act from making a further entry.

By section 172 of the Civil Code of California, it is provided that "the husband has the management and control of the community prop-

erty with the like absolute power of disposition (other than testamentary) as he has of his separate estate."

The supreme court of California in the case of Greiner *v.* Greiner (58 Cal., 115), say,

> Prior to the adoption of the codes the title to the common property vested in the husband. He could during the coverture dispose of such property absolutely, as if it were his own separate property. The interest of the wife during the same period was a mere expectancy, like the interest which an heir may possess in the property of his ancestor (Van Maren *v.* Johnson, 15 Cal., 312; De Godey *v.* Godey, 39 id., 164). It is true that the husband could not deprive her of it by his will (Beard *v.* Know, 5 Cal., 256). The same is true under the civil code.

In section 1402 of the civil code of California, it is provided that "in case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance and the charge and expense of administration."

In view of the provisions of the law of California, and the decisions of the courts thereunder, I am of the opinion, that the interest of the wife in the community property, is not such an interest as prohibits her from making an entry under the act in question.

In the case of Delila Stukel (10 L. D., 47), it was held that a married woman in the State of Oregon could purchase under the provisions of the act in question.

To deny the same right to a married woman in the State of California is to render the operations and benefit of the law unequal in the different States where the law is operative, a result neither provided for nor contemplated by the act.

The evidence shows that the applicant Harris is qualified to purchase under her application.

For the reasons stated the rule announced in the case of Isabella M. Dwyer (6 L. D., 32), will be followed.

Your decision is, therefore, reversed.

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### OSAGE LAND—RIGHT OF PURCHASE—SECTION 2285 R. S.

### DANIEL W. DEBO.

The provisions of section 2285 of the Revised Statutes are not intended to exempt the settlers named therein from the specified restrictions of the pre-emption law except as to the particular tracts held by settlement on May 9, 1872, and the purchase of said lands exhausts the pre-emption right either as to Osage or other land.

Settlement on Osage land subsequent to the act of May 9, 1872, does not authorize the purchase thereof, if prior thereto such settler had perfected an entry of Osage land.

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

On May 24, 1886, Daniel W. Debo made Osage cash entry of the N. ½ of NE. ¼ and the N. ½ of NW. ¼, Sec. 14, T. 32 S., R. 14 E., Topeka,

Kansas, which you held for cancellation, for the reason that he had previously, to wit: on July 12, 1871, made entry of one hundred and sixty acres of Osage Indian trust and diminished reserve lands, and that having made one entry of these lands, to the extent of one hundred and sixty acres, he is debarred from making another entry of Osage lands.

From this decision the claimant appealed, alleging error in said decision in holding that an entry made of Osage lands prior to "March 22, 1872," is a bar to a subsequent entry of other Osage lands. In support of this appeal he relies upon section 2285 of the Revised Statutes, which provides that:

> The restrictions of the pre-emption laws, contained in sections twenty-two hundred and sixty and twenty-two hundred and sixty-one, shall not apply to any settler on the Osage trust and diminished reserve lands in the State of Kansas, who was actually residing on his claim on the ninth day of May, eighteen hundred and seventy-two.

By treaty of September 29, 1865 (14 Stat., 687), the Great and Little Osage Indians ceded to the United States certain tracts of land to be sold for the benefit of said Indians. By the 1st article of said treaty a cession was made of what is known as the Osage ceded lands, in which it was stipulated that "Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, but no pre-emption claim or homestead settlement shall be recognized." By the 2d article of said treaty, the Indians also ceded what is known as the Osage trust lands, to wit:

> A tract of land twenty miles in width from north to south, off the north side of the remainder of their present reservation, and extending its entire length from east to west; which land is to be held in trust for said Indians, and to be surveyed and sold for their benefit by the Secretary of the Interior, under such rules and regulations as he may from time to time prescribe, under the direction of the commissioner of the general land office, as other lands are surveyed and sold.

It was also agreed by the 16th article of said treaty that, if said Indians should agree to remove from the State of Kansas and settle on lands provided for them by the United States in the Indian Territory, then the diminished reservation shall likewise be disposed of in the same manner and for the same purpose as the trust land provided for by the second article of the treaty.

The joint resolution of April 10, 1869 (16 Stat., 55), provided that any *bona fide* settler residing upon any portion of said lands sold to the United States by the first and second articles of the treaty, who is a citizen of the United States, or had declared his intention to become a citizen, shall be entitled to purchase the same, in quantity not to exceed one hundred and sixty acres, at one dollar and twenty-five cents per acre.

The act of July 15, 1870 (16 Stat., 362), made an appropriation for the removal of the Indians from the diminished reservation, and pro-

vided that after the removal therefrom, said lands, as well as the trust lands north of said diminished reservation,

Shall be sold to actual settlers only, said settlers being heads of families, or over twenty-one years of age, in quantities not exceeding one hundred and sixty acres, in square form, to each settler at the price of one dollar and twenty-five cents per acre, payment to be made in cash within one year from date of settlement or of the passage of this act.

From the foregoing, it will be seen that the joint resolution of April 10, 1869, conferred upon *bona fide* settlers residing upon the Osage ceded lands and the Osage trust lands a preference right of purchase, in quantity not exceeding one hundred and sixty acres, at the single minimum price for public lands, and the act of July 15, 1870, restricted the sale of the Osage trust and the diminished reserve lands to actual settlers only, in quantities not exceeding one hundred and sixty acres to each settler, without subjecting the disposition of said lands to all the provisions of the pre-emption law.

The only condition necessary to the right of purchase under the act of July 15, 1870, was that the purchaser should be an actual settler on the land, and, although he had removed from land of his own, or was the owner of three hundred and twenty acres of land, or had formerly exercised the right of pre-emption of public lands under the act of September 4, 1841, he would nevertheless be entitled to purchase Osage lands by virtue of his settlement thereon, to the extent of one hundred and sixty acres to each settler. Foster *v.* Brost (11 Kansas, 350); United States *v.* Woodbury (5 L. D., 303).

This was the law in force providing for the disposition of these lands when the act of May 9, 1872 (17 Stat., 90), was passed, subjecting all entries of these lands to the general principles of the pre-emption laws, but provided by the third section of said act.

That the sale or transfer of his or her claim upon any portion of these lands by any settler prior to the issue of the commissioner's instructions of April twenty-sixth, eighteen hundred and seventy-one, shall not operate to preclude the right of entry, under the provisions of this act, upon another tract settled upon subsequent to such sale or transfer: *Provided*, That satisfactory proof of good faith be furnished upon such subsequent settlement: *Provided further*, That the restrictions of the pre-emption laws relating to previous enjoyment of the pre-emption right, to removal from one's own land in the same State, or the ownership of over three hundred and twenty acres, shall not apply to any settler actually residing on his or her claim at the date of the passage of this act.

The second proviso to said section was subsequently embodied in section 2285 of the Revised Statutes, as heretofore quoted.

It was obviously the sole purpose of the third section of said act to protect the rights of actual settlers, whose claims were initiated under the laws in force at the date of the passage of the act, and who were then actually residing on their claims, by allowing them to complete their entries and perfect their title, although they might not have the qualifications of pre-emptors, as prescribed by the first section of the act; but it did not intend to exempt such settlers from the restrictions

of the pre-emption law, except as to the particular tracts then settled upon, and the purchase of said lands exhausted the pre-emption right, and could not be again exercised, either in the purchase of Osage lands, or of other lands under the pre-emption law; and also where settlement was made on Osage trust and diminished reserve lands, after the passage of the act of May 9, 1872, such settler could not acquire title to said land, if he had previously made entry of Osage lands, or had exhausted his pre-emption right under the general pre-emption law. (Todd Knepple, 5 L. D., 537.)

Nor does the third section of said act authorize the entry of a tract of Osage Indian trust and diminished reserve land settled upon after the passage of the act of May 9, 1872, if such settler had already acquired title to one hundred and sixty acres of Osage lands. The provision contained in said section, "that the sale or transfer of his or her claim upon any portion of these lands, prior to the issue of the commissioner's instructions of April twenty-six, eighteen hundred and seventy one, shall not operate to preclude the right of entry, under the provisions of this act upon another tract settled upon subsequent to such sale or transfer," has reference to the sale or transfer of a claim initiated by settlement that had not been perfected, and not to an entry that had been allowed. It was not the purpose of the act to enlarge the rights of the settlers upon these lands, but merely to protect their rights or claims acquired under laws existing at the date said claims or rights were initiated, and as the act of July 15, 1870, expressly limited the right of purchase to one hundred and sixty acres to each settler, when an entry of this quantity was made, the right of the settler was exhausted as to these lands, and he could not acquire a right to purchase any other quantity under any of the laws.

The decision of your office is affirmed.

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PRACTICE—APPEAL—NOTICE—APPLICATION FOR RE-INSTATEMENT.

CHARLES A. PARKER.

Where an appeal is taken from a decision holding an entry for cancellation, on account of the adverse claim of another, it will not be entertained in the absence of due notice to such adverse claimant.

The failure of the General Land Office to return, under rule 82 of practice, an appeal which is defective for want of notice, does not relieve the Department from the necessity of dismissing said appeal on account of such defect, if the time allowed for appeal and notice thereof has expired.

A pending application for the re-instatement of an entry for land embraced within the intervening entry of another, is at once effective on the cancellation of such intervening entry, and segregates the land covered thereby.

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

I have considered the application by Charles A. Parker, for a review of my decision of February 10, 1890, dismissing his appeal from your

decision of June 27, 1889, holding for cancellation his timber culture entry for the SE. ¼ of Sec. 31, T. 3 N., R. 50 W., Denver, Colorado.

My decision was based upon the ground that no copy of the appeal of Parker had been served upon William Whitehurst, an adverse claimant.

The material facts in the case are as follows:

William Whitehurst made timber culture entry for the tract in question September 1, 1885.

On March 28, 1887, said entry was held for cancellation upon the report of Inspector Hobbs, that the same was made through George F. Work and T. B. Babcock, notary public, without the formality of swearing claimant to the preliminary affidavits. As the claimant failed to respond to the notice sent him, the entry was canceled December 7, 1887.

On December 31, 1887, Andrew J. Clute, jr., made timber culture entry for the land. On January 16, 1888, the local officers transmitted to your office, the application of Whitehurst for the re-instatement of his entry. In his affidavit in support of his application, he states that he swore to the timber culture affidavits before T. B. Babcock, a notary public, at Yuma, Colorado, that he signed the necessary papers at Otis, Col., and by arrangement said Babcock met him as the train passed the station at Yuma, and administered the oath to him. He also swore that during the first year he plowed over five acres and had planted cuttings and tree seeds, and had plowed fifty acres additional, and that he was living on adjoining land which he had settled upon as a pre-emptor.

T. B. Babcock, the notary public, corroborates the statement of Whitehurst, as to the manner in which the affidavits in question were taken.

On April 11, 1888, your office, instructed the local officers, to call upon Andrew J. Clute, jr., to show cause why the entry of Whitehurst should not be re-instated, and his subsequent entry canceled.

It appears that before this letter was written, viz., on March 29, 1888, Clute had relinquished his entry, and the same had been canceled at the local office, and on the same day Charles A. Parker made timber culture entry for the land.

By letter of April 17, 1888, you re-instated the entry of Whitehurst.

On June 27, 1889, you held the entry of Parker for cancellation on the ground that it was erroneously allowed during the pendency of the application of Whitehurst for the re-instatement of his entry.

Parker filed an appeal from your decision, alleging,—

1st. Error in re-instating the entry of Whitehurst without notice to Parker, and,—

2nd., Error in holding the entry of Parker for cancellation without opportunity to show cause why said entry should not be canceled.

Parker failed to serve a copy of this appeal on Whitehurst, and on

motion of attorney for the latter, the appeal was dismissed by my decision of February 10, 1890.

The motion for review is based upon the following grounds,—

1. That the decision appealed from was in an *ex parte* case in which there was no opposing party entitled to notice.

It is sufficient answer to this assignment to say that the decision from which the appeal was taken expressly states that the entry of Parker was held for cancellation by reason of Whitehurst's adverse claim and Parker was required to take notice of the same, even if by reason of defective annotations the proper records of the local office did not show the existence of such a claim.

The 2nd ground upon which review is asked is:

That if the appeal was considered defective, for want of service on Whitehurst, the appellant should have been notified, under practice rule 82, and allowed the opportunity of amending the same within fifteen days.

Under this rule, it was the duty of your office to notify appellant of the defect in his appeal and to return the same for amendment. John Ralls (7 L. D., 454). When the defective appeal reached this office it was too late to amend the same and file within the time required by the rules of practice, hence the appeal was dismissed for failure to serve notice on the adverse party as required by said rules. Bundy *v.* Fremont Townsite (10 L. D., 595). The third ground upon which review is asked is:

That the error of the Commissioner in the decision appealed from is so apparent and the injustice to Parker so great that it would be proper for you in the exercise of your supervisory powers to reverse it if you should hold that the appeal was not properly taken.

In reply I would say that the decision of your office was in accordance with the established rulings of the Department, that an application to enter land segregated the same and operated to prevent further disposal thereof until final decision. Saben *v.* Amundson (9 L. D., 578); Arthur P. Toombs (10 L. D., 192); Griffin *v.* Pettigrew (10 L. D., 510).

The application of Whitehurst for a re-instatement of his entry, was, in effect, an application to enter the land, and should it be alleged that the existing entry of Clute segregated the land at the time the application was filed, the instant the land became free by the cancellation of Clute's entry, the application took effect, and the subsequent entry of Parker was erroneously allowed.

If, as is intimated by counsel for Parker, the entry of Whitehurst is illegal, it is subject to contest.

The motion is denied.

PRIVATE CLAIM—SCRIP—ACT OF MARCH 2, 1889.

MCDONOGH SCHOOL FUND.

Scrip issued under the act of June 2, 1858, in satisfaction of a private claim, may only be located upon land subject to sale at private cash entry.

*Acting Secretary Chandler to the Commissioner of the General Land Office, October* 10, 1890.

I have considered the appeal of the commissioners of the McDonogh school fund from the decision of your office affirming the action of the local officers in rejecting the application of said commissioners to purchase sections 14 and 15, township 19 south, range 28 east, S. E. District, Louisiana, with surveyor-general scrip.

Said application was rejected, upon the ground that the tract applied for is not subject to sale at private cash entry. From this decision the applicants appealed, alleging error in said decision upon the ground that the original claim for which the scrip was issued had been donated by the confirmee to the McDonogh school fund and should have been confirmed in place.

This scrip was issued under the act of June 2, 1858 (11 Stat., 294), which provided that where any private land claim has been confirmed by Congress, and the same in whole or in part has not been located or satisfied, that the surveyor-general shall issue to the claimant certificates of location for a quantity of land equal to that so confirmed, which may be located upon any of the public lands of the United States, subject to sale at private entry at one dollar and twenty-five cents per acre. This scrip was received by the confirmees, or their assignees of such claim, in satisfaction of the claim so confirmed, and the mere fact that the claim for which the scrip was issued had been located in place confers no right upon the holders of this scrip to locate it upon other lands, except those subject to private cash entry at one dollar and twenty-five cents per acre.

The act of March 2, 1889 (25 Stat., 854), withdrew from private cash entry all public lands of the United States, except in the State of Missouri, and these lands were therefore not subject to purchase with said scrip at date of the application.

Your decision is affirmed.

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TIMBER CULTURE ENTRY—TECHNICAL QUARTER SECTION.

JAMES C. GARMAN.

Under the timber culture law an entry may embrace a technical quarter section, without reference to its relation to the entire section.

The case of Andrew Johnson cited and distinguished.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October* 10, 1890.

On February 3, 1888, James C. Garman applied at the Denver, Colorado, land office to make timber culture entry for the SE. ¼, Sec. 20,

T. 12 N., R. 51 W., which application was rejected by the local officers for the reason that "the tract applied for contains more than one-quarter of the area of the entire section."

Your office on June 23, 1888, upon appeal of the entryman, affirmed that judgment and the applicant has appealed therefrom to this Department.

The tract applied for is the ordinary quarter section of one hundred and sixty acres, but it appears the entire section in which it is located contains but 389.56 acres.

Section 1 of the timber culture act, (June 14, 1878, 20 Stats., 113,) provides:

> That the act entitled "An act to amend the act entitled 'An act to encourage the growth of timber on western prairies,'" approved March 13, 1874, be and the same is hereby amended so as to read as follows: That any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States, who shall plant, protect, and keep in a healthy, growing condition for eight years ten acres of timber, on any quarter-section of any of the public lands of the United States, or five acres on any legal subdivision of eighty acres, or two and one-half acres on any legal subdivision of forty acres or less, shall be entitled to a patent for the whole of said quarter-section, or of such legal subdivision of eighty or forty acres, or fractional subdivision of less than forty acres, as the case may be, at the expiration of said eight years, on making proof of such fact by not less than two credible witnesses, and a full compliance of the further conditions as provided in section two: *Provided further*, That not more than one quarter of any section shall be thus granted, and that no person shall make more than one entry under the provisions of this act.

The judgment of your office and of the local office is based on the proviso: "That not more than one-quarter of any section shall be thus granted for a timber culture entry." In this I think you are in error. It is clear to my mind that what Congress intended by this phrase is that not more than one-quarter section of any section should be appropriated for the artificial cultivation of timber in any one section. And what it meant by the term "one quarter of any section" as here used means a legal subdivision covered by the descriptive term "quarter section," and that in no case can more than one quarter section as surveyed be entered under the timber culture act. This is borne out, I think, by the use of the language "that any person . . . . who shall plant . . . . on any quarter section of public lands ten acres of timber . . . . shall be entitled to a patent for the whole of said quarter section . . . . at the expiration of eight years, etc."

The whole import of said section clearly implies that a qualified entryman may enter a quarter section or any lesser legal subdivision of a section of land subject to such entry. If the language used therein was that "not more than one-fourth of any section" shall thus be granted, then there could be no question about the construction to be placed upon the act. But I am firm in my conviction, from the reading of said section, that Congress had in mind a technical quarter section in adopting this prohibitory clause.

In this case the application is for a technical quarter section as surveyed. It is not, therefore, technically for "more than one quarter" of the section.

Under the homestead law (Section 2289, R. S.) entries are restricted to "one quarter section or a less quantity."

It is now the established opinion of this Department that under this language an entry may be made of a quarter section as it is found surveyed without reference to its area or to the area of the section. William C. Elson (6 L. D., 797), Benjamin L. Wilson (10 L. D., 524).

The pre-emption law provides (Section 2259, R. S.) that an entry may be made of "any number of acres not exceeding one hundred and sixty, or a quarter section." This language also is held by the Department to authorize an entry of a technical quarter section without regard to its actual area. John W. Douglas (10 L. D., 116).

These rulings clearly indicate the attitude of the Department upon the construction to be placed upon the terms used in the laws mentioned as descriptive of the quantity of land which may be entered. Following the spirit of these rulings, I find no difficulty in concluding that the words of the timber culture law should receive a like construction. The reasons supporting the conclusion in those cases are equally applicable in this, and need not here be set out. Reference to those cases is sufficient.

It is true in the case of Andrew Johnson (10 L. D., 681), an application to make entry for a certain lot was rejected on the ground that the area of the lot added to that of a tract in the same section already covered by a timber culture entry "would exceed one-fourth of the section." I am of the opinion that case should be distinguished from the one at bar. In that case entry of one legal subdivision, eighty acres, of a section which contained only 380.60, had been made, and to allow another subdivision in a different quarter section to be entered would be to allow entry of more than one-fourth of the area of the section.

Hence, that case does not furnish a guide for the disposition of this. Each case must stand on the peculiar circumstances surrounding it, and at the same time carry out the spirit of the act and the intent of Congress. I am clearly of the opinion that the views herein expressed are a correct interpretation of said act.

I conclude, therefore, that a timber culture entry may be made of a technical quarter section, without reference to its relation to the entire section.

Said decision is consequently reversed.

## SCHOOL INDEMNITY—STATE OF WASHINGTON.

### L. H. WHEELER.

An indemnity school selection made by the territory of Washington under the provisions of section 2275 R. S., reserves the land covered thereby from sale or entry, and land thus selected is not released from such reservation by the act providing for the admission of said Territory into the Union.

*Acting Secretary Chandler to the Commissioner of the General Land Office, October* 13, 1890.

This appeal is filed by L. H. Wheeler from the decision of your office of April 27, 1889, affirming the decision of the local officers rejecting his application, filed August 11, 1888, to make homestead entry of the NE. ¼, Sec. 15, T. 38 N., R. 2 E., Seattle, Washington, and rejecting his several applications to purchase at private cash entry certain tracts of land fully set forth in your decision of April 27, 1889, from which this appeal is taken.

Said applications were made at different dates, in the months of August and September, 1888, while Washington was a Territory, and were rejected because the lands had been selected as school indemnity. From the decision of your office affirming said action, the applicant appealed, assigning the following grounds of error:

1. That all lieu selections heretofore made are absolutely void;
2. That lieu selections must be made after we become a State;
3. That the manner of selection must be determined by the legislature of the State;
4. That no selections can ever be made for losses occasioned by fractional sections or deficiencies arising from any *natural* cause whatever;
5. That any selections made where such deficiencies form a part are invalid as to the whole.

The sole question to be determined in this case is, whether the lands applied for were at the date of the applications subject to entry, and it is therefore unnecessary to consider the question as to what the status of said lands was after the State was admitted into the Union.

It is contended by the applicant that the act of February 26, 1859 (11 Stat., 385), was not intended to apply to the Territory of Washington, and that all lieu selections made while the territorial government existed are absolutely void, but if said selections were then valid, no selections of lieu land can be valid since the act of February 22, 1889 (25 Stat., 676), providing for the admission of Washington into the Union, for the reason that said act dissolved the reservation in making other provisions for the grants to said State.

With reference to the first proposition, it is sufficient to say that the question thereby presented was fully settled in the decision in the case of John W. Bailey *et al.*, 5 L. D., 216, in which it was held that said selections were authorized by the act of February 26, 1859, and said

lands so selected being in a state of reservation, were not subject to other disposition during its continuance.

The lands being so reserved at the date of application, it is immaterial whether said reservation was dissolved by the admission of the State into the Union or not, so far as it affects the applications to purchase at private cash entry, for the reason that the act of March 2, 1889, 25 Stat., 854, withdrawing from private entry all public lands of the United States, except in the State of Missouri, was in force when the State of Washington was admitted into the Union, and was applicable to these lands.

But, independently of this, the act of February 26, 1859 (Revised Statutes, 2275), is a general provision applicable alike to all the States and Territories, and this provision is not repealed as to the State of Washington by the 17th section of the enabling act of February 22, 1889, but is retained as a part of the grant for school purposes by the 10th section of said act. Therefore the reservation made by the selection of said tracts while the territorial government existed still continues, until said selection shall be canceled. If it can be shown that the land for which Wheeler applies to make homestead entry was not subject to selection by the Territory or State, by reason of adverse rights acquired prior to selection, or of a defective basis, that question may be considered whenever a proper application is made for the land.

From the record before me, I see no error in the decision of your office and it is therefore affirmed.

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### SCHOOL INDEMNITY—STATE OF WASHINGTON.

### HULDA M. SMITH.

The act of February 26, 1859 (R. S., 2275) is applicable to the State of Washington, and reservations made by school indemnity selections while the territorial form of government existed continue until such selections are canceled.

The authority to make indemnity selections under said act rests with the county commissioners who derive such authority from the act of March 2, 1853.

*Acting Secretary Chandler to the Commissioner of the General Land Office, October* 13, 1890.

On March 19, 1889, Hulda M. Smith made application to enter the SE. ¼ of Sec. 31, T. 24 N., R. 4 E., Seattle, Washington, under the homestead law.

Said application was rejected by the local officers, for the reason that said land was not subject to entry, having been selected as school indemnity for lands lost in said township. Your office affirmed said decision, on July 3, 1889, and the applicant appealed therefrom, assigning the following grounds of error:

First. In finding that said land had been legally selected as indemnity school land.

Second. In finding that said pretended selection withdrew said land from entry under the homestead laws.

Said pretended selection is void because:—

1st. The Territory is not entitled to the number of acres selected in said township.

2d. Said selection is in excess of the basis.

3d. The commissioners of King county, W. T., had no authority to make selections on the basis they employed.

4th. Said commissioners took no legal action on said selection.

5th. Said commissioners had no power to delegate their authority in making said selection.

6th. Said commissioners never executed or approved the execution of the list in which said selection is embraced.

These assignments of error are predicated upon the theory that the Territory of Washington was not authorized to take indemnity to compensate deficiencies for fractional townships, under the act of February 26, 1859 (11 Stat., 385), and that the county commissioners had no power to make such selections.

This case is in the main controlled by the decision of the Department in the case of L. H. Wheeler, rendered this day, holding that the act of February 26, 1859 (Revised Statutes, 2275), is applicable to the State of Washington, and that the reservations made by the selection of said tracts while the territorial government existed is a continuing reservation until said selection shall be canceled.

The act of March 2, 1853 (10 Stat., 172), conferred upon the board of county commissioners the authority to select indemnity for school purposes, where sections sixteen and thirty-six shall be occupied by actual settlers prior to survey, and this act must be construed in *pari materia* with the general indemnity act of February 26, 1859, *supra*, which contains no provision as to how or by whom said selections shall be made. The authority to make selections under the latter act must therefore rest with the county commissioners, who derive their authority to select indemnity land for school purposes under the former act.

It is further alleged that the county commissioners had no power to delegate their authority to an agent to make said selections, and that they never executed or approved the list.

I can see no reason why said selections may not be made by the county commissioners through an agent, if the act of the agent is approved by the board, but there is nothing in this appeal to show that said selections were not made regularly and in the manner provided by law.

The decision of your office is affirmed.

HOMESTEAD ENTRY—SOLDIERS' FILING—ACT OF MARCH 2, 1889.

GEORGE W. BLACKWELL.

A homestead entry may be made under section 2, act of March 2, 1889, by one who has previously filed a soldier's declaratory statement for another tract.

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

George W. Blackwell has appealed from your office decision of February 8, 1889, rejecting the final proof offered by him on his homestead entry No. 6946, for Sec. 10, T. 10 S., R. 25 W., Wa-Keeney land district, Kansas.

Said proof was rejected because he had previously filed soldier's declaratory statement on another tract of land.

Said decision of your office was correct under the law as it existed at the time the decision was rendered (Stephens *v.* Ray, 5 L. D., 133; Maria C. Arter, 7 L. D., 136; Joseph M. Adair, 8 L. D., 200). But since that date—to wit, on March 2, 1889 (see 25 Stat., 854)—Congress has passed an act the second section of which provides:

> That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not exceeding one quarter-section of public land subject to such entry, such previous filing or entry to the contrary notwithstanding.

Under this provision of said act I think it clear that the claimant is entitled, under the act cited, to make a homestead entry, notwithstanding he had exhausted his homestead right under previous laws by the filing of a soldier's declaratory statement (Richard T. Henning, 9 L. D., 382). In case you find the proof on file to be satisfactory in other respects, his entry will be approved for patent (John J. Stewart, 9 L. D., 543).

The decision of your office rejecting his proof is modified accordingly.

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

INSTRUCTIONS.

Maps showing a continuous line of road may be submitted for approval under the act of March 3, 1875, though exhibiting sections of road in excess of twenty miles.

*Acting Secretary Chandler to the Commissioner of the General Land Office, October* 14, 1890.

I have the letter of the 9th instant from the Acting Commissioner, in which he refers to maps filed by railroad companies under the right of way act of March 3, 1875, showing sections of road that exceed twenty miles in length, and expressing the desire for instructions as to whether such defect will be considered sufficient ground for their rejection.

In reply I have to state that the almost universal rule of action by the Department on maps submitted under the act referred to, has been to approve them without reference to the number of miles embraced in any *continuous* section of road, if found to be correct in all other respects, and your office should be thus governed.

This action of the Department is not, however, to be confounded with that in the case of a map showing detached portions of line of route, or of one embracing a portion of a main line and a branch or spur. In these instances the maps should be returned to the companies filing them.

In case then that maps depicting a continuous line of route in excess of twenty miles come before you for action they may be regularly submitted for departmental approval if otherwise without defect.

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PRACTICE—NOTICE OF APPEAL—RULE 93.

LANG *v.* ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RY. CO.

An appeal will not be entertained if a copy thereof is not served upon the opposite party within the period prescribed by the rules of practice.

*Acting Secretary Chandler to the Commissioner of the General Land Office, October* 14, 1890.

On October 9, 1889, you transmitted the appeal of Francis Lang from your decision of March 25, 1889, holding for cancellation his homestead entry for lot 1, of section 6, T. 1 N., R. 11 W., Little Rock, Ark., and awarding the land to the St. Louis, Iron Mountain and Southern, and Little Rock and Memphis Railroad companies.

Your decision was based upon the ground that the land in question "is within the six mile granted limits of the grants by the act of February 9, 1853, for the Cairo and Fulton, now St. Louis, Iron Mountain and Southern and the Memphis and Little Rock, now Little Rock and Memphis Railroad companies, and lot 1 of Sec. 6, passed to the State upon the definite location of the railroads August, 1855, having been vacant public land at that time and also at the revival of said grants by act of July 28, 1866."

Notice of this decision was given to Lang, April 3, 1889.

On May 8, 1889, he filed an appeal from said decision in the local office. A copy of the same, however, was not served on the agents for the railroad companies until June 25, 1889.

On July 24, 1889, Messrs. Britton & Gray, attorneys for the St. Louis, Iron Mountain and Southern R. R. Co., filed a motion to dismiss said appeal for the reason that service of copy of the same was not made on the company within the sixty days allowed by rule 93 of the rules of practice.

As notice of this appeal was not properly given to the adverse party

as required by said rule of practice, the same is hereby dismissed. Brake *v.* California and Oregon R. R. (11 L. D., 249).

In view of allegations made by the claimant to the effect that since the date of the grant for the railroad company the land in question became an island in the Arkansas river and that the same was surveyed in 1883, thirty years subsequent to the date of said grant, and was declared to be public land subject to entry, I am of the opinion, that the facts in relation to the formation of said island should be ascertained, and the question carefully considered, before the land is declared to enure to the grant.

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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., September* 20, 1890.

This circular is re-issued for the information and benefit of those concerned.

LEWIS A. GROFF,
*Commissioner.*

*Circular in relation to the furnishing of certified copies of the records, papers on file, or plats, in the General Land Office.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*July* 20, 1875.

Annexed are the laws (Revised Statutes of the United States) relative to the powers and duties of the General Land Office in furnishing exemplifications of patents, papers, or plats on file or of record therein, of the legal force and effect of such certified copies, and the terms upon which the same can be procured.

With a view to give proper effect to said statutes, the following requirements are prescribed by direction of the Secretary of the Interior.

1. All copies which may be required by parties interested will be furnished when the cost thereof shall *first* have been paid to the General Land Office.

2. The applicant must address a communication to the Commissioner of the General Land Office designating the tract or tracts in regard to which the verified transcripts are wanted, describing as accurately as possible the record, papers, or plats of which said transcripts are desired, and sending a sum of money quite sufficient to cover the cost according to the extent of the copying required; and should the sum sent to this office be in excess of the actual legal cost, such excess will be returned to the applicant.

The following is the tariff established under the statute, section 461, for furnishing transcripts, to wit:

*First.* Fifteen (15) cents for every hundred words in a transcript.

*Second.* Two (2) dollars for copy of township plat or diagram.

*Third.* One (1) dollar for the Commissioner's certificate of verification and official seal.

*Fourth.* One (1) dollar for appending such certificate and seal to official certificates of approval of assignments of bounty-land warrants or military bounty-land scrip.

3. Upon the receipt by the General Land Office of the application particularly describing the record or paper of which transcripts are required, accompanied by the requisite amount to cover the expense, the same will be duly acknowledged, and the exemplifications promptly transmitted.

S. S. BURDETT,
*Commissioner.*

The following sections of the *Revised Statutes of the United States* relate to applications for exemplifications of patents, etc., as referred to in the accompanying circular:

Fees for exemplification of patents, etc.

2 July, 1864, c. 224, v. 13, p. 375.

SEC. 461. All exemplifications of patents, or papers on file or of record in the General Land Office, which may be required by parties interested, shall be furnished by the Commissioner upon the payment by such parties at the rate of fifteen cents per hundred words, and two dollars for copies of township plats or diagrams, with an additional sum of one dollar for the Commissioner's certificate of verification with the General Land Office seal; and one of the employés of the office shall be designated by the Commissioner as the receiving clerk, and the amounts so received shall, under the direction of the Commissioner, be paid into the Treasury; but fees shall not be demanded for such authenticated copies as may be required by the officers of any branch of the Government, nor for such unverified copies as the Commissioner in his discretion may deem proper to furnish.

Copies of records, etc., of General Land Office.

25 April, 1812, c. 68, s. 4, v. 2, p. 717.

4 July, 1836, c. 352, ss. 2, 7, v. 5, pp. 109, 111.

SEC. 891. Copies of any records, books, or papers in the General Land Office, authenticated by the seal and certified by the Commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record. (See sections 2469, 2470.)

3 March, 1843, c. 95, ss. 1, 2, v. 5, pp. 627, 628.—Galt *vs.* Galloway, 4 Pet., 331.

Copies of records, etc., to be certified.

4 July, 1836, c. 352, s. 7, v. 5, p. 111.

SEC. 2469. The Commissioner of the General Land Office shall cause to be prepared, and shall certify, under the seal of the office, such copies of records, books, and papers on file in his office as may be applied for, to be used in evidence in courts of justice. (See section 891.)

Exemplifications valid without names of officers signing and countersigning.

3 March, 1843, c. 95, s. 1, v. 5, p. 627.

SEC. 2470. Literal exemplifications of any records which have been or may be granted in virtue of the preceding section shall be deemed of the same validity in all proceedings, whether at law or in equity, wherein such exemplifications are adduced in evidence, as if the names of the officers signing and countersigning the same had been fully inserted in such record.

Extract from section 448:

2 June, 1858, c. 82, s. 1, v. 11, p. 301.

SEC. 448. * * And the chief clerk of the General Land Office shall perform the duties of the Commissioner of the General Land Office in case of a vacancy in said office, or of the absence or sickness of the Commissioner.

PRACTICE—COSTS OF CROSS-EXAMINATIONS—RULE 55.

DUCLOS *v.* HARKSEN.

Rule 55 of practice requiring each party to pay the cost of taking testimony upon his own direct and cross-examination, is construed to mean that each party must pay the cost of taking the testimony of his own witnesses, both in the direct and cross-examination of such witnesses.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October* 17, 1890.

Samuel J. Harksen made timber culture entry of the SW. ¼ Sec. 26, T. 110 N., R. 68 W., Yankton, Dakota, June 5, 1882, and on August 14, 1886, John B. Duclos filed affidavit of contest against said entry charging that the claimant—

Has failed to plant and cultivate said land as required by law, in this, that the trees, seeds and cuttings planted during the third year after entry were not cared for and cultivated, but were allowed to be crowded down and choked out by the weeds. That the said five acres of trees, seeds and cuttings planted during the third year after entry are not growing and standing, and have not been replowed. That the said claim has grown up to weeds. That there is not at this date ten acres of trees, seeds or cuttings planted and growing on said claim. That the seeds planted on said land during the fourth year after entry were not planted in a proper way, nor in such manner as would insure their growth in an ordinary season. That said entry is not held in good faith for the sole use and benefit of the entryman, but is held for speculation and for the use and benefit of another person.

Upon the testimony taken at the hearing the local officers found that claimant had not complied with the law in the planting, cultivation or protection of the trees, seeds or cuttings, and recommended the cancellation of the entry. Your office, by decision of May 20, 1889, reversed said judgment and dismissed the contest, holding that the contestant had failed to sustain the charge by his own testimony. From this ruling the contestant appealed, alleging error in said decision as follows:—

1. In holding that the testimony of contestant, Duclos, in any manner admitted or proved compliance with the timber culture law by claimant, Harksen.
2. In holding that defendant Harksen's failure to have a full and healthy stand of trees upon the land was the result of excessively dry seasons.
3. In holding or deciding that Harksen's recent arrival from Holland was a sufficient excuse for his failure to properly comply with the law.
4. In reversing the finding of the register and receiver.
5. In sustaining the entry of defendant in view of the testimony in the case.

The hearing in this case was taken before a notary public, who upon motion of contestant refused to allow the claimant to cross-examine contestant or his witnesses, unless he (claimant) paid the cost of such cross-examination, the contestant insisting that he having waived the preference right of entry that said examination should be governed by Rule 55 of Rules of Practice. The contestant offered no objection to the cross examination, but declined to pay the cost, and the claimant offered

to cross-examine the witnesses, but also declined to pay the cost. The notary refused to allow said cross-examination without payment of costs, upon the ground that the testimony was being taken under rule 55, and not under rule 54, and that the contestant was not required to pay the cost, except upon his own direct examination.

The ruling of the local officers refusing to allow claimant to cross-examine contestant and his witnesses without paying the cost therefor was error under either rule. Rule 55, requiring each party to pay the cost of taking testimony upon his own direct and cross-examination, is construed to mean, that "each party must pay the cost of taking the testimony of his own witnesses, both in the direct and cross examination of such witnesses." (Milum *v.* Johnson, 10 L. D., 624.)

If the decision of your office was sustained by the testimony of the contestant, it would be immaterial whether he had been cross-examined, or not, but I do not so find. You will therefore remand the case to the local officers, with directions to allow the cross-examination of the witnesses by the opposing parties, and at the hearing ordered for this purpose either party may introduce further testimony material to the issue.

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### FINAL CERTIFICATE—PATENT—MISDESCRIPTION OF LAND.

### MARTHA BELL.

A misdescription of the land in the final certificate and patent will not defeat the right of the purchaser to the land actually covered by the sale and purchase, or render such land subject to the entry of another.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October* 17, 1890.

I have considered the appeal of Martha Bell from your decision of June 18, 1889, rejecting her application to make homestead entry for the S. ½ of SE. ¼ of Sec. 6, T. 18 S., R. 2 W., Huntsville Meridian, Montgomery, Alabama.

In your decision you state that the land in question was embraced in the homestead entry No. 5504, of Samuel B. Otts made July 1, 1873, which was commuted to cash entry No. 16,639 on January 15, 1881, under the act of June 15, 1880, and that patent issued October 30, 1882, for the land. Hence the rejection of said application.

The appeal is based upon the ground that the cash entry was for other land than that embraced in the homestead entry of Otts, and this contention is based upon the fact that the register in his cash certificate No. 16,639, described the land as S. ½ of SE. ¼ of Sec. 6, T. 18 S., R. 2 W., *St. Stephens* Meridian, instead of *Huntsville* Meridian.

Otts original homestead application was for the S. ½ of SE. ¼ of Sec. 6, T. 18 S., R. 2. W., Huntsville Meridian, containing 79.97½ acres.

The records of your office show that the entry was made for the same land.

On December 3, 1880, Otts made affidavit that he was the same person who made homestead entry No. 5504, at Montgomery, Ala., on July 1, 1873, for the S. ½ of SE. ¼ of Sec. 6, T. 18 S., R. 2 W., and he made application to purchase said land under the act of June 15, 1880. This was granted and payment was made to the receiver by Otts for 79.97½ acres and the register issued his certificate as above recited and patent issued in which the land is described as S. ½ of SE. ¼ of Sec. 6, T. 18 S., R. 2 W., *St. Stephens* Meridian.

The mistake in the patent was made by erroneously describing the meridian. With this exception the land is properly described and there can be no doubt whatever in relation to what the intention of Otts was, also as to the intention of the government; the former intended to purchase the tract in question and did purchase it, and the government intended to sell him said land and did sell it, and accepted his money in payment for the same, and the receivers' receipt is evidence of that fact.

The subsequent error on the part of the register in inserting in his certificate the wrong meridian in no way invalidated the transaction between the purchaser and the government, that transaction ended when the former made his proper application to the register to purchase the tract in question, and made payment for the same to the receiver. The register's certificate, subsequently issued, contained a recital of this transaction. If this recital contained an error which led the Land Department to issue a patent describing a meridian which improperly located this land, that fact in no way invalidates the claim of Otts. And it would be bad faith upon the part of the Department to now attempt to disturb him therein, and it will throw no obstacle in the way of defeating the intent of the government in conveying the land upon which Mr. Otts settled, to him.

It is asserted that Bell has resided upon the land for fourteen years, and a hearing is requested. Admitting that she settled upon the land at the date alleged, at that time the tract was embraced in the uncanceled homestead entry of Samuel B. Otts, and she could acquire no legal right under said settlement, and I see no reason why a hearing should be ordered.

Your decision is affirmed.

MINING CLAIM—ADVERSE PROCEEDINGS.

JAMIE LEE LODE *v.* LITTLE FOREPAUGH LODE.

An adverse claim will be recognized as filed within time, if such filing is in accordance with the regulations then in force.

No action can be taken in the Land Department on an application for mineral patent during the pendency of adverse judicial proceedings.

The relinquishment by the applicant of the land originally in conflict, does not authorize the Land Department in re-assuming jurisdiction of the case, during the pendency of judicial proceedings by adverse claimant, who has been permitted in such proceedings to amend so as to embrace a larger quantity of land than was included in the original adverse claim.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 20, 1890.*

I have considered the appeal of James Henshall entryman of Jamie Lee lode claim, lot No. 472, in SW. ¼ of Sec. 18, and NW. ¼ of Sec. 19, T. 9 S., R. 79 W., 6th P. M., mineral entry No. 2478, Leadville, Colorado, land district, from so much of your office decision of February 13, 1889, as relates to the Alpha adverse claim, and the appeal of William Coleman and Israel Cramer representing the adverse claim of the Little Forepaugh lode claim from your said office decision dismissing the adverse claim of said Little Forepaugh.

The record shows that James Henshall made application for patent for the Jamie Lee lode claim on the 23rd day of August, 1879. Due notice thereof was given by posting and publication in a weekly newspaper. The first publication of said notice was in the issue of said paper dated the 23d day of August, 1879, and the last one on the 25th day of October, following.

On the 24th day of October, 1879, Israel A. Cramer and William Coleman filed in the local office the adverse claim and protest of the Little Forepaugh lode claim showing a conflict to the amount of .4385 acres with the Jamie Lee application.

On the 25th day of October, 1879, The Enterprise Mining and Prospecting Company of Colorado, by its secretary, Hermann W. Polliz filed the adverse claim of the Alpha lode claim showing a conflict of 2.0638 acres with the Jamie Lee. Suit was commenced on each of said adverse claims, in the district court of Lake county, Colorado, within the thirty days required by law, judgment was entered in each case in favor of the adverse claimant, and afterwards set aside by the court, and so far as the record shows said suits are still pending and undetermined.

January 28, 1885, the Jamie Lee claimant filed in the local office a relinquishment of all that part of said claim which was filed in the United States land office of Leadville, Col., that conflicts with the Little Forepaugh claim "as described in and shown by said protest and adverse and plat thereto annexed." It appears that the Little Forepaugh was

allowed to amend its complaint in court so as to embrace a larger quantity of land than was included in the adverse claim filed in the local land office.

On the 13th day of February, 1889, your office dismissed the adverse claim of the Little Forepaugh for the reason that the Jamie Lee claimant duly relinquished from his application for patent and before entry all the land covered in the Little Forepaugh adverse claim as filed.

From your office decision the Little Forepaugh claimants appeal.

On the same date your office decided that as "the Alpha adverse claim was filed on the sixty third day of the period of publication of the Jamie Lee application for patent, and under the practice of this office prevailing at the time of such filing, to wit, October 25, 1879, it is considered as having been filed in time." This point was correctly ruled by your office upon the authority of Miner *v.* Marriott *et al.* (2 L. D., 709).

Your office further properly held that as the adverse claim of the Alpha was pending in court, that the court was the proper forum to determine all questions between the respective parties, and "pending proper evidence of the final determination of said Alpha adverse suit the Jamie Lee will remain suspended in the files of this office." From which decision the Jamie Lee claimant appeals.

As to the appeal of the Little Forepaugh it is insisted in argument by the Jamie Lee that the Little Forepaugh is not entitled to be heard on this appeal for the reason that no notice of appeal was ever served on the Jamie Lee claimant, or his attorney, as required by Rule of Practice 93. It is urged against this claim that "It is true there is on the appeal paper no evidence of such service, but present counsel filed no motion to dismiss the appeal for this reason, nor any evidence (such as the affidavit of the then attorney or of the claimants) that such copy was not served; it is simply assumed that service was not had, but it is too late to raise the point after argument by them on the merits of the case; such argument is the recognition of the appeal, and waiver of failure to serve notice." In view of the conclusion I reach upon the case I do not deem it necessary to pass directly upon the question thus raised. When an adverse claim is filed during the period of publication and suit commenced thereon then full and complete jurisdiction over the subject-matter connected with all of the rights of the parties is transferred from the Land Department until final judgment is rendered by the court and a copy of the record filed in the local land office, whereupon full and complete jurisdiction re-vests in the Land Department to require a compliance with the requirements of the law in other respects not adjudicated by the court.

Revised Statutes, section 2326, provides:

> Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of

notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived . . . . 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 a patent shall issue thereon for the claim or such portion thereof as the applicant shall appear from the decision of the court to rightly possess.

In the case of Richmond Mining Co. *v.* Rose *et al.* (114 U. S., 576), in passing upon this very question the court said:

It is apparent that the law intended, in every instance where there was a possibility that one of these claims conflicted with another, to give opportunity to have the conflict decided by a judicial tribunal before the rights of the parties were foreclosed or embarrassed by the issue of a patent to either claimant . . . . It is in full accord with this purpose that the law should declare, as it does, that when this contest is inaugurated the land officers should proceed no further until the court has decided, and that they shall be governed by that decision; to which end a copy of the record is to be filed in their office. They have no further act of judgment to exercise. If the court decides for one party or the other the land department is bound by the decision . . . . With all this these officers have no right to interfere. After the decision they are governed by it. Before the decision, once this proceeding is initiated, their function is suspended.

The Little Forepaugh claim was filed and suit commenced upon it in the required time; after the suit was commenced and while it was pending in court the Jamie Lee filed its relinquishment as to the conflict as originally filed in the land office, and upon this your office assumed to resume proceedings by deciding that the Jamie Lee was entitled to its patent. In this your office was clearly in error. A discrepancy between the adverse claim as filed and accepted in the local office, and that upon which suit is instituted will not warrant the Land Department in the resumption of proceedings during the pendency of the suit in court. Bay State Gold Mining Co. *v.* Trevillion (10 L. D., 194).

For the foregoing reasons your office decision as to the Little Forepaugh claimants is set aside and proceedings will be stayed thereon in your office until the proper evidence of the termination of the suit is furnished, upon receipt of which your office will proceed as provided by law. Your office decision as to the Alpha claim is hereby affirmed.

Said decision is accordingly modified.

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See page 406 17120480

PRACTICE—NOTICE—ATTORNEY—SETTLEMENT RIGHT.

MOODY *v.* KIRKLAND.

Notice of a decision to an attorney of record is notice to the party he represents.

One who has made settlement and due residence on a tract, but failed through mistake to include the same within his entry, will be protected as against a subsequent occupant of the premises who takes forcible possession thereof with full knowledge of the facts.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 20, 1890.*

I have considered the case of Jeremiah Moody *v.* W. B. Kirkland involving the E. ½ of NW. ¼ and W. ½ of NE. ¼ of Sec. 34, T. 26, R. 27 E., Gainesville, Florida, on appeal by the latter from your decision of May 5, 1888, holding his entry for cancellation.

The records show that Moody made homestead entry for the E. ½ of NW. ¼ and W. ½ of NE. ¼ of section "35," T. 26 S., R. 27 E., December 16, 1881, and Kirkland made homestead entry for the tract in dispute October 19, 1882.

Upon the application of Moody who alleged that his entry did not embrace the land upon which he had made settlement and improvement, a hearing was ordered by your office which took place on May 14, 1884, and upon an application by Kirkland a re-hearing was ordered which took place on January 23, 1886.

The local officers found that Moody made settlement on the land in dispute in the winter of 1877, and built two small houses, that he cleared a few acres of land, set out some orange and peach trees, planted crops, etc., and had resided on the land when not necessarily absent to work for his support and to obtain means to improve the claim. That while Moody was absent from the land in the latter part of 1881 or first of 1882, Kirkland took possession of the place and has resided thereon and cultivated the same since that date. But in view of the fact that Moody had not resided on the land since Kirkland took possession of the same, the local officers held that he had failed to comply with the requirements of the homestead law and recommended that the contest be dismissed and the entry of Kirkland remain intact.

In your decision of May 5, 1888, you reversed the local officers, and held the entry of Kirkland for cancellation and allowed Moody to amend his entry to embrace the land in question upon which he had made settlement and improvement. No appeal was taken from said decision and by letter of March 27, 1889, the case was closed by your office and the entry of Kirkland canceled and on May 20, 1889, the local officers notified Kirkland of this action.

On June 21, 1889, H. N. Copp, Esq., attorney for Kirkland, filed an appeal from your decision of May 5, 1888. It is alleged that Kirkland did not receive notice of said decision. The local officers state that the

name of A. N. Ham appears on their record as the attorney for Kirkland, and Mr. Ham was notified of your decision, by the local officers, on December 26, 1888, and acknowledged the receipt of said notice.

The records show that on October 25, 1886, M. O. Crumpler wrote to your office stating that A. N. Ham was no longer his attorney in any of his cases, including that of Moody *v.* Kirkland and stating that he (Crumpler) represented Kirkland. It is contended by the present attorney for Kirkland that this letter was a revocation of the authority of Mr. Ham to appear as attorney. On August 23, 1889, the local officers reported that M. O. Crumpler had not complied with the requirements of your office circular of March 19, 1887, and was not therefore eligible to represent claimants to public land, and furthermore, that he had never filed in the local office any authority from Kirkland entitling him to appear as attorney.

In view of these facts it must be held that notice of your decision was duly given to the attorney of record for Kirkland, and under rule 106 of the rules of practice, the same was notice to him. Hence the appeal filed June 21, 1889, was not in time and it must be dismissed.

But aside from the fact that no proper appeal was taken from your decision, I see no reason why the same should be disturbed.

The evidence taken at the two hearings shows that Moody made settlement on the land in question, and resided thereon for four years or more, and through mistake made entry for another tract. That Kirkland was aware of this fact, and yet he took possession of the premises during the absence of Moody and tore down the houses of the latter and threw them outside the enclosure. All this was against the protest of Moody. The latter swears that he was afraid to return to the place to attempt to reside there as Kirkland had threatened him. Kirkland's actions have not been such as entitle him to the protection of the Department. The papers in the case are herewith returned.

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### PRIVATE CASH ENTRY—EQUITABLE ADJUDICATION.

JOSEPH C. LEA.

A private cash entry, made in good faith, of the land covered by the previous timber culture entry of the purchaser, may be referred to the board of equitable adjudication in the absence of an adverse claim.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October* 20, 1890.

I have considered the appeal of Joseph C. Lea from your decision of December 17, 1888, holding for cancellation his private cash entry No. 1149, for W. ½ of SW. ¼, NE. ¼ of SW. ¼ and SE. ¼ of NW. ¼ of Sec. 34, T. 10 S., R. 24 E., Las Cruces, New Mexico.

The records show that said Lea made timber culture entry for the

tract in question on September 1, 1879, and on November 21, 1885, he made private cash entry for the same land.

On December 17, 1888, your office held the latter entry for cancellation on the ground that the same was void as it was made while the land embraced therein was reserved by the timber culture entry, and on December 19, 1888, your office held the latter entry for cancellation on the ground that the claimant had abandoned the same when he made private cash entry for the land.

With his appeal Mr. Lea submitted a corroborated affidavit stating that from 1879 to 1885, he planted 10,000 trees, constructed ditches etc., and expended $750, in improvements, and endeavored in good faith to obtain title to the land under his first entry, but he found that it was impossible to obtain sufficient water to secure the growth of timber and in 1885 he abandoned said entry and made cash entry for the land, and has since then expended $650 in improvements on the tract. He appears to have acted in good faith in the matter. His entry appears to have been allowed by the local officers under the impression that the land was liable to private entry.

There is no adverse claimant.

In my opinion this entry should be submitted to the board of equitable adjudication for consideration under the appropriate rule.

Your decision is modified accordingly.

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PRACTICE—RULE 48—OSAGE FILING—MARRIED WOMAN—PAYMENT.

BROOKS *v.* SCHOPPER ET AL.

A decision of the local office contrary to existing laws and regulations may be corrected by the Commissioner of the General Land Office, though no appeal is taken from such decision.

The failure of a settler on Osage land to file therefor within three months from date of settlement subjects his claim to any other valid intervening right.

A single woman who has the qualifications of a pre-emptor, and after due compliance with law and submission of Osage final proof, marries, is not by such marriage deprived of the right to have her proof considered and entry allowed.

It may be presumed that the first payment was properly tendered with Osage final proof, where such proof is rejected for reasons not involving the matter of payment, and the record shows full compliance with the law in other respects but is silent as to such tender.

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

I have considered the several appeals of Cyrus H. Brooks, William Conway and James M. Crabb from your office decision of May 8, 1889, wherein you direct that Annie M. Schopper be allowed to complete her entry upon her Osage filing, made March 14, 1884, on the NE. ¼ of Sec. 19, T. 27 S., R. 12 W., Larned, Kansas.

This appeal involves the conflicting interests of four applicants to purchase said tract, under the provisions of the act approved May 28, 1880 (21 Stat., 143), relating to the Osage lands.

William Conway filed upon said tract March 14, 1884, alleging settlement February 28, of that year. On June 6, 1884, he gave notice of his intention to make final proof on August 29, of that year.

Anna M. Schopper filed upon the same tract on March 14, 1884, alleging settlement January 20, 1884. She gave notice of her intention to make final proof on September 8, of that year.

James M. Crabb made his filing upon said tract on May 31, 1884, alleging settlement February 27, 1884. He gave notice of his intention to make final proof on August 27, of that year.

Each of said parties submitted final proof, pursuant to their respective notices.

On August 15, 1884, Conway filed his protest in the local office against the allowance of Crabb's proof; and on August 26, 1884, Schopper filed her protest against the allowance of the final proofs of both Crabb and Conway, asserting her superior right to make proof and payment for the land.

On September 25, 1884, the register and receiver ordered a hearing to be had before them on October 20, following, for the purpose of determining which of them (if either) ought to have the land. The hearing was duly had, and the case finally closed November 1, 1886.

On January 6, 1887, the register and receiver rendered their decision, holding, in effect, that Crabbs' residence was not sufficient to entitle him to the land, and that he had abandoned the same before he submitted his final proof. They also held that Conway had never established an actual residence on the land, and that his real home, at the time of and before offering his final proof, was with his sister. As to Schopper, they found that she began her residence on the tract about the first of April, 1884, and resided there

personally, actually and continuously up to month of October, 1884, when she submitted her proof and moved from the tract to Ellenwood, Burton Co., Kansas, where she has ever since resided, and where she has since married. . . . The testimony shows that up to October, 1884, Schopper was the only one of the three claimants for this land who had complied with the pre-emption law as to actual personal and continuous residence up to that time; but having abandoned the land before her entry was allowed at this office, and having disqualified herself as a pre-emptor by marrying, her final proof must be rejected.

The local officers accordingly rejected the several final proofs of Crabb, Conway and Schopper, and held for cancellation their several declaratory statements. From this judgment the three claimants filed their several appeals.

On December 19, 1887, Cyrus H. Brooks offered to file on the same tract. His filing was refused by the local officers, by reason of existing contests of Crabb, Conway and Schopper. Brooks appealed, alleging that none of the parties herein named had a valid claim to the land,

and that he had made such compliance with the law in respect to residence and cultivation as entitled him to the land.

By your office letter "H," of August 8, 1888, you ordered a hearing, to enable Brooks to show cause why none of the other claimants, Crabb, Conway and Schopper, should be permitted to enter the land; also to allow said last-named claimants to rebut such testimony as Brooks might submit. This second hearing was duly had, at which all four of the claimants participated, and submitted testimony in support of their respective claims and against the opposing claims of the others.

The record of the second hearing was transmitted to your office January 26, 1889; and on consideration of the entire testimony you modified the judgment of the local officers, affirming the same as to the rejection of the final proofs of Conway and Crabb, and reversed it as to the rejection of the final proof of Schopper.

I have carefully reviewed the entire record. The several claimants have contended with great pertinacity, and the result is a mass of testimony, of great extent irrelevant and strangely contradictory. It is, therefore, impossible to arrive at a just conclusion and at the same time reconcile the testimony and accord to the several witnesses that honesty of statement which should characterize every one in giving testimony under the solemnities of an oath.

As to James M. Crabb, I think, the testimony shows that he was not an "actual settler" on the land within the meaning of the act; and, if he were, he failed to file on the land within three months from the time of his alleged settlement, and therefore the land was subject to any other valid, intervening right. Circular of April 26, 1887, 5 L. D., 581; Hessong *v.* Burgan, 9 L. D., 353.

The testimony shows that William Conway went on the land on February 27, 1884, and selected a site for a house and dug a few holes with a spade. On the following day, he hauled a few scantlings on the land and nailed them together in the shape of the letter "A." This so-called house was admittedly not habitable. Conway tried to stay there that night, but was driven away by the cold, after remaining three hours. On the 10th of March, following, he began to plow sod for a house. This house (about fourteen by sixteen feet), he alleges, was completed two days afterwards. It had neither window nor floor. He put a stove in it, and staid there the night of the 12th of March. He swears he made this house his continuous residence thereafter; that he dug a well, and plowed about twelve acres of ground and cultivated it to corn.

The evidence, however, shows that he did no cooking at the place; that such meals as he ate at the house were carried there; he kept his clothing at the house of his brother-in-law, McCann, about two miles from the land. He worked for farmers in the neighborhood of the claim, and, while he doubtless slept in his house a few times, it was evidently done to give an appearance of having his real home there.

The furniture in his house consisted of a frame scaffold, on which was placed some straw and a blanket for a cover; also a stove, and a few tin cans. He was seen about the place very seldom; he says himself, "I went to my claim once a week"; again, he says, "I was at my claim Saturday nights, and once or twice a week." One witness says his house was in plain view of Conway's, and if ever Conway lived on the place at any time, he did not know it; that witness had passed Conway's house every day for more than a year and never saw him in the house; that Conway made his home at his brother-in-law's.

Independent of this, I think a fair construction of the entire testimony justifies me in concurring in the conclusion reached in your said office letter, also by the local officers, that Anna M. Schopper made the first settlement upon the land. She selected the land for a home January 20, 1884. The ground was then frozen, and she could not build her sod house. Her first act of settlement was February 25, 1884, when she cut the grass (blue stem) from off the building site and marked the foundation for her house, sixteen by nineteen feet. She employed hands, and began her house (sod) March 8, 1884, and finished it March 16th of that month, and moved into it her furniture, and made it her continuous home from that time until long after she submitted her final proof. She caused ten acres of the land to be broken, and cultivated the same to corn; dug a well, and cultivated a vegetable garden. She is corroborated by five witnesses as to her residence and cultivation and prior settlement. On February 18, 1886, about seventeen months after she submitted her final proof, she was married to one William Lueders.

It is strenuously insisted by opposing counsel, and so decided by the register and receiver, that by Schopper's marriage before her entry was allowed by the local office, she disqualified herself and forfeited her claim to the land.

This position can not be maintained. She had all the qualifications of a pre-emptor when she settled upon the land; her residence and cultivation were sufficient under the laws and regulations governing the disposition of the public lands to show her good faith; she submitted her final proof within the time required; the hearing developed the fact that at the time she submitted her final proof she had literally fulfilled every requirement of the statute, and should have been permitted to complete her entry. Had she married before she had lived upon the land the requisite period, it would be a far different case; but having performed all the conditions the law imposed upon her, and having submitted her final proof in time, her marriage afterwards could not annul her rights to have her proof considered and her entry allowed. Melissa J. Cunningham, 8 L. D., 433.

It is insisted by counsel that it does not affirmatively appear that Schopper made tender of the first installment of the purchase money, and therefore her entry should now be refused. It appearing that she had performed every other necessary act to entitle her to the land, and

the evidence being silent as to whether she made tender of the money or not, and the local officers having placed their objection to the acceptance of her final proof on an entirely different ground, it may be presumed that she tendered the purchase money when she submitted her final proof.

It appears that Schopper's appeal was filed one day late; but, since the action of the local office in rejecting her proof on the grounds stated is regarded as contrary to existing laws and regulations, your action, correcting such error under rule 48 of the Rules of Practice, without reference to her appeal, is approved.

Brooks settled on the land long after Schopper had submitted her proof; he knew that the several prior applications had not been passed upon; he entered into the contest to defeat all others, and knew his own claim depended upon his success. He has no right to complain of the result.

Schopper's final proof will be returned to the local office for acceptance, and she will be permitted to perfect her entry within thirty days from receipt of notice of this decision.

Your said office decision is affirmed.

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### HOMESTEAD—NOTICE—DEFAULT CURED.

### HEPTNER *v.* MCCARTNEY.

The initiation of a contest, so far as the rights of the entryman are concerned must be considered as of the date of his appearance at the hearing, in the absence of record evidence showing service of notice.

A contest must fail if, prior to the initiation thereof, the entryman without actual or constructive notice of the pending suit, cures the default in good faith.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October* 15, 1890.

C. L. McCartney made homestead entry, No. 5061, September 3, 1885, of the SE. ¼ of Sec. 18, T. 8 S., R. 31 W., Oberlin, Kansas. April 27, 1886, Andrew Heptner filed affidavit of contest against the same, alleging abandonment and lack of cultivation. Hearing was had June 17, 1886, and the local officers recommended the cancellation of the entry, and on appeal to your office the judgment of the register and receiver was affirmed August 13, 1888, and the entry held for cancellation. From this decision McCartney now appeals to this Department.

The contestant offered evidence for the purpose of showing that claimant and one Nelson built a house in partnership on the half section line between McCartney's entry and the NE. ¼ of the same section, which was entered by Nelson at the date of McCartney's entry (September 3, 1885). This house was ten by twelve feet, built of lumber, with one door and two windows, and cost eighty-five dollars. This, with two

furrows plowed around three sides of the claim, constituted all the improvements and cultivation up to the time of the filing of the affidavit of contest.

It is admitted that from the date of entry until the morning of April 27, 1886, a period of more than six months, McCartney was absent from his claim, residing in a different county, that the house was built by Nelson during such absence of McCartney, and one witness for contestant says Nelson admitted to him that he and McCartney were partners in the building of the house. That they were such partners is contradicted both by McCartney and Nelson. They both testify that the lumber was bought by McCartney and that Nelson was paid for building the house, though Nelson says he may have told contestant's witness that he was in partnership with McCartney. This admission is the only evidence of partnership, and the admission being of Nelson can not bind McCartney. No rule of evidence makes it admissible for that purpose. I must find that the house was McCartney's alone. The preponderance of the evidence also is clearly to the effect that the house, at least at the time of the hearing, was wholly on the claim of McCartney.

The only remaining question then is: Did the claimant forfeit his entry by failing to reside on it for more than six months?

So far as the record shows (although the affidavit of contest was filed April 27, 1886), no notice of the contest was ever served upon McCartney, either personally or by publication. The initiation of the contest then, so far as it affected the rights of McCartney, must be considered as of the date of his appearance at the hearing, June 17, 1886. (Stayton *v.* Carroll, 7 L. D., 198). At that date the evidence is undisputed that appellant was in the bona-fide occupancy of his house, had cultivated six or seven acres of his claim, and planted it with corn, had made a garden and planted shade trees, and had fully complied with the homestead law as to residence and cultivation, and so had cured his default before receiving *legal* notice of the contest. In Scott *v.* King, 9 L. D., 299, it is held that: "Evidence of compliance with the law after the filing of the affidavit and before the service of legal notice should be considered with reference to the question whether the claimant *in fact* had or had not knowledge of the filing of the contest," and the general tenor of the later decisions is to the effect that even though the claimant had cured his default before notice was legally served upon him, yet if it was apparent that he had actual knowledge of the filing of the affidavit and hastened to cure his default only for the purpose of defeating the contest, such action on his part, unaccompanied by evidence of good faith in other respects, would not defeat the rights of the contestant.

In the case under consideration no actual knowledge of the filing of the contest is shown to have been received by claimant, the only circumstance pointing in that direction being the fact that he moved into his house on the morning of the 27th day of April, the date of contest-

ant's filing. This may have been a mere coincidence, and as there is nothing in the evidence to the contrary, it must be regarded as such. In fact, the evidence on the part of appellant and his witnesses, which is undisputed, shows that he was at the house as early as eight o'clock in the morning, and at that time could not well have had any actual knowledge of the filing, if, indeed, the affidavit had been filed previous to that hour, and the evidence is silent as to the time of day the contest was filed.

It will be held that the claimant had no actual or constructive notice of the contest prior to the curing of his default, and his entry will be sustained and the contest dismissed.

The decision of your office is reversed.

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FINAL PROOF—CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., October* 21, 1890.

REGISTERS AND RECEIVERS,
*United States Land Offices:*

GENTLEMEN: Your attention is directed to the provisions of an act of Congress approved October 1, 1890, entitled "An act for the relief of certain settlers on the public lands of the United States and to authorize the taking and filing of final proofs in certain cases," a copy of which is hereto attached.

If you have any cases suspended in your office coming under the provisions of the first section of said act, you will pass upon the same without delay. No comment upon the provisions of the act appears to be necessary.

Very respectfully,

W. M. STONE,
*Acting Commissioner.*

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AN ACT for the relief of certain settlers on the public lands of the United States and to authorize the taking and filing of final proofs in certain cases.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in cases now before any of the land offices of the United States in which there has been or is now a vacancy in either of the offices of register or receiver, where the day set for hearing final proofs came during the vacancy in said office, and there is no contest or protest against said claims, and where the remaining officer has taken said proofs and reduced the same to writing, the same may now be passed upon by the register and receiver as if the same had been taken when there was no vacancy.

SEC. 2. That hereafter, when a vacancy shall occur in any of the land offices of the United States by reason of the death, resignation, or removal of either the register or receiver, and the time set for taking final proofs falls within the vacancy thus

caused, the remaining officer may proceed to take said final proofs, in the absence of any contest or protest, reduce the same to writing, and place it on file in the office to be considered and passed upon when the vacancy is filled.

Approved, October 1, 1890.

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PRACTICE—MOTION FOR REVIEW.

OWENS *v.* GAUGER.

An application for review calling for the exercise of the supervisory authority of the Secretary on behalf of a stranger to the record will not be entertained, where such applicant can assert his rights through regular proceedings instituted for that purpose.

*Acting Secretary Chandler to the Commissioner of the General Land Office, October* 25, 1890.

A motion for review of the departmental decision in the case of Henry Gauger, involving a right to enter the NE¼ of Sec. 18, T. 105 N., R. 56 W., Mitchell land district, South Dakota, is now before me. In that case, on a contest by one Bruce, the timber culture entry of Shepherd, for the described tract, was held for cancellation by the register and receiver on June 30, 1888. Twenty-three days thereafter and before the expiration of the period within which the entryman was entitled to appeal, Gauger made application to enter said tract under the timber culture law. This application was denied by the local officers, and, on appeal your office affirmed the judgment. On appeal here that judgment was reversed, and it was held, in effect that said application should have been received subject to the outstanding right of appeal in the entryman, and of the preferred right of entry in the successful contestant, but should not be made of record until the rights of the former entryman were finally determined, and then subject to the rights of the successful contestant, if the time for the exercise thereof had not expired. (10 L. D., 221.)

In promulgating this decision, your office directed that if Bruce, the contestant, had failed, after due notice, to exercise his preference right of entry, then, upon proper showing and payment, the application of Gauger should be allowed; and upon report of that fact to your office, the timber culture entry of William J. Owens on said tract would be canceled. It is stated that Gauger made entry May 13, 1890.

On April 23, 1890, a motion for review of said departmental decision was filed in the local office, in behalf of said Owens, which has been duly forwarded here.

It is not necessary to go into the details as to the grounds upon which said motion is based. It is not charged that said judgment is erroneous because of mistake of law or fact, therein committed, upon the record then before the Department. But Mr. Owens, who was permitted to make timber culture entry of said tract January 31, 1889,

pending the appeal of Gauger here, claims superior rights to the latter in the premises, and alleges that he, Owens, had no proper notice of the proceedings in said case, and asks that a hearing be ordered to ascertain who has the prior right of entry. The decision sought to be reviewed did not pass upon any rights Mr. Owens may have in the premises and therefore cannot prejudice those rights; and he can as readily assert them in a proper manner now as he could before said decision. The present motion for review is not the proper method for him to pursue. His application is in effect to re-open said case and inaugurate a new contest between him, a stranger to the record, and Gauger, upon matters which were not involved in the former case. This is not the office of a review. The application is more in the nature of an appeal to the supervisory power of the Secretary, which should not be invoked when relief may be obtained, if it ought to be afforded, by a proper application presented in the regular way to the proper land officers.

The motion is dismissed.

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SETTLEMENT RIGHTS—NOTICE OF CLAIM.

COOPER *v.* SANFORD.

Actual notice of the extent of a settlement claim will protect such claim as against the subsequent entry of another.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 27, 1890.*

On May 19, 1886, Daniel E. Cooper made timber culture entry for the W. ½ SE. ¼ and E. ½ SW. ¼, Sec. 6, T. 25 S., R. 46 W., Lamar, Colorado, and on the following day Asa L. Sanford filed declaratory statement for the same tract, alleging settlement the 16th of the same month.

On March 11, 1887, Sanford made final proof before the local office and Cooper appeared and cross-examined the witnesses, and submitted proof on his own behalf, claiming priority of right.

The local officers, on consideration of the testimony, held that Sanford's right to the land is fully established. On appeal your office by letter of February 12, 1889, also found that Sanford was entitled to the land, and directed that Cooper's entry should stand subject to Sanford's rights.

Cooper's appeal is now before me.

The facts are that on May 16, 1886, Sanford drove across the tract in question and determined to make settlement upon it. In pursuance of this intention, on the morning of the 18th he cut several poles from the banks of the Arkansas river, each of which was about twelve feet long, and from three to five inches in diameter, hauled them to the land and placed them in the form of a square, he says, to represent the foundation of a house. In the center of his foundation he drove a stake upon which

he wrote the description of the land and signed his name. While he was engaged in this work Cooper drove up. Several others were present, one or more of whom were making settlement in like manner on neighboring tracts. Cooper asked Sanford whether he thought the structure sufficient "to hold the claim." Sanford said he did. The former then drove away, and on the following day made entry.

It appears that building material could not be procured in the neighborhood. As soon as practicable, about June 1, 1886, Sanford built a house and has since continued to reside on the tract.

I have no difficulty in finding that Sanford has the prior right. Cooper, however, urges that the settlement right is confined to the W. ½ SE. ¼, because the improvements were located on that technical quarter section, and that the entry should be allowed to stand for the tract lying in the SW. ¼. In support of this the case of L. R. Hall (5 L. D., 141), is cited.

In that case Hall made settlement on four quarter-quarter sections lying in a line running north and south, two of them being in section 26, and two in section 35. Thereafter certain additional homestead entries were allowed for the tracts in section 35, which were shortly passed to patent. Subsequently, Hall offered final proof, which was rejected on account of conflict with the patented homestead entries. He then asked that suit be brought by the government to set aside said patents. In discussing this question the Department held that,

> the settlement *and* improvements of Hall, if confined to section 26, would not be such notice as the entryman in section 35 would be bound to regard. The notice given by settlement and improvement applies only to the quarter section as defined by the public surveys. If, therefore, the rights of the entryman attached before notice of the claim of Hall was given, he is without remedy. If, however, Hall had given notice by settlement or improvement, *or in any competent manner*, of his claim to the tracts in section 35, prior to the making of said entries, then he has an adequate remedy in his own hands.

It is not a proper interpretation of this ruling to hold that only actual improvements give notice of settlement; nor will the words of the ruling bear this interpretation. Notice given "in any competent manner" is sufficient. Whether the notice given in this case would be sufficient as against any applicant for the land need not be considered. It is sufficient that the claim and the extent thereof were personally brought to Cooper's attention. He was charged with notice. Settlement is not confined by law to a technical quarter section, and it is impracticable for a settler to place improvements on all the subdivisions of his claim at the instant of settlement. Actual notice of the extent of the claim therefore, is at least as good as that given by improvements. Having had actual notice Cooper made his entry subject to the rights of the settler. As Sanford followed his settlement by residence on the tract claimed, it must be held that his right to the tract in controversy is superior to the claim of Cooper.

The decision appealed from is accordingly affirmed.

PRACTICE—NOTICE OF APPEAL—ACCEPTANCE OF SERVICE.



WHEELER *v.* CLARK.

There is no prescribed form of words necessary to be used in giving notice of appeal; and to serve the appellee with a true copy of the appeal is sufficient notice thereof.

The words "service accepted", endorsed on the appeal by the attorney of appellee, imply service of notice accepted; and the acknowledgment of the receipt of "copy" thus endorsed implies that such copy is of the paper so endorsed.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October* 27, 1890.

I have considered the case of Adeline F. Wheeler *v.* Walter P. Clark, on appeal by the former from your decision of April 25, 1888, dismissing her contest against the homestead entry of the latter for the SW. ¼ Sec. 1, T. 110 N., R. 64 W., Huron, South Dakota land district.

Your decision states substantially and fairly the record and evidence in the case, and having carefully reviewed the entire record I find no ground for disturbing your conclusion, and your decision is affirmed.

The first assignment of error in the appeal to this Department is that "no notice of appeal was served on contestant upon appeal to the Commissioner," and this ground is insisted upon by counsel, but I find the appeal endorsed—"Service accepted and copy received this 24th day of May 1886." Signed by the attorney of appellee.

This paper, after properly naming the parties and describing the land involved, says, "Appeal by Walter F. Clark the claimant, from the decision of the Hon. Receiver of the Huron Land Office, dated April 27, 1886."

It then gives a statement of the record of the case and this is followed by the assignment of error, and argument of counsel. This appeal was filed in the local office May 24, 1886, being within thirty days of the decision, and on same day a copy of the same was served on the attorney of appellee.

Rule 46 of the Rules of Practice says:—"Notice of appeal and copy of specifications of error shall be served on appellee" etc.

There is no prescribed form of words necessary to be used in giving notice of an appeal, and to serve the appellee with a true copy of the appeal, is certainly sufficient notice of it. In the case at bar the words "service accepted" imply service of notice accepted, and the acknowledgment of the receipt of "copy" endorsed on the paper implies that the copy is of the paper so endorsed. The point therefore is not well taken.

CONTEST—SUPPLEMENTAL CHARGE—APPEAL.

WARTHEN *v.* VANCE ET AL.

A supplemental affidavit of contest does not constitute an abandonment of the prior charge, or waive rights secured under a hearing subsequently had thereon.

The failure of a party to properly appeal from a decision of the local office does not deprive him of due protection in the General Land Office as against a decision contrary to existing laws and regulations.

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

I have considered the appeal of Henry B. Vance from your decision of December 17, 1888, allowing him sixty days to show cause why his timber culture entry for the SE. ¼ of Sec. 14, T. 8 S., R. 34 W., Oberlin, Kansas, should not be canceled.

The records show that Asa Troxel made timber culture entry for the tract in question December 7, 1885.

On December 7, 1886, Calvin H. Warthen filed an affidavit of contest against said entry alleging that the same was illegal and fraudulent from inception, also that "said claimant had never done any work on said land."

On the day following, December 8, Henry B. Vance filed an affidavit against said entry, alleging that the entryman had failed to break the first five acres as required by law.

On February 16, 1887, Warthen filed an affidavit which was expressly stated to be "supplemental to his contest affidavit filed against this entry on December 7, 1886." In this affidavit it was charged that Troxel had failed to break five acres from date of entry.

On April 22, 1887, the local officers issued notice of contest, in the case of Warthen *v.* Troxel containing only the charges made in the affidavit filed December 7, 1886, and appointed July 7, 1887, as the day for a hearing, at which time the contestant appeared and submitted evidence sustaining the charges made. The claimant made default.

On said July 7, Vance appeared and moved to dismiss the contest of Warthen on the ground that the filing of the supplemental charge February 16, 1887, by Warthen was an abandonment of his contest filed December 7, 1886, and that the contest of Vance filed December 8, 1886, thus became the prior one and that of Warthen should be held subject thereto. This motion was granted, and on July 8, notice issued on Vance's complaint and at the hearing October 6, 1887, he sustained the charge made and the local officers recommended the cancelation of Troxel's entry, and no appeal being filed, the entry was canceled by your office on May 14, 1888, on the record sent up by the local officers on December 19, 1887, and in the absence of any knowledge of the contest of Warthen. It appears that the latter had, on July 25, 1887, appealed from the action of the local officers dismissing his contest, but

said officers retained his appeal with the record in the case, until May 11, 1888, three days prior to your decision in the case of Vancé *v.* Troxel, when they transmitted the same to your office.

On July 20, 1888, Vance made timber culture entry for the tract in question.

Your decision contains a full and clear statement of the case, and there can be no doubt as to the correctness of your conclusion.

The action of the local officers in dismissing the contest of Warthen was erroneous, and their action in retaining his appeal in their office for nearly a year after the same had been filed, and in the mean time transmitting the subsequent case of Vance is deserving of censure. The appeal should have been transmitted at once and the contest of Vance held to await the decision in said case.

Vance filed the following appeal from your decision:

> The error relied upon is that the Hon. Commissioner erred in his holding that the timber culture entry of Vance should be held subject to a preference right of Warthen in face of the record showing that Warthen failed to comply with Rules of Practice Nos. 45 and 46. We contending that the failure of Warthen to so comply acted as a termination of all the rights of said Warthen to be further heard or to disturb the acquired rights of Vance, which rights of Vance have been acquired without any notice whatever that Warthen was resisting his attempts, and acts to perfect his title to said land now embraced in his timber entry since July 20, 1888.
>
> Very respectfully submitted,
>
> HENRY B. VANCE
> by MAY AND MCELROY,
> *His attorneys.*

No statement is added to this appeal, neither is any argument filed in its support, and the Department is thus left to put its own interpretation upon the same.

I assume that the attorneys for Vance had reference to the appeal of Warthen from the decision of the local officers rendered July 7, 1887, dismissing his contest and allowing that of Vance. The contention seems to be that the rights of the former are in some manner barred by his failure to comply with rules 45 and 46 of the rules of practice.

This appeal was filed July 25, 1887, which was within the time allowed and the reasons for the same are given, thus complying with rule 45, but no notice of the appeal was served on Vance, who was an adverse party in interest, and who was entitled to notice. Warthen thus failed to comply with rule 46 of the rules of practice.

By reason of this failure the appeal of Warthen should properly have been dismissed by your office. Cone *v.* Bailey (10 L. D., 546); Bundy *v.* Fremont Townsite (10 L. D., 595).

Had this action been taken, however, it would have been the duty of your office in the exercise of its supervisory power, to have reversed the decision of the local officers, as the same was not only contrary to existing laws and regulations, but to the principles of justice, and to have reinstated Warthen in his rights of which he had been deprived

by the wrongful act of said officers. His failure to serve notice on Vance merely left him in the position of one who had failed to take an appeal, but did not deprive him of the protection of your office or of this Department. Pearce *v.* Wollscheid (10 L. D., 678).

I see no reason why there should be any further hearing in this case. The entry of Vance should be canceled and that of Warthen placed on record if the latter still so desires. Should he, however, waive his right to make entry, that of Vance should be allowed to remain. Warthen should be allowed ninety days in which to determine what action he will take.

Your decision is modified accordingly.

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### PROCEEDINGS ON FINAL PROOF—MINERAL LAND.

### DARRAGH *v.* HOLDMAN.

In proceedings had under a protest against final proof the Commissioner should pass on the whole case as presented by the record, including the sufficiency of the final proof.

The General Land Office has no jurisdiction over a case after an appeal from its decision thereon.

When witnesses are examined by the local officers their finding of facts where there is a conflict of testimony, is entitled to special consideration.

Findings of fact concurred in by the local and general land offices will be accepted as conclusive by the Department unless clearly wrong.

A segregation survey at the expense of the agricultural claimant may be properly directed, where such claim includes land of a mineral character covered by a previous mineral location.

*Acting Secretary Chandler to the Commissioner of the General Land Office, October 30, 1890.*

I have considered the case of Richard Darragh *v.* George S. Holdman on appeal by the former from the decision of your office dated June 17, 1889, holding that the land claimed by Holdman, in Darragh's homestead entry No. 3250 of the fractional S ½ of the SW ¼ of Sec. 6, and fractional N ½ of NW ¼ of Sec. 7 in T. 5 S., R. 20 E., Stockton, California, was mineral in character.

The record shows that Darragh made said homestead entry on July 14, 1880, and on March 4, 1886, gave due notice of his intention to make final proof and payment for said land on April 24, same year; that on said last-named date said Holdman appeared and filed his protest against the allowance of said proof, for the reason that he had located a placer claim covering 15.88 acres in the SW ¼ of the SW ¼ of said sec. 6, and the NW ¼ of the NW ¼ of said sec. 7, prior to the date of said homestead entry, which he had continually worked during the mining season of each year.

A hearing was duly had and from the testimony submitted by both parties, who were present and were represented by counsel, the local officers found that said Holdman, on January 15, 1878, filed in the recorder's office of Mariposa county his notice of location of the Holdman placer mine, covering the ground in question, and afterwards, during the same year, had said claim surveyed and the boundaries marked with stakes; that on October 30, and November 22, 1878, Holdman filed for record in said office notice of his claim to the water running in Snow creek through part of said claim and also for water running through a certain gulch to be conveyed upon said mineral claim; that said Holdman has worked for two or three months upon his claim during each winter season when he could secure water, and by means of box and ground sluices has mined a gulch therein, extending six or seven hundred feet; that said Darragh made his homestead entry with constructive notice of said mineral claim, and in September, 1880, received actual notice in writing of Holdman's claim; that after making said entry Darragh erected a dwelling upon said placer claim, in which he has since resided, and has also kept a store and the post office; that Darragh fenced about thirty acres of his claim, including ten acres claimed by Holdman, upon which he raised crops of wheat, rye and barley; that the soil upon said placer claim is composed of a sandy loam, with reddish clay, granite and some gravel; that the improvements of Darragh are valued at from $700 to $1,000, and the value of the work and improvements of Holdman is from $500 to $1,200; that it is shown that gold exists on said placer claim in paying quantities; that said Holdman, although an illiterate man, appears to be honest, and there is no reason to discredit or reject his testimony; that the weight of evidence shows that the land in controversy is mineral in character; that the residence of Darragh, having been made upon the mineral and not upon the agricultural part of the land covered by said entry, he could acquire no right thereby, and the local officers therefore conclude that said proofs should be rejected.

Upon appeal, your office concurred in the finding of the local officers as to the character of the land in question, and held said homestead entry for cancellation so far as the same covered said mineral claim, and required said Darragh "to segregate from the balance of the land, by a survey at his own expense, under the direction and with the approval of the United States surveyor general of California" that the sufficiency of the final proof and the effect of his residence upon the mineral claim would remain for future determination. From said decision Darragh appealed, and, among other things, urged that it was error to require him to have a segregated survey made without any assurance that he would receive patent for the balance. He also submitted affidavits alleging that Holdman's contest was not made in good faith. Your office, on May 16, 1889, advised the local officers that said objection was good, and that "if Darragh will withdraw his said appeal

and file in lieu thereof a motion for review, the same will be duly considered."

On May 28, 1889, Darragh filed a motion for review of said decision of your office, and also submitted the affidavits filed with his said appeal, and prayed that a new hearing might be ordered by your office, if, upon consideration of the record, the decision should be adverse to him.

On June 17, 1889, your office again considered the case, and held that the homestead entryman must have said survey made segregating the mineral land; that the evidence shows that Darragh resided on the land continuously, and, having shown good faith, the fact that his residence was on that portion of the land shown to be mineral, would not of itself defeat his rights, and that his final proof should not have been rejected.

Darragh again appealed, upon the ground that said decision was contrary to law and the evidence.

If the findings of fact by the local office, and concurred in by your office, are sustained by the evidence, the conclusions of law inevitably follow. The witnesses were examined by the local officers, and, in such cases, their findings of fact, especially where there is a conflict of testimony, are entitled to marked consideration. Morfey *v.* Barrows (4 L. D., 135; Neff *v.* Cowhick, 6 L. D., 660). Besides, when the findings of the local officers have been concurred in by your office, as in this case, they are accepted by the Department as conclusive, unless clearly wrong. Chichester *v.* Allen (9 L. D., 302); Conly *v.* Price (id., 490); Collier *v.* Wyland (10 L. D., 96); Finan *v.* Palmer, *et al.* (11 L. D., 321).

A careful examination of the testimony shows that the decision of your office affirming the findings of the local land office as to the character of the mineral claim is sustained by the evidence. The record, however, shows some irregularities in the proceedings which should be noticed. In the first place, your office should have passed upon the whole record, including the sufficiency of the final proof. And, secondly, after said appeal was filed your office had no jurisdiction of the case, it being removed at once to this Department by virtue of said appeal. John M. Walker, *et al.* (5 L. D., 504); Ida May Taylor (6 L. D., 107); Sapp *v.* Anderson (9 L. D., 165); Keller *v.* Bullington (11 L. D., 140).

The decision of your office requiring said segregation survey is affirmed, and upon presentation of the same, if satisfactory, Darragh's final proof will be accepted, and upon payment of fees and commissions, certificate will issue for the agricultural part of his entry.

### ADDITIONAL HOMESTEAD—COMPLIANCE WITH LAW

### BOWEN *v.* MCMICHAEL.

An additional homestead entry under the act of March 3, 1879, cannot be maintained through acts of the entryman's tenant in the matter of residence, occupancy, and cultivation.

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

I have considered the case of Ephraim Bowen *v.* Daniel McMichael, on appeal by the former from your decision of May 21, 1889, dismissing his contest against the additional homestead entry of the latter for the NE. ¼ of NW. ¼ of Sec. 32, T. 1 N., R. 11 E., Lincoln, Nebraska land district (Beatrice series).

On November 20, 1882, McMichael made additional homestead entry for this land, under act of Congress of March 3, 1879, and October 13, 1884, he submitted final proof in support of the same which was accepted by the local officers.

On November 15, 1884, Bowen filed an affidavit of protest against the same, alleging, in substance, that said entry was not made in good faith as an additional homestead for the entryman, but that the same was made for one Fred Parli and that said entryman had failed to comply with the requirements of the law in regard thereto, and that he did not occupy or cultivate the land, and did not control or use it from date of entry up to making final proof, but that it was in the sole control of said Parli. He further alleges that said entryman has failed to maintain a residence on the homestead to which the tract in controversy was made "additional," but was absent from the same more than six months at one time.

Notice of said protest and of a hearing which was set for August 31, 1887, was given defendant, at which the parties appeared and the plaintiff offered the testimony of sundry witnesses, when an adjournment was taken until September 6th following, at which time the parties again appeared and the testimony was concluded and on the 13th of same month the local officers passed upon the case and decided in favor of the defendant and dismissed the protest. From this decision Bowen appealed to your office and on May 21, 1889, you affirmed said judgment and dismissed said protest, from which ruling he again appealed.

The testimony shows that one Frederick Parli made a timber culture entry for this land, of date March 13, 1875; that he had fenced the tract with Osage hedge and wire on one side and on the other three sides he had rail and post and wire fence. This "forty" in controversy was situated in the corner of Parli's farm and joined the land of McMichael. Parli had broken a few acres and made some pretence from time to time of growing trees, but used the land as a pasture. There was a stone quarry on the tract and he sold stone therefrom.

In October, 1882, one Henry Holton initiated a contest against Parli's timber culture entry, and hearing of the same was set for November 20,

1882. A few days before the date fixed for the hearing Parli paid Holton $50 to abandon said contest, and on the day of hearing he and McMichael appeared at the local land office and had an entry of dismissal thereof made. Then Parli filed a relinquishment of his entry and cancellation of the same was entered and McMichael made additional homestead entry for the tract.

The testimony of McMichael shows that he and Parli talked about a sale of the land to Parli, but made no actual contract. He paid Parli nothing for the relinquishment and did not refund any of the money paid Holton. After the entry was made he rented the land to Parli for $12.50 per year. Parli was to break some ground to hold the land, and was to reset and repair some fences and to have all the stone he wanted to take from the quarry. He does not fix any particular time or place where this agreement was made and gives it in piecemeal. He has not exercised any act of ownership over the land since the entry was made, has paid no attention to it. When asked his purpose in making the entry he said "I took it to enhance my pecuniary interest." He says he knew the law did not allow him to make an agreement of sale. He promised Parli that if he sold he, Parli, should have the refusal of it. Parli never spoke to him about paying anything for the relinquishment or the money paid Holton.

Parli requested him to go to the land office and make the entry. He does not remember whether he told him that Holton had abandoned his contest. Parli furnished the team to go to the land office and nothing was said about the expense; he paid for feeding the team; does not remember whether they talked about the law prohibiting a contract of sale or not, but expected they did. Parli has had possession since the entry; he does not know how much has been broken since, may be an acre or an acre and a half; nothing in the agreement as to how much was to be broken; does not know if the plowed ground was sowed to rye or if cultivated in any way; does not know about the fence; Parli reset some of it, does not know if the wire is barbed or smooth, nor does he know anything about the posts; does not know how much stone has been taken from the quarry. He refused to testify on the first day and says he saw Parli and talked over the case and the testimony that had been offered, before testifying in the case.

One witness who worked for Parli testifies that Parli told him that the land had cost him about $200.

The testimony is voluminous in the case, but without going into further detail, it is sufficient to say that it convinces me that this entryman has wholly failed to comply with the law relative to additional homesteads. After providing therefor on certain conditions, it concludes as follows:

> Provided, That in no case shall patent issue upon an additional or new homestead entry under this act until the person has actually and in conformity with the homestead laws occupied, resided upon and cultivated the land embraced therein at least one year. Act of March 3, 1879, (20 Stat., 472).

The entryman, to take the most charitable view of the case, made by him, attempted to occupy, reside upon and cultivate the land by a tenant. It is well settled that this can not be done. See West *v.* Owen, (4 L. D., 412); Byer *v.* Burrill, (6 L. D., 521).

From a careful consideration of the evidence in the case I am satisfied that the entryman has not acted in good faith, and it is quite clear that he has not complied with the requirements of the statute in the matter of residence, occupancy and cultivation of this tract.

Your decision is reversed; the entry will be canceled.

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DESERT ENTRY—UNSURVEYED LAND—FINAL PROOF.

C. B. MENDENHALL.

Final proof under a desert entry should be made within three years from date of the initial entry, even though the official surveys have not been extended over the land.

Where satisfactory final proof has been made in such a case, supplemental proof, without republication, should be required after survey, showing that the claim conforms, or has been adjusted, to the lines of said survey.

*Acting Secretary Chandler to the Commissioner of the General Land Office, October* 31, 1890.

I have considered the appeal of C. B. Mendenhall from the ruling of your office of August 3, 1889, in which you held that as he had submitted final proof on a desert land entry before the official survey was filed, he must, when the land is officially surveyed, make new proof, showing the proper reclamation thereof.

On March 24, 1884, Mendenhall filed in the local office at Bozeman, Montana, his declaration of intention to reclaim the SE. ¼ of Sec. 15, N. ½ of NE. ¼ Sec. 22, N. ½ of NW. ¼ and NW. ¼ of NE. ¼ of Sec. 23, SW. ¼ and W. ½ of SE. ¼ of Sec. 14, and lot No. 1 of Sec. 14 (as it may be designated), all in Tp. 1 S., R. 12 E., Boseman, Montana, land district, containing six hundred and forty acres. He paid the receiver $160.

It appears that within three years, but before the official survey was filed, he made final proof to the acceptance of the local officers, and the same was transmitted to your office.

On July 20, 1889, your office called upon him to show—

why his entry should not be canceled for expiration of the statutory period, and to serve notice in the manner prescribed by circular of October 28, 1886.—(5 L. D., 204.)

On August 3, 1889, in reply to a letter from the local office, asking the return of the final proof that final payment might be made, you returned the proof, and instructed the local officers that:

In such cases, when the land is officially surveyed, the claimants are required to describe by legal subdivisions, section, township and range, the land embraced in their respective entries, and to make new proof, showing the proper reclamation thereof.

From this ruling the entryman appealed, assigning the following errors:

First, that he had made final proof within three years; that the same was accepted, and the $1.00 an acre tendered; that there is no provision of law requiring a repetition of final proof after the filing of the survey, and that the Commissioner erred in holding the contrary.

The statute (act of March 3, 1877, 19 Stat., 377) allows a desert land entry to be made before survey, the land in such case to be described "as nearly as possible." By circular of General Land Office, 1889, page 37, it is provided that: "After a township has been surveyed the claim must be adjusted to the lines of the survey."

The act above cited provides that:

> At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid . . . . . a patent for the same shall be issued to him.

In the case of Edward C. Simpson, 9 L. D., 617, it was held that:

> The law does not authorize an extension of the time within which to make proof upon a desert entry, but proof submitted after the expiration of the statutory period may be equitably considered, etc.

This rule was also laid down in case of Morris Asher 6 L. D., 801.

There is no provision of statute for delay of proof on account of the delay of the official survey; nor does any of the decisions mention that fact as an excuse for delay. Want of an official survey does not, in law, excuse the making of final proof within three years from date of filing. This being so, if proper, acceptable proof is made, before survey showing reclamation, the means of irrigation, etc., it would be useless to have such proof duplicated after the survey is filed, but the claim must conform to the official survey, or it "must be adjusted to the lines of the survey," and the lots and tracts in the claim must agree in their numbers with those in the survey. Proof that the claim does so conform or has been so adjusted to the lines of the survey, must be furnished, but the same may be made as supplemental to the final proof on file, and may be offered without publication.

Your decision is modified accordingly.

HOMESTEAD CONTEST—APPEAL—ACT OF JUNE 15, 1880.

MACBRIDE *v.* STOCKWELL.

A contestant who fails to appeal from an adverse decision of the local office is barred thereby from asserting any further claim or right under his contest.

An application to purchase under section 2, act of June 15, 1880, reserves the land covered thereby until final action thereon.

The cancellation of a homestead entry is no bar to a purchase under said act, in the absence of an intervening adverse right.

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

I have considered the appeal of Henry R. W. Macbride from your decision of September 8, 1888, holding for cancellation his homestead entry for the SW. ¼ of NW. ¼ of Sec. 10, E. ½ of NE. ¼ and SW. ¼ of NE. ¼ of Sec. 9, T. 28 S., R. 37 E., Gainesville, Florida, and allowing Geo. H. Stockwell to purchase said land under the second section of the act of June 15, 1880.

The record shows that said Stockwell made homestead entry for the tract in question October 14, 1876. The seven years during which he was allowed to make final proof for the same expired October 14, 1883, without any action on the part of the claimant to perfect his title.

On December 6, 1883, Henry R. W. Macbride filed an affidavit of contest against said entry alleging abandonment. The hearing in this case took place May 9, 1884, and the local officers rendered a decision recommending that the contest be dismissed. Due notice of this decision was given to Macbride, who failed to take an appeal therefrom, and the same became final so far as he was concerned.

On February 16, 1885, your office considered the case and decided that in view of the fact that the entry had been reported by the local officers for cancellation as having expired by limitation, which was *prima facie* evidence of abandonment, that the entry should be canceled. Sixty days were allowed for appeal. No appeal was taken and the entry was canceled September 18, 1885, and on October 3, 1885, Macbride made homestead entry for the land.

It appears that sometime between July 6, 1885, and September 9, 1885, (but the exact date is not given) Stockwell filed in the local office an application to purchase the land under the second section of the act of June 15, 1880.

The contention by Macbride is, in substance, that he is a successful contestant and procured the cancellation of Stockwell's entry, and had the preference right to enter said land. I do not think this position can be successfully maintained.

The action of your office on February 16, 1885, holding the entry of Stockwell for cancellation was not based upon the evidence submitted by Macbride at the hearing, but was based upon the fact that more than seven years had elapsed since the entry was made, and the claimant had

failed to show cause why his entry should not be canceled for expiration of the statutory period after due notice given him by the local officers.

The decision of the local officers was a proper one upon the evidence submitted to them and Macbride failed to appeal therefrom, and by that failure he was barred from asserting any further claim or right under his contest. This being the case it is unnecessary to discuss at length the question of the validity of the contest of Macbride. The record in said case shows that the notice was given by publication but no affidavit was filed showing that personal service could not be made, neither was there any evidence that notice was sent to the claimant by registered letter, nor was there sufficient evidence that the notice was published for a period of thirty days. On account of these failures to comply with the rules of practice, the contest might properly have been dismissed.

As it thus appears that Macbride has no right as a contestant, the question to be determined is, has he any right to the land by virtue of his entry made subsequent to the cancellation of Stockwell's entry.

Stockwell's application to purchase was transmitted to your office September 9, 1885, which was prior to Macbride's entry, October 3, 1885. This application reserved the land from entry until final action thereon. Griffin *v.* Pettigrew (10 L. D., 510). The application should also have operated as a bar to the action of your office, September 18, 1885, cancelling said entry. Said cancellation was an inadvertence on the part of your office, but should it be admitted that the entry was canceled in the regular order of business, in the absence of an adverse right by virtue of a subsequent entry under the homestead laws, at the date of application to purchase, said cancellation would be no bar to the purchase of the land under the act of June 15, 1880. Simpson *v.* Foley (4 L. D., 21); Martha A. Carter (9 L. D., 604).

Your decision is, therefore, affirmed.

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CIRCULAR—FAILURE OF CROPS—PAYMENT.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., October* 27, 1890.

REGISTERS AND RECEIVERS,
*United States Land Offices.*

GENTLEMEN: Your attention is directed to the joint resolution of Congress, approved September 30, 1890 (26 Stat., 684), which reads as follows:

Joint resolution to extend the time of payment to settlers on the public lands in certain cases.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever it shall appear by the filing of such evidence in the offices of any register and receiver as shall be prescribed by the Secretary of the

Interior that any settler on the public lands, by reason of a failure of crops for which he is in no wise responsible, is unable to make the payment on his homestead or pre-emption claim required by law, the Commissioner of the General Land Office is hereby authorized to extend the time for such payment for not exceeding one year from the date when the same becomes due.

Any party applying for the extension of time authorized by said resolution will be required to submit testimony to consist of his own affidavit, corroborated, so far as possible, executed before the register or receiver, or some officer authorized to administer oaths in land matters within the county where the land is situated, setting forth in detail the facts relating to the failure of crops, on which he relies to support his application, and that he is unable by reason of such failure of crops to make the payment required by law.

On receipt of such application in your office, you will note upon your records in pencil that the same has been filed, and transmit it, together with the testimony filed in support thereof, to this office, accompanied by your report, and await further instructions.

Very respectfully,

W. M. STONE,
*Acting Commissioner.*

Approved:
GEO. CHANDLER,
*Acting Secretary.*

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PRACTICE—NOTICE—EVIDENCE—ABANDONMENT.

DURKIN *v.* LINDSTRAND.

The notice of a contest should recite the charges contained in the affidavit of contest, but it will not be regarded as defective if it shows on its face a sufficient allegation to support a judgment of cancellation.

A defendant who appears to the merits of an action, without objection to the sufficiency of the notice, can not, after judgment against him, be heard to question the legality thereof.

A notice of contest may be signed by one or both of the local officers.

It is not necessary that the affidavit of contest should accompany an order designating an officer to take testimony, nor that said affidavit should be in the possesions of such officer.

Under rule 35 of practice an officer designated to take testimony in a contest may properly authorize any other qualified officer to take such testimony.

It is not error that a party is not informed of his right to cross-examine witnesses, where due opportunity for such cross-examination is allowed.

A charge of abandonment against an entry is sustained by evidence showing that the entryman has not established residence on the land within six months after entry.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November* 1, 1890.

In the record transmitted with the appeal of William Lindstrand, from your office decision of April 23, 1888, in the case of Thomas Durkin *v.* William Lindstrand, the following facts appear:

March 19, 1883, said Lindstrand made homestead entry No. 2349, for the SW. ¼ Sec 24, T. 115 N., R. 61 W., Huron, Dakota.

November 11, 1884, Durkin filed a contest against said entry, alleging in his affidavit that "Lindstrand is now living on his pre-emption, and has wholly abandoned said tract (homestead) and changed his residence therefrom for more than six months since making said entry and next prior to the date herein; that said tract is not settled upon and cultivated by said party as required by law."

Embodied in the affidavit was a request that the hearing might be had at Doland, Dakota.

Service on this affidavit was made by publication, summoning the defendant to appear at the office of H. Beecher, a notary public, at Doland, Dakota, on February 17, 1885, to respond, etc. Lindstrand did not appear at the place designated to take the depositions, and the evidence was taken *ex parte* before one William M. Rogers, a notary public, at Doland, and forwarded to the register and receiver at Huron, who, on February 27, 1885, rendered judgment canceling the entry.

At the time of filing the affidavit and publication of notice, as aforesaid, the defendant, Lindstrand, was absent in Europe.

On application of the defendant, alleging certain irregularities in the above proceedings, your office, by letter dated December 26, 1885, remanded the case for a rehearing.

In obedience to this direction, on January 9, 1886, notice was again issued to the defendant, summoning him to appear "at the office of H. Beecher, a notary public, at Doland, D. T., before him on the 23rd day of March, 1886," and stating therein that the testimony would be examined and final hearing had and decision rendered at the local office (Huron, Dakota,) April 2, 1886.

This notice was signed J. S. McFarland, register, and recited that complaint had been entered at "this office by Thomas Durkin against William Lindstrand for abandoning his homestead entry No. 2349," describing the land. The notice was based on the original affidavit, containing the charges heretofore recited, and was served personally upon the defendant February 1, 1886.

On the 23d of March, pursuant to notice, plaintiff and defendant appeared before William M. Rogers, a notary of Doland, who had been authorized by Beecher to take the testimony in his place, because he (Beecher) was unable to be at Doland on the day specified. The testimony of plaintiff and one other witness was taken by Rogers at the office of Beecher when it was stipulated in writing between plaintiff and defendant that the further taking of testimony should be "adjourned or moved to the office of Wm. M. Rogers," which was done, and the testimony completed the same day. On this hearing testimony was introduced by both parties. No objection was made by the defendant to the notice, nor to the place or places of taking the testimony, nor officer before whom it was taken. This testimony as above taken was properly

certified and forwarded to the register and receiver at Huron, who on the 2d of April, 1886, rendered their joint decision thereon, recommending that the entry be canceled.

April 5 (not 15, as stated in your office decision), 1886, both parties were notified of the decision of the local officers, and on May 8, counsel for defendant filed a motion with the register and receiver for a "rule or order" to set aside the testimony taken as above, also the judgment of the local officers, and that a new hearing or trial be had at Huron, alleging as ground therefor:

1st. A variance between the complaint and notice.

2d. That the complaint or affidavit was not in the hands of the officer (Rogers) who took the testimony.

3d. That the evidence was insufficient to support the judgment.

4th. That the officer before whom the testimony was taken was not the proper officer, and had no authority so to do.

5th. That the claimant was not informed of his right of cross-examination.

6th. Same as 3d.

7th. That there is a variance between proof and notice.

8th. That there is a variance between the proof and the charge in the information.

May 24, 1886, this motion was overruled—

1st. Because untimely, and

2d. Because the judgment had become final, and

3d. Because the defendant was present at taking of testimony and cross-examined the witnesses and submitted testimony, and none of the reasons offered are sufficient to set aside this judgment.

This judgment is attached to the motion, and signed by E. W. Miller, receiver.

The defendant appealed, and your office affirmed the action and decision of the register and receiver, and he now appeals to this Department.

The errors complained of before the Commissioner and this Department are in substance the same as those above enumerated in the motion to set aside the judgment of the local officers.

I find no reversible error in these proceedings. The objection that there is a variance between the complaint and the notice is answered in Green *v.* Berdan, 10 L. D., 294.

While the notice should recite the charges contained in the affidavit, it will not be regarded as defective if it shows on its face a sufficient allegation to support a judgment of cancellation. This notice charged abandonment of the entry, which, if proved, would support such judgment. (Smith *v.* Johnson, 9 L. D., 255.) Moreover, the notice is a means to obtain jurisdiction of the person of the defendant, and in this case the defendant appeared to the merits of the action and made no

objection to the sufficiency of the notice, and he can not after judgment against him be heard to complain of the legality thereof.

As to the second point, that the affidavit was not in the hands of the officer who took the testimony, it is sufficient to say that it did not belong there. That it was made for the sole purpose of giving information to the register and receiver, upon which to issue notice or summons to the claimant alleged to be in default. This done, its office was performed, and it was not necessary that it should accompany the writ, nor be or remain in the hands of the officer taking the testimony. The objection that the officer before whom the testimony was taken was without authority to take the same is untenable. Subdivision 7 of Practice Rule 35 expressly authorizes the taking of testimony by an officer other than the one designated by the local officers. This rule was followed in this case.

There is no provision of the Rules of Practice sustaining the 5th alleged error. Rule 40 provides that "due opportunity will be allowed opposing claimants to cross-examine the witnesses," which was done in this case.

The variance alleged in errors 7 and 8, between proof and notice and proof and information is not such as will invalidate the judgment or support a motion for a new trial. The proof showed that three years had passed since he made his entry, and that he had never established a residence on the land, his own witnesses testifying that he went to the tract about once every six months and stayed in a shanty over night, he and his witnesses thinking that he thus avoided the charge of abandoning the tract.

It will be observed that the charge in the motion is that of abandoning his *entry*. This charge is sustained by showing that he has not established a residence on the land within six months after making entry. One material allegation of the information and notice (that of abandonment) is sustained by the proof, and it is a universal rule of practice that if one material count in a petition or complaint is sustained by the evidence, the judgment based thereon will stand.

There is no force in the argument of appellant's counsel that the notice is void because not signed by both the register and receiver, for the 2d subdivision of Practice Rule 8 provides that such notice may be signed by one of them, and, besides, the defendant appeared and so waived any irregularity in the issuance or service of notice.

There being no error in the proceedings, and the evidence clearly showing an entire lack of residence on the land for three years after entry, your decision is affirmed, and the entry canceled.

HOMESTEAD ENTRY—RESIDENCE.

RUTH MCNICKLE.

Temporary absences on account of exceptional circumstances may be excused, but such absences should be the exception and not the rule governing homestead residence.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November* 1, 1890.

Ruth McNickle, whose maiden name was Ruth Tofflemire, has appealed from the decision of your office of April 22, 1889, holding for cancellation her homestead entry No. 22,220, cash certificate No. 13,272, embracing the SE.¼, Sec. 3, T. 107 N., R. 64 W., Mitchell, Dakota.

She made her said entry September 22, 1882, and submitted final proof (commutation) November 8, 1884, and received her certificate (cash entry 13,272) November 28, 1884.

Your office, by letter of November 3, 1888, rejected her said proof because her residence was not shown to be satisfactory, and suspended her entry to allow her to make new proof without publication.

February 13, 1889, she submitted new proof, made before the clerk of the district court of Jerauld county, Dakota. The new proof differed in no material respect from that first submitted, except that it was accompanied by claimant's affidavit, excusing her lack of continuous residence. This proof was also rejected, and "by reason of the bad faith shown" the original entry and final certificate were held for cancellation, and the claimant now appeals to this Department.

The material facts in relation to her residence are correctly stated in your office decision, and show that her residence on the claim consisted of occasional visits, three or four times a month, excepting in the winter months, when the weather was so cold that she "could not make the trip." That during these visits she resided in Huron, about thirty miles distant from her claim, or in the neighborhood, working as a hired girl for the neighbors; that in September, 1884, she returned to the claim and "resided there continuously, until after making final proof November 8," of the same year; that on the 27th of that month she was married to McNickle, and has resided with her husband in Winona, Minnesota, ever since. Her excuse for not living continuously on her claim is, that she had to earn a living, and that her lawyer told her that, if "I wanted to make proof, the almost universal practice, and the one tacitly sanctioned by the Land Department, was for parties without a family to be on the claim once in thirty days."

This was bad advice, and can not receive the sanction of this Department. While temporary absences on account of sickness or other exceptional circumstances have been and may be excused, such absences must be the exception, and not the rule governing residence on homestead claims.

This claimant made the exception the rule, and immediately after receiving her certificate removed to a town several hundred miles distant, and has ever since resided there. Her improvements, though valued at $75, consist of a house, eight by ten feet, and six acres of cultivation; no fencing.

The case is parallel with that of Sydney F. Thompson, 8 L. D., 285. I do not think the proofs submitted show that the claimant intended in good faith to make her home on the land, and the lifetime of her entry having now expired, the same will be canceled.

The decision of your office is affirmed.

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### TIMBER CULTURE CONTEST—AMENDMENT OF CHARGE.

DAVIS *v.* BOTT.

The amendment of an affidavit of contest, by adding thereto an additional charge, does not preclude the contestant from showing a default originally charged.

Acts in compliance with law performed after the initiation of contest, and induced thereby, will not relieve the entryman from the effect of a default existing at date of contest.

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

I have considered the case of Clarence H. Davis *v.* Valentine Bott on appeal by the former from your decision dismissing his contest against the timber culture entry of the latter for the NE. ¼ Sec. 10, T. 108, R. 36, New Ulm series, Tracy land district, Minnesota.

On February 13, 1880, Bott made timber culture entry for this land and on March 13, 1884, Davis filed an affidavit of contest against the same. Hearing was set for May 30, 1884, at which the parties appeared and the contestee moved to dismiss the contest because the contestant had not applied to enter the land, which motion was sustained by the local officers. From this action contestant appealed and your office on July 21, 1885, reversed said decision, whereupon the contestee appealed to this Department and the matter coming on for hearing your decision was affirmed by the Secretary of the Interior, and the complaint was returned with directions that contestant be allowed to proceed with his case. Notice was given the parties, and on April 11, 1887, they appeared and contestant on said day filed an amended affidavit and the hearing was then had upon said amended affidavit and the local officers found in favor of contestee and dismissed the contest, from which the contestant appealed and on May 1, 1889, your office affirmed said decision, from which he appealed to this Department.

In this case there does not appear to be much dispute upon the question of compliance with the law at the time the case was heard, to wit, on April 11, 1887, but it is contended that the claimant has cured his laches by planting trees and cultivating them since the notice of contest

was served and that he should not have been allowed to show any act of compliance with the requirements of the law after service of notice of contest upon him.

It will be observed that contestant's original affidavit read thus:—

Valentine Bott, failed during the year after date of entry or at any time since to plant in trees, tree seeds or cuttings five acres of said tract, and also failed to cultivate in any manner such trees as were planted on said claim as by law required.

This was filed March 13, 1884. On the day of trial, April 11, 1887, he amended his original complaint so as to charge that:—

Valentine Bott, failed and neglected during the third and fourth year after entry (or at any time since said entry) to plant or sow in trees, tree seeds or cuttings, ten acres of said tract and that said Bott has failed and neglected to cultivate in any manner such trees tree seeds, or cuttings as were planted or sown on said tract.

This amendment cannot be considered an abandonment of the original charge. It incorporates all of the old complaint and enlarges thereon by covering the time from the filing of the affidavit of contest up to the day of trial. If the contestant failed to prove a default during the time covered by the amendment, he failed to that extent of establishing his charge, but that did not preclude his showing under the allegations of his amended complaint a default during the third year, which was embraced in his original complaint, and which existed prior to the entryman curing his latches. The contestant is not bound to stand or fall by the proof of all his allegations. Though he fail to the extent of being unable to establish some one or more of them, yet he may succeed upon as many causes of complaint as he is able to establish by the preponderance of the evidence, and his success in these may warrant a judgment in his favor.

It will not do to hold that on account of the amendment the contestant may not still show a default as originally charged. He may still fall back upon his first cause of action for it is still embraced in his complaint. He has waived nothing by expanding his charges, or adding to his original cause of action still another. He is not thereby estopped from showing that the entryman had failed to comply with the requirements of the law during the third year after date of entry. Under the rulings of the Department, a default cannot be cured after notice of contest.

The entry must be weighed in the balance of the law, as it stood at the time of the initiation of the contest. Waldroff *v.* Bottomly, (10 L. D., 133).

The testimony shows that the entryman was in default during the third and fourth years, that he made an effort to comply with the requirements of the law and had at the date of hearing, April 11, 1887, substantially cured the laches of the third and fourth years of his entry, but the testimony shows that this condition was induced by the contest.

I am of the opinion, therefore, that under the law and departmental rulings the entry must be canceled. Your decision, is, therefore, reversed.

MINING CLAIM—ENTRY—ALIEN CORPORATION.

HOOK ET AL. *v.* LATHAM ET AL.

A citizen of the United States acting in the interest of a foreign corporation can not make a mineral entry for the benefit of such corporation.

*Acting Secretary Chandler to the Commissioner of the General Land Office, November* 10, 1890.

On October 22, 1875, Milton S. Latham made mineral application No. 239, for the Buchanan copper mine, lot 37, Sec. 34, T. 8 S., R. 18 E., M. D. M., Stockton, California, and on March 14, 1876, made mineral entry No. 123 therefor.

On June 17, 1888, B. F. Hook and D. McIntyre filed protest against the issue of patent on said entry and a hearing was thereupon ordered.

After the taking of certain depositions the case was submitted on an agreed statement of facts. The local officers concluded that the application and entry were made by said Latham for and on behalf of the London and San Francisco Bank (limited), a foreign corporation, organized and existing under the laws of England. They, therefore, held that the entry had been made in contravention of section 2319, Revised Statutes.

Your office, by letter of June 1, 1889, held the entry for cancellation.

Appeal has been taken by said bank and Arthur Scrivener, trustee.

It appears that Latham was a citizen of the United States and president of the branch office at San Francisco of said London and San Francisco Bank, (limited) a corporation organized and existing under the laws of England; that on May 4, 1869, one William T. Atwood, having the mere possessory title to said mine executed to said Latham his promissory note for $12000, secured by mortgage on said mine; that said note and mortgage though made and executed to said Latham individually, were in fact made to him as president of said bank and for the benefit of said bank; that on September 1, 1870, another note for $5,650.51, made by said Atwood and secured by mortgage on said mine, was assigned to said Latham individually, but in fact for the benefit of said bank; that subsequently Latham, acting in his own name, but in fact for the benefit of said bank, brought suit against said Atwood to foreclose said mortgages, and obtained judgment for $16,385.34; that under these proceedings said mine was, on February 7, 1871, struck off to said Latham as the highest bidder for $16,863.40, "but no purchase money was paid by Latham to the sheriff or at all, but the price for which said mine was bid off by him at said sheriff's sale was in satisfaction of the judgment of foreclosure aforesaid and was merely credited to said judgment as if it had been received by said sheriff, though in fact no money whatever had been received by him, the purchase having been made by said Latham for the benefit of the

bank, in pursuance of his said trust as aforesaid;" that on November 30, 1877, Latham, being about to retire from the bank, transferred said mine by deed to said Arthur Scrivener as trustee for said bank, and no consideration passed to said Latham therefor; that the expenses of said mineral application and entry and other expenses were paid by said bank.

This recital puts it beyond question that said entry was made by Latham in the interest of said foreign corporation and for its benefit. In the case of Capricorn Placer (10 L. D., 641), it was held that a citizen of the United States acting as the trustee of an alien corporation, can not make a mineral entry for the benefit of such corporation. In accordance with that ruling this entry must be canceled. The facts relating to the mortgages and their foreclosure are irrelevant to this issue. The legal title remains in the United States and patent can issue only upon an entry made in accordance with law. No such entry has been made. The proceedings on foreclosure gave to the bank only such interest as the mortgagor had. If that interest has failed, it shows only that the bank has taken insufficient security.

Said decision is accordingly affirmed.

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TIMBER CULTURE CONTEST—DEVOID OF TIMBER—PRACTICE.

CROTTINGER *v.* LOWE.

A timber culture entry made in good faith of land not strictly devoid of timber, will not be disturbed where it is allowed in accordance with the departmental construction of the statute then in force.

Concurring decisions of the local and general land offices are generally accepted by the Department as conclusive on questions of fact, but the rule does not extend to questions involving an interpretation of the law.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November* 10, 1890.

I have considered the case of Albert O. Crottinger *v.* Isaiah A. Lowe on appeal by the latter from your decision of February 20, 1889, cancelling his timber culture entry for the NW.¼ of Sec. 10, T. 18 S., R. 17 W., Wa-Keeney, Kansas land district.

Lowe made timber culture entry for this land December 16, 1883, and Crottinger filed affidavit of contest December 9, 1885, alleging that there were twenty-four hundred trees aggregating ten inches in diameter growing on said land; further that the entryman had failed to plow or break five acres of said land during the first year of said entry.

Notice of said contest was duly issued, setting the hearing for January 23, 1886. On that day, upon motion of the contestant, the cause was continued to March 23, 1886, and an amended affidavit filed and service of notice duly made, hearing being set for May 21, 1886. Said amended affidavit repeated the averment that the land contained a

natural growth of timber, omitted the averment that there was a want of breaking and cultivation, but contained an averment charging the entrymen with fraudulently making said entry for one Shelby Wilson.

Testimony was taken on the last named day and the local officers held from the evidence that the land was timber and the entry illegal, and decided to hold the entry for cancellation. From this decision Lowe appealed, and upon February 20, 1889, your office affirmed said judgment and held said entry for cancellation, from which he again appealed.

There was no testimony taken on the charge of failure of breaking or cultivation nor upon the complaint that the entry was fraudulently made for Wilson, so that the only matter for consideration is the question of whether the natural growth of timber on the land excluded it from the operation of the timber culture act.

The testimony shows that there is a small stream flowing through this tract, just what part does not appear, nor is the trend of the stream given. Its banks are from six or eight to thirty feet high, sloping with more or less abruptness. Along the slope thereof grow water-elm, cottonwood, some ash and box-elder trees, probably (averaging the statements) seventy-five over ten inches in diameter, a few which are twelve to fifteen inches, several hundred are over two and under ten inches. These are low, gnarled, twisted and scrubby, unfit for lumber for building purposes, and of little use for anything except fire-wood. There are no trees on the tillable land except those which were planted by a former entryman. The tenant of Lowe says he planted or "set out" about 1,200 cottonwood and elms along the creek bank. This entire strip of timber is estimated to contain about three and one half acres.

In the case of Blenkner *v.* Sloggy (2 L. D., 267), the trees, some six hundred ash, oak, elm and underbrush, were scattered over five to eight acres, and the entry was allowed.

In the case of Bartch *v.* Kennedy (3 L. D., 437), it was found that—

> On the banks of the Knife river, which passes through the western half of Sec. 18, there are from five to six acres of trees of different kinds . . . . and located mostly on the river bank, where the land is subject to overflow, etc.

In this case it was held that the testimony failed to show such a natural growth of timber as would make a timber culture entry illegal.

In the case of James Spencer (6 L. D., 217), decided October 11, 1887, the law was fully discussed and the liberality of the Department considered and it is there held:

> The former rulings on this subject will not be allowed to prevail longer. Timber culture entries made after the date of this decision must be made of land . . . . devoid of timber—

but this judgment is not retroactive. In the case at bar the entry was made in 1883, when the decisions of the department recognized such tracts as subject to entry under the timber-culture act.

Fringes of timber along the banks of streams may be found in many places where all the tillable land is barren of trees, and will so remain until cultivation and protection produces them.

This case comes under the liberal rulings of the Department prior to October 11, 1887. The fact that this contest was initiated so soon after the entry was made, and as there is no evidence reflecting upon the entryman's good faith in the matter of "breaking" or cultivating, and no testimony tending to show fraud, I feel disinclined to cancel it. I am not unmindful of the rule that on questions of fact the concurring decisions of the local and General Land Office are generally accepted as conclusive, but this case does not come within that principle, for as a matter of law, under the interpretation placed upon said act by this department when this entry was made, it should be upheld.

Having considered the case fully, I am of the opinion that this contest should be dismissed and the entry allowed to stand, subject to compliance with the law, and the entryman be allowed a reasonable time within which to comply therewith by growing and cultivating trees upon tillable land of said tract, and if he fails in this regard, his entry should be canceled.

Your decision is therefore reversed.

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RAILROAD GRANT—INDEMNITY—ORDER OF MAY 28, 1883.

NORTHERN PAC. R. R. CO. *v.* JOHN O. MILLER.

(On Review.)

Indemnity can only be selected in lieu of a section, or part of a section, lost in place, and the basis for such selection must be specifically designated, and shown to be excepted from the grant before indemnity can be allowed; and the rights of settlers can only be ascertained and protected by the enforcement of this rule.

The departmental order of May 28, 1883, did not contemplate the selection of lands subject to settlement without designating the basis therefor, but was applicable only to such lands as were protected by withdrawal.

*Acting Secretary Chandler to the Commissioner of the General Land Office, November* 13, 1890.

The Northern Pacific Railroad Company has filed a motion for review of the decision of the Department of July 1, 1890, (11 L. D., 1) affirming the decision of your office of September 16, 1885, rejecting the selection of said company of the SE. ¼ of the NE. ¼ and the NE. ¼ of the SE. ¼, Sec. 19, T. 131 N., R. 40 W., Fergus Falls, Minnesota.

The land in controversy is within the granted limits of the St. Paul, Minneapolis and Manitoba Railroad Company, which was definitely located opposite the tract in question December 20, 1871, and is also within the indemnity limits of the Northern Pacific Railroad Company, and was embraced in a withdrawal for the benefit of this company,

which was received at the local office January 6, 1872. At both of said dates the land was covered by the pre-emption declaratory statement of Jens Anderson, which excepted it from the grant to the first named company, and also from the withdrawal for the benefit of the Northern Pacific Company.

On January 30, 1884, the Northern Pacific Company applied to select this land, but no specific tract was designated as a loss for which the indemnity was claimed. The application was rejected by the local office, and the company appealed.

On April 8, 1884, John O. Miller applied to make homestead entry of the tract.

The selection of the company was rejected by the Department in the decision now sought to be reviewed, upon the ground that the right to select a particular tract as indemnity can not be recognized, if the loss for which the indemnity is claimed is not specifically designated.

The company asks for a review of this decision upon the following grounds:

1st. That said application to select was filed January 30, 1884, and *was made* under the direction of the Secretary of the Interior, it being in accordance with his instructions May 28, 1883 (copy enclosed), directly applicable to this company's grant.

2nd. That upon the issue of the circular of your Department of August 4, 1885 (4 L. D., 90), this company endeavored to comply therewith, and has designated the lands lost 'in place,' and for which indemnity selections had been made, and supposed it had made such designation for all lands selected, and that it is only an oversight that no land was designated for the tract here in dispute.

3rd. That your said circular of August 4, 1885, does not declare selections of indemnity lands unaccompanied by designation of lost lands, illegal, but only directs that no new selections shall be admitted until the losses for those already made shall be specified.

4th. That the company not having been originally in default, but being clearly within the instructions of the Secretary, its selection or application to select is not *illegal*, and should not be canceled, but that the company should be permitted to designate a loss therefor.

Conceding, for the sake of argument, that this selection was made in accordance with the instructions of May 28, 1883, I do not see why it should affect the rights of Miller, which must be determined by the act making the grant. Indemnity can only be selected in lieu of some section or part of section lost in place, and the basis for such selection must be specifically designated and shown to be excepted from the grant before the right to indemnity can be exercised. While, as between the government and the company, the practical effect would be the same, where indemnity was allowed in bulk for an equivalent quantity of land lost in place, as where indemnity was allowed tract for tract, yet the individual rights of the settler can only be ascertained and protected by the latter mode.

Where lands are settled upon which have been selected by the company in lieu of an equivalent quantity of lands, without designating the particular basis for each tract, and part of the basis should from any

cause be disallowed, it would be impossible to determine which of the selections should be rejected and which retained. The rights of the settler in cases where the lands were subject to settlement at date of the company's selection would be materially affected by any rule that did not require the selection to be made tract for tract and the basis specifically designated, so that his rights as against the company might be definitely determined.

But the selection in this instance is not in my opinion protected by the order of May 28, 1883, as that order did not contemplate the selection of lands subject to settlement by merely listing the lands, without designating the basis, but was intended to be applicable only to such lands as were protected by the withdrawal. The purpose of the order is expressed in the first paragraph, to wit: "to open for settlement as speedily as possible all the lands within the indemnity limits of the grant to the Northern Pacific Company, not actually required to supply the lands lost in place within the granted limits."

Now, as lands not subject to the withdrawal were already opened to settlement at date of said order, it could not have been intended that such lands should be simply listed as selections, without designating the specific basis, because no purpose could be accomplished by such listing, and such selection could not have accomplished the purpose of the order or facilitated the restoration to settlement of lands within the indemnity limits, for the simple reason that such lands had already been restored.

After a careful consideration of this case, I am satisfied that the validity of the selection is subject to attack by the settler, and that it is not protected by the order of May 28, 1883.

The motion is denied.

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RAILROAD GRANT—CONFLICTING ENTRY—CERTIORARI.

FORNEY *v.* UNION PACIFIC RY. CO.

The erroneous allowance of an entry for land included within the limits of a railroad grant cannot divest the right of the company under its grant.

The writ of certiorari will be denied if, from the application therefor, it is apparent that the applicant's appeal if before the Department would be dismissed.

*Acting Secretary Chandler to the Commissioner of the General Land Office, November* 13, 1890.

I am in receipt of your letter of the 3d instant, transmitting an application for certiorari by Wm. G. Forney in the case of said Forney *v.* Union Pacific railway company, involving the E. ½ NE. ¼ SW. ¼, NE. ¼, and SE. ¼ NW. ¼, Sec. 5, T. 17 N., R. 84 W., Cheyenne, Wyoming.

It appears that in 1886 Forney applied to make homestead entry for said tract and that the local officers, being in doubt as to whether the

tract was within the withdrawal for said company, forwarded the application to your office for instructions. Your office by letter of April 7, 1886, advised the local office that the official diagram showed the tract to be outside of the withdrawal. The entry was, accordingly, allowed. Claimant alleged settlement in 1880.

By letter of April 4, 1889, your office directed the cancellation of the entry for conflict with the railroad grant. Notwithstanding this direction the local officers, apparently acting on the former instructions, allowed the entryman to make final proof, and issued certificate.

In February, 1890, the local officers called attention to the conflict in the instructions, and your office thereupon, on February 10, 1890, requested the company to relinquish its claim in favor of Forney. The company responded that the tract had been sold to a third party, and suggested that Forney might be able to reach a satisfactory agreement with the purchaser.

On March 8, 1890, your office directed the local officers to notify Forney of the result of the correspondence, and that pending his action in the matter the order of cancellation would be suspended.

Forney was notified, but failed to reach an agreement with the purchaser. On June 30, 1890, more than ninety days having elapsed, your office canceled the entry.

By letter of September 1, 1890, the local officers forwarded the appeal of Forney. On September 26, 1890, your office dismissed the appeal for the reason that Forney had never appealed from the order of cancellation of April 4, 1889, and for the further reason that he had not availed himself of the opportunity of negotiating with the purchaser of the tract.

Forney then filed the present application.

The diagram on file in your office shows this tract to be within the limits of the withdrawal for said company, made on the filing of the map of definite location on January 6, 1868. Forney does not allege any right prior to 1880, nor does he allege that the tract was excepted from the operation of the withdrawal, by any other claim. The record therefore shows the right of the company was superior. The erroneous allowance of the entry by your office cannot divest the right of the company under the statute.

Passing other questions, the case here presented is fully met by the rulings of the Department that the writ of certiorari will be denied if, from the application therefor, it is apparent that the applicant's appeal if before the Department, would be dismissed. A. B. Cook (11 L. D., 78); Rudolph Wurlitzer (6 L. D., 315).

On the authority of these cases the application is denied.

RIGHT OF WAY ACT—PROOF OF ORGANIZATION.

MONTANA AND WYOMING EASTERN R. R. CO.

An application for the benefit of the right of way act can not be approved in the absence of due proof showing the organization of the company under its incorporation.

*Acting Secretary Chandler to Messrs. Thompson and Slater, November 15, 1890.*

Your letter of yesterday enclosing a certified copy of the articles of incorporation of the Montana and Wyoming Eastern Railroad Company, together with a certified copy of the law of Montana relating to the incorporation of railroad companies, and under which the company named was incorporated, has been received.

The papers have been examined and are found to be in proper form so far as they have been supplied by the company. It is observed, however, that there are yet lacking certain of the required due proofs of organization, which must be supplied before the papers are acceptable to the Department, viz:

First; The copy of articles is not certified to by the proper officer of the company under its corporate seal;

Second; The official statement, under seal, by the proper officer that the organization has been completed; that the company is fully authorized to proceed, etc., etc., and

Third; A true list, under oath, signed by the president, under seal of the company, showing the names and designation of officers.

Explanatory of the failure of the company to supply the omissions noted above, there are with the papers two affidavits made by Mr. D. S. Wade, to the effect that the company is a body corporate, that all necessary steps are being taken to perfect its organization, that the organization has been completed as fas as possible under the Montana law and further that it is intended to at once consummate the organization.

It is understood from these affidavits that at the present time the organization of the company, under its charter, has not been completed, but that all has been done that can be, to that end, till stock subscription books have been opened after thirty days notice, and thereafter a meeting of stockholders has been held after another thirty days notice, which acts are required by law.

The right of way act provides, in its first section, that its benefit can be secured by

any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of organization under the same, etc. (18 Stat., 482).

As evidenced by the affidavits filed, the company is not yet organized under its incorporation, and its good intention to so organize cannot be accepted for the purpose of giving the company the standing of a beneficiary under the right of way act, in place of the plain requirements of both the law and the regulations thereunder. The intent of the company to supply the defects in the future does not warrant the Department in accepting incomplete papers.

That portion of the law and regulations in regard to due proofs of organization was intended for the protection of the Department, particulary as an evidence of *bona fides* on the part of railroad companies, and in no instance have the requirements in this regard been deviated from with respect to companies organized under the Montana law or under those of any other State or Territory. Exception cannot now be made in favor of the Montana and Wyoming Eastern Railroad Company, as such action would not be just to companies heretofore accepted as beneficiaries under the right of way act, and might be used as a precedent by companies applying for future recognition.

The papers are therefore returned herewith. On being re-submitted in the required and complete form they will be duly considered.

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PRACTICE—NOTICE—SERVICE BY PUBLICATION.

BUGBEE *v.* COSBY.

Notice by publication, defective for want of copy by registered letter, is not made good by subsequently mailing such notice, without new posting and publication.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September* 11, 1890.

This is an appeal by Henry Bugbee from your office decision of February 23, 1888, dismissing the proceedings upon his contest against the homestead entry of Hiram H. Cosby made ovember 16, 1882, for the SW. ¼, Sec. 7, T. 100 N., R. 65 W., Yankton, Dakota, and remanding the case "for rehearing after due and proper notice."

Notice of hearing on said contest to be had at the local office February 9, 1887, was made by publication and a copy thereof was posted in the local office and on the land.

On the day fixed for hearing, Bugbee filed an affidavit setting forth that his attorney had failed to send said notice to Cosby by registered mail and asking a continuance "to enable him to give said notice legally."

Thereupon March 29, 1887, (at the local office) was duly designated as the date of hearing and on the same day (February 9, 1887) notice thereof was sent to Cosby by registered mail, but such notice was neither published nor posted.

Bugbee appeared in pursuance of the notice last mentioned and submitted testimony and Cosby made default.

The local office recommended the cancellation of the entry in question. By the decision appealed from your office found that as "no alias notice was issued" the local office erred in allowing the contestant to proceed on the original" notice.

Bugbee's first notice of contest was irregular for the reason that it was not sent by registered mail. Rule 14 of practice. Watson *v.* Morgan *et al.* (9 L. D., 75). This being so the publication and posting of his second notice were essential to its legality.

I must therefore find that no legal notice has been issued upon Bugbee's contest and that the local officers were consequently without jurisdiction in the premises. Watson *v.* Morgan *et al.*, *supra.*

The decision appealed from is accordingly affirmed.

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CIRCULAR—SETTLERS ON RAILROAD LANDS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., November* 1, 1890.

REGISTERS AND RECEIVERS,
*United States Land Offices.*

SIRS:

Your attention is called to an act of Congress entitled "an act to amend an act entitled 'an act for the relief of settlers on railroad lands,' approved June twenty-second. eighteen hundred and seventy-four," approved August 29, 1890, as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the privileges granted by the aforesaid act approved June twenty-second, eighteen hundred and seventy-four, are hereby extended (subject to the provisos, limitations, and restrictions thereof) to all persons entitled to the right of homestead or pre-emption under the laws of the United States, who have resided upon and improved for five years lands granted to any railroad company, but whose entries or filings have not for any cause been admitted to record.

It appears to be the intention of this bill to enlarge the class of cases in which relinquishment by the company will be permissible under the act of June 22, 1874 (18 Stat., 194), by removing the requirement that an entry or filing should have been allowed, thus aiding the adjustment of claims growing out of settlements made upon railroad lands subsequent to the attachment of the rights of the companies under the grants.

Upon the filing of a relinquishment under this act, it being shown that the person in whose favor it is made is entitled to the right of homestead or pre-emption, and has resided upon and improved the land for a period of five years, you will permit entry to be made as in the case of other public lands, it being held by this Department that a relinquishment under the act of June 22, 1874, releases the land from all claim of the company, and it thereby becomes subject to disposal under the general land laws (6 L. D., 716; 7 L. D., 481).

Lands within the indemnity limits of a grant do not afford a basis for relinquishment and selection under this act (10 L. D., 50; *Ibid.*, 609), and your acceptance of a relinquishment does not amount to an approval of the selection based thereon (8 L. D., 472), as a relinquishment confers no right upon the company, if the land covered thereby was, in fact, excepted from the grant (10 L. D., 264).

The relinquishment may be made by a simple waiver of claim when the land has not been certified or patented to or for the benefit of the company; but, when title has passed, formal reconveyance will be required.

This act is not mandatory upon the companies, and confers no right upon the settler as against the company in the absence of a relinquishment.

It simply provides a mode of adjustment dependent upon the voluntary action of the companies, and it is hoped that, by a liberal and mutual spirit of compromise and concession, the benefits intended for the settler may be made available.

Respectfully,

W. M. STONE,
*Acting Commissioner.*

Approved:
GEO. CHANDLER,
*Acting Secretary.*

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CIRCULAR—SETTLERS ON NORTHERN PACIFIC INDEMNITY LANDS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., November 7*, 1890.

REGISTERS AND RECEIVERS,
*United States Land Offices.*

GENTLEMEN:

Your attention is called to the provisions of an act of Congress entitled "An act for the relief of settlers on Northern Pacific Railroad indemnity lands," approved October 1, 1890, copy of which is attached, containing two sections.

By the first section of the act the right is given to those persons who, after August 15, 1887, and before January 1, 1889, settled upon, improved, and made final proof under the homestead and pre-emption laws, for lands within what is known as the second indemnity belt of the grant for the Northern Pacific Railroad, to transfer their entries to any other vacant government land they may select, in compact form, and subject to entry under the homestead and pre-emption laws, and to receive final certificates and receipts therefor, in lieu of the entries heretofore made in said second indemnity belt, provided the transfer be made within twelve months from the passage of the act.

In case of the death of any person so entitled, the transfer may be made by his legal representative.

The right given is personal and can not be transferred, nor can the transfer provided for in the act be made through the intervention of an agent or attorney; further, no transfer will be approved by the land department, except where the proof made upon the original entry shows a satisfactory compliance with law in the matter of residence and improvement.

When application is made to make such transfer to lands in your district, you will require the applicant to make affidavit as to the facts in relation to his former entry, and whether he has received the return of the fees and commissions, or purchase money, paid upon said entry; and in the event that he has received such return, you will require that he make payment anew for the land to which the transfer is made.

The second section provides for a similar transfer within one year from the passage of the act where persons, possessing the requisite qualifications under the homestead or pre-emption laws, in good faith have settled upon and improved lands in said second indemnity belt, having made filing or entry of the same, and for any reason otherwise than voluntary abandonment, failed to made proof thereon. The entry or filing must have been allowed within the time specified in section one.

In making proof upon the tract to which the transfer is made, credit will be given for the period of *bona fide* residence and amount of improvements made upon the tract heretofore entered or filed for in said second indemnity belt; but final entry will not be permitted except upon proof of continuous residence upon the land to which the transfer is made for a period of not less than three months prior to the making of proof.

When application is made for transfer under this section, you will require that the party make affidavit as to the facts relative to the former entry or filing, and where the fees and commissions paid thereon have been returned, it will be necessary that he make payment anew before the allowance of the transfer.

Said affidavit must be corroborated by at least two witnesses having knowledge in relation to the party's residence and improvement upon the land from which the transfer is sought, and should satisfactorily show a compliance with the requirements of law to the extent claimed, as the same will necessarily form a part of the final proof for the land to which the transfer is made.

The corroborating affidavits may be made before any officer authorized to administer oaths.

Final payment upon entries and filings transferred under this section will be made as under existing laws.

Very respectfully,

LEWIS A. GROFF,
*Commissioner.*

Approved:
GEO. CHANDLER,
*Acting Secretary.*

[PUBLIC—No. 344.]

An Act for the relief of settlers on Northern Pacific Railroad indemnity lands.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That those persons who, after the fifteenth day of August, in the year of our Lord eighteen hundred and eighty-seven, and before the first day of January, in the year eighteen hundred and eighty-nine, settled upon, improved, and made final proof on lands in the so-called second indemnity belt of the Northern Pacific Railroad Company's grant under the homestead and pre-emption laws of the United States, or their heirs, may transfer their said entries from said tracts to such other vacant surveyed government land in compact form and in legal subdivisions, subject to entry under the homestead and pre-emption laws, as they may select, and receive final certificates and receipts therefor, in lieu of the tracts proved up on in said belt by the respective claimants: *Provided,* That such transfer of entry shall be made and completed within twelve months from the date of the passage of this act, and be so made in person by the claimant, or in case of death by his legal representative, and without the intervention of agent or attorney.

SEC. 2. That all persons possessing the requisite qualifications under the pre-emption or homestead laws, who in good faith settled upon and improved land in said second indemnity belt, having made filing or entry of the same, and for any reason, other than voluntary abandonment, failed to make proof thereon, may, in lieu thereof within one year after the passage of this act transfer their claims to any vacant surveyed government land subject to entry under the homestead or pre-emption laws, and make proof therefor as in other cases provided; and in making such proof credit shall be given for the period of their bona fide residence and amount of their improvements upon their respective claims in the said indemnity belt, the same as if made upon the tract to which the transfer is made: *Provided,* That no final entry shall be permitted, except upon proof of continuous residence upon the land, the subject of such new entry, for a period of not less than three months prior thereto. Payment for said final selection shall be made as under existing laws. The provisions of this act shall be carried into effect under such rules and regulations as may be prescribed by the Secretary of the Interior.

Approved October 1, 1890.

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### RAILROAD GRANT—PROCEEDINGS ON FINAL PROOF.

### SOUTHERN PACIFIC R. R. CO. *v.* CONNIFF.

In proceedings under the protest of a railroad company against the final proof of a settler, the qualifications of such settler at date of settlement will be presumed on appeal, in the absence of any allegation to the contrary in the protest.

Where the company in such a case does not in its protest raise any question as to the settler's citizenship at date of settlement it will not be heard to do so on appeal.

The existence of a valid settlement claim excepts the land covered thereby from the operation of a subsequent withdrawal.

*Acting Secretary Chandler to the Commissioner of the General Land Office, November* 13, 1890.

I have considered the case of the Southern Pacific Railroad Company *v.* Michael Conniff, as presented by the appeal of said company from the decision of your office, dated September 27, 1888, holding for

cancellation its selection of the SW ¼ of Sec. 25, T. 4 N., R. 21 W., San Bernardino meridian, Los Angeles, California.

The land in question is within the indemnity limits of the grant of March 3, 1871 (16 Stats., 573–579), the withdrawal of which became effective on May 10, 1871.

On July 20, 1883, Conniff filed pre-emption declaratory statement No. 2440 for the SW ¼ of Sec. 25, T. 4 N., R. 21 W., S. B. M., Los Angeles, California.

On October 3, 1887, the Southern Pacific Railroad Company selected all of said section in lieu of Sec. 19, T. 2 N., R. 15 W., which was within the primary limits of said grant.

On August 15, 1887, said order of withdrawal was revoked, and on October 7, same year, the lands within the indemnity limits were restored to entry.

Conniff alleges that he first made proof in support of his claim in January, 1885, at which time the company appeared and filed its protest. Said proof having been lost, new proof was required and made. The company filed its protest against the allowance of said proof, alleging seven specific grounds of objection, which may be condensed as follows: (1) that said land was within the limits of said withdrawal, and that said order of revocation was and is null and void; (2) that said company made said selection as aforesaid, "and the title thereto is in the Southern Pacific Railroad Company;" (3) that said company "will be obliged to contest the said application of Michael Conniff through the various departments of the Land Department of the United States, and, if defeated therein, will be forced to prosecute its claims for said piece of land in the federal courts of the United States and the supreme court of the United States, in order that the proper adjudication of its rights in the premises may be determined for all time to come . . . . . and that said application has not been made within the time prescribed by the provisions of section 2267 of the Revised Statutes, and that, by reason thereof, said Conniff has forfeited all right thereto."

It thus appears that in said protest no question was raised by the company that said Conniff was not a qualified pre-emptor at date of settlement, or that he was not a citizen of the United States, or had not filed his intention to become such at date of said settlement and at the date of said withdrawal.

The final proof shows that said Conniff was "a naturalized citizen of the United States;" that he first settled on said land on January 1, 1871, built a house, twelve by fourteen feet, a stock corral, cleared some land of brush, and fenced and plowed a portion of the land and raised a crop of hay; that his improvements are worth $150; that he has continuously resided upon said land and made the same his home, since the date of his said settlement. With his said proof was filed his certificate of naturalization, issued on July 20, 1875, by the judge of the county

court of Ventura county, California, which recited, among other things, that "the said applicant has heretofore, and more than two years since, and in due form of law declared his intention to become a citizen of the United States."

It thus affirmatively appears from the record that Conniff was a qualified pre-emptor when he filed said declaratory statement, and it does not clearly appear that Conniff was not a qualified settler at the date of settlement, prior to said withdrawal. Moreover, the company did not, in said protest, raise the question of Conniff's citizenship at the date of his said settlement, and it will not be heard to do so on appeal, nor will the Department reject his proof, since it does not affirmatively appear that he is not entitled to the land. It is, therefore, unnecessary in this case to consider the question whether the naturalization of a pre-emptor relates back to the date of his settlement so as to defeat the indemnity withdrawal.

The record shows that, prior to the selection by the company, Conniff was a qualified pre-emptor and his filing was then of record: that the company appeared and offered no objection to his qualifications to make said settlement on the date alleged, and it will therefore be assumed, on appeal, that Conniff was a qualified settler prior to said withdrawal, on the date of his alleged settlement.

For the foregoing reasons the decision of your office holding said selection for cancellation was correct, and the decision appealed from to that effect must be, and it is hereby, affirmed.

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PRACTICE SERVICE OF NOTICE—RESIDENT ATTORNEY

17140480
See 18488 PETERSON *v.* FORT. See page 394+406
17140139

The time within which an appeal from the decision of the Commissioner must be filed begins to run from the date that service is first made, whether it be upon the party himself or upon his attorney, either local, or resident in Washington.

*Acting Secretary Chandler to the Commissioner of the General Land Office, November* 13, 1890.

Catharine Peterson files this application, praying that the record in the above stated case may be certified to the Department under rules 83 and 84 of Rules of Practice. Said application presents the following case:

On October 1, 1889, your office rendered a decision in the case of Catharine Peterson *v.* George W. Fort, rejecting the final pre-emption proof of said Peterson for the E. ½ of the NW. ¼, NW. ¼ of the NW. ¼, Sec. 20, and NE. ¼ of the NE. ¼, Sec. 19, T. 32 N., R. 15 W., Niobrara, Nebraska, and allowing the homestead entry of George W. Fort for said tract; that on December 28, 1889, the applicant, by her said attorney, filed in the

General Land Office an appeal from said decision, which your office declined to transmit to the Department, for the reason that "it was not filed within sixty-one days from the date of the decision."

The applicant contends that under the rule laid down in the case of Boggs *v.* West Las Animas Townsite, 5 L. D., and in King *v.* Leitensdorfer, 2 L. D., 374, the time for filing such appeal did not expire until on or about January 6, 1870, or seventy days from the day when notice of the decision was mailed by the local officers.

In the letter of your office of January 10, 1890, declining to transmit said appeal, it is stated that "said appeal is denied under rules 86 and 97 of practice."

Rule 86 is as follows:

Notice of an appeal from the Commissioner's decision must be filed in the General Land Office, and served on the appellee or his counsel within sixty days from the date of the service of notice of such decision.

Rule 97 provides that:

Fifteen days, exclusive of the day of mailing, will be allowed for the transmission of notices and papers by mail, except in case of notice to resident attorneys, when one day will be allowed.

It is not stated in the application when or how notice of the decision of your office of October 24, 1889, was served, but from the fact that it was decided under rule 97, it may be assumed that the service was made on the resident counsel in this city.

The rule that the time for filing an appeal from the Commissioner's decision does not expire until after seventy days from date of notice, only applies where notice of said decision is sent through the mails by the local office. This was the ruling in the case of Boggs *v.* West Las Animas Townsite, *supra.* The case is not controlled by that ruling, for the reason that this notice was not sent through the local office, but was served on the resident counsel in Washington. In the former case, the time allowed for appeal is controlled by rule 87, but in the latter case it is controlled by rule 97. It is, however, contended by counsel that rule 87 is made applicable to this case by the ruling in the case of King *v.* Leitensdorfer, 2 L. D., 374. This was a decision of the Commissioner, in which it was held that, where notices of the decision of the Commissioner is served on resident attorneys in Washington, and also by the local office on the party or his local attorney, the time for appeal will commence to run from date of the latter service. Also to the same effect is another decision by the same Commissioner: that of Roach *v.* Myers *et al.*, 1 L. D., 464.

This construction of the rule, which is not evolved from any sound principle or process of reasoning, has not been followed by the Department; but, on the contrary, the reverse has been the ruling. (Case of John G. Parker, Lands and Railroad Div., Vol. 70, page 3).

It is a well settled rule that service may be made upon either the party in interest or his attorney, and service upon the attorney is suffi-

cient service upon the party. It is also a well settled rule that where there are several attorneys of record, service upon any one of them is sufficient service to bind the client. Rule 106, Rules of Practice; Thomas Howard, 3 L. D., 409; George Premo, 9 L. D., 70; Thomas C. Cook, 10 L. D., 324. Now, if service upon either of the attorneys of record "will be deemed notice to the party in interest, it must necessarily follow that the time within which the appeal must be filed commences to run from the date that service is first made, whether it be upon the party himself, or upon his attorney, either local, or resident in Washington.

The petition is denied.

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MINING CLAIM—RES JUDICATA—MINERAL LAND.

SEARLE PLACER.

A departmental decision that land is mineral in character does not preclude subsequent investigation, on the part of the Department, as to the character of such land, as the Department retains jurisdiction to consider and determine the character of land claimed under the mineral laws until deprived thereof by the issuance of patent.

A placer application will not be allowed if the evidence does not show as a present fact the placer character of the land involved.

*Acting Secretary Chandler to the Commissioner of the General Land Office, November* 13, 1890.

This is an appeal by A. D. Searle from your office decision of March 6, 1886, rejecting his application to make mineral entry for the Searle placer claim, amended survey No. 435, Leadville, Colorado.

His original application was filed July 5, 1879, for 150.02 acres. By the pending application filed March 10, 1882, his claim was reduced to 101,918 acres, thereby excluding certain conflicting lode claims.

It appears from the statements of your office that prior to the original application the county judge having applied on behalf of the inhabitants of North Leadville to enter the land as a townsite, a hearing was ordered to determine its character and the priority of right, that upon the evidence adduced your office decided in favor of Searle, and that on appeal, this Department on April 17, 1880 (7 C. L. O., 36), affirmed that decision and held that the surveyor general's return as to the mineral character of the land had not been overcome. The townsite application was accordingly dismissed.

Subsequently, on the report of a special agent of your office and the representations of certain residents of Leadville, alleging among other things that the ground was not placer, the Department, December 27, 1882, finding a "great doubt whether or not the ground claimed is more valuable for placer mining than for other purposes" ordered a

hearing to ascertain the character of the land and the status of all existing claims and interests and suspended all prior orders and proceedings.

Upon the evidence adduced at the hearing had (November, 1883), in pursuance of the above order the local officers found that the land was not distinctively valuable for placer mining and that the same had not been improved as required by law and recommended the rejection of the pending application.

On Searle's appeal from this ruling, the same was affirmed by your said office decision of March 6, 1886.

In his appeal here he alleges that the question as to the character of the land became *res adjudicata* by reason of the action of the Department (7 C. L. O., 36, *supra*) upon the former hearing.

This contention is disposed of adversely to him by the departmental decision in the case of the Central Pacific R. R. Co. *v.* Valentine (11 L. D., 238), wherein it was held (p. 246), that the Land Department had jurisdiction to ascertain and determine what lands were subject to the railroad grant (from which mineral land was expressly excepted) and that such jurisdiction continues "until the lands have been either patented or certified to, or for the use of, the railroad company."

The matters touching the merits of the case are sufficiently stated by your office in the decision appealed from and reference is had thereto.

It, will therefore be quite unnecessary for me to comment in detail, upon the voluminous testimony submitted in this case.

It is the rule of the department that the "first care in recognizing an application for patent upon a placer claim must be exercised in determining the exact classification of the lands," which are sought to be acquired as such. (Sec. 1, Circular September 22, 1882, 1 L. D., 685.)

The testimony produced at the rehearing had before the local officers in November, 1883, although conflicting in its character, I think by a fair preponderance, establishes the fact that continued prospecting for several years failed to disclose in any appreciable quantity, the presence of valuable placer mineral in the claim or to establish as a "present fact" within the meaning of section 2329, R. S., the "placer" character of the land. Peirano *et al. v.* Pendola, 10 L. D., 536. It further appears that while the appellant has constructed some ditches on the tract, he has brought no water thereon and that the work on the claim consisted mainly in making a considerable number of shafts with the view to the discovery of "lodes" and not for the purpose of "placer" development.

The testimony was taken before the register and receiver, who saw and heard the witnesses on the stand, observed their demeanor and could judge therefrom who is most worthy of credit.

Their joint opinion is accordingly entitled to special consideration. Kelly *v.* Halvorson (6 L. D., 225); Morfey *v.* Barrows (4 L. D., 135).

In accordance therefore with the views heretofore expressed, I must

find that no sufficient warrant is shown for disturbing the concurring decisions of the local and your office, which under like circumstances are generally accepted by this Department as conclusive. Chichester *v.* Allen (9 L. D. 302); Conly *v.* Price (id., 490). Cleveland *v.* North, 11 L. D., 344.

The judgment of your office is affirmed.

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RAILROAD GRANT—PRE-EMPTION FILING—SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. CO. *v.* MARSHALL.

A prima facie valid pre-emption filing of record, at date of statutory withdrawal on general route, excepts the land covered thereby from the operation of such withdrawal.

A claim based on settlement, residence, and cultivation, existing at the date when the grant becomes effective, excepts the land covered thereby from the grant.

*Acting Secretary Chandler to the Commissioner of the General Land Office, November* 15, 1890.

With your letter of October 9, 1889, you transmit the appeal of the Northern Pacific Railroad Company from your office decision of April 9th of that year, wherein you hold that the NW. ¼ of Sec. 29, T. 1 S., R. 1 W., Bozeman, Montana, is excepted from the operation of the grant to said company, by act of July 2, 1864 (13 Stats., 365). It appears from the record that on June 5, 1885, Ira M. Marshall made homestead entry of said tract. That the land is within the granted limits of the Northern Pacific Railroad Company. The withdrawal of the odd numbered sections for the benefit of which became effective February 11, 1872, upon the filing of the map of general route. The line of road opposite the land in question was definitely located July 6, 1882, and the right of the company is held to have attached at that date.

When the land was withdrawn from market, it was occupied by one Jerome Bishop, a citizen of the United States, who had filed a declaratory statement for the tract January 29, 1872. He built a house and barn, and cultivated about twelve acres to wheat in 1871, and cut forty or fifty acres of grass in the year 1872. He also dug an irrigating ditch and extended it through the land the same year. Bishop lived on the claim until the fall of 1873, when he sold his possessory right to Alonzo Gillam, who was a single man, over twenty-one years of age, and a citizen of the United States. Gillam occupied the tract until the spring of 1874, when he sold the improvements to the defendant for $500, and he has been in possession of the tract since that date, cultivating and improving the same every year.

On the 31st day of May, 1881, Marshall appeared at the local land office and applied to file on the land. He was informed by the receiver, John V. Bogert, that the tract belonged to the Northern Pacific Railroad

Company. Subsequently, Marshall made homestead entry of the land, as above set out, and on March 15, 1886, after publication and posting of notice, he made his final homestead proof and final certificate was duly issued.

From the above it will be seen that the unexpired filing of Bishop, *prima facie* valid at date of the statutory withdrawal on general route, excepted the land covered thereby from the operation of said withdrawal. Northern Pacific Railroad Company *v.* Stovenour, 10 L. D., 645, and the land was continuously occupied and cultivated thereafter. At date of definite location of the road it was occupied and claimed by Marshall, whose settlement, residence and cultivation served to except it from the operation of the grant to the company. Northern Pacific R. R. Co *v.* Anrys, 10 L. D., 258.

For these reasons your said office decision is affirmed.

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RAILROAD GRANT—SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. CO. *v.* WILDER.

An allegation, made by an applicant for a tract of land within the limits of a railroad grant, that said tract is excepted from the grant by reason of a settlement claim will be investigated by the Department, even though such action may not inure to the benefit of the applicant.

*Acting Secretary Chandler to the Commissioner of the General Land Office, November* 17, 1890.

On July 28, 1890, the Department rendered a decision in the above-stated case, directing the cancellation of the homestead entry of Wilder for the E. ½ of the NW ¼, the SW. ¼ of the NE. ¼ and the NW. ¼ of the SE. ¼, Sec. 31, T. 15 N., R. 17 E., North Yakima, Washington, holding that said tract passed to the railroad company under its grant.

Your office rejected the claim of the company and allowed the homestead entry of Wilder, for the reason that the land was excepted from the operation of the withdrawal of June 11, 1879, on filing of map of amended general route (even if there was authority for such withdrawal), by the unexpired pre-emption filing of one Thomas Chambers, made March 2, 1877, alleging settlement February 22, 1877, which remained of record May 24, 1884, the date of filing the map of definite location, and excepted said tract from the operation of the grant.

This ruling was reversed by the decision of the Department aforesaid upon the ground that the filing of Chambers had expired at date of definite location, and, in the absence of an allegation that the claim was still subsisting and maintained at date of definite location, it may be presumed that it had been abandoned.

Wilder now files a motion for review of said decision, upon the following grounds:

I. That by mistake the local land officers at the said land office where said homestead filing was offered declined to take proof of the continuous residence and cultivation of said land since the year 1877, which excepts said land from the grant to the Northern Pacific Railroad Company.

II. That said Wilder acted under the direction and under the advice of said local land officers, and did not thus produce any testimony as to the residence of Thomas J. Chambers, whose filing was then of record in said land office and of said Wilder's succession to the rights of Chambers and of Wilder's continuous residence and cultivation of said land.

The motion is supported by the affidavits of the claimant and four other witnesses, to the effect that said land was occupied and claimed by the said Chambers from the time of his alleged settlement up to about April, 1880, when he sold his improvements to Wilder, who continued to improve and occupy the tract from that time to the present; also that the claimant offered to make such proof before the local officers, who declined it, for the reason that it was unnecessary, as the filing of record excepted the tract.

Independent of the rights of Wilder, if such a claim by a qualified homesteader existed at date of definite location, it excepted the tract from the operation of the grant, and upon information of the existence of such facts it would be the duty of the Department to investigate it, whether it would inure to the benefit of Wilder, or not.

The decision of the Department of July 28, 1890, is therefore modified, and you will order a hearing, for the purpose of determining whether the land was so occupied and claimed at date of definite location, and upon the testimony taken at said hearing you will re-adjudicate the case.

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### RAILROAD GRANT—PRE-EMPTION—PUBLIC OFFERING.

### CENTRAL PACIFIC R. R. CO. *v.* EDWARD L. TAYLOR.

The pre-emptive right is not defeated by the failure of the settler to make proof and payment for the land covered by his claim prior to a day erroneously appointed for the public offering thereof, where such tract, on the discovery of the error, is subsequently withheld from sale.

Central Pacific R. R. Co. *v.* Orr, 2 L. D., 525, overruled.

*Acting Secretary Chandler to the Commissioner of the General Land Office, November* 17, 1890.

A motion to review and reverse the departmental decision of June 25, 1890, in the case of the Central Pacific Railroad Company *v.* Edward L. Taylor, is now before me for consideration.

The case arose on the application of Taylor to make homestead entry of the fractional NE ¼ and N ½ of the SE ¼ Sec. 25, T. 10, N., R. 7 E., M.

D. M., Sacramento land district, California, which is within the limits of the grant of July 1, 1862 (12 stat., 489), to said company. The decision referred to states that, at the time the maps of designated route and definite location were filed, June 30, 1862, and March 24, 1864, respectively, the tract was covered by the pre-emption declaratory statement of George Auztt, filed June 17, 1857, alleging settlement May 15th, previous; and that said filing remained intact upon the records until August, 1885, when it was canceled upon a hearing had upon the application of the railroad company. It was further stated that, though said tract was included in the land described in the proclamation of the President as land to be offered for sale at Maryville on February 14, 1859, yet the records of the General Land Office show that the lands in the township, in which said tract is located, were withheld from sale in accordance with official information received from the surveyor-general, stating that they were covered in whole or in part, by private land claims. On this state of facts, it was held in said decision that the tract in question, being unoffered land, was covered at the date of the filing of both maps, by an unexpired pre-emption filing intact upon the record, which, under the decisions of the Departments, excepted said tracts from the operation of the railroad grant, and therefore that the application of Taylor to make homestead entry of the same should be allowed.

In the motion to review and reverse said decision, the facts as stated are substantially admitted, but it is said in behalf of the company that the fact that said land "was not offered for sale" is not material, inasmuch as—

> It was proclaimed to be offered on and after a certain day, and the law says if the settler fails to make his proof and payment before the day appointed, the pre-emption law shall not be available; that is, he shall have no pre-emption right by reason of his settlement before that day.

It is therefore insisted that, as Auztt failed to make his proof and payment before February 14, 1859, the day "appointed" for offering said tract for sale, his pre-emption claim then and there expired and could not serve thereafter to except said tract from the railroad grant.

The legislation of Congress bearing upon this question is to be found in two acts.

By section 14 of the pre-emption act of September 4, 1841 (5 Stats., 453–7), it is provided:

> *And be it further enacted*, That this act shall not delay the sale of any of the public lands of the United States beyond the time which has been, or may be, appointed by the proclamation of the President, nor shall the provisions of this act be available to any person or persons who shall fail to make the proof and payment, and file the affidavit before the day appointed for the commencement of the sales as aforesaid.

By the last clause of section 9 of the act of March 3, 1843 (5 Stats., 619–21), it is declared:

> And said act shall not be so construed as to preclude any person who may have filed a notice of intention to claim any tract of land by pre-emption under said act, from the right allowed by law to others to purchase the same by private entry after the expiration of the right of pre-emption.

In relation to the construction of a statute, it was said by the supreme court in the case of Heydenfelt *v.* Daney Gold, etc., (93 U. S., 634–38):

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

Following the rule thus laid down, there ought to be but little difficulty in arriving at a conclusion on the point presented.

Prior to 1841 the settled policy of Congress was to dispose of the public lands by public and private sales in quantities to suit purchasers. The passage of the act of September 4, 1841, was the first legislative action in the direction of a change to the present beneficent policy of distributing the public domain among the people as homes for the homeless. This legislation was apparently only tentative, for while the public lands were thereafter to be thrown open to settlement and entry, the policy of selling them was adhered to; the settler was permitted to acquire, by his inhabitancy and improvements, only a preferred right to purchase the lands when sold. But this preferred right was not to interfere with the cherished policy of public sales at stated intervals. If any of the lands advertised for sale were occupied by settlers, unless they availed themselves before the day of sale of the right of pre-emption, acquired by settlement and improvement, it would be forever lost, and the lands would be offered first at public sale, and if not sold thereafter became subject to private sale. Hence the passage of the fourteenth section as quoted. Its great purpose as declared by its language, is to provide that the pre-emption right conferred by the act "shall not delay the sale" of public lands beyond the time appointed. So that if it was thought expedient to sell any portion of the public lands, a pre-emption claimant by bare assertion, without full compliance with the requirement of the law, should not indefinitely delay or defeat the sale. This is the apprehended evil which section fourteen was intended to prevent, and only this. There is no known rule of law which would justify this Department in extending the provisions of that section beyond the obvious purpose for which it was enacted. To hold, when a day had been erroneously "appointed" for the offering of this tract for sale, which appointment was revoked or abandoned by the authority making it, because of the discovery of the error, that the settler was obliged to make payment and proof before that day or forfeit his one pre-emptive right, would be, in my opinion, making the law applicable to a condition of affairs beyond its declared purpose, and obviously beyond its purview.

No good reason is suggested why a forfeiture should be enforced under such circumstances, the only one suggested being that, the letter of the law says payment is to be made before the day "appointed," and a day once appointed is always appointed. Concede, for the sake of argument, that there is room for such a contention, how could Auztt, the pre-emptor in this case, have complied with the requirement to make proof and payment prior to the day appointed? The land in question was reported by the surveyor as being covered by certain private land claims and consequently, under the law, it was reserved from sale and entry until the final adjudication of those claims.

Now if, under these circumstances, Auztt had gone to the local land office and offered to make proof and payment, as it is contended was his duty to do, the officers would not, and, under the law, could not, have received either, or given him a final certificate or permitted his entry, because of said reservation; or, if they had done so, their action would have been not merely irregular but absolutely null and void, as the land was then placed by law outside of their jurisdiction. Nor would a mere offer on the part of the pre-emption claimant to make the proof and a tender by him of the price of the land, to the register and receiver, have availed him, in this instance, if we are to adopt the theory of the company and follow the letter of the law; for the language applies, without qualification, under that theory, to any one who "shall *fail to make* proof and payment" by the day "appointed." If the statute is to be construed literally, without regard to its purpose and sense, in the one instance, it must be so construed in the other. We would then have a relentless and unbending requirement for the pre-emptor to make—not offer to make, but successfully and completely to make his proof and payment by the day named, and if he fail, through his own fault or that of the officers, or of the law itself, there is no excuse, he simply fails to make the proof as required and must abide by the result. I can not bring myself to believe that the law contemplated such "absurd results," or required such impossible or vain things of the settlers upon the public lands, under penalty of a forfeiture of their one pre-emptive right.

In the case of the Central Pacific Railroad Company *v.* Orr (2 L.D., 525), the construction of law here contended for by the company's attorney seems to have been adopted. But my convictions as to the correctness of the construction placed by me upon the statute are so clear and strong that I find myself unable to concur in the conclusion arrived at in that case, but am compelled to disregard and overrule it as an authority in that respect.

Entertaining these views, the motion for review is denied.

PROCEEDINGS ON FINAL PROOF—PRE-EMPTION.

HASKET *v.* CANON ET AL.

One who has filed a declaratory statement for a tract and submitted final proof therefor, is under no obligation to protest against the final proof of another who subsequently initiates a claim for said land and offers proof thereon.

Final proof should not be submitted for land involved in a pending contest.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November* 18, 1890.

On July 11, 1885, Alban B. Canon filed Osage declaratory statement No. 2817 for the NE. ¼ of Sec. 14, T. 32 S., R. 22 W., Garden City, Kansas, alleging settlement thereon June 7, of that year.

On October 21, 1885, Joseph R. Hasket filed Osage declaratory statement No. 3729, for the E. ½ of the NW. ¼ and W. ½ of the NE. ¼, said section, alleging settlement June 24, of that year.

Canon published notice that he would make his final proof on December 24, 1885, and on that day Hasket filed his protest against the same.

Canon submitted his proof, after which several witnesses were examined, touching the residence and improvements of both Canon and Hasket.

The hearing was closed on April 15, 1886, and on May 27, 1887, the register and receiver held that "Canon's proof be accepted." Hasket duly appealed, and on March 30, 1889, you rendered your opinion, affirming the judgment of the local officers, and held for rejection the final proof of Hasket as to the W. ½ of the NE. ¼ of Sec. 14, being in conflict with Canon's filing. Your said opinion further states:

> I find upon examination of the tract books that you have allowed one Joseph Swords to enter the E. ½ of the NE. ¼ of Sec. 14, and the S. ½ of the SE. ¼ of Sec. 11, T. 32 S., R. 22 W., and have issued a receipt and final certificate to him under Osage cash entry No. 6821, application No. 4144, and dated February 24, 1887, alleging settlement June 8, 1886. As the above entry conflicts with Canon's filing as to E. ½ of the NE. ¼ of Sec. 14, I hold it as regards said tract for cancellation, subject to appeal.

Hasket did not appeal, but appears to have filed his relinquishment of the W. ½ of the NE. ¼ of said section, on receiving notice of your said decision. Swords, however, appeals from that part of your decision above quoted, and insists that Canon waived his right to the land and abandoned the same by failing to assert such right at the time Swords made final proof, and that you have no jurisdiction to cancel a *prima facie* valid entry, though it may conflict with a prior uncompleted adverse filing.

This position is not well taken. Canon's filing being first in time, he was under no obligations to protest against the final proof of Swords, whose filing and settlement on eighty acres of the land were made subsequent to the submission of Canon's final proof. Moreover, Swords

knew that Canon's filing embraced eighty acres of the land in his filing. He went upon the land with the full knowledge that, if Canon's final proof should be accepted, he could not procure this eighty acres under his filing. He made no protest against Canon's final proof, and must have depended on Hasket to secure the cancellation.

The contest between Hasket and Canon was in progress at the time Swords made his filing, and, while it specifically applied to the W. ½ of the NE. ¼ of Sec. 14, yet it also involved the whole of the NE. ¼ of said section, and postponed the acceptance of the final proof of Canon. Hasket's charge against Canon went to the latter's good faith, so that the filing and final proof of Swords were made during the pendency of a contest, involving part of the land embraced in his filing.

Final proof should not be submitted during the pendency of a contest. Rule of Practice 53, 4 L. D., 43; Bailey *v.* Townsend, 5 L. D., 176; Wade *v.* Sweeney, 6 L. D., 234; Lewis Peterson, 8 L. D., 121.

Your said office decision, holding for cancellation Swords' entry as to the E. ½ of the NE. ¼ of said section, is affirmed, and Canon's final proof will be accepted.

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### PRE-EMPTION CLAIM. RESIDENCE

### SAMUEL C. HAVER.

To establish residence there must be, concurrent with the act of settlement, an intent to make the land a home to the exclusion of one elsewhere.

The fitness of the land as a place of permanent abode, the period of inhabitancy, and the claimant's relation to the land after final proof, may be considered in determining whether the claim of residence is made in good faith.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November* 19, 1890.

On July 28, 1885, Samuel C. Haver made pre-emption cash entry based upon declaratory statement filed June 10, 1884, alleging settlement the 5th of the same month upon the NE. ¼ of Sec. 21, T. 12 S., R. 77 W., Leadville, Colorado.

By letter dated July 6, 1888, your office finding that Haver's published notice of intention to make final proof did not "properly describe the land involved" and that said proof did not satisfactorily show the "claimant's good faith or compliance with legal requirement" required him to make within ninety days new proof "after due advertisement."

Such new proof having been transmitted by register's letter dated October 29, 1888, your office on November 16, following found the same to be insufficient and held the said entry for cancellation.

From this action Haver appeals to this Department.

It appears from his original pre-emption proof made July 25, 1885, before the judge of the Park county court, that Haver was the head of

a family consisting of his wife and three children; that he made settlement on the land June 5, 1884, by laying a foundation; that his residence thereon established June 10, 1884, was continuous, that the altitude of the land being too great for farming he neither broke nor cultivated any part thereof but used the same for grazing and that he has built thereon a house fourteen by eighteen feet valued by himself at ninety and by his witnesses at fifty dollars.

In his new proof (new form) made October 27, 1888, before the county judge both Haver and the witnesses thereto, who appear to be the same persons who testified in support of his original proof, (old form), in reply to the various questions concerning Haver's residence on the land simply refer to the general and affirmative statements made by them in such original proof. The said new proof sets out that in addition to the house mentioned, Haver has constructed on the land two irrigating ditches, each one quarter of a mile in length, a log stable twelve by fourteen feet, a cattle corral and horse pasture; that his said improvements have a total value of $155, that the altitude of the land is nine thousand feet, that it "is mostly on the open range and used by all having stock on that range," and that after making final (original) proof Haver conveyed the land to "a small cattle company" in which he was the principle owner.

It further appears from the affidavits of Haver and of four others, made in September, 1890, and filed during the pendency of the appeal here, that the land is valueless for agriculture, that it is some three miles from the nearest habitation, that by reason of the springs thereon and its "sheltered" location its chief value was for "a drinking place and good headquarters for range stock," that Haver's wife and children lived with him on the land during the summer of 1884 for about two months, after which, owing to his wife's delicate health, they stayed in Denver until May or June, 1885, when they returned to the land and continued to live thereon until the "close of the summer," that Haver, who during the greater part of the winter of 1884 and 1885, when "elsewhere working for wages as a rider and stockman" visited the tract occasionally to look after his stock; that (as he avers) Haver 'took this land up in good faith for a headquarters for a small individual stock enterprise of his own and intended to keep it as such;" that he did not change such intention "till *at* or after the taking of his first final proof when the president of the company with which he was connected . . . . learning of it, questioned the propriety of a rival, though small, cattle business being conducted in the same part of country by a member of the company;" and that upon consideration the said company offered Haver a fair price for the land which he accepted.

The foregoing shows that the land is undesirable as a place of residence and valuable only as an appurtenant to a stock range. This and his limited inhabitancy considered in connection with Haver's subsequent sale (and evident abandonment) of the land which seems to have

been made about the time of his first proof shows, I think, that his settlement thereon was not made with the intention of making the same his permanent abode. To establish residence there must be concurrent with the act of settlement or going upon the land an intent to make it a home to the unqualified exclusion of one elsewhere. Albert H. Cornwell (9 L. D., 340).

The circumstances attending Haver's occupancy of the land showing his said settlement to have been made with no such intention, but rather with a view to securing the same as "headquarters for a small individual stock enterprise," through a colorable compliance with the law, I must find that his entry has been properly held for cancellation.

The decision appealed from is affirmed.

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RESERVATION—SETTLEMENT RIGHTS—FINAL PROOF.

ETNIER *v.* ZOOK.

Acts of settlement on land held in reservation confer no right against the government but may be considered in determining the priorities of subsequent claimants.

A pre-emption filing for land covered by the prior homestead entry of another should not be allowed, unless the superior right of the pre-emptor is established on a hearing had for that purpose.

Final proof should not be submitted during the pendency of an action involving the right of the claimant to the land in question.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November* 19, 1890.

The case of Mary J. Etnier *v.* Elhanan Zook is here on appeal of the latter from your office decision of June 8, 1889.

The record is in some respects imperfect, and the proceedings in the local office irregular; but I think enough can be gleaned therefrom to correctly determine the rights of the parties in accordance with the principles of law involved therein. The facts as I gather them, are as follows:

On the 11th of September, 1886, said Zook made homestead entry for the NW. ¼ of the SE. ¼, the NE. ¼ of the SW. ¼, the SE. ¼ of the NW. ¼ and the SW. ¼ of the NE. ¼, Sec. 5, T. 2 N., R. 52 W., Denver, Colorado. On the same day T. B. Stuart made timber culture entry for the N. ½ of the NE. ¼ and the NE. ¼ of the NW. ¼ of the same section.

September 15, 1886, Mary J. Etnier applied to file her pre-emption declaratory statement for the NE. ¼ of the SW. ¼ the E. ½ of the NW. ¼ and the NW. ¼ of the NE. ¼ of the same section, alleging settlement thereon August 11, 1886.

Four years prior to these proceedings, namely: August 21, 1882, said lands had been reserved for artesian well purposes, but on July 31, 1886, the order of reservation was revoked, and the land opened to settlement and entry September 11, 1886.

When Etnier applied to file her said declaratory statement, she entered into an agreement in writing with Zook, whereby the question of her right to file for said tract was to be submitted to the register and receiver for their determination upon affidavits and such other evidence as they might present on or before September 22, 1886. This agreement was signed by Leon F. Moss, as attorney for Etnier, and T. B. Stuart, as attorney for Zook. The said Stuart, although not a party to the record, has filed herein an agreement signed by himself and Etnier that his rights shall be determined by this controversy.

November 10, 1886, the local officers rendered their decision thereon, in which they say: "We sustain the entries now of record, and reject the pre-emption filing offered by Mary J. Etnier."

She appealed, and on March 21, 1887, your office, by its letter "G," instructed the register and receiver to allow her declaratory statement to be filed as of date of presentation, September 15, 1886.

May 30, 1887, Zook offered final proof (commutation) when Etnier protested against its allowance, alleging prior rights in herself by reason of her acts of settlement, improvements, residence, etc., and asked for a hearing thereon and that such hearing be had before a judge of the county court of Washington county, the county in which the land was situated, alleging as a reason therefor that nearly all the witnesses for herself and Zook resided in or near Akron, in said county, which was more than a hundred miles from the local office. This application was denied, and the protest overruled, Zook's proof accepted, and he was allowed to make cash entry No. 7077 for the land embraced in his homestead entry.

This decision was rendered by the receiver during the absence (on leave) of the register. On his return, the register also rendered a separate opinion, in which he concurred in that of the receiver.

Etnier appealed separately from both these decisions.

May 7, 1888, your office by its letter "H," suspended Zook's cash entry and ordered a hearing on the protest, at a time and place most convenient for the parties concerned.

August 1, 1888, Zook moved for a review of the Commissioner's decision ordering a hearing, as above. This motion was overruled by the Commissioner's letter "H" of October 12, 1888.

After taking depositions before several officers in different States, the register and receiver, on March 5, 1889, rendered the joint decision, stating that "upon a full consideration of all the testimony which has been submitted, we find no reason to change our opinion as to the priority of right of Mr. Zook, or as to the sufficiency of the proof ..... We therefore sustain the entry of Mr. Zook." Etnier appealed from this decision, and your office, by its letter of June 8, 1889, reversed the judgment of the local officers, and held Zook's homestead and cash entries for cancellation as to that part of the land embraced in the declaratory statement of Etnier. From this decision Zook now appeals to this Department.

From this abstract of the record, it will be seen that the land in dispute between Zook and Etnier is the NE. ¼ of the SW. ¼ and the SE. ¼ of the NW. ¼ of said section 5, while the NE. ¼ of the NW. ¼ and the NW. ¼ of the NE. ¼ of said section embraced in Etnier's declaratory statement, is claimed by Stuart under his timber culture entry, whose rights are dependent upon the result of this case, as per agreement heretofore mentioned.

The homestead entry of Zook being the first claim of record after the land was opened to entry, reserved the tract covered thereby from other entries or filings, while the same remained uncanceled. The declaratory statement of Etnier, however, alleged settlement prior to the said entry, which allegation in effect charges, that the entry of Zook was improperly allowed, because of such settlement. A hearing was therefore properly allowed to determine the respective rights of the parties. (James A. Forward, 8 L. D., 528; James *et al. v.* Nolan, 5 L. D., 526.)

The alleged settlement of Etnier was made while the land was not subject to entry, it having been reserved for artesian well purposes, and, although such reservation had been discontinued in July of the same year, it was not opened to entry until September 11th. While she could not acquire any rights as against the government by her acts of settlement while the land was so reserved, yet, as between herself and another claimant, priority of settlement was properly considered. (Geer *v.* Farrington, 4 L. D., 410; Tarr *v.* Burnham, 6 L. D., 709; Rothwell *v.* Crockett, 9 L. D., 89.)

On the hearing ordered for this purpose the register and receiver rendered a decision, in which they sustained "the entries now of record" and rejected the pre-emption filing of Etnier.

The reasons upon which this judgment is based do not appear in the decision, except that it was rendered "upon examination of the evidence and agreement submitted." The "agreement" referred to is the one heretofore noted, which provided that the evidence should be submitted on or before September 22, 1886.

On appeal by Etnier to your office, it reversed the judgment of the register and receiver and returned her declaratory statement, with directions that it should be allowed. This, in effect, was a judgment canceling the entries of Zook and Stuart, so far as they conflicted with her filing, for it could not be allowed while the land embraced therein was covered by their entries. Grove *v.* Crooks, 7 L. D., 140.

But an examination of your decision shows that it was not designed to determine the rights of the parties, because it says "these matters (acts of settlement) might be considered in determining the respective rights of the parties, should either offer proof, or contest be regularly initiated against either of the several claims." The error was in holding that a pre-emption declaratory statement which alleged settlement

prior to the date of an entry of record should have been allowed without a hearing in support of such allegation of prior settlement.

No appeal was taken by Zook from this judgment, but on May 30, 1887, he offered final proof on his homestead entry and asked to have it commuted to cash. Zook failing to appeal from this decision, he must be considered as acquiescing therein. In fact, the record shows that both parties followed the suggestions contained in this decision, Zook in offering proof, and Etnier in protesting against its acceptance on the ground of her superior rights.

Although these proceedings were irregular and unnecessarily complicated, yet, as all parties have acquiesced therein, and as their rights may be investigated and adjusted on the evidence and record now before me, these errors will not be allowed to stand in the way of a judgment on the merits of the controversy.

The only question remaining to be considered then is as to which has the prior right to the land under the evidence submitted: Zook or Etnier.

Zook's entry consists of the four forties that corner at the center of section 5. Etnier lays no claim to the two eastern subdivisions of his entry, but disputes his right to the NE. ¼ of the SW. ¼ and the SE. ¼ of the NW. ¼ of section 5.

The evidence shows that on August 11, 1886, a month before the land was opened to entry, each of these parties commenced the erection of a house on this land. Mrs. Etnier built her house on the NE. ¼ of the SW. ¼ and Zook on the NW. ¼ of the SE. ¼ of said section, the latter subdivision, on which Zook built his house, is not claimed by Etnier. Etnier has lived in her house continuously ever since its completion, about the 12th or 13th of August, 1886. She is a widow, having one son about twelve years of age living with her. Zook is a married man, and while he claims to have made his residence in his house on the land ever since its erection, his wife had never resided there up to the time of the hearing, and his residence consisted of staying there all the time when not necessarily away attending to his business of a roadmaster for a railroad which ran through Akron, a town in the near vicinity of the land. He explains his wife's absence from the land as due to the delicate condition of her health, yet he claims that his house is comfortable, and there is no evidence showing that the climate is unhealthy. Mrs. Etnier, however, does not endeavor directly to impeach his residence, but claims that, granting his continuous residence, he acquired no right thereby to the subdivision on which she resided, nor the other one in dispute, which lies immediately north of it.

The act of settlement by Zook upon which he bases his right to the two quarter sections in dispute was in having them surveyed and two furrows plowed around them on August 11th, the day on which Etnier alleges her settlement. She, on her part claims that a few hours previous to these acts by Zook she had her land surveyed, and had thrown

up sod mounds on the boundaries of her claim. While these acts were nearly simultaneous, a careful examination of all the evidence, including the depositions and affidavits, will, I think, lead to the conclusion that she was first to establish her boundaries. One witness for Zook (Lewis Vookland) states in his affidavit that when he plowed around Etnier's claim (12th of August) he found sod mounds that had been thrown up as a guide to follow in his plowing; that these mounds were not found where Zook had plowed (probably the day before) on the boundaries of his claim, where the same also bounded the Etnier claim, which may indicate that Zook had plowed over the sod marks which had been placed there by Etnier previous to his plowing.

James Irwin, another of Zook's witnesses and the one who plowed the two furrows on the 11th of August, says that when he was plowing around Zook's claim, he came upon Mr. Vance and some other men surveying, and that they removed their compass to let him pass. Vance was the man who surveyed for Etnier, and who testifies that his survey was previous to that of Zook.

The survey and the plowing of Zook were done at the same time, the plow following along with the surveying party, while Mrs. Etnier's plowing was not done till the day after she had surveyed her land and thrown up sod marks to indicate the boundaries and guide the plowman. There is an effort on the part of Zook to show that Mrs. Etnier could not have been on her land prior to August 12. I do not think, however, that he has successfully impeached her testimony in this behalf. I concur therefore with the decision of your office in finding that the evidence shows that Etnier's settlement was prior to that of Zook.

During the pendency of the appeal in this case, namely: June 20, 1889, Etnier applied to make final proof on her pre-emption filing, which was rejected by the local officers, because a part of the same was covered by the cash entry of Zook. Her application was properly rejected because of the pendency of this appeal, the decision of which is necessary to determine her rights in the premises.

The pre-emption filing of Mary J. Etnier will be allowed, and so much of the homestead and cash entries of Zook and timber culture entry of Stuart as is embraced in her said filing will be canceled, and she will be allowed to submit her final proof on due publication of notice.

The decision of your office is modified accordingly.

MINING CLAIM—PUBLICATION—EQUITABLE ACTION.

ORO PLACER CLAIM.

The publication of an application for mineral patent, in a weekly paper, requires ten insertions, but where the proof shows that such publication was made under a former practice that recognized nine insertions as sufficient, the entry may be equitably confirmed in the absence of an adverse claim.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November* 20, 1890.

I have considered the appeal of the heirs of Walter Willey, applicants for patent for the Oro placer mine, mineral entry No. 1088, Sacramento, California, land district, from your office decision of November 27, 1888, holding said entry for cancellation.

The record shows that on the 27th day of March, 1873, O. G. Spaulding, James Abram, and C. S. Strobel made application for a patent for said mine. On the second day of April, 1873, notice was given of said application. The evidence shows that on the 25th day of September, 1879, Walter Willey became the sole owner of said mine.

December 19, 1885, a deputy mineral surveyor made his report on the mine, showing the survey and proper requisites of a placer mine, as well as the working and improving of the claim at an expense of not less than ten thousand dollars by claimants and their grantors. On the 21st of December, 1885, John Abram, J. S. Bickford and E. D. Hurd filed sworn statements, corroborating the fact stated by the deputy mineral surveyor. Abram is shown to be the executor of the estate of Walter Willey, including the Oro placer mine, and as such applied for patent.

On the 21st day of January, 1886, the local officers accepted the proof, received payment, and issued final certificate, and on the same day transmitted the evidence to your office. On March 1, 1888, your office notified the register and receiver that the evidence of publication fails to show that the notice of application for patent was published for the full statutory period, the affidavit showing that said notice was published from April 5, 1873, to and including May 31, 1873, and in case the notice was actually published for the statutory period, proper evidence thereof must be furnished. On March 23, 1888, they transmitted to this office the affidavit of Walter B. Lyon, made March 22, which shows that during the year 1873 he was the business manager and as such had charge of the "Placer Argus," a weekly newspaper published in Auburn, Placer county, California; that notice of the application of Abrams *et al* for the Oro Placer Mine was published in each weekly issue of said newspaper, commencing April 5, 1873, and ending June 6, 1873, which affidavit appears to be in the handwriting of said Lyon. On the 7th day of May, 1888, the local officers transmitted to your office the corroborated affidavit of Walter Croft *et al.*

asking for a hearing with a view to the cancellation of said entry. On the 26th day of May, 1888, your office denied the petition for a hearing, and directed the local officers to notify the parties and report at the expiration of thirty days. On the 21st day of July, 1888, you notified the register and receiver that no response to your letter of May 26th had been received, and directed a prompt report as to what action, if any, had been taken on said letter. On the second day of August, 1888, they transmitted to your office an appeal of Walter Croft *et al.* from your said decision of May 26, 1888. On the 24th day of August, 1888, you decided that Walter Croft *et al.* appear in this case only as protestants, and that they are not entitled to an appeal, and declined to forward the same.

There was forwarded with said appeal an affidavit of J. M. Fulweiler, in which he alleges that in the month of November, 1885, he examined the files of the local land office and the only affidavit of publication of the application for said Oro placer mine was one made by Walter B. Lyon, and that said affidavit contained the statement that said notice had only been published from April 5th to and including May 31, 1873; that any affidavit subsequently made by W. B. Lyon in said application for patent, showing any publication of said notice for patent after May 31, 1873, does not state the truth, was false, and fraudulently procured, as affiant believes, from said Walter B. Lyon.

In view of these charges your office required corroborative proof. Thereupon, there was filed in your office, on the 12th day of November, 1888, an affidavit of Walter B. Lyon, sworn to on the 25th day of September, 1888, in which he states generally, that the notice of application for patent was published first on the 5th of April, and in each subsequent issue of the "Placer Argus," a weekly newspaper, until and including the 31st day of May, 1873; that he was the managing editor of the paper at the time; that immediately after the 31st of May, 1873, he made out in proper form proof under oath, according to the fact, and forwarded the same to the officers of the land office at Sacramento. Not long thereafter he severed his connection with the paper, and for more than ten years past has been living and doing business in the city of San Francisco, California; that the matter of the publication of the notice of said appplication had passed almost out of his mind; that in the month of December, 1885, or January, 1886, one William Muir, "came to me and stated to me that there had been a slight and technical mistake made by me in my affidavit and proof of said publication;" and "that he had with him a corrected and proper proof of the said publication, that he wished I would sign and swear to, in order that they might correct the proof thereof. I asked him whether it was according to the facts, and he stated to me that it was, and desiring to accommodate him and fully relying upon his representations as to the truth of its contents, I signed and took oath to the same, without careful examination thereof; that since the making of the said last mentioned proof

of publication of the said notice, I have caused the files of the said newspaper to be carefully examined, and find that the said notice of application for patent to said Oro Placer Mine was only printed and published in the said Placer Argus on the 5th, 12th, 19th, and 26th days of April, and the 3rd, 10th, 17th, 24th and 31st days of May, 1873, and not more, and that if the said affidavit or proof of said publication as made by me at the request of the said William Muir shows a publication thereof in said newspaper after the 31st day of May, 1873, such statement therein is not true and the same was made by me under a misapprehension of the facts as aforesaid."

On the 27th day of November, 1888, your office held the entry for cancellation.

From your judgment the heirs of Walter Willey appeal. There is no adverse claim involved, and the only irregularity suggested is that the notice of application was only published for nine weeks. The statute (act of May 10, 1872), Revised Stat., Sec. 2325, requires the register to publish notice of the application for sixty days and also to post such notice in his office. The statute is silent as to how or by whom the proof of this publication and posting shall be made. The regulations while requiring the register to certify as to the posting of the notice, do not specify who shall make proof of the publication thereof. The mining circular issued June 10, 1872, thirty days after the passage of the act under which these proceedings are taken, does not specify the number of insertions required, but in the case of McMurdy *et al. v.* Streeter *et al.* (1 C. L. O., 34) decided April 30, 1874, it was held that ten insertions are required where the notice is published in a weekly newspaper, and this ruling has since been followed. Prior to the decision of McMurdy *v.* Streeter, *supra*, it was the custom of the Land Department to accept evidence of publication for nine weeks as sufficient. In Miner *v.* Mariott (2 L. D., 709), it is said, "The rule of this decision should not operate to interfere with or take away any rights acquired under the law as it has heretofore been construed by your office. Though such construction is, in my opinion, clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretation. Until a rule is changed it has the force of law, and acts done under it while it is in force must be regarded as legal."

In Becker *v.* Sears (1 L. D., 575), it is in effect held that as the duty of publication is put by statute upon the register, the claimant should not be made to suffer from an insufficient compliance in that respect (nine insertions) where no prejudice to the rights of others is shown.

In the case of the Mimbres Mining Company (8 L. D., 457), it is held that if the published notice is not as explicit as the notice posted on the claim, such defect is properly chargeable to the register, and may be cured by a reference to the board of equitable adjudication. Under the facts as developed in this case, the burden should not be put upon

the claimant at this late day of proving affirmatively that the register properly discharged his duty, when the presumption is in favor of such conclusion. Conceding that but nine insertions were made, the entry should not be disturbed but referred to the board of equitable adjudication for its action which is accordingly done. The decision of your office is modified accordingly.

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### TIMBER CULTURE CONTEST COMPLIANCE WITH LAW.

### GRENGS *v.* WELLS.

The breaking done by a former occupant of the land inures to the benefit of a timber culture entryman, if it is properly utilized.

Planting trees before the time fixed by the law is compliance with its requirements, so far as time is of the essence of the matter, provided the land has been broken, cultivated, and properly prepared.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November* 20, 1890.

I have considered the case of Nicholas Grengs *v.* Perry G. Wells on appeal by the latter from your decision of May 2, 1889, canceling his timber culture entry for the SW. ¼ of Sec. 8, T. 114, R. 43, Marshall, Minnesota land district.

On December 31, 1883, Wells made timber culture entry for this land, and on April 21, 1887 Grengs filed affidavit of contest against the same alleging that—

> Perry G. Wells has failed to plant and cultivate to trees, tree seeds, nuts or cuttings the five acres required by law to be planted the third year after his said entry, and that said failure still exists.

Hearing thereon was set for June 7th following, and personal service of notice of same was made on contestee on April 25, 1887. On the day of hearing contestee filed an affidavit for a continuance, averring the absence of two material witnesses, which affidavit was in substantial compliance with Rule 20, Rules of Practice. The same was disallowed and the hearing proceeded. Upon the testimony introduced the local officers recommended that the entry be canceled. From this decision the entryman appealed, and your office on May 2, 1889, affirmed said decision and held the entry for cancellation, from which he appealed to this Department.

The contestant testified in the case and introduced as witnesses his brothers George and Frank Grengs and one Franz Antony. Antony knew but little about the case. The testimony of the other witnesses tended to show that no trees or seeds were planted in 1886, the third year of entry, and they say they could find no trees on the land in 1886.

The entryman was sworn in his own behalf and he was asked how many acres he plowed on the land in contest in 1884. Objection was

made to this question. The objection was sustained, and exceptions noted. The attorney for contestee stated "that he expected to prove and show by the witnesses that in the spring of 1884 he (the entryman) plowed twenty or twenty-five acres on the land in contest that had been previously plowed and cropped; that the ground was in a good state of cultivation . . . . that he put it in crop . . . . that after harvest he had a part of the land that had been cropped plowed" etc.

This was the first year after entry; what he did to prepare the land for trees was competent, as reflecting on his compliance with law and on his good faith. Not only so, but the breaking done by a former occupant inures to the benefit of a timber culture entryman if it is properly utilized. See McKenzie *v.* Killgore (10 L. D., 322).

This entryman had a right therefore to show that some land had been previously broken and cultivated in the tract and that he had utilized it. It was error to rule out this testimony. Following this the witness was asked what work he did on the land in contest in the spring of 1885. To this objection was interposed. The objection was sustained and exceptions noted. The attorney stated that he expected to show and prove by this witness that in the spring of 1885 he (the entryman) had plowed, dragged, marked and planted to tree seeds, of maple, box elder and elm, over five acres of the land in controversy, and that he had cultivated twenty-five acres of the land in crops during that season. The register held that what he did this, the second year, was not in issue. This ruling was clearly erroneous. This evidence was competent and material as tending to show a compliance with the law.

Planting trees *before* the time fixed by the law is compliance with its requirements so far as time is of the essence of the matter, provided the land has been broken and cultivated, and thus reclaimed from its wild state.

A number of other material questions were asked, calling for testimony entirely competent and relevant to the issue as showing compliance with law and as reflecting upon the good faith of the entryman; but they were not permitted to be answered, and the error does not stop with the rejection of the testimony, but the register excluded it from the record in violation of rule 41, Rules of Practice, it not being "obviously irrelevant." It may be that this entryman had not complied with the law, but the proceedings before the register and receiver show such disregard of the rules of evidence, rules of practice, and the departmental regulations, that I can not uphold their judgment.

Your office decision affirming their action is therefore reversed, the case will be returned to the local office for a hearing, *de novo* in accordance with law.

SPECIAL AGENT'S REPORT—MINERAL LAND—ACT OF JUNE 15, 1880.

JOHN E. WILLIAMS.

The admission of the entryman that the facts as stated in a special agent's report are true, does not extend to a conclusion of said agent contained therein.

The proximity of land to coal veins will not warrant the conclusion that it is mineral in character, where it is not returned as such, and its mineral character is not made to appear as a present fact.

The failure of a homesteader to comply with the law in the matter of settlement and residence does not affect his right to purchase the land under section 2, act of June 15, 1880.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November* 20, 1890.

This record involves the validity of cash entry No. 16,995, made by John E. Williams under the second section of the act of June 15, 1880, 21 Stats., 237, for the NE. ¼ Sec. 32, T. 16 S., R. 5 W., Montgomery, Alabama.

He made original homestead entry January 27, 1874, and the entry in question on June 22, 1881.

On September 17, 1887, Special Agent Griffin of your office, reported that in connection with adjoining land where he has lived for twenty years, Williams cultivated some four acres of the tract involved, that he has made no further improvements nor settled or resided thereon, that "large veins of coal have been developed in near vicinity" and that the same is "mineral land but there are no out-croppings."

On November 19, 1887, your office held said cash entry for cancellation and allowed Williams sixty days to apply for a hearing to show cause why the same should be sustained. On May 11, 1888, such hearing was, upon his application, ordered by your office. Pending the hearing thus ordered, on August 4, 1888, he filed a petition in your office wherein he set out that he accepted the said special agent's report "as a true statement of the facts in the case" and that he relied upon the second section of the act of June 15, 1880, *supra*, to sustain his entry, and asked that your office decision of November 19, 1887, be set aside and the entry passed to patent.

On December 19, 1888, your office revoked said order for hearing and held the entry for cancellation.

This decision on motion by Williams for reconsideration, was on April 11, 1889, adhered to by your office. He appealed from the order of cancellation to this department. Your office found that in allowing the facts as stated by the special agent, Williams admitted that his original entry was made without intention of settlement and that such entry being consequently fraudulent, it could not, under the ruling in the case of J. S. Coue, 7 L D., 94, constitute a basis of purchase under the act of June 15, 1880, *supra*.

This conclusion is not sustained by the record. In his said report Special Agent Griffin in reply to the question (14) "Was the fraud wilful?" says: "It is evident that the entryman never intended to settle on the land." This being simply a conclusion by the agent, could not come within the scope of Williams' admission, which obviously related only to the facts. Moreover such conclusion is expressly controverted by his original homestead affidavit and by his sworn statements in support of the said motion for reconsideration.

The tract involved, as I am advised by your office, does not appear on the mineral list and as further shown by the record, Special Agent Harrison on May 31, and October 13, 1883, and Special Agent Toole on September 12, 1887, reported to the effect that it is non-mineral. Furthermore, it is not shown by the said Special Agent Griffin to be "as a present fact" valuable for coal or other mineral.

As the land in question had not been returned as mineral the record shows that it was properly subject to homestead entry at the time of Williams' original and also at the time of his cash entry. Consequently it appears that said original entry was valid at its inception and in this respect the case at bar differs from that of J. S. Cone, *supra*. No adverse claim has intervened and the failure of Williams to comply with the homestead law with regard to settlement and residence, could not affect his right to purchase under the act referred to. Geo. E. Sanford (5 L. D., 535). See also Campbell *v.* Kelly (8 L. D., 75); Chapman *v.* Patterson (10 L. D., 129).

The entry in question will, accordingly, remain intact.

The judgment of your office is reversed.

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RES JUDICATA PRIVATE CLAIM—HOMESTEAD OCCUPANCY.

BRADY *v.* CENTRAL PACIFIC R. R. CO.

The final adverse decision of the Department precludes favorable consideration of a subsequent application of the same party raising the question involved in the former action.

A Mexican grant of quantity, within a tract of larger area, is a float, and the lands within such larger area are subject to the operation of a railroad grant, at the date it becomes effective, except as to the quantity that may be actually required to satisfy the float.

An allegation that land is excepted from a railroad grant by reason of a settlement claim, is not established by a showing that said tract was included within a large body of land improved and occupied as a whole for the purposes of a cattle ranch.

*Secretary Noble to the Commissioner of the General Land Office, November 21, 1890.*

The land in controversy embraces lots 1, 8, 9, 10, and 11 in Sec. 1, T. 2 S., R. 3 W., M. D. M., California and lies within the twenty mile

limits of the grant to the Central Pacific Railroad Company, the line of which was definitely located opposite the tract in question January 21, 1870.

In March 1884 James Brady applied to make homestead entry of said tract, alleging that it was within the claimed limits of the Moraga and El Sobrante Mexican grants. This application was finally rejected by the Department December 9, 1886 (58 Lands and Railroads 67), holding that said application was controlled by the decision in the case of Rees *v.* Central Pacific R. R. Co. (5 L. D., 62), the land in both cases being in the same range of townships. On April 30, 1887, he renewed his application to enter said land, alleging that it was excepted from the grant to the railroad company for the reason that it was within the claimed limits of the Moraga and El Sobrante grants at date of definite location and for the further reason that from 1861 to date of application the land was claimed, occupied and improved by different claimants—citizens of the United States who had erected dwellings and made other improvements thereon. Upon this application a hearing was ordered to determine the status of the tract at date of withdrawal, January 31, 1865, and of definite location, Janury 21, 1870, and upon the testimony taken at such hearing the register found that the land was within the exterior limits of the Moraga grant from 1841 to August 10, 1878, when it was excluded therefrom by official survey and restored to the public domain, and that it was used, occupied, improved and claimed by successive settlers and claimants—citizens of the United States—from 1855 to date of hearing, and held as private property. The receiver found that it was not within the exerior limits of staid grant under the ruling of the Department in the Rees case, and that the evidence did not show the occupancy of the land by any settlers such as would reserve it from the operation of the grant to the company.

From these disagreeing decisions of the local officers the company and Brady respectively filed appeals.

Your office held that it was unecessary to consider the question as to whether said land was within the exterior limits of the Mexican grants, for the reason that this question had been once adjudicated and definitely settled in the case of Rees *v.* Central Pacific R. R. Co., *supra.* As to whether the land was claimed, occupied, and improved at date of withdrawal and of definite location, you held that the evidence shows that this tract was part of a larger tract comprising over four hundred acres, which was used as a whole for stock purposes, that—

> The land in question was never occupied by any one claiming it under any of the laws permitting occupation or settlement, but only by cattle roaming at large over the entire tract, the owners of which were non-residents, whose agents lived in a house situated at least half a mile from the tracts applied for by Brady.—

From this decision Brady appealed.

The question as to whether this land was embraced within the limits of the Moraga or El Sobrante grants is not only controlled by the

ruling of the Department in the Rees case, but that question was directly adjudicated adversely to this applicant by the Department in its decision of September 9, 1886, upon the application of Brady to enter this identical tract. Moreover, it was held in the case of Childs *v.* Southern Pacific R. R. Co. (9 L. D., 471), following the case of United States *v.* McLaughlin (127 U. S., 428), that a Mexican grant of quantity, within a tract of larger area, such as the said Moraga grant, was a float, and that the lands within such larger area are subject to the operation of a railroad grant, except as to the quantity actually required to satisfy the float.

The only remaining question is whether there was such a claim existing at date of withdrawal and of definite location as would except it from the operation of the grant. The evidence shows that this land was occupied, claimed and improved by various persons from 1855 to date of definite location, but such occupancy was by persons who claimed it as the Grass Valley Ranch, and who improved it and occupied it as a ranch for grazing cattle, not as part of the government land which they expected to enter under the homestead laws, but by purchase of the right from private parties. In fact there is no testimony showing that the identical land claimed by Brady was occupied by any one prior to definite location except in connection with the entire ranch, and none of the improvements of the ranch were upon the land claimed by him except the fence which did not enclose that tract but the entire ranch which was under one fence. The character of the occupancy of this land is shown by the admission of the counsel for Brady in his argument, in which it is stated that this land was considered as being embraced in a private land grant, and the method of settlement was by taking up ranches and awaiting the adjudication of the claims, when they hoped to get title from the grant claimants. He says:

> These ranches were in many cases redeemed from a state of nature and covered with valuable improvements. The ranch embracing the land in controversy contained over five hundred acres, and at one time was held by a number of owners. In 1871, the improvements thereon were extensive and as far back as 1860, according to the testimony of witness Field, there were on it a dwelling house and three or four barns "holding cattle in the winter and so forth." Such possessory claims were bought and sold, and taxed, and the owners by reason of possession, occupancy and expenditure of money, had an equitable interest therein.

It is contended that such claim and occupancy excepted the land from the operation of the grant under the ruling of the Department in the case of Bowman *v.* Northern Pacific R. R. Co. (7 L. D., 238). But in the Bowman case the tract claimed by Bowman did not exceed the quantity of land that could have been claimed and entered under the homestead law, and the limits of the tract were defined and part of it was under fence. In this case the land claimed was part of a tract of five hundred acres known as the Grass Valley Ranch, and the improvements and occupancy of the entire five hundred acres by ranchmen,

was not such an occupancy of the land by homestead settlers as would except it from the operation of the grant.

Your decision is affirmed.

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### RAILROAD GRANT—LOCATION OF TERMINAL LINE.

### MICHIGAN LAND AND IRON COMPANY.

Pending further consideration as to the proper location, under the forfeiture act of March 2, 1889, of the western terminal line of the grant in aid of the Marquette, Houghton and Ontonagon R. R. Co., the action heretofore had in said matter will remain suspended.

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

This is a petition filed by the Michigan Land and Iron Company (limited) asking that you be directed to certify to this Department the record and proceedings in the matter of the application filed by it for a correction of the terminal line established by your office under the act of March 2, 1889 (25 Stats., 1008), of the Marquette, Houghton and Ontonagon Railroad at the western, or L'Anse end thereof, as constructed under a grant to the State made by the act of June 3, 1856 (11 Stat., 21), in that such further action may be had in the premises as may be deemed lawful and proper.

By said act of March 2, 1889, all lands theretofore granted to said State by the act of June 3, 1856, "which are opposite to and coterminous with the uncompleted portion of any railroad, to aid in the construction of which said lands were granted, or applied," were forfeited to the United States. The Marquette, Houghton and Ontonagon Railroad appears to be one of the roads embraced within the contemplation of said forfeiture act.

The petition sets forth, among other things, that shortly after the passage of said act you transmitted to the local office certain instructions relative to the restoration to market of the lands forfeited thereby, accompanied by a diagram, or sketch, purporting to show the lands forfeited at the western or L'Anse end of the Marquette, Houghton and Ontonagon line of constructed road; that the terminal line of constructed road was thus established by you as a matter of *ex parte* routine business, without notice to the State, or to any of the parties interested in the title to the lands affected thereby; and it is alleged that such terminal line does not correctly designate the lands earned by the location and construction of the road.

It is also alleged that certain lands at the L'Anse end of said constructed road, with many others elsewhere, were, in 1860, conveyed by the United States to the State of Michigan in part satisfaction of said grant; that the State subsequently conveyed said lands to the Mar-

quette, Houghton and Ontonagon Railroad Company, and that said company, in 1881 conveyed them to the petitioner—the said Michigan Land and Iron Company (limited)—for a large money consideration; that under the title thus acquired the petitioner continued in the undisturbed possession and enjoyment of said lands from the year 1881 until after the passage of said forfeiture act; that the terminal line in question, as shown by the aforesaid diagram, or sketch, is improperly and erroneously located, in that it is drawn with reference to the line of constructed road, as the base thereof, whereas it should have been drawn at right angles with the line of road as originally located under the grant; and that said location, if allowed to stand, will result greatly to the prejudice of the petitioner in the matter of the lands thereby designated as having been forfeited by said act.

It is further set forth that, on April 18, 1890, the petitioner, having obtained knowledge of the transmission by you of the diagram, or sketch, aforesaid, filed in your office its application for a correction of said terminal line so as to conform to the law; that by office decision of July 17, 1890, you declined to consider the question presented by said application, and dismissed the same, on the ground of want of sufficient parties to the record, it being stated that there was nothing to show that the petitioner was authorized to represent the Marquette, Houghton and Ontonagon Railroad Company; and further, that any application looking to a re-adjustment of such terminal line should be made by said railroad company to the Secretary of the Interior; that the petitioner thereupon filed an appeal, which, by office decision of September 19, 1890, you declined to entertain, for the same reasons set forth in the decision dismissing the application. Copies of said decisions, with said rejected appeal, are filed with the present petition.

It is further alleged in said petition,

> that notwithstanding the instructions accompanying the said map were submitted to and received the approval of the Honorable Secretary of the Interior, yet that the proceeding was entirely *ex-parte*, without notice to any one interested, or a hearing, and that as matter of fact neither the proper location of said terminal line, nor the accuracy of the Commissioner's location thereof, nor the question what lands had been earned by location and construction was presented to, considered or determined by the Honorable Secretary; but that his approval of the said instructions were made in the usual order of routine business, and upon the assumption that no controversy as to its accuracy as to what lands had been earned existed or was likely to arise, that the line as designated was correct and that no existing vested rights were prejudiced thereby.

And the "petitioner denies, upon information and belief, that the question of the accuracy of this line or of what lands had been earned was ever, in any proper sense of the word, presented or submitted to the Secretary, for consideration, or was by him considered or decided.

In my opinion, the correctness of the location of said terminal line should be fully considered by the Department, giving to all parties adversely interested an opportunity to be heard upon the merits. You

are therefore directed to certify to the Department the record in said case, including copies of letters of your office giving instructions to the local office relative to the status of the lands in controversy. The local office should be advised to take no action relative to the lands in controversy until the correctness of said terminal line shall have been finally adjudicated by the Department.

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TIMBER CULTURE CONTEST—COMPLIANCE WITH LAW.

KELSEY *v.* BARBER.

The failure of the entryman to secure the requisite growth of trees does not call for cancellation, where such result is not due to negligence in planting and cultivation, but to the character of the season, and seed that proved defective.

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

I have considered the case of James M. Kelsey *v.* Eber Barber on the appeal of the former from your decision of February 11, 1889, dismissing his contest against the timber culture entry of the latter for the W. ½ of NW. ¼ and W. ½ SW. ¼ of Sec. 14, T. 17, R. 20 W., Grand Island Nebraska land district.

On July 20, 1883, Barber made timber culture entry for the land, and on August 26, 1886, Kelsey filed affidavit of contest against the same, alleging—

failure to plant or cause to be planted, up to this date, to trees, seeds, nuts or cuttings, five acres of said tract and that the only attempt was to plant not to exceed two and one-half acres; that the cuttings were dead when planted; that they were not cultivated and that said Barber has failed to cultivate the tract according to law.

The time for the hearing was set for October 16, 1886. After some preliminary motions and delays final hearing of the case was had January 27, 1887, both parties being present in person and by attorney, and upon motion for continuance, and application to take depositions on the part of the claimant being overruled, the testimony was submitted and on April 22, 1887, the register and receiver, upon consideration thereof, decided the case against the entryman and held his entry for cancellation. He appealed from this judgment to the Commissioner, where, on February 11, 1889, the decision of the local office was reversed and the contest dismissed, from which ruling the contestant appealed to this Department.

The testimony is quite voluminous and discloses the fact that there is a good deal of ill feeling on the part of the contestant and his witnesses against the entryman, and on account thereof, there is a great deal of irrelevant matter contained in the record. It appears, however, that this entryman broke in the first year of his entry about fifteen acres, and

raised sod corn on it; that in the year 1885, he cultivated this ground and had some ten acres more broken and in May 1886, he had five and a half acres plowed, harrowed and marked in rows. Some three and a half acres of this ground he had planted to cottonwood cuttings and the remainder to box-elder, cottonwood and other tree seeds.

It appears that the season of 1886 was quite dry during June and July, and the cuttings did not do well, although it appears that he gave the ground reasonably good cultivation. The seeds did not germinate as they should have done, but there is evidence tending to show that the seeds grown in Custer and some adjoining counties of Nebraska in 1885 were injured in some way and did not grow well.

This entryman has put wire fence around sixty acres of the land, dug a well and has stock on the land.

I think he has manifested good faith in the work performed and it appears to have been owing to the dry season and defective seeds which were not easily detected except by trial, that he has not more growing trees on the land.

Your decision is affirmed and the contest will be dismissed.

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### HOMESTEAD CONTEST—RESIDENCE—APPLICATION.

PATTON *v.* KELLEY.

Residence can not be established, nor maintained, by occasional visits to the land while the actual home of the claimant is elsewhere.

An application to enter can not be allowed during the pendency of an appeal to the Department from a decision holding for cancellation the existing entry of another for the land in question.

*First Assistant Secretary Chandler to the Commssioner of the General Land Office, November* 24, 1890.

I have considered the appeal of Mrs. Tempie Kelley (widow of John Kelley) from your office decision of June 1, 1889, in which you held for cancellation homestead entry No. 8168, made by said John Kelley, December 20, 1886, upon the NW. ¼ of Sec. 26, T. 4 S., R. 67 W., Denver, Colorado.

It appears that a pre-emption filing was made by him upon the tract, March 29, 1884, and transmuted to a homestead entry on the date above given.

On June 27, 1887, Ambros E. Patton filed in the local office his affidavit of contest, charging claimant's abandonment of the land for more than six months since making the entry.

After due notice, the hearing was had and the register and receiver found that claimant "has not established and retained his residence as required by law," and recommended that the entry be canceled; and by your said decision you affirm that judgment.

I have carefully examined the evidence, and find it substantially and correctly set forth in your opinion.

It shows that claimant's real home after making the entry was in Denver, Colorado, where he was engaged in the saloon business. Moreover, he voted in that city, and his alleged residence on the tract was nothing more than visitations to keep up an appearance of residence. It can hardly be said that he abandoned his residence on the tract, for the reason he never established it there. He was doubtless in poor health, and it may be conceded that he could not make a living on the land, and was compelled to seek employment elsewhere; but this can not excuse his lack of compliance with the law in the matter of residence. His house, ten by twelve feet; was built with four posts roughly boarded; it had no floor and no window, and the furniture placed therein he says consisted alone of "a chair, stove, dishes and bed." This shows very meagre preparations for housekeeping, and demonstrates a lack of good faith—taken in connection with the other admitted fact that he lived in Denver. Your said decision canceling the entry is accordingly affirmed.

It appears that on July 10, 1889, Mrs. Kelley, widow of the entryman, appealed from your said judgment of June 1, 1889, and on August 8, 1889, Eva H. Patton, widow of contestant, Ambros E. Patton, (the latter having died since your decision), filed an application to be allowed to make homestead entry of the land in question. The register and receiver rejected this application, because the tract was covered by Kelley's entry. Mrs. Patton appealed, and on October 7, 1889, you sustained the action of the local officers, saying:

> Kelley's homestead entry was not canceled by office letter "H" of June 1, 1889, and as long as it remains of record, it is a bar to the appropriation of the land by any other person.

She made this application so as to be first on record, and thus "reap the benefits of the contest made by her husband, providing the Secretary of the Interior affirms the decision of the Commissioner."

Your decision "held the entry for cancellation" and directed notice to be given to Kelley of "his right of further appeal." His widow exercised this right before Mrs. Patton applied to enter the land, and Mrs. Kelley's appeal removed the case from your jurisdiction, and suspended all action touching the disposition of the land, until the case should be finally decided by this Department. Saben *v.* Amundson, 9 L. D., 578.

It is insisted that your said decision had the effect of canceling the entry, and that the land thereby became subject to entry, and the case of John H. Reed (6 L. D., 563) is cited as authority.

This case, however, differs from the Reed case, in this: that prior to Mrs. Patton's application to enter, the case was appealed to this Department, and thus the jurisdiction of the local office was removed; whereas, in the Reed case no appeal was taken from the judgment of cancellation, and, although it was held that the expiration of the sixty days

was not essential to the finality of the judgment, yet the proper practice would be not to allow another entry of record until the time allowed for appeal had expired, or the entry had been canceled by the appellate tribunal. But the filing of the appeal within the sixty days suspended the judgment of cancellation and operated to reserve the land from further disposition until the final decision upon the appeal as effectually as if the judgment of cancellation had not been rendered.

For the reasons above given, Mrs. Patton's application was properly rejected, and her appeal is hereby dismissed.

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### RAILROAD GRANT PRE-EMPTION CLAIM SETTLEMENT RIGHT.

NORTHERN PACIFIC R. R. CO. *v.* DUNHAM ET AL.

Land covered by a prima facie valid pre-emption filing, at date of withdrawal on general route, is excepted thereby from the operation of such withdrawal.

The occupancy of land at definite location, by one who holds under and by virtue of the company's title, and asserts no right under the settlement laws, will not defeat the attachment of the grant.

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

This record presents the appeal of the Northern Pacific Railroad company from your office decision of January 21, 1888, in the case of said company against Elijah Dunham and Fred T. Kegler, involving the SW. ¼, Sec. 35, T. 12 N., R. 20 W., Helena, Montana.

Kegler made homestead entry for the tract on July 7, 1885. On June 5, 1886, he published notice of intention to make proof in support of such entry against the allowance of which protests were filed by Dunham.

In pursuance of said notice Kegler's proof was made before the clerk of the district court for Missoula county, on July 17, 1886, when both parties appeared with counsel and submitted testimony.

Upon the evidence adduced the local officers rendered separate opinions. The register found that Kegler's entry should be passed to patent and the receiver, that the same should be canceled.

No further action appears to have been taken by the said parties and on January 19, 1887, the local office transmitted the record.

Thereupon your office by the decision appealed from finding the only question presented to be "as to the right if any of the company" declined to consider the respective claims of Dunham and Kegler and rejected the company's claim to the tract involved.

From the said decision it appears that the tract "is within the forty mile limits of the grant to said company by act of July 2, 1864 (13 Stat., 365), as shown by map of general route filed February 21, 1872, and by map of definite location filed July 6, 1882, at which dates respectively

the withdrawal for the company took effect and its right to lands in the granted limits attached."

The records show that on November 17, 1870, John Silverthorn filed declaratory statement alleging settlement on the tract April 1, 1870, and that William Church filed in like manner on March 23, 1872, alleging settlement August 4, 1871.

It appears that Dunham having bought the improvements of a prior occupant went on the land in the spring of 1875, that he has since continued to live thereon and that his improvements valued at $1,500 consist mainly of a log house about eighteen by forty-two feet, a frame house sixteen by eighteen feet, stable, chicken house, fencing and about thirty-five acres cultivated.

Dunham subsequently bought the land from said company for $480 and the same was conveyed to him by deed acknowledged February 18, 1885.

Dunham had borrowed the said purchase money from Kegler to whom he executed for the same, a mortgage on the tract dated January 27, 1885.

During April or May following, Kegler hearing that the company's title to the land was doubtful, made said homestead entry therefor.

Kegler's proof sets out that with his wife and two children he resided on the land continuously from about September 25, 1885, and that his improvements valued at $2,200 comprise a frame house, barn, corral, fencing, water-ditch and fourteen and a half acres cultivated.

Your office found that the land was excepted from the withdrawal on general route by the filings of Silverthorn and Church and also from the operation of the grant at the date of definite location by the "settlement, occupation and residence" of Dunham.

The said filings being of record and *prima facie* valid at the date of the withdrawal on general route it was correctly held by your office that they operated to except the land therefrom. Malone *v.* Union Pacific Railway Co. (7 L. D., 13), Northern Pacific Railroad Company *v.* Stovenour, decided June 7, 1890 (10 L. D., 645).

I cannot, however, agree with the conclusion that the occupancy of Dunham excepted the land from the operation of the grant on definite location.

Prior to the Kegler entry in July, 1885, Dunham had asserted no claim under the settlement laws to the tract involved. This with his said purchase of the same shows that at the time when its rights under the grant attached Dunham was occupying the land under and by virtue of the company's title and with the obvious intention of ultimately acquiring the same. That such occupancy could not prevent the attachment of the company's rights is, I think, manifest.

I must, therefore, find from the record before me that the right to the land in question passed to the company upon the definite location of its line of road.

The decision appealed from is accordingly reversed. The said case of Dunham *v.* Kegler is remanded for appropriate action by your office.

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CERTIORARI—APPEAL—RES JUDICATA.

ROBERT H. STEEVES.

Certiorari will not lie where the right of appeal to the Department is lost through failure to appeal from the decision of the local office.

An application for certiorari will not be granted if it appears that substantial justice has been done in the disposition of the case below.

The issuance of a final certificate by the local office, can not be set up by the entryman as an adjudication that precludes such office from rendering a decision on a hearing subsequently ordered by the General Land Office.

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

Robert H. Steeves has applied for a writ of certiorari directing your office to certify to the Department the record of proceedings in the case of the St. Paul & Duluth Railroad Company *v.* said Steeves (and others), involving the SE. ¼ of the NE. ¼ of Sec. 3, T. 36, R. 26, Taylors Falls land district, Minnesota.

His application is based upon the allegation that your office decision of August 20, 1890, adverse to him, in summing up the decision of the register and receiver, stated that it held, "that Steeves, having failed to appear, waived his claim, and that final certificate should be issued upon the entry of Hoeft," when in fact these *exact words* are not to be found in said decision of the register and receiver.

The finding of the local officers was in favor of Hoeft and against Steeves; and in the report of proceedings at the hearing, prefixed to their decision, they state that Steeves did not appear. So, while the language quoted and objected to by counsel for Steeves is not a literal extract from the opinion of the local officers, it is a correct summary of the facts.

Applicant contends that as "the register and receiver had issued final certificate to Steeves a year prior thereto" (to the hearing), "so far as their office was concerned the matter as between Steeves and Hoeft was *res judicata*." When your office ordered a hearing in the case, upon the conclusion of said hearing it was the duty of the local officers, as directed by your office, to report their opinion upon the evidence adduced; and the doctrine of *res judicata* has no application in the premises.

It appears that Steeves failed to appeal from the decision of the local officers; and that for this reason his application to appeal from your office decision of August 30, 1890, was denied; hence this application for certiorari. But as the right of appeal from your office was lost by

the failure to appeal from the decision of the local officers, an application for writ of certiorari will not lie (Blake *v.* Rasp, 4 L. D., 277).

The application might very properly have been denied because not made under oath (Rule 84 of Practice); also because no copy of the Commissioner's decision, complained of, is furnished (Smith *v.* Howe, 9 L. D., 648; Lyman C. Dayton, 10 L. D., 159); but it has been deemed preferable to consider the question upon its merits. Moreover, "application for certiorari will not be granted if substantial justice has been done" (Reed *v.* Casner, 9 L. D., 170; Lyman C. Dayton, 10 L. D., 159; Stiles *v.* Newman, 10 L. D., 491; Reuben Spencer, 3 L. D., 503; Dobbs Placer Mine, 1 L. D., 565; Tomay *v.* Stewart, 1 L. D., 570); and there is no showing—indeed, no allegation—in the case at bar that substantial justice has not been done.

The application is denied.

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### CONTESTANT—PREFERENCE RIGHT—NOTICE OF CANCELLATION.

### KIBBE *v.* BATES ET AL.

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

The entry of an intervening claimant must be canceled if, after due notice, he fails to show sufficient cause why the right of the successful contestant should not be recognized.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November* 21, 1890.

I have considered the case of Everett W. Kibbe *v.* Franklin H. Bates and John J. Caldwell on the appeal of Caldwell from the ruling announced in your office letter "H" of April 6, 1889, to the effect that Kibbe would be allowed to make entry for the N. ½ SE. ¼ and SW. ¼ SE. ¼ and SE. ¼ SW. ¼ of Sec. 10 T. 17 S., R. 36 W., Wa-Keeney, Kansas land district, and that the entry of Caldwell for said land would be canceled.

Your said letter sets forth substantially the record and history of the case.

It was held in case of Robertson *v.* Ball *et al.*, (10 L. D., 41), that the successful contestant is entitled to thirty days from the receipt of notice of cancellation within which to exercise the preference right of entry. It was also held in that case that notice should be given the intervening entryman to show cause, if any, why his entry should not be canceled, where the contestant applies to make entry within the time fixed by law, and as this notice has been given and no sufficient cause shown, your action is approved and your instructions to the local officers as per said letter will be complied with.

CONGRESSIONAL GRANT—CERTIFICATION—JURISDICTION.

## SMITH ET AL. *v.* PORTAGE LAKE AND LAKE SUPERIOR SHIP CANAL CO.

Under a grant that does not require the issuance of patent, the certification of lands is equivalent to patent, and divests the Department of all jurisdiction over the lands, or the title thereto.

Such a certification is in effect a decision of the Department that the lands thus certified are in fact subject to the grant, and the validity of such action can only be questioned in the courts.

*Secretary Noble to the Commissioner of the General Land Office, November* 21, 1890.

This case comes before the Department upon the appeal of Angus Smith and others from the decision of your office, rejecting their applications, presented at the local office in January 1887, to locate Porterfield scrip upon certain tracts of land which had been selected by the Portage Lake and Lake Superior Ship Canal Company, under the grant of March 3, 1865 (13 Stat., 519), and which were approved by the Department October 30, 1868.

The material ground of error alleged is in holding that the certificate of these lands to the State for the benefit of the Canal Company vested the title in the State for the benefit of the company and deprived the Department of all jurisdiction over them. The reasons assigned in support of said allegations of error are—(1) that said selections were not nearest to the location of the canal, and had been designated as "mineral" before the passage of the act, and not being the lands granted, the certification of the Secretary was absolutely null and void, and (2) because the certification of these lands is not equivalent to a patent.

The act of March 3, 1865, *supra*, granted to the State of Michigan, for the purpose of aiding in the construction of said canal, two hundred thousand acres of land in the upper peninsula of said State. The second section of said act is as follows:

> That there be, and hereby is, granted to the said State of Michigan, for the purpose of aiding said State in constructing and completing a harbor and ship-canal to connect the waters of Lake Superior with the waters of Portage Lake, two hundred thousand acres of public lands, to be selected in subdivisions agreeable to the United States survey, by an agent or agents appointed by the governor of said state, subject to the approval of the Secretary of the Interior, from any lands in the upper peninsula of said State, subject to private entry: *Provided*, That said selections shall be made from alternate and odd-numbered sections of land nearest the location of said canal in said upper peninsula, not otherwise appropriated, and not from lands designated by the United States as 'mineral' before the passage of this act, nor from lands to which the rights of pre-emption or homestead have attached.

The approval of these selections by the Secretary of the Interior was to all intents and purposes a decision by that official that the lands so selected were the odd numbered sections nearest the location of said

canal, not otherwise appropriated, and that said lands were subject to selection under the terms of the grant. Although this certification might have been erroneous, and although it might now appear that there were at the date of selection lands nearer to the location of the canal than those selected which had not been appropriated, yet the approval and certification having been made in the exercise of the jurisdiction of the Secretary to determine whether said selections were unappropriated lands nearest the location of the canal, removed from the Department all further jurisdiction over those lands, and the validity of said certification could thereafter only be questioned in the courts.

Whether the lands selected were of "lands nearest the location of said canal . . . . . not otherwise appropriated," was a question of fact, to be determined by the Secretary, and that determination was made by his approval of the list of selections and the certification thereof to the State.

The act excepted from the grant all lands "designated by the United States as 'mineral' prior to the passage of this act." It is therefore contended that, as these lands *had* been so designated, it is immaterial whether they actually contained mineral or not; that if they *had been* designated as mineral prior to the passage of the act, they were expressly excepted from the operation of the grant, and the certification of such lands was an absolute nullity. The language of the act will reasonably bear a different construction. The lands may at one time prior to the passage of the act have been designated as mineral, and yet that designation may also have been changed prior to the passage of the act, and may have been designated and known to be non-mineral. I do not think the mere fact that the lands had once been designated as mineral prior to the passage of the act would except them from the operation of the grant, if that designation had been afterwards changed and they were known to be non-mineral prior to that date. Without determining this question, it is sufficient to say that it may have been presented to the mind of the Secretary when the lands were certified, and in the exercise of his jurisdiction to determine whether the lands had been properly selected the statute may have been so construed.

It appears that these lands had at one time been designated, in common with a large tract of country in the upper peninsula of Michigan, as mineral lands, but in 1851 they were offered at public sale under the proclamation of the President. No information is contained in the letter of your office, or in the appeal and argument of the appellants, as to whether these lands are actually mineral in character, but it may be assumed that they are not, otherwise they would not be subject to these locations, even if they were public lands. Whether the true character of these lands had been ascertained prior to the date of the grant, I am unable to determine, but from all the facts before me I am satisfied that the approval of these selections removed from the Department all further jurisdiction over them, and there was no error in the decision of your office rejecting said applications.

The granting act contains no provision requiring the issuance of patents for the lands selected, but simply that said selections shall be made by an agent or agents appointed by the State, subject to the approval of the Secretary of the Interior. This approval is the only act required to divest the government of the title to the land selected, and to invest that title in the State, and it is therefore the equivalent of patent. Garriques *v.* Atchison, Topeka and Santa Fe Railroad Company, 6 L. D., 543; Frasher *v.* O'Connor, 115 U. S., 102.

I do not deem it necessary to take any action in this decision upon the question as to whether any steps should be taken looking to the cancellation of this certification by the courts, in the absence of direct action thereon by your office. If such action should be deemed advisable, it may be presented hereafter.

Your decision is affirmed.

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### MOTION FOR REVIEW.

### CRAWFORD *v.* FERGUSON.

Motion for the review of the departmental decision rendered March 7, 1890, 10 L. D., 274, denied by Secretary Noble, November 22, 1890.

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### PRE-EMPTION—SETTLEMENT RIGHTS—SECTION 2269 R. S.

### ORVIS *v.* BIRTCH ET AL.

A settlement on land that is under reservation confers no right of pre-emption, and if the settler dies, while the land is in such condition, his heirs have no right thereto that can be perfected, under section 2269 of the Revised Statutes, after the land is restored to the public domain.

The right to amend a declaratory statement can not be exercised in the presence of a valid intervening adverse claim.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 22, 1890.*

These cases involve the rights of the several parties under their conflicting claims to the S. ½ SW. ¼, NW. ¼ SW. ¼ and SW. ¼ NW. ¼ of Sec. 22, T. 45 N., R. 8 W., N. M. P. M., Lake City, Colorado, embraced in the declaratory statement of Lewis F. Orvis, as administrator of the estate of A. H. Jarvis, deceased.

The first case arose upon the application of Martin Birtch to make final proof under his declaratory statement, covering the S. ½ of the SW. ¼ of said Sec. 22, and other land in Sec. 27, which was offered November 27, 1886, when Orvis, administrator, appeared and protested against the allowance of said proof, on the ground of prior settlement as to the S. ½ of the SW. ¼ of Sec. 22.

The second case arose upon the application of Orvis, administrator, to make final proof in support of the claim of the heirs of A. H. Jarvis, deceased, for the land covered by the declaratory statement of Orvis, adm'r, aforesaid, which was offered March 14, 1887, when Birtch, William Rothwell, and James W. Austin, each protested against the allowance of the entry for said heirs, denying their right to make entry of said tract. The claims of the several protestants under their respective filings conflicted with the claim of Orvis, administrator, as follows:

The conflict between Orvis, administrator, and Birtch is as to the S. ½ of the SW. ¼ of Sec. 22, and between Orvis, administrator, and Rothwell and Austin it is as to the NW. ¼ of the SW. ¼ and the SW. ¼ of the NW. ¼ of said section.

On March 16, 1887, the local officers rendered a decision in favor of Birtch, and on April 4, thereafter, Orvis filed a motion for review thereof and at the same time asked to amend his declaratory statement so as to claim the land in his own right instead of as administrator. On April 18, 1887, the local officers overruled both motions, and on April 20, they passed upon the final proof submitted by Orvis, and rendered judgment denying his right to make entry of the land, either as administrator of the estate of Jarvis, or in his own right, and the entire record was transmitted to your office. From the action of the local officers Orvis appealed, both as administrator of the estate of Jarvis and in his individual right.

On May 4, 1889, you affirmed the action of the register and receiver rejecting the proof of Orvis in the case of Orvis, administrator, *v.* Birtch, and in rejecting the application of Orvis to amend so as to claim in his own right, and held his filing for cancellation, also upholding their decision allowing the proof of Birtch in the case of Birtch *et al. v.* Orvis. From this judgment Orvis, administrator, appealed, assigning the following grounds of error:

First. In holding that on May 24th, 1886, there was no right of pre-emption existing in Orvis as administrator of the estate of Jarvis, deceased.

Second. In holding that on May 24, 1886, there were no rights existing in the heirs of Jarvis, deceased, by reason of their long and continued residence, which could antedate the claimed rights of Birtch.

Third. In denying Orvis' application to amend his declaratory statement to read in his own right, as such privilege is clearly due him by reason of his prior settlement and claim to the land in conflict, and

Fourth. In holding either as a matter of fact or of law that Birtch, Rothwell or Austin, or either of them, had any rights which could defeat Orvis, either in his own right, or in his administrative capacity. The contrary is shown by the facts in the testimony and law cited in our brief.

The controlling issue in this case, so far as it affects the claim of the heirs of Jarvis, is, whether a settlement made on land not subject to settlement and entry by one who dies while the land is so reserved, will entitle the heirs of such settler to the right to make pre-emption entry of said land after its restoration to the public domain, by virtue

of such settlement, under the provisions of section 2269 of the Revised Statutes, which reads as follows:

Where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned.

The material facts in this case are fully and correctly set forth in the decision of your office of May 4, 1889, from which this appeal is taken. By reference thereto, it appears that the land was originally within the Ute Indian reservation, and so continued until the act of June 15, 1880 (21 Stat., 199), when it was set apart for the benefit and enjoyment of the people as a public park. This last reservation continued until it was restored to the public domain by the act of May 14, 1884 (23 Stat., 22). It further appears that Jarvis moved on the land, August 3, 1877, while it was so reserved, and continued to reside thereon with his wife and child, and to improve the tract until February 14, 1879, when he died. His widow and child continued to reside upon the land, and in June, 1882, she married Orvis, who took up his residence on the tract, and continued the same up to the time of hearing, March 14, 1887.

The exemption of this tract from pre-emption or settlement by reason of its being, first, a part of the Ute Indian reservation and its subsequent dedication as a public park for the benefit of the people, existed at the date of Jarvis' settlement, and continued to be so reserved until May 14, 1884, *supra*, when it was restored to the public domain; but the subdivisional plat of survey was not filed in the local office until April 24, 1886.

Not only was this land exempt from pre-emption entry or settlement under the general law, by reason of such reservation (2258 Revised Statutes), but the act of June 15, 1880, *supra*, expressly reserved this land from settlement, occupancy or sale, and declared that all persons who locate or settle upon or occupy any part of said land are trespassers, and provide for their removal.

Jarvis died in 1879, while the land was in reservation, and having acquired no right himself by virtue of his settlement, he had "no estate in the land that he can devise by will, or which, in case of his death, will pass to his heirs at law." Buxton *v.* Traver, 130 U. S., 232.

If the heirs of Jarvis have any right by virtue of his settlement, it must be under section 2269 of the Revised Statutes.

But in the case of Buxton *v.* Traver, *supra*, it was held that "Section 2269 of the Revised Statutes has no application to the case of a settler who dies before the time arrives when the papers necessary to establish a pre-emption right can be filed." This ruling is directly decisive of the question involved in the case at bar, and it must be controlled thereby.

The rule invoked by appellant, to the effect that, although a person

can acquire no right against the government by settlement upon segregated or reserved lands, yet as between such settlers and another claimant priority of settlement will be considered, can only apply where adverse claimants having the right to enter are on the land claiming it at the time when it is restored to the public domain, and becomes subject to settlement and entry.

At the time this land became subject to settlement and entry, the widow of Jarvis had married, and her child was a minor. Neither she nor the child was then qualified to make entry, but Orvis, if otherwise qualified, might by virtue of his settlement at that time have filed for the land in his own right, and the question of priority would then have been between himself and Birtch, as to one part of the tract, and between himself and Austin and Rothwell, as to the other. But he failed to file a declaratory statement in his own name, and when he applied to amend his filing so as to claim the tract in his individual right, the right of Birtch, Austin and Rothwell had attached by their filings, made within three months from the filing of the township plat in the local office, and the application to so amend his declaratory statement was therefore properly rejected.

I find no error in the decision of your office, and it is affirmed upon each and all of the points therein decided.

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### PRACTICE—PETITION FOR RE-REVIEW.

### REEVES *v.* EMBLEN.

A petition for re-review that presents no suggestions of facts, or points of law, that have not already been considered in the case will not be granted.

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

I have considered the petition filed by Rufus H. Thayer, attorney for George F. Emblen (not Reeves, as stated in your office letter dated June 11, 1890), asking for reconsideration of the decision of the Department, dated May 23, 1890 (10 L. D., 600), in the case of David W. Reeves *v.* George F. Emblen, involving the NW ¼ of Sec. 23, T. 2 N., R. 48 W., Denver, Colorado, in which the Department refused to review and change the departmental decision dated November 27, 1889 (9 L. D., 584), declining to revoke the decision of your office ordering a hearing upon the contest affidavit filed by said Reeves against Emblen's commuted homestead entry No. 11,579 of said land.

The ground of said petition for review is, that the Department erred in not finding that the allegations in the contest affidavit of said Reeves were identical with the allegations in the former contest of McCue against said entry, which having been finally adjudicated in favor of

the entryman, was conclusive against any subsequent contest based upon the same allegations.

The record shows that upon the petition of Emblen a writ of certiorari was awarded, directed that the record in the case of Reeves *v.* Emblen, and also in the case of Frank McCue against Emblen, involving the latter's homestead entry, decided September 15, 1888, "be transmitted to the Department for consideration." (8 L. D., 444.) It was expressly stated in said decision granting the certiorari that, "it does not clearly appear that the charges contained in the contest of McCue cover all the grounds alleged in Reeves' contest," and the writ was allowed, because of the allegation of the applicant that he "met and overcame each and every charge that is now made by Reeves," and also because "proof might have been offered in said case upon all issues presented in Reeves' contest."

Upon the transmission of the record, the Department, on November 27, 1889 (9 L. D., 584), after reciting the record facts, and referring specially to the decision of the Department holding that "Emblen should not be required to defend against charges that had previously been in issue and passed upon by the Department," stated that the record had been carefully examined, and nothing appears that indicates an abuse of the discretion of the Commissioner in ordering said hearing, nor was there such a state of facts as would justify the Department in interfering with said order directing a hearing.

The decision of the Department granting said writ does not purport to decide upon the merits of the question only so far as to direct that the record be transmitted for the consideration of the Department.

The departmental decision of November 27, 1889, quotes from your office decision of January 17, 1889, giving the allegations of Reeves' contest, which are precisely the same as those contained in the certified copy of the contest affidavit of Reeves, filed by said Emblen with his said petition. Afterwards, Emblen filed a motion for review of said departmental decision, alleging that "the question in issue was overlooked," and that the Department, not having a copy of Reeves' affidavit of contest, could not have had an accurate knowledge of its contents. But the Department denied the motion, and held "that the question as to the charges in these two contests being the same . . . . . was not overlooked, but was carefully considered," and that there was "no good reason for setting aside the decision complained of."

The petition for re-review presents no suggestions of fact, or points of law, which have not already been considered in the case, and therefore it can not be granted. Neff *v.* Cowhick, 8 L. D., 111; Dayton *v.* Dayton, 9 L. D., 93; Anderson *et al. v.* Byam *et al.*, id., 295; Frost *et al. v.* Wenie, id., 588; Spicer *et al. v.* Northern Pacific R. R. Co., 11 L. D. 349.

Besides, upon a careful examination of the record, no error appears in the departmental decision sought to be revoked. Said petition is therefore dismissed.

RAILROAD GRANT—WITHDRAWAL—SETTLEMENT RIGHTS—SELECTION.

NORTHERN PACIFIC R. R. CO. *v.* EDWARD MILLER.

A valid settlement right, existing at date of withdrawal on general route, excepts the land covered thereby from the operation of said withdrawal, and such land is thereafter open to settlement or entry by the first legal applicant.

The existence of a valid settlement claim at date of definite location excepts the land included therein from the grant, and the failure of the settler to place his claim of record cannot be called in question by the company.

No rights are acquired by the "selection" of land within granted limits, as the right of the company is determined by the status of the land at the date the grant becomes effective by definite location.

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

I have considered the case of the Northern Pacific Railroad Company *v.* Edward Miller, as presented by the appeal of the former from the decision of your office, dated March 23, 1889, rejecting its claim to the SW¼ of the SW¼ of Sec. 19, T. 13 N., R. 19 W., Helena, Montana.

The facts are fully set out in said decision, from which it appears that said tract is in an odd-numbered section within the withdrawal on general route of February 21, 1872, and also within the primary limits of the grant to said company by act of Congress approved July 2, 1864 (13 Stats., 365), upon the filing of the map of definite location on July 6, 1882; that on September 18, 1871, one Dennis K. Butler filed pre-emption declaratory statement No. 1964, for certain tracts in said section alleging settlement thereon September 14, same year, and on July 29, 1872, filed his amendatory declaratory statement No. 2726, embracing the tract in question, alleging settlement on the same day as in his first filing; that on November 9, 1885, said Miller made homestead entry No. 2975, of the SE¼ of the NW¼ and the E½ of the SW¼ of said section, alleging settlement "in May, 1878," and on April 8, 1886, applied to amend said entry so as to cover the tract in question, which was pending when "The Northern Pacific Railroad Company selected the W½ SW¼, 19, July 28, 1886, list No. 11;" that on June 15, 1888, your office ordered a hearing to determine the status of said tract at the date of said withdrawal, and also, at the date of the definite location of said road; that a hearing was duly had at which both parties were represented, and, upon the evidence submitted thereat, the local officers found that said tract was excepted from the withdrawal on general route by the settlement of said Butler, and from the grant by the settlement of said Miller, and "that the railroad selection should be canceled and Miller allowed to amend his homestead entry."

On appeal, your office affirmed the findings of the local office and held said "selection" for cancellation to the extent of the land in controversy.

It is insisted by the company in its appeals that it was error to hold that "the pre-emption of Butler excepted the tract from the withdrawal on general route," or "that the settlement of Miller excepted the land from the grant on definite location," and it is claimed that the land, upon the abandonment by Butler, became reserved from sale and entry, except by the company, under the provision of the sixth section of said granting act. This contention cannot be maintained.

Said granting act is *in præsenti*, and the withdrawal on general route took effect upon "the odd sections hereby granted" at the date thereof, and if the odd sections or any part thereof were excepted from said withdrawal, then they became subject to settlement or entry by the first legal applicant. If the odd sections are not mineral and are "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," they pass under the express terms of the grant to the company. (See sections 3 and 6 of the granting act.)

But it must be held that the valid settlement of Butler excepted the tract in question from said legislative withdrawal of 1872. (Harris *v.* Northern Pacific R. R. Co., 10 L. D., 264; Northern Pacific R. R. Co. *v.* Evans, 7 L. D., 131, and the numerous departmental decisions therein cited.)

Since said tract was settled upon and occupied by said Miller, while the same was subject to settlement and entry, and said settlement and occupancy being valid and continuing at the date of definite location, served to except the tract from the grant to the company, and the failure of the entryman to place his claim of record cannot be called in question by the company. (Northern Pacific R. R. Co. *v.* Kerry, 10 L. D., 290; Northern Pac. R. R. Co. *v.* Roberts, id., 427; Northern Pac. R. R. Co. *v.* Anrys, 8 L. D., 362).

It is stated in your office decision that said tract was "selected" by the company. This could give the company no advantage, for the reason that the prior application of Miller to amend his homestead entry reserved said tract, and also because being in the granted limits the land either passed by the grant to the company or was excluded therefrom. (Roeschlaub *v.* Union Pac. R. R. Co., 6 L. D., 750; Northern Pac. R. R. Co. *v.* Johnson, 7 L. D., 357).

Upon a careful examination of the whole record, no error appears in the findings of the local office and the conclusions of your office. Said decision is accordingly affirmed.

TIMBER LANDS—ACT OF JUNE 3, 1878—JURISDICTION.

UNITED STATES *v.* MONTGOMERY ET AL.

Timbered land that is fit for cultivation by ordinary agricultural process, when the timber is removed, is not subject to entry under the act of June 3, 1878.

Until patent issues, the Department has authority to cancel an entry on sufficient proof that the land is not subject to such appropriation, or that the entry is in fraud of the law.

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

I have considered the case of the United States *v.* J. B. Montgomery, E. W. Bingham, H. W. Rogers, Hamilton Knott and Ziba M. La Rue, as presented by the appeals of the latter from the decision of your office, dated June 21, 1888, holding for cancellation the following timber land entries, in the Vancouver land district, in the State of Washington, namely: No. 2024, of the SW ¼ of Sec. 10, made October 28, 1882, by said Montgomery; No. 2025, of the S ½ of NE ¼ and N ½ of SE ¼ of Sec. 10, made December 13, 1882, by said Bingham; No. 2046, of the W ½ of NE ¼ and E ½ of NW ¼ of Sec. 22, made December 13, 1882, by said Rogers; No. 2132, of the W. ½ of NE. ¼ and E. ½ of NW. ¼ of Sec. 18, made June 2, 1883, by said Knott; and No. 2133 of the NW. ¼ of Sec. 28, made June 2, 1883, by said La Rue—all of said entries being in township 9 north of range 1 west.

The local officers rendered an elaborate and exhaustive decision, in which they state that all of said entries were held for cancellation for fraud, "the first three upon the reports of Special Agent S. P. C. Stubbs, made October 30, and November 3, 1885, and the last two upon the reports of Special Agent J. A. Munday, made March 8, and 9, 1886;" that hearings were ordered by your office letters, dated April 2, and June 14, 1886, which were had, beginning on September 20, and ending October 9, same year; that said Special Agent Munday represented the United States at said hearing, and the defendants were represented by counsel, who were duly authorized so to do; that following the ruling in the case of George W. Macey *et al.* (5 L. D., 52), the local officers considered all of said cases in one decision, because the entries were all made under the same act, involve the same questions, affect the same parties in interest, and are deemed "as integral parts of a general scheme, designed to vest in one and the same individual title to a large body of land;" and that it was not possible to properly understand the bearing of said entries upon each other, except by considering them together. The local officers held that said cases involved but two points: (1) Would the lands in question be unfit for cultivation if cleared? and (2) Were the entries made in the interest and for the benefit of one and the same party as alleged by the government? that the defendants might insist that there was a third question involved, namely: whether the lands

are valuable chiefly for timber, but the local officers thought that it was unnecessary to consider said question, for the reason that it may be presumed that said lands were valuable for timber, for, if otherwise, "defendant, Montgomery, would not have sought title to them for that purpose, and under the timber act;" that it was clearly shown that the value of the land for timber is only prospective, and will depend upon transportation to be supplied in the future; that if a way of transportation of said timber be opened up, it would enhance the value of the lands for agriculture, and the sale of the timber on said lands would furnish funds sufficient in whole or part to pay the expense of clearing the land and fitting it for cultivation; that it matters not how dense or valuable the growth of timber may be on said lands, if, when cleared, it would not be under the terms of the act "unfit for cultivation," and that the only questions properly before the local officers were, (1) the fitness of the lands for cultivation, and (2) were the entries made fraudulently. The local officers reviewed at length the evidence submitted, quoting freely from the testimony of the witness for the government and for the defendants, and decided "that it is evident that the lands in controversy are clearly susceptible of cultivation when the timber is removed," citing as authority the cases of Spithill *v.* Gowen (2 L. D., 631), and Rowland *v.* Clemens (id., 633). Upon the question of fraud the local officers found that the lands covered by said entries lie conveniently near railroad lands and other entries claimed by said Montgomery, making a large and compact body of land; that final proofs in support of nearly all of said entries were made by George F. White and Robert Rockwell, assisted by one George W. Taylor, who was "a member of White's household, and, like him, a professional timber claim witness;" that it was upon the testimony of said witness that the title to all of said land rested; that said White "finally became so notorious as a witness in supposed fraudulent timber cases, and so bold in his movements, that the then register and receiver refused to accept any further final proof from White," and advised the Department that they were of the opinion that said White and said Montgomery, together with one E. W. Bingham, "were conspirators in an effort to secure a large body of timber land fraudulently." The local officers also refer to the fact that final proof was made by said White and Rockwell in support of the timber land entry in Sec. 28, T. 10 N., R. 1 W., of one A. J. Moss, and that prior to making said proof the land was entered under the homestead law by one Woodward, who was then occupying and successfully cultivating the same; that said Taylor was indicted for perjury in the pre-emption proof in support of cash entry No. 2052, made by Charles L. Large, of the NE. ¼ of Sec. 12, T. 9 N., R. 1 E., which was canceled for fraud, together with several other cases, all of which, in the opinion of the local officers, "throws a suspicion over all testimony given by White and Taylor and Rockwell, and with the testimony on behalf of plaintiff overturns the *prima facie* case made on final proof, both as to unfitness for cultivation and good faith."

The local officers further find that the witnesses White and Taylor, in the case of Montgomery, and White and Rockwell, in the La Rue and Knott cases, were employed and paid by said Montgomery, either directly or indirectly, and that said entries were made by parties who knew little or nothing about them, and "who were in the employ of or indebted to J. B. Montgomery; that shortly after making final proof said La Rue and Knott conveyed to said Montgomery, for the sum of one dollar, the land covered by their respective timber entries; that said White, who was a witness to the final proof in all of said cases, was also the chief witness for the defense, and guided and controlled the other witnesses, nearly all of whom had never been on a majority of the claims prior to the time they went for the purpose of becoming witnesses, and saw only that part which was pointed out to them by said White; that none of the entrymen attended the hearings, except Montgomery, who did not testify, and Rogers, who was called to the witness-stand by the United States, although they were not farther away than Portland, Oregon. The local officers therefore concluded from the testimony:

(1) That the lands embraced in the five entries herein are susceptible of cultivation by ordinary farming processes, when cleared, and hence not timber lands within the meaning of the act of June 3, 1878; (2) that they were made on speculation, and in the interest of J. B. Montgomery, as component parts of a general scheme to secure to himself title to a large body of timbered lands, in contravention of law.

From said decision of the local officers an appeal was duly taken by said Montgomery, alleging therein several specifications of error, which may be grouped under three heads, namely:—

1st. Want of jurisdiction in the local office to render any decision in the premises, for the reason that final certificates had issued for the land upon proofs regularly submitted and decided by the proper tribunal to be sufficient.

2d. Error in finding that the land was fit for cultivation by ordinary methods of agriculture, and, hence, not subject to entry as timber land; and

3d. Error in holding that said entries were made with fraudulent intent, for the reason that the notice given of the hearing contained no allegation of fraud, or notice that any other issue would be tried than "the character of the land."

Your office, on June 21, 1888, considered said appeal, and found from the testimony that the land embraced in said entries "would be suitable for cultivation when cleared;" that the effort of the defense to show that the land was chiefly valuable for the timber thereon, if successful, would make no difference, since it was shown by the testimony that the lands, if cleared, would be *fit for cultivation.*

Your office further found from the evidence, that said Montgomery had purchased from the Northern Pacific Railroad Company its selections in said township; that the final proofs in nearly all of the timber

land entries in said township were made by one George F. White and his assistants, Robert Rockwell and George W. Taylor; that said White and his assistants were hired, either directly or indirectly, by said Montgomery to examine lands for him; that said White was the chief witness for the defendants, and guided the other witnesses in making an examination of said lands, for the purpose of becoming witnesses at said hearings; that White's testimony in said final proofs was impeached at said hearings; that one of said entrymen, Bingham, was the attorney of said Montgomery and had charge of the completion of the entries and the payment of the purchase money in some instances, and the question is asked: "Why did not Montgomery testify in his own behalf, and refute the charge of conspiracy, or why did he not put the entryman on the stand for the same purpose?"

Your office further found that the local officers had jurisdiction to determine the question of fraud, for the reason that the entrymen were duly advised of the charges contained in the reports of the special agents, upon which their said entries were held for cancellation under the provisions of circulars of July 31, 1885 (4 L. D., 503), and May 24, 1886 (id., 545), and when they applied for hearings the parties had already been advised of the allegations against their entries; that under the well settled ruling of the Department, until the issuance of patent, it has the jurisdiction to determine the validity of any entry, upon any charge that may be brought against it; that the testimony clearly shows that the lands in question "when cleared, would be susceptible of ordinary cultivation, and are not therefore such lands as are contemplated by the act of June 3, 1878, and further that said entries were procured to be made by James B. Montgomery, in his interest in violation of law." Said entries were accordingly held for cancellation, and said Montgomery duly appealed to this Department, alleging, substantially, the same errors as in his appeal from the decision of the local land officers, and also that the notice for hearing contained no suggestion or intimation that said entries were fraudulent.

On February 27, 1890, counsel for Montgomery was heard orally in support of said appeal, and in addition to the points specially mentioned therein contended strenuously that, as to the entries of Montgomery and Bingham, which were made under the construction by the Department of the timber land act then in force, they ought not to be disturbed on account of the subsequent change of ruling by the Department; that the rest of said entries should be allowed to go to patent, for the reason that the lands are chiefly valuable for timber and unfit for cultivation, and, if it shall be adjudged that said entries would be fit for cultivation if cleared, then the Department should return to its former ruling and make the value of the tract for the timber or stone, at the date of the sale thereof, the criterion in determining whether it is subject to sale under said act; that the record fails to show that there was any fraud committed by said entrymen in making said entries.

The act of Congress, approved June 3, 1878 (20 Stat. 89), is entitled, "An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory." The first section provides that the surveyed public lands of the United States within said States, not reserved,

> Valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres, to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre, and lands valuable chiefly for stone may be sold on the same terms as timber lands.

The second section of said act provides that any person wishing to purchase timber or stone land—

> Shall file with the register of the proper district a written statement and duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber and stone; that it is uninhabited, contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person, except himself.

It is also provided that "effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office."

On August 13, 1878, the Commissioner of the General Land Office issued instructions to registers and receivers under said act, approved by Secretary Schurz, which required the timber or stone applicant to make oath to the duplicate statement required, to give due publication, and make proof by "at least two disinterested witnesses" that the land applied for is non-mineral in character, unoccupied and unimproved, and, if no adverse claim be filed at the expiration of the sixty days' notice by publication, upon receipt of the purchase money, the local land officers were required to issue final entry papers for the land. (2 C. L. L., 1456.)

This statute has been frequently construed by the Department. In the case of Spithill *v.* Gowen (2 L. D., 631), decided May 8, 1883, Mr. Secretary Teller said:

> All timbered lands are unfit for cultivation in their natural condition; but if they may be redeemed and made susceptible of cultivation by ordinary farming process, they are not, in my opinion, within the purpose of this act, which was intended to embrace within its provisions timbered tracts only in broken, rugged or mountainous districts, with soil unfit for ordinary agricultural purposes when cleared of timber.

This case was a contest between a pre-emptor and a subsequent timber land applicant, and the Department dismissed the timber application and allowed the pre emption declaratory statement to remain intact.

In the case of James W. Baird (10 C. L. O., 328), Secretary Teller also said:

> If a settler desires to make a home on the public land, he has the right to select a timber lot, if he chooses; and, if he does select a timber lot, he will not select a poor one, if he is wise. The timber may be the real inducement for him to make the selection of the land; but, if he goes on the land with the intention of settlement under the laws, and carries out such intention by conforming to the provisions of the statutes, and completes his title, he is not a trespasser.

In Hughes *v.* Tipton (2 L. D., 334–338), it was held that

> the character of the soil at date of entry, apart from the character and value of the trees then covering it, is the true test of its status as agricultural land . . . . . The burden of proof must be on the timber applicant where the issue is on the character of the land; for this law is an exception to the general settlement laws, and the person claiming its benefits must show that his case comes within the exception.

See also Rowland *v.* Clemens (id., 633); Merrit *v.* Short *et al.* (3 L. D., 435); Woolway *v.* Day (4 L. D., 164); Houghton *v.* Junett (id., 238); Ellis *v.* Moore (6 L. D., 630); Porter *v.* Throop (id., 691); Grove *v.* Crook (7 L. D., 140); Reed *v.* Fitzgerald (8 L. D., 159).

The contention of counsel that Mr. Secretary Teller changed the former construction of said act, in the case of Spithill *v.* Gowen (*supra*) is not supported by any departmental decision in the brief of counsel, nor has any such ruling been brought to my attention. Spithill *v.* Gowen did not specifically overrule any former decision of the Department.

It is quite evident that Congress was not actuated by the sole purpose of receiving revenue from the sale of lands under the provisions of said act. If such had been the object, the sale would not have been limited to one entry of one hundred and sixty acres to each person, but the lands would have been put up at auction for sale to the highest bidder, without any limitation or restriction, except, perhaps, to fix a minimum price for the sale of the lands.

It will hardly be necessary to cite many authorities in support of the proposition that until patent is issued, this Department has the authority to cancel entries upon sufficient proof, showing that the land was not subject to such entry, or that the entry was made in fraud of the law. Such has been the uniform practice of this Department, and is sanctioned by the decisions of the United States supreme court. United States *v.* Johnson *et al.* (5 L. D. 442) Leonard F. Case (6 L. D., 255); John W. Setchel (9 L. D., 573); Richardson *v.* Moore (10 L. D., 415); Witherspoon *v.* Duncan (4 Wall., 210); Lee *v.* Johnson (116 U. S., 48).

There was no error therefore in exercising jurisdiction in the premises by the local officers under the direction of your office.

The second and third divisions of errors assigned (*supra*) involve mainly questions of fact upon which both the local office and your office agree. If the findings under the second head be correct, namely: the land in question was fit for cultivation by ordinary agricultural process, then the entries must be canceled, without regard to the question of the good faith of the entrymen.

It is not deemed necessary to comment in detail upon the conflicting testimony in the record. If the witnesses for the government are to be believed, then the lands in question when cleared will be fit for profitable cultivation by the usual methods of agriculture, and, on the contrary, the evidence in behalf of the defendants, if true, shows that the land in controversy will not be fit for profitable cultivation when cleared, and, hence, it was properly subject to entry under said act. In such case it must be evident that due weight should be given to the concurring decisions of the local and your office.

In the case of Morfey *v.* Barrows (4 L. D., 135), Acting Secretary Jenks said:

> The local officers, before whom the witnesses personally appear, have the advantage over appellate tribunals, from their opportunity to observe the appearance and bearing of the witnesses, their manner in giving their testimony, etc., for which reason, especially in case of contradictory evidence, the Department looks with great respect upon the conclusions of the local office as to matters fact. See also Kelley *v.* Halvorson (6 L. D., 225); Austin *v.* Thomas (id., 330); Neff *v.* Cowhick (id., 660); Chichester *v.* Allen (9 L. D., 302); Conly *v.* Price (id., 490); Collier *v.* Wyland (10 L. D., 96).

While the evidence of the witnesses, relative to the character of the land, must be almost wholly a matter of opinion, yet, taking into consideration all of the evidence in the case, including the field notes of survey, which show that the land in question is first and second rate, and the general description states that the land in said township "is well adapted to farming and grazing" (Vol. 5, p. 489, General Land Office Records) there does not appear to be sufficient ground for disturbing the conclusions of the local office and your office relative to the character of the land.

Since said land was not subject to entry under said act, it will be unnecessary to pass upon the question of fraud, for the entries must necessarily be canceled.

The decision of your office is accordingly affirmed.

Note—A similar ruling was made by Secretary Noble in the case of the United States *v.* Joseph Hughes, William F. Hummel, Joseph J. Meagher, James L. Jewett, and James B. Montgomery, decided November 24, 1890, and involving lands in township 9, range 1, west, Vancouver land district, Washington.

RAILROAD GRANT—PRIVATE CLAIM—SURVEY.

SOUTHERN PACIFIC R. R. CO. *v.* MACKEL.

The land reserved by a private claim for a specific place, or rancho, is that included within the boundaries of the claim as finally ascertained and confirmed.

The survey of a private claim, made under the act of July 1, 1864, that has not been approved by the surveyor general, the General Land Office, or the Department, is not effective as against the operation of a railroad grant.

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

The attorney for the Southern Pacific R. R. Company has filed a motion for review of departmental decision of February 25, 1889, in the case of said company *v.* James Mackel, involving lots 7, 8, 9, 10, 11, and 12, Sec. 23, T. 2 S., R. 7 W. S. B. M., Los Angeles, California land district.

It seems that in March 1887, Mackel applied to make timber culture entry for said tracts which application was refused by the local officers. On appeal to your office it was said:

The claim of the railroad company was finally rejected as to lots 7, 9, 10, and 11 of the section specified by departmental decision of February 19th 1884, in the case of Charles Howard, and was finally rejected as to lot 8 of said section, by departmental decision of April 11th 1887 in the case of E. E. Duncanson. It only remains therefore, at this time to decide as to the right of said company to lot 12, applied for by Mackel.

As to this lot it was held that it was excepted from said grant by reason of being embraced in the claimed limits of the Jurupa Rancho at the date the grant to the company took effect.

In the departmental decision complained of the history of the action had in your office and this Department in reference to the tracts involved in the Howard and Duncanson cases was recited and it was said:—

It is not contended by the railroad company in its appeal that the status of lot 12 is different in any respect from that of the other lots. The contention is that not only the decision appealed from but the decisions in the Howard and Duncanson cases were erroneous.

In such interpretation of the law I do not concur. Your decision is in accordance with the ruling of the supreme court in the case of Newhall *v.* Sanger (92 U. S. 761), and is affirmed.

It is now sought to have that decision revoked on the ground that the case of Newhall *v.* Sanger cited as authority therefor as construed and explained in the case of United States *v.* McLaughlin (127 U. S., 428), does not justify the conclusion reached.

The decisions of this Department upon the status of those tracts of land involved in the Howard and the Duncanson cases were in accord with the rulings of the Department in force at that time and had become final before the decision in the McLaughlin case had been rendered by the supreme court, and as between the parties to those cases would not

now be disturbed. In the case now under consideration the parties are different and as between these parties the question as to the status of the land at the date the rights of said company attached under its grant is not *res judicata*. Until such time, as the legal title to a tract of the public land has passed out of the United States, the duty of passing upon and deciding questions relating to the right to the title thereto is cast upon this Department. In passing therefore upon Mackel's application to enter, the claims of the railroad company as against the allowance of such application should, and will be, taken into consideration. The decision to be rendered herein, will not and can not affect any rights that either Howard or Duncanson may have acquired under the decision in his favor.

These tracts are within the primary limits of the grant of March 3, 1871 (16 Stat., 579) to the Southern Pacific R. R. Company as shown by the map of designated route filed April 3, 1871. An order of withdrawal embracing said tracts was made April 21, and received at the local office May 10, 1871.

The grant of the Jurupa Rancho was confirmed by the board of land commissioners in 1854 and that decision was in 1861 confirmed by the district court, it being said in the decree of confirmation:—

> The lands of which confirmation is hereby made are those known as "Jurupa" situated in the county San Bernardino to the extent of eleven square leagues and no more within the boundaries designated in the juridical possession given of said lands to Juan Bandini.

This was a grant of a specific place or rancho and the donee was entitled to the whole tract according to the boundaries given, subject only to the limitation imposed by the Mexican colonization law of 1824, limiting all grants of this character to eleven square leagues in quantity.

The subsequent surveys of this grant demonstrated that the boundaries set forth in the grant embraced a less quantity than eleven square leagues. The only thing necessary to locate land included in this grant was to ascertain and establish on the ground by proper survey the boundary lines as designated by the decree of confirmation. For this purpose a survey was made in 1869 which included within the boundaries of said grant the tracts here in controversy. The grant as located by this survey contained 33,819.11 acres, while the survey made in 1878 upon which patent was finally issued showed the grant to contain 32,259.16 acres. The survey made in 1869 was published in accordance with the provisions of the act of July 1, 1864, and on February 26, 1872, was approved by the surveyor general for the State of California. When this survey was examined in your office it was decided on May 13, 1876, that the lines as therein designated did not correspond with the boundaries set forth in the record of the juridical possession, the survey was rejected and the matter referred to the surveyor general with instructions to amend the survey in accordance with the views in said letter set forth.

Upon appeal to this Department that action of your office was by decision of February 21, 1877 (21 L. and R. 255), affirmed. The survey made in 1878 by which the tracts in controversy were det ermined to be outside the limits of said rancho, was finally approved and on April 3, 1879, patent was issued for the land thereby designated. It is contended that these tracts were excepted from the operati on of the grant to the railroad company because they were at the date the same took effect within the claimed limits of Jurupa Rancho, as designated by the survey of 1869. The extent to which these private land grants are effective to exclude land from a subsequent grant was under consideration by the Supreme Court of the United States in the case of Doolan *v.* Carr (125 U. S., 618), where it was said :—

> Those Mexican claims were often described, or attempted to be described, by specific boundaries. They were often claims for a definite quantity of land within much larger outboundaries, and they were frequently described by the name of a place or rancho. To the extent of the claim when the grant was for land with specific boundaries, or known by a particular name, and to the extent of the quantity claimed within outboundaries containing a greater area, they are excluded from the grant to the railroad company.

The same statement in effect was made in the case of the United States *v.* McLaughlin (127 U. S., 428). Under the rule thus laid down the land reserved by the Jurupa grant was that included within the boundaries of the claim as confirmed, *i. e.*, within the boundaries shown by the record of the juridical possession. These boundaries were determined on the ground by the survey of 1878 and hence the only land reserved by said private grant was that within that survey. To render a survey made under the act of July 1, 1864 effective, it was necessary that it should be approved by the Commissioner of the General Land Office. The survey of this grant made in 1869 never received the approval of your office or of this Department and in fact had not, at the date the grant to the railroad company took effect, been approved by the surveyor general. Such a survey was not effective to except these tracts in controversy from the operation of the latter grant.

For the reasons herein set forth the departmental decision of February 25, 1889, is hereby revoked and set aside, and the decision of your office of November 23, 1887, allowing Mackel's application is reversed and said application is, for the reasons herein set forth, refused.

RAILROAD GRANT—PROCEEDINGS ON FINAL PROOF—SELECTION.

SOUTHERN PACIFIC R. R. CO. *v.* BARRY.

A railroad company claiming rights under a selection within a revoked indemnity withdrawal, will not be heard to plead insufficient notice of an adverse settlement claim, where it appears in response to the settler's published notice of intention to submit final proof, files protest setting up its rights, and is duly heard thereon.

A settlement claim, acquired and maintained in good faith after the revocation of an indemnity withdrawal, is entitled to priority as against a subsequent selection by the company.

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

I have considered the appeal of the Southern Pacific Railroad Company from the decision of your office of November 24, 1888, holding for cancellation its selection of lot 2 of section 11, T. 3 N., R. 20 W., S. B. M., Los Angeles, Cal.

The land selected is within the indemnity limits of the grant of March 3, 1871 (16 Stats., 579), to the branch line of the Southern Pacific Railroad Company, which became effective when the company's map of designated route was filed in your office April 3, 1871. The indemnity lands under this grant were withdrawn from market by order dated April 21, 1871, and received at the local office on the 10th of the following May. The order for this indemnity withdrawal was revoked by subsequent order dated August 15, 1887, and the indemnity lands, except those covered by approved selections, were restored to the public domain and opened to settlement. See order referred to (6 L. D., 92), and circular dated September 6, 1887 (6 L. D., 131). The order of revocation took effect from its date, August 15, 1887, but filings and entries were not to be received until notice of the restoration had been given as required by the circular.

This notice was duly given, and Barry, the claimant, on the 27th of October, 1887, filed his pre-emption declaratory statement for the land in controversy, alleging settlement thereon October 1, 1887. This land had not been selected by the railroad company at the time that the order of revocation took effect (August 15, 1887,) but was included in its selection of October 3, 1887, list 25, a few days subsequent to Barry's alleged settlement.

On the 9th of May, 1888, Barry gave the required notice through the register of the local land district, of his intention to make final pre-emption proof before the county clerk at San Buena Ventura, on the 5th day of July, 1888. The railroad company appeared by attorney at the same time and filed its protest, claiming the land in question under its indemnity selection of October 3, 1887. The final proof of Barry, taken under protest, was submitted to the land officers, who rejected

the same on the ground that Barry had not complied with the requirements of the pre-emption law as to residence.

On appeal, this action of the local officers was reversed by your office, and the company's selection of this land was held for cancellation.

The company appealed from that decision, and the case is now before this Department for consideration.

The specifications of error in substance allege:

1. Error in making a decision, Barry having failed to enter a contest against the company's selection, as required by the rules of practice.
2. Error in holding that Barry's residence was such as required by the pre-emption law; and
3. Error in holding the company's selection for cancellation.

As to the first of the alleged errors, it may be said that the rules of practice (Nos. 1, 2, 8 and 9) referred to by counsel for the company, do not require contests. A contest may be initiated by an adverse party against a party to any entry or filing for good and sufficient cause affecting the legality or validity of the claim, and provision is made for conducting such contests, but they are not required. The circular issued by this Department September 6, 1887, and above referred to as relating to the restoration of indemnity land, provides, in substance, that whenever application to file or enter is presented, alleging upon sufficient *prima facie* showing that the land is not subject to the company's right of selection, notice thereof will be allowed thirty days after service of said notice within which to present objections to the allowance of said filing or entry.

Under the provisions of this circular the company was entitled to notice of Barry's filing, and to thirty days after receiving such notice to present its objections to the claim; but the circular does not specify when or by whom such notice shall be given. Notice by publication was given in this case of Barry's intention to make his final proof and present his pre-emption claim. This notice exceeded thirty days, and was intended for all parties, the railroad company included. The company appeared by counsel at the time appointed for making this final proof, and filed its protest. The evidence, taken under protest, was submitted to the local officers, who held the same to be insufficient.

The action of the local officers having been reversed, the company has appealed to this Department and submitted its arguments, thus showing it had ample notice of Barry's claim and sufficient opportunity to present its alleged prior rights to the land under its selection.

It now contends that the Department had no authority to revoke the indemnity withdrawal by its order of August 15, 1887. But this is not an open question. The decisions of this Department in the cases of the Southern Pacific Railroad Company *v.* Meyer (9 L. D., 250), of the same company *v.* Cline (10 L. D., 31), and of Lane *v.* Southern Pacific Railroad Company (10 L. D., 454), are conclusive on this point. They not only recognize the right of the Secretary to revoke an order withdraw-

ing indemnity lands under a railroad grant, but hold that a settlement made on such lands after the order of revocation entitles the settler to a priority of right over a selection of the same land subsequently made by a railroad company. The settler, however, must prove that he acted in good faith and in compliance with the settlement law, to entitle him to the land.

In this case, the proof shows that Barry settled on this land October 1, 1887, several days prior to the selection by the railroad company, and this selection remains unapproved. On the day of settlement Barry built a house on the land and took possession of it with his family, and claims that his residence has been continuous, except when absent on account of sickness in his family. About the 1st of November, 1887, one of his children being severely ill, he went with his family to San Buena Ventura, where the sick child could have medical treatment; and was detained there by the continued sickness of this child and the confinement of his wife until March 1, 1888, when he returned to the land with his family and remained there continuously until he made his final proof. Being a surveyor by occupation, he was occasionally absent, as explained in his final proof, looking after and attending to work connected with his business.

Having established a residence on the land, and having no other home, temporary absences, occasioned by illness or for the purpose of making a livelihood, do not justify a presumption of abandonment. (See Evan L. Morgan, 5 L. D., 215; Houf *v.* Gilbert, id., 238; John W. Alderson, 8 L. D., 517; Helen E. Dement, id., 639).

According to the evidence, Barry frequently returned to the land when his family were in San Buena Ventura, and ate and slept there, thus evincing good faith and a determination to make the tract a permanent home. The house built on this land was constructed of boards; it was twelve by fourteen feet in size, one story high, with window, door and floor, and valued at fifty dollars. The land itself, containing 17.55 acres, was enclosed, and the greater part, if not the whole of it, was under cultivation after Barry made his settlement; the crop was harvested shortly before the final proof was made. It is said that the crop was put in and harvested by another party, and it does not appear what interest in it was owned by Barry; but there seems to be no contention as to the crop, and as the land was under cultivation after Barry's settlement, the cultivation should inure to his benefit.

The case of the Central Pacific Railroad Company *v.* Geary (7 L. D., 149), referred to by counsel for the Southern Pacific Railroad Company, differs materially from the case under consideration. At the time that Geary submitted his final proof although he gave notice by publication of his intention, the Central Pacific Company made no appearance, filed no protest at that time, and presented no brief in support of its right to make selection of the land. This Department, in that presentation of the case, held that the claimant should have special notice.

But in the pending case, the Southern Pacific Railroad Company availed itself of the published notice given by Barry, appeared by counsel at the time of making his final proof; protested against its being allowed, and subsequently, on appeal, filed specifications of error, and supported the same with a carefully prepared argument.

The company has had its day in court, and its right to make selection of this land having been considered, no exception to a want of notice can now be sustained. There are other distinguishing features between the Geary and the pending case, but they need not be referred to at present.

Barry's settlement on the land in controversy, being subsequent to the revocation of the indemnity withdrawal as above mentioned, and prior in point of time to its selection by the railroad company, has priority of right to the said land, and this right will be sustained, provided the claimant be able to show that he has subsequently acted in good faith and in compliance with the provisions of the pre-emption law.

The decision of your office, holding the company's selection of this tract for cancellation, is therefore hereby affirmed.

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### HOMESTEAD CONTEST—FAILURE TO ESTABLISH RESIDENCE.

### LA BARRE *v.* HARTWELL'S HEIRS.

The plea of sickness and poverty can not be received as an excuse for failure to establish residence within the requisite period, unless good faith is clearly shown, and it is apparent that such failure is due to the causes alleged.

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

This motion is filed by the heirs of Helen E. Hartwell, deceased, asking for a review and reconsideration of the decision of the Department of April 10, 1890, in the above stated case.

The decision of the Department now sought to be reviewed reversed the decision of your office of November 23, 1888, dismissing the contest of La Barre, and held that the claimant never built or placed a house upon her homestead, nor established actual residence thereon from the date of entry up to the date of her decease; that there being no evidence that she was prevented by sickness, poverty, or climatic reasons from living upon her homestead and establishing actual residence thereon within six months after entry, such failure should be treated as an abandonment of her entry, and any cultivation of said tract by her heirs after her decease can not avail or cure the default of the entryman. This was substantially the finding of the Department, in the decision now complained of.

A review of this decision is asked upon the following grounds:

1. The Hon. First Assistant Secretary erred in holding that Helen E. Hartwell, the decedent, was not prevented by sickness or poverty from establishing a residence on said land before the expiration of the first six months.

2. He erred in holding that the improvements and cultivation by the heirs of the decedent's death did not cure any laches she may have committed.

3. He erred in holding that decedent was not taken sick until August 28, 1881, and before the expiration of the first six months.

6. He erred in holding that because decedent did not establish a residence on said land or build a house thereon within six months that such failure should be treated as an abandonment of said land by her.

The entry in controversy was made February 25, 1881, and the entryman died September 17, 1881, without having established an actual residence on the land. These facts are admitted, but it is contended that the claimant was taken sick prior to the expiration of six months from date of entry, and under the ruling in the cases of Grimshaw *v.* Taylor, 6 L. D., 254, and Nilson *v.* St. Paul, Minneapolis and Manitoba Railroad Company, Ib., 567, her failure to establish residence within that period is therefore excusable and can not be treated as an abandonment of the land.

The six months from date of entry expired August 25, 1881. In the decision of the Department it is stated, that "during the summer of 1881 decedent was employed teaching school, and about August 28, 1881, she became sick and went to the house of one Henry Gardiner, in sections 24 and 25, township 103, and died there September 17, 1881." There seems to be no question that the claimant was not confined to her bed with sickness until August 28, as above stated, but it is contended that the testimony shows that she was sick prior to that time. It is also shown by the testimony that the same day the decedent made her homestead entry, she also made final proof and entry of her pre-emption claim, which she sold on the same day to George S. Bidwell, reserving the shanty on said claim, intending to remove it to her homestead. The evidence shows that she never built or placed a house upon her homestead, nor established an actual residence thereon, and that after her death Bidwell removed the shanty from the pre-emption claim to his own homestead.

It may be admitted that Miss Hartwell was taken sick prior to August 25, as contended for by counsel, but notwithstanding this admission it does not appear that sickness, poverty or climatic reasons prevented her from building a house and establishing a residence upon the tract within the six months from date of entry.

The rule that the settler must within six months after making his entry establish his actual residence in a house upon the land is a regulation of the Department, and a failure to comply with it will be considered as evidence of abandonment of the land, unless the utmost good faith be shown. If, as in the cases of Grimshaw *v.* Taylor, 6 L. D., 254, and Nilson *v.* St. Paul, Minneapolis and Manitoba Railroad

Company, Ib., 567, the subsequent conduct of the entryman showed that it was his *bona fide* intention to acquire the tract for a home, and that the failure to establish actual residence within said period was only prevented by poverty, sickness, or other unavoidable causes, such failure would not sustain a charge of abandonment, and the settler would be allowed to perfect his entry. But there is not sufficient evidence in this case to warrant the finding that this entryman was prevented from establishing a residence upon the tract, and the fact that on the day she made her homestead entry she made proof and payment on her pre-emption claim, which she immediately sold, reserving the shanty for the purpose of removing it to her homestead, and the failure to take any action looking to the establishment of a residence upon the claim from the date of entry to the month of August, may all be taken into consideration in determining whether the entry was made with *bona fide* intention of acquiring the tract for a home.

Upon a full consideration of this case, I see no sufficient reason for disturbing the decision of the Department.

The motion is refused.

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PRACTICE—APPEAL—INTERVENOR.

ABRAHAM *v.* CAMMON.

An appeal by one not a party to the record, will not be entertained, in the absence of due showing as to the nature of the interest claimed by the intervening appellant.

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

On April 5, 1882, Frederick W. Cammon made homestead entry of the SE. ¼ of Sec. 31, T. 104 N., R. 61 W., Mitchell, Dakota. On January 20, 1883, he commuted the same to cash entry, and final certificate No. 9014 was issued.

On February 3, 1886, Will G. Abraham filed his affidavit of contest against the entry, charging substantially that during the time claimant held said tract as a homestead he and his family resided in Mitchell, Dakota, continuously.

A hearing was ordered, service being had by publication. The register and receiver recommended the cancellation of the entry, and by your office letter of May 27, 1889, you affirm that judgment.

One O. T. Letcher brings this appeal from your said office decision. He is not a party to the record, and there is nothing to show that he is a transferee of the entryman.

Rule 102 of the Rules of Practice provides as follows: "No person not a party to the record shall intervene in a case without first disclosing on oath the nature of his interest."

There has not been a compliance with the requirements of this rule.

On July 23, 1889, Mr. J. M. Adams, attorney for contestant filed a motion to dismiss the appeal herein, for the reasons above assigned. Notice of this motion was served by registered letter upon David W. Scott, attorney for appellant herein, on July 24, 1889.

For failure to comply with the requirements in such cases, the motion is sustained and the appeal dismissed.

Mary L. Tiffany, 7 L. D., 480; Scott Rhea, 8 L. D., 578; Emmert *v.* Jordan, 9 L. D., 249; Elmer E. Bush, Ibid., 628.

The papers transmitted are herewith returned.

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### TIMBER CULTURE CONTEST—"DEVOID OF TIMBER."

ZORNE *v.* REID.

A timber culture entry within a section containing a natural growth of valuable timber trees is invalid, and will be canceled.

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

I have considered the case of Joseph Zorne *v.* John W. Reid on appeal by the former from your decision of May 1, 1889, dismissing his contest against the timber culture entry of the latter for the E. ½ SE. ¼ Sec. 26, T. 4, R. 11, Kirwin, Kansas land district.

On January 2, 1880, Reid made timber culture entry for said land, and on July 23, 1886, Zorne filed affidavit against the same alleging that said entry was made in fraud and violation of law; that at the date of said entry there was a large amount of timber in said section of natural growth, to wit, ash, elm, hackberry, cottonwood and box elder, ranging in size from one and a half inches to twenty inches in diameter and a large quantity of stumps of same kind from which timber had been cut; that said timber is fit for use for very many practical purposes on a farm.

Notice thereof was served on the entryman, the case being set for September 6, 1886. Continuances of the hearing were had until November 5th following when the testimony was taken and considered by the local officers, and they found that the allegations were sustained by the evidence, and recommended the cancellation of said entry, from which decision the entryman appealed, and your office decision of May 1, 1889, reversed said decision and dismissed the contest, from which the contestant appealed to this Department.

The testimony shows that this section is not devoid of timber, but on the contrary that there is a thrifty growth of ash, elm, hackberry and box elder, with a few cottonwood trees growing upon it—not merely fringing a stream—but scattered in groves about the section in the lower portions of the land. The weight of the testimony shows from five

thousand to six thousand trees from one and a half inches to twenty inches in diameter upon the land and that there are about three hundred stumps of various sizes from seven to twenty-two inches in diameter, from which timber had been cut.

A number of the witnesses say the section has always been considered a timber section, others say it has been regarded as prairie land,—all agree that the timber on the land is increasing rapidly by natural growth, and that prairie fires and stock ranging over the land formerly interfered to some extent with the growth of timber.

The entryman introduced in evidence the record showing that his application to enter said tract had been rejected by the local officers on the ground that the land was not subject to timber culture entry, from which action he appealed, and to secure favorable action by the Commissioner he sent to the General Land Office the joint affidavit of a Mr. Baffington and a Mr. Kellum, who swear positively that "they know of their own personal knowledge that there is no timber whatever in said entire section, and that the only indications of timber in said section are two stumps left where trees had been cut off, and some small scrub brush in heads of drains."

This affidavit was ex parte and neither of these men was called as a witness at the hearing, or was ever cross examined. Not only so, but these statements were untrue, or all the witnesses in this case have sworn falsely at the hearing. Even the witnesses for the entryman admit there are several hundred trees over seven inches in diameter and one says there were several hundred "poles" between four and seven inches in diameter, that he did not count as timber.

Taking the case as it stands it is quite apparent that this entryman felt that if by any means he could secure this entry, he could hold it, and have the benefit of the timber growing upon it, as well as the benefits ordinarily accruing to a timber culture entry.

It is true that the rulings of the Department at the time this entry was made were quite liberal. A few "scrubby pines" scattered about, or trees and brush merely fringing a stream and kept alive by the moisture of the water of the creek or river and its occasional overflows, would not prevent a timber culture entry being made for the land, but a line must be drawn somewhere, and, where thousands of trees of various varieties are growing in groves on the tillable lands, and hundreds of stumps from eighteen to twenty-two inches, prove that other trees have grown there, the case is beyond the most liberal construction ever placed upon the law, and it is certainly past the point where the line should be drawn. A step beyond this case and the forests of the west would be entered under the timber culture law. Nature has supplied this section with timber, and according to the testimony, had done so prior to this entry. The presence of three hundred stumps, some of which are twenty-one inches in diameter and the presence of several hundred trees from seven to twenty inches in diameter, prove conclusively that

while there may not have been as many trees upon the land when the entry was made as at date of contest, there was such a growth of timber as would take the land out of the class open to timber culture entry, and render the entry invalid.

Your decision is reversed, and the entry will be canceled.

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### RAILROAD GRANT—INDIAN COUNTRY—SETTLEMENT RIGHTS.

### OSTLUND *v.* NORTHERN PACIFIC R. R. CO.

Settlement on an odd numbered section which lies partly within the former boundaries of the "Indian country," claimed by the Wahpeton and Sisseton Sioux, and wholly within the limits of the grant to the Northern Pacific, does not, on the extinction of the Indian title, confer any rights as against said grant, if the settlement is on that part of the land lying within the Indian country.

*Secretary Noble to the Commissioner of the General Land Office, November 25, 1890.*

The record in the case of Jonas Ostlund *v.* Northern Pacific Railroad Company shows that on July 5, 1871, Ostlund settled on the NE. ¼ of Sec. 33, T. 146 N., R. 51 W., Fargo, Dakota. At the time of his settlement all of said tract, excepting about twenty acres along the northern boundary thereof, was within the Indian country formerly claimed by the Wahpeton and Sisseton bands of the Sioux Indians, and the whole of said tract was within the limits of the withdrawal for the Northern Pacific Railroad Company, ordered March 30, 1872, on the map of general route, also within the granted limits as defined by the map of definite location, filed with the Secretary of the Interior May 26, 1873.

The Goose River is the northern boundary of the Indian country, and flows eastwardly through this land, leaving about twenty acres of the northern portion thereof subject to pre-emption, at the time of Ostlund's settlement in 1871.

By letter of March 11, 1886, your office allowed Ostlund to file his declaratory statement for the land in dispute. From that action the defendant herein appealed, claiming that at the time Ostlund settled on the land it was not open to settlement by reason of the same being Indian land and occupied as such by the said bands of Indians.

On said appeal the Secretary ordered a rehearing by the register and receiver to determine whether the settlement of Ostlund in 1871 was made north or south of the Goose river, that is: whether within or beyond the limits of the Indian country. (See case of Northern Pacific Railroad Company *v.* Ostlund, 5 L. D., 670.) The register and receiver found that his settlement was, and still remains, south of the river, and so within the Indian lands. On this finding of fact, which is conceded to be true, your office awarded the land to the railroad company, and held the filing of Ostlund for cancellation, and Ostlund now appeals to this Department.

This Department in the case of Hogland *v.* the Northern Pacific Railroad Company (5 C. L. O., 107,) held that all lands *wholly* within the Indian country and embraced within the limits of the withdrawal for said railroad vested in the company under the terms of the grant, upon the extinguishment of the title of the Wahpeton and Sisseton bands of the Sioux Indians. Their title was fully extinguished by treaty on the 19th of May, 1873. This was also ruled in the case of Buttz *v.* Northern Pacific Railroad Company, 119 U. S., 55.

The disposition to be made of lands settled upon prior to the extinguishment of the Indian title, which, as in this case, lay *partly* within the Indian country and wholly within the withdrawal for the railroad, was determined in the unreported departmental decision of July 29, 1880, relative to claims of settlers along Goose River.

The rule laid down by said decision was in brief that if the *residence* and settlement of the claimant were upon the Indian lands, he could have no right of pre-emption to any part of the land covered by his filing. But if his residence was on that portion of the claim not embraced in the Indian country, such residence and settlement drew to it the constituent portion of the legal subdivision upon which it was made. (See 5 L. D., *supra.*) Under the rule so adopted, the residence of Ostlund, having been within the Indian country, he acquired no rights by his settlement as against the defendant. Had he settled north of Goose river, that is, outside the Indian country, such settlement being on land subject thereto, he would have been allowed to hold thereunder the constituent portion of the two quarter quarter sections (smallest legal subdivisions) embraced in his filing, notwithstanding much the larger portion of such subdivisions was on land not open to settlement.

At the time of the adoption of the rule above mentioned, many other plans were suggested and maturely considered by the Department, and this one adopted as being on the whole the most equitable and just to the settlers, and, although, as in this case, it may at times work a hardship to the settler, I see no reason to change it after it has been followed for ten years.

Counsel for plaintiff has submitted an ingenious argument, insisting that at the time Ostlund settled on this land it was not Indian land, because in 1864 the government had treated with the Red Lake and Pembina bands of the Chippewa Indians for the same land, therefore the Wahpetons and Sissetons had no claim thereto, and the land was open to settlement in 1871. (See case of Hogland *v.* N. P. R. R. Co., *supra.*)

Without noticing this argument in detail, it is sufficient to say that this Department, Congress and the highest judicial tribunal of the government have recognized their title, and I do not now feel at liberty to question the wisdom of such judgment

The decision of your office is affirmed.

REVIEW—RES JUDICATA—SCHOOL LAND.

MICHAEL DERMODY (ON REVIEW).

The final decision of the Secretary of the Interior is not subject to review by his successor in office.

Where the State takes school indemnity for land returned as mineral it is estopped from asserting a further claim to the basis even though it is in fact agricultural land.

*Secretary Noble to the Commissioner of the General Land Office, November 25, 1890.*

I am in receipt of your letter of June 19, 1890, in which you state, "I have the honor to transmit herewith a motion for review of your decision of April 9, 1890, in the case of Michael Dermody (10 L. D., 419).

The motion transmitted by you is one by Michael Dermody "for review on error of the Department decision rendered August 12, 1881, canceling the homestead entry of Peter Dermody now deceased, as to N. ½ of the NE. ¼ of section 16, T. 35 N., R. 9 W., Durango, Colorado.

Admitting that Michael Dermody is the legal representative of Peter Dermody he has no more right in the present instance, than would be possessed by Peter Dermody were he still living, and an application by the latter for a review would be denied for the reason that the decision of Secretary Kirkwood in the case has become final, and can not be reviewed by the present head of the Department. This doctrine is so well settled that no lengthy discussion of the same is necessary. J. H. Kopperud (10 L. D., 93) and cases therein cited.

The motion is therefore denied.

Michael Dermody asserts that his brother Peter and himself have maintained possession of the tract since 1875, and have improved and cultivated the same, and he asks that some relief be extended to him by the Department.

This land was returned by the surveyor as mineral and was so designated on the plat, and it is contended that under the grant of school lands to Colorado, said land could not pass to the State even though such an award was made by this Department.

If the land is in fact mineral, it can neither be taken under the grant by the State, nor by Dermody as agricultural land. If it is in fact agricultural land it passes to the State under the grant. The presumption that it is mineral which arises from such a return by the surveyor, may be overcome by testimony. (U. S. Mining Laws and Regulations thereunder, Circular of October 31, 1881).

If, acting upon the returns of the surveyor, the State applied for, and accepted indemnity for this tract, she is estopped from asserting any further claim to the same, even though it is agricultural land, but it should be considered public land subject to disposal under the public

land laws. If it should be found on investigation that the facts, as above suggested, warrant this conclusion and Dermody should apply to enter the land as a homestead, his application should be considered upon its merits as an application for public land, and in such an event the departmental decision of April 9, 1890, should not be construed as denying his right to make entry for the tract in question.

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### HOMESTEAD CONTEST—RESIDENCE.

HILTON *v.* SKELTON.

Temporary absences on business may be excused, where residence is established to the exclusion of a home elsewhere, and the improvements demonstrate the claimant's good faith.

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

Boyington Skelton made homestead entry No. 4839 on June 10, 1882, for the SE. ¼ Sec. 12, T. 5 S., R. 69 W., Denver, Colorado.

On January 31, 1887, F. W. Hilton filed a contest against said entry, charging that claimant

has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required by law; that said Skelton never established a bona fide residence on said tract.

Pursuant to notice, a hearing was duly had—both parties being present—and upon the testimony taken, the register and receiver sustained the contest and recommended the cancellation of the entry. Upon appeal, your office, by letter of May 17, 1889, reversed said judgment and held, "as facts, that claimant established a bona fide residence on the land in 1882, and maintained the same up to the date of the hearing, and that he has cultivated and improved the land and complied in good faith with all the requirements of the law and the regulations of the Department." From this decision contestant appeals, alleging substantially the following grounds of error:

1. That the decision is unsupported by the facts and against the weight of the evidence.

2. It was error to dismiss the contest.

Claimant is thirty-eight years old and has lived in Colorado twenty-six years; he is unmarried, and prior to the entry lived with his father about one and a half miles from the land; about June, 1882, he constructed upon the land a single-room frame house, with one door and one window, comfortable at all seasons in the year, and respectable in appearance.

It appears that eighty acres of this tract was claimed by John P. Marston, or his stepson Hall, and after claimant had entered the land,

he purchased from them their possessory right, giving therefor $218, and a span of horses.

Claimant fenced the entire tract with barbed wire, red spruce posts, boiled in tar and placed two rods apart; he placed his stock, consisting of horses and cattle, on the land. He used it as a stock ranch until 1884, being too dry, as he thought, to cultivate; in that year he sowed a piece of wheat; in 1886 he plowed twenty acres and sowed a part of it in wheat; he then organized a company to get water across a sag a mile long and twenty-four feet deep. This was constructed at a cost of $3,000.00, claimant owning one-third interest. By means of this water system his whole tract can be irrigated. He also constructed a lake, covering forty acres, with an embankment from five to twelve feet on the west side, and fifty feet at the base, at a cost of $2,000.00. He expended in all about $3,500.00 on the land. In the spring of 1887, he sowed twenty acres of oats and constructed ditches leading from the water pipe to his land.

There is little controversy over the improvements or amount expended on the land; the principal inquiry relates to the matter of residence.

Marston and his stepson Hall, from whom claimant purchased the possessory right to eighty acres of the land, are the principal witnesses against the entry. The evidence given by them and others is of a negative character. Marston swears: "I have found him at his home with his father and mother when ever I have found him at all, without I have found him in town." "I never met him but once on the land. I have lived by it for eight years and in plain view. I have been on it several hundred times in last five years. I am hunting and fishing on the lake every day when it is favorable. Mr. Skelton has not lived on the place. I understood he lived with his father and mother." Other witnesses, Hall, Brooks and Elliott, also give evidence of frequently being at the place and failure to see claimant thereabouts. There is also evidence tending to show meager preparations for housekeeping; that the floor of the house was found torn up several times, and claimant not about the premises. Claimant swears that, as soon as he built his house, he put therein his furniture, consisting of a bed, bedding, cooking utensils, dishes and provisions, and occupied the place as a home thereafter; that the first year he was on his land nearly every day, sleeping there at night and also taking his meals there; that his residence was continuous all the time: he made several trips away on business, but always returned to the land, and often found on his return that his house had been broken into, his things disturbed and his floor torn up; that he repeatedly repaired his house, and never found out who had done the mischief; that he always left his furniture in the house when he went away; that his business as a breeder of fine stock necessarily kept him from home. He has three imported Norman horses, worth $9,000.00, and he has kept them a few weeks at a time in

Denver and other places; he was also in Denver during the sitting of the legislature, looking after certain measures of legislation pertaining to stock, and while there rented a room. He swears his home was not with his father, but on the contrary on the land, and in this he is corroborated by several witnesses, among whom is his mother, who swears he has not lived with her since he made the entry. He admits frequent absences from the land; admits he occasionally ate and slept at his father's, but swears he had no other home besides the land in controversy.

It is said in Edwards *v.* Sexson (1 L. D., 63), that in every possible case actual personal continuous residence is not necessary, and in the case of Patrick Manning, 7 L. D., 144, it is said,

> Actual presence on the land is necessary in the first instance in order to acquire residence, as the entryman must go on the land for that purpose, but continuous presence, thereafter is not essential to the continuity of such residence.

Each case, however, must depend upon the facts and circumstances surrounding it, and if it can be gathered or inferred therefrom that the entryman established his residence upon the land in good faith, with the intent to make it his home as evidenced by his residence, cultivation and improvement, then he should be awarded the tract although he may be temporarily absent therefrom at short intervals on business or for the purpose of earning means to improve the tract.

In this case the entryman, although not at all times on the land, has no other recognized home; his improvements abundantly demonstrate his good faith. I agree with you that the evidence shows that he established a bona fide residence on the land in 1882 and maintained the same up to the date of the hearing.

Your said office decision is affirmed, and the contest is dismissed.

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### PROCEEDINGS BY THE GOVERNMENT—SECOND HOMESTEAD.

### UNITED STATES *v.* ALEXANDER.

In proceedings by the government against an entry, a stranger to the record, alleging intervening settlement rights, will not be heard to set up his claim, but must await the disposition of the pending action.

The Land Department has authority to cancel an entry where it is duly shown to have been procured through false testimony.

A second homestead entry will not be allowed to one who has perfected title under a former entry; and such an entryman will not be heard to allege that his first entry was in fact illegal, and fraudulent, and hence no bar to the second.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November* 26, 1890.

I have considered the case of the United States *v.* Charles G. Alexander on his appeal from your decision of April 27, 1889, holding for

cancellation his commuted homestead entry for the NW. ¼ Sec. 17, T. 36 S., R. 25 E., Lakeview Oregon land district.

On October 12, 1880, he made homestead entry for this tract and commuted the same to cash entry on June 20, 1883, and received final certificate therefor.

On July 31, 1886, Special Agent McCormick reported that said entryman had exhausted his right of entry by making a homestead entry in California at the Stockton land office and the entry in controversy was thereupon held for cancellation, and on November 5, 1886, Alexander was, by your office, given sixty days in which to apply for a hearing.

On January 7, 1887, he made such application supported by his affidavit which contains among other averments the following:

> That prior to making this said entry (in the Lakeview district) I had never made a homestead entry under any of the laws of the United States of America. I further say I did not make homestead entry No. 755 in the Stockton California Land district. At the time it is alleged I made final proof and commuted said entry at Stockton, Cala., to wit, November 16, 1872, I was residing in Tehama county, Cala., engaged in the general merchandise business . . . . . I was not within the Stockton land district during the said month of November 1872 . . . . nor was I in said land district during said year 1872 except to pass through it on the cars without stopping, while on my way . . . . If any entry was made in my name either under the pre-emption or homestead laws in said Stockton land district, it was done without my knowledge, and was a fraud upon my rights and upon the rights of the government of the United States. This application for a hearing is made in good faith and not for the purpose of delay.

Upon this showing a hearing was granted, on May 13, 1887, and the same was set for November 21, 1887, and Special Agent Brockenbrough was directed to appear on behalf of the government. The hearing was continued from time to time until July 10, 1888, when the entryman appeared in person and by counsel, and the government produced in evidence the original papers in the Stockton California entry in the name of Alexander, and also a duly certified copy of a deed executed by him to one Pickens for the land entered.

On being confronted with this evidence Alexander went upon the witness stand and testified among other things, that he was forty-one years of age and resided in Warner Valley; that the entry made at Stockton land office and the commuting of the same was made in his name by J. A. Pickens, who lived in Fresno county California, and was engaged in speculating in lands. He denies having ever seen the land or having been at the land office; that he was engaged in merchandising. The patent came to Pickens and he (Alexander) made a deed to him (Pickens). Pickens said to him "sign these papers and I can get some land," he signed them and made the affidavits; does not know whether they were filled up or not. Pickens had assisted him in getting a clerkship and he signed the papers to help him get the land as a matter of friendship, received no compensation therefor. He (Alexander) had been in the confederate army three years.

Upon this testimony the local officers found that he had exhausted

his right to make homestead entry and recommended the entry in controversy for cancellation, from which action Alexander appealed to your office and on April 27, 1889, you affirmed said decision and held the entry for cancellation, whereupon he appealed to this Department.

He assigns as error:

First: That the Commissioner erred in holding that claimant had exhausted his rights, etc.

Second: In holding that a person who had borne arms against the government of the U. S. could, prior to revision of the statutes of the U. S. make a homestead entry. The so called first homestead entry having been made under the act of Congress approved May 20, 1862 and before the enactment of Sec. 2289 (Rev. Stat.).

Third: In not holding that the entryman was entitled to make a homestead entry under Sec. 2289 (Rev. Stat.) even though he had made an entry under the act of Congress approved May 20, 1862.

Pending this appeal, Henry N. Copp, attorney for Nehemiah Fine, filed, on September 14, 1889 in your office, an application that Fine be allowed to appear in the case as an intervenor, and the same is supported by the affidavit of Fine corroborated by several witnesses setting forth that in 1888, immediately after the local officers had recommended the cancellation of Alexander's entry he (Fine) had gone upon the land to make a settlement and that he had built a house thereon and moved his family into the same, and that he had earnestly tried to make a settlement and residence on the land and had applied to enter the same; that Alexander and his hired men had torn down his (affiant's) house and carried away the material at two different times; that he had rebuilt each time and was continuing to live on the land; that Alexander had transferred his interest in the land to one H. C. Wilson, and that Wilson had brought an action in a justice's court and upon a judgment of restitution had caused him to be ejected from the premises, but that he had again returned and was attempting to retain his settlement; that Wilson had brought suit against him in the United States court at Portland, Oregon (Wilson being a citizen of California) and that the same was still pending.

It is insisted by counsel for Fine that the appeal of Alexander is made in bad faith and is fraudulent; that it is for delay merely and to harrass a settler, and he moves that the appeal be dismissed.

Also: That Alexander's entry being fraudulent is therefore absolutely *void;* that it did not segregate this land from the public domain and was therefore no bar to Fine's settlement, and that Fine being a legal settler in possession of the land, has rights in the premises that should be protected.

On October 15, 1889, Cogswell and Ross, attorneys for Alexander filed in your office objections to Fine's application to he allowed to intervene, and among other objections they allege that the contest was not initiated by Fine, but by the general government and that he could acquire no rights thereunder, or claim to the land thereby, other than

could any other citizen—they deny that his settlement gives him any prior right to enter the land.

Upon the appeal of Alexander they raise the question of the jurisdiction of the Land Department of the government to try this cause, and to show their good faith in this objection to jurisdiction, which they say can be raised at any time, and than it is not "frivolous" they offered a newspaper clipping which they say is the printed decision of Circuit Judge M. P. Deady, involving this identical land.

The decision purports to be the decision of the United States circuit court, district of Oregon.—Henry C. Wilson *v.* Nehemiah Fine—Action to recover possession of real property, heard upon demurrer to answer. In this decision the court held that:

> An entry and certificate issued to a settler under the homestead act for land subject to entry thereunder, can not be set aside or canceled by the land Department on its own motion for fraud or mistake committed or occurring in obtaining or issuing it. In such case the government must seek redress in the courts, etc.

This is substantially the case as it appears of record.

The case is regularly before the Department.

The right of Fine to make entry by reason of his settlement can be determined when the question as to the legality of his settlement arises. A decision of the question before me, viz, the validity of Alexander's entry, does not involve the rights of third persons, except they should claim under Alexander, and I therefore see no reason for considering Fine's claim at this time, or for making him a party hereto. This being so, the motion to dismiss the appeal is not properly before me.

This leaves only the question of the jurisdiction of the Land Department of the government to try this cause. This question has been so well settled that it does not require discussion. I note the fact however, that the supreme court of the United States in the case cited by counsel herein, to wit, Cornelius *v.* Kessel (128 U. S., 456) say—

> The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land office in the disposition of the public lands, undoubtedly authorizes him to correct and annul entries of land allowed by them . . . . . But the power of supervision and correction . . . . can be exerted only when the entry was made upon false testimony or without authority of law.

This implies authority to inquire into, to try and determine whether the entry was made on false testimony and if so to cancel it, as this is all the jurisdiction that is sought to be exercised in the case at bar, I shall proceed to dispose of the case.

The first assignment of error, is a mere assumption that your office decision was wrong; it does not specify any error.

The second and third amount to one assignment, and are not well taken.

An entryman can not make a second homestead entry, he having perfected title under the first. One having made an entry, is estopped to

plead his own wrong—to say that it was fraudulent and procured by his own perjury. This entryman admits that he was an instrument in the hands of a "land speculator" to aid in defrauding the government, the record shows that he, himself, made the entry and perfected his title, to secure a hearing he swears that if such entry was made it was made without his knowledge and was a fraud upon his rights and the rights of the government, this too after deliberation and consultation with his counsel. When confronted with the proof, he attempts to plead ignorance of law when the first entry was made, but he no where explains his affidavit for a hearing. Taking the case as it stands it illustrates the wisdom of the law that gives the Land Department authority to cancel a fraudulent entry, procured by false swearing.

Your decision is affirmed and the entry of Alexander will be canceled.

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### PRACTICE—MOTION FOR REVIEW—HYPOTHETICAL CASE.

### CATLIN *v.* NORTHERN PACIFIC R. R. CO. (ON REVIEW).

In the absence of sufficient reason shown, a motion for review will not be considered, if not filed within the period prescribed by the rules of practice.

The Department will not render an opinion in a hypothetical case.

*Secretary Noble to the Commissioner of the General Land Office, November 26, 1890.*

On March 27th last, the attorney for the Northern Pacific railroad company submitted a letter asking for "a re-examination of the law of April 21, 1876, as applied in the case of Wm. Catlin" decided September 26, 1889 (9 L. D., 423).

The attorney says that,—

> While the time for filing an application for review of that case has elapsed, and we may not now obtain a reversal of said decision to the extent of an award of said land to us, we respectfully ask that you will re-examine the law of the case in connection with the accompanying argument, and that you may reach and adopt the conclusion therein contended for. This we ask because the decision will reach a large number of other cases along the line of the road.
>
> Should you coincide with our view of the law, we would ask that you will so instruct the Commissioner, to the end that your decision in said case of Catlin may not be taken by him as controlling in other like cases which are now before him, and to which he will of course apply the rule of said decision.

He further states:

> By a reference to the case of Catlin it will be observed that his claim was initiated April 13, 1883.
>
> The plat of definite location of the line of road opposite said land was filed in the Office of the Commissioner of the General Land Office, July 6, 1882, but the withdrawal was not ordered until June 9, 1883.
>
> Now our contention is that the 1st section of the law of 1876 is not *prospective* in its provisions; it cannot and was not intended to apply to entries initiated since its passage as it was enacted with the view to remedy an evil then existing—to relieve certain settlers who had been brought into misfortune by conflicting rulings of the Land Department.

No reason is assigned by the company for its failure to file a motion for review within the time prescribed by the rules of practice. Had such motion been filed the alleged errors would have been fully examined.

To grant this request now before me would be to invite applications for the reconsideration of many decisions without reference to the rules of practice. Such an undertaking cannot be assumed in justice to the many cases pending and awaiting examination in regular order.

Furthermore, eliminating the facts in the Catlin case, the question becomes merely hypothetical. It is the practice of the Department to decline to answer such questions. Neil A. Hill (9 L. D., 194); W. H. Miller (7 L. D., 254). The wisdom of this practice must be obvious.

For the reasons herein stated the request is denied.

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PRIVATE CLAIM—INDEMNITY SELECTION.

RANCHO PUNTA DE LA LAGUNA.

Selections under the act of October 1, 1890, in lieu of lands belonging to said rancho, and disposed of by the United States, must be made within one year from the date of said act, and may be made by duly appointed attorney, or authorized agent, under appropriate instructions to the local officers.

*Secretary Noble to the Commissioner of the General Land Office, November 26, 1890.*

I am in receipt of your office report dated the 13th instant upon the communication of the attorney for the beneficiaries under the act of Congress entitled "An act relative to the Rancho Punta de la Laguna," approved October 1, 1890 (26 Stat., 644), requesting that an order may be issued at an early date authorizing selections to be made under the provisions of said act, on account of the limited time within which said selections can be made. The preamble of said act recites that:

Whereas it is alleged that five thousand and ninety-nine and ninety-three one-hundredths acres of land embraced in the Rancho Punta de la Laguna, in the counties of Santa Barbara and San Luis Obispo, State of California, granted and confirmed to Luis Arellanes and Emidio Miguel Ortega, have been appropriated to the use and disposed of by the United States, and that the said confirmees, claimants, and owners have been deprived of the use of the same.

The enacting clause authorizes and directs the Secretary of the Interior—

to carefully investigate the said allegation in the preamble of this act mentioned, and if he shall find that said allegation is true he is hereby authorized and directed to make good any such deficiency so found to exist to the persons justly entitled thereto, by issuing to them patents for an equal quantity of the unoccupied, unappropriated, and unreserved public lands of the United States in the State of California, not mineral, to be selected by them, respectively, within one year next after the passage of this act, and not afterward, and in tracts not less than the subdivis-

ions provided for in the United States land laws, and if not surveyed when taken, to conform, when surveyed, to the general system of the United States land surveys; and the issuance and acceptance of patents under this act shall be deemed and taken as a release to the United States of all claims of all persons so found to be entitled as aforesaid to any and all lands not embraced in the survey made under the confirmation of the said grant in the preamble of this act mentioned.

In support of his said application, said attorney filed with the Department an abstract of title to said rancho, also affidavits of the alleged owners, and beneficiaries under said act, and the affidavits of the local attorneys giving the names of the parties entitled to the benefits of said act, together with a copy of court record in a partition suit to determine the relative rights of the several claimants to said Rancho. There is also filed a power of attorney appointing W. E. Dargie, of the city of Oakland, in California, attorney in fact with full power to act for all of said beneficiaries, except one, and another power of attorney from said Dargie constituting George C. Hazleton, of the District of Columbia, his attorney in fact to act for him and the said beneficiaries under said act.

Upon the evidence submitted and from the records of your office, you report: (1) That the Punta de la Rancho was legally entitled to six square leagues of land in amount to equal 26,632.08 acres; (2) That by reason of an erroneous survey, including lands "within the grant and juridical possession of the 'Guadulupe' . . . . its area has, therefore, been reduced to 21,530.14;" (3) That the lands within the juridical possession of the Punta la Laguna rancho, erroneously excluded from the final survey and patent thereof have been disposed of by the United States as public lands, and (4) you therefore find that said allegation in the preamble of said act is sustained by the evidence. In this view I fully concur.

I am also of the opinion that the finding in said report relative to the proportionate shares of the several claimants and owners is sustained by the evidence. Said finding is based upon the final decree of the Superior Court of the county of Santa Barbara, in said State, in a suit for partition of the interests of the several claimants as tenants in common of said "Rancho Punta de la Laguna," and transfers subsequently made by some of the parties in interest. At the date of said act the record shows *prima facie* that the following persons were each entitled to indemnity under its provisions to the amount set opposite each name, to wit:

| | | | |
|---|---|---|---|
| W. L. ADAM | 110–1320 | 424.99 | acres. |
| J. L. SCHUMAN | 110–1320 | 424.99 | " |
| ERMINIA DARGIE, formerly ERMINIA PERALTA | 110–1320 | 424.99 | " |
| JOSEFA P. VAN VRANKEN formerly JOSEFA PERALTA | 110–1320 | 424.99 | " |
| ISAAC GOLDTREE | 220–1320 | 849.99 | " |

| | | | |
|---|---|---|---|
| J. B. ARELLANES | 220–1320 | 849.99 | acres. |
| W. E. DARGIE | 220–1320 | 849.99 | " |
| J. H. Rice | 55–1320 | 212.49 | " |
| ELIZA DUTARD, wife of HIPPOLYTE DUTARD | 55–1320 | 212.49 | " |
| L. M. KAISER | 55–1320 | 212.49 | " |
| S. I. JAMISON | 45–1320 | 173.86 | |
| Estate of A. TOGNAZZINI | 10–1320 | 38.63 | " |
| Total | | 5099.89 | |

The record fails to show that said attorney in fact, Dargie, is authorized to represent the estate of A. Tognazzini which appears to be entitled to select as indemnity only 38.63 acres less than the smallest legal subdivision. But since it appears that he left several minor children, and that an administrator of said estate has been duly appointed, I agree with you that such administrator or duly authorized guardian of said children may be allowed to select the indemnity to which they appear to be entitled. Said act requires patents to be issued to said beneficiaries duly found entitled thereto, "for an equal quantity of the unoccupied, unappropriated, and unsurveyed public lands of the United States in the State of California, not mineral," which lands are required "to be selected by them (that is, the beneficiaries), respectively, within one year next after the passage of this act, and not afterward, and in tracts not less than the subdivisions provided for in the United States land laws, and if not surveyed when taken, to conform, when surveyed, to the general system of the United States land surveys." The beneficiaries are therefore limited by the express terms of said act to one year from October 1, 1890, to make said selections. If they fail to make said selections within the time specified, or select land of the character not granted, they do so at their peril, for this Department has no authority to extend the time prescribed in said act. Baca Float No. three (5 L. D., 705). I see no objection, however, to allowing said selections to be made by the duly appointed attorney or authorized agent of said beneficiaries under appropriate instructions to the several local land officers in said State. You will please prepare said instructions, as soon as practicable, and transmit the same for my approval.

It is not intended to decide herein that the Department will issue patents upon the selections made by said beneficiaries, if it shall appear from further evidence that the parties are not "justly entitled" thereto.

COAL LAND—DECLARATORY STATEMENT—PREFERENCE RIGHT.

BULLARD *v.* FLANAGAN.

A coal declaratory statement should not be received while the land is covered by the existing homestead entry of another.

Priority of possession and improvement of coal land, followed by proper filing and development of the mine in good faith, entitle the claimant to the preference right of purchase under the statute.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 26, 1890.*

I have considered the appeal of William H. Bullard from your office decision of May 18, 1889, holding for cancellation the coal declaratory statement of said Bullard for lot 4, of Sec. 2, T. 7 N., R. 47 E., Miles City, Montana, and allowing A. P. Flanagan to perfect his coal filing for said tract.

The record shows that on the 12th of May, 1880, said Flanagan filed a pre-emption declaratory statement for said lot together with one hundred and twenty acres adjoining it.

On January 5, 1881, one Carland made a timber culture entry for said tract. A contest between said Carland and Flanagan was had which finally resulted in favor of Carland.

January 9, 1883, upon receipt of the final decision in that case at the local office one H. H. Gerrish filed an affidavit of contest against Carland's entry. A hearing was ordered for May 16, 1883, at which Carland made default and Gerrish's homestead entry was allowed.

On January 22, 1883, Flanagan presented an application to contest Carland's timber culture entry which was denied by the local officers and your office sustained them, and upon appeal here, your said office decision was affirmed.

April 5, 1884, Flanagan filed here a motion for review thereupon, on May 9, 1884, the decision was revoked and a hearing ordered between Flanagan and Gerrish which was had and the local officers found in favor of Flanagan and upon appeal to your office their decision was affirmed on the 22nd day of June, 1885.

November 10, 1885, your office ordered Gerrish's homestead entry canceled. Afterwards on November 24, 1885, your office ordered action thereon suspended to allow time for Gerrish to proceed under Rule 85 of Rules of Practice.

January 11, 1886, your office directed the local officers to proceed as under your letter of November 10, 1885.

September 12, 1885, Flanagan filed his relinquishment as a pre-emption claimant to said lot 4 and accompanied it with a coal declaratory statement for said lot but neither paper was entered of record.

September 15, 1885, Bullard the present contestant also filed a coal declaratory statement for said lot 4, which was disallowed. On Novem-

ber 20, 1885, Bullard again filed his coal declaratory statement for said lot, which was allowed by the local officers after they had noted on their docket a cancellation of Gerrish's homestead entry pursuant to your office decision of November 10, 1885.

On the 17th day of January, 1886, the local officers made opposite Gerrish's homestead entry the annotation on their docket "Finally canceled as per Commissioner's letter "G" January 11, 1886."

On January 23, 1886, Flanagan offered again to file a coal declaratory statement for said lot 4, which was accepted by the local officers his former application, as well as Bullard's first one, having been rejected for the reason that said lot was then covered by Gerrish's homestead entry then pending in contest on appeal.

On September 29, 1886, Bullard published notice of his intention to make final proof on his coal declaratory statement and particularly notified Flanagan of his intention.

On October 7, 1886, notice was given by Flanagan of his intention to make final proof on said tract. November 8, 1886, was fixed as the time for both of the parties to make their proof at which time both parties appeared and submitted their evidence. From the evidence introduced before them the local officers found in favor of Flanagan and against Bullard. From this decision Bullard appealed to your office, which on the 16th day of March, 1889, reversed their decision and disallowed Flanagan's coal declaratory statement and allowed Bullard's for said tract.

Afterwards a motion for review was filed in your office by Flanagan and on the 18th day of May, 1889, your office reversed your said decision of March 16th, 1889, and recalled the said decision and affirmed the decision of the local officers and awarded the tract to Flanagan.

From your said office decision of May 18, 1889, Bullard appeals.

It appears from the evidence that in 1880, Flanagan first laid claim to the tract in dispute by filing his pre-emption declaratory statement for it. Afterwards it appears that coal was discovered in close proximity to it, so much so that it appeared reasonably certain that the tract was more valuable for coal than for agricultural purposes and no doubt acting on this assumption Flanagan, on the 12th day of September, 1885, offered to file his relinquishment to said tract as a pre-emptor and at the same time offered his coal filing on it neither of which was accepted by the local officers. They were both rejected on the ground that said tract was embraced in the subsisting homestead entry of Gerrish. The homestead entry of Gerrish was subsequently canceled on the proceedings by Flanagan but before Gerrish's entry was finally ordered canceled by your office, to wit, on November 20, 1885, Bullard again presented his coal declaratory statement for said tract which was allowed by the local officers.

On November 24, 1885, your office suspended action on your letter of November 10, 1885, ordering Gerrish's entry canceled and the suspen-

sion remained until the 11th day of January, 1886, when your office directed the local officers to cancel Gerrish's homestead entry. On January 23, 1886, Flanagan again presented his coal declaratory statement for said tract which the local officers accepted. Both parties gave notice of their intention to perfect their title under their coal declaratory statements. The hearing was ordered and had thereon to determine their respective rights. The evidence adduced is voluminous and conflicting. I have examined it carefully and I find that Flanagan has been in the actual possession of the tract since 1880, claiming it all the time under either his pre-emption or coal declaratory statement. That his good faith is shown as a coal claimant from the date of his first offer to file coal declaratory statement, to wit, September 12, 1885, that he commenced to take out coal a few days thereafter and has continued to take out coal in considerable quantities and develop the mine as best he could. That his improvements are worth from $800 to $900, thereon. On the other hand Bullard was never on the tract until the 14th day of September, 1885, the day before he offered his first filing. His improvements are not worth to exceed $550. There is some doubt as to whether his improvements were made for the purpose of development of the mine, or for his own benefit or the benefit of another.

Flanagan's good faith is shown to be superior to that of Bullard's in the premises. The offer of Flanagan to file coal declaratory statement on September 12, 1885, and Bullard his of September 15, 1885, were properly rejected because at that time the tract was covered by Gerrish's homestead entry. The acceptance of Bullard's coal declaratory statement of November 20, 1885, was erroneous and illegal for the same reason, as Gerrish's homestead entry was not finally directed to be canceled by your office until January 11, 1886, and in fact canceled by the local officers on the 17th day of January, 1886. On the 23rd day of January, 1886, five days after the final cancellation of Gerrish's homestead entry Flanagan offered his coal declaratory statement which was properly accepted by the local officers and which was the first legal filing after the cancellation of Gerrish's homestead entry. It is clear that Flanagan's possession and improvement of the tract were prior to Bullard's and being followed by proper filing and continued good faith entitles him to the preference under the statute. See Revised Stats., sections 2348, 2349, and 2351.

After a careful examination of the case I am satisfied that the conclusion reached by your office in the decision appealed from is correct and it is accordingly affirmed.

PRIVATE CLAIM—STATEMENT OF ACTION.

NOLAN GRANT NO. 39.

In view of the conflict between the opinions heretofore expressed and entertained with respect to the validity and status of this grant, and the various complications arising thereunder, and the further fact that the present claimant proposes to assert his alleged right through the representative of a foreign government, the Department does not deem it expedient to express an opinion upon the case in its present condition.

*Secretary Noble to the Secretary of State, November* 26, 1890.

I beg to acknowledge receipt of your letter of October 23, 1890, transmitting a note from the *Charge ad interim* of Mexico, here, relative to the complaint of William Pinkerton, said to be a Mexican citizen, as to the action of this Department in declaring that certain lands, claimed by him are part of the public domain, whereby he has sustained heavy losses; and you request my views as to Mr. Pinkerton's complaint and the practicability of his proposition to secure indemnity in the premises, provided he is entitled thereto.

The alleged claim of Mr. Pinkerton grows out of what is known as the Nolan grant, No. 39.

Under section eight of the act of July 22, 1854 (10 Stats., 308), it became the duty of the surveyor-general of New Mexico, under the direction of the Secretary of the Interior, "to ascertain the origin, nature, character and extent of all claims to lands under the laws and usages and customs of Spain and Mexico," and report to Congress his opinion as to the validity or invalidity of each of the same; and it was declared that:

until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government.

On February 27, 1860, the widow and heirs of one Gervacio Nolan filed before the surveyor-general of New Mexico, under said act of Congress, a claim to a tract of land, situated in Mora county in said Territory, which was said to have been granted by the Mexican authorities to said Nolan and two others on November 18, 1845; and that previous to the decease of said Nolan, he purchased all the right title and interest of his said associates. On this application proceedings were duly had before the surveyor-general who, on July 10, 1860, reported that, in his opinion, the grant was valid, and ought to be confirmed to the heirs and legal representatives of said Nolan, in whom title to the whole grant was shown to be vested. Said report was transmitted to Congress by this Department on January 11, 1861. See House Executive Document No. 28, 2d Sess. 36th Congress.

Some time afterwards, the exact date does not appear, the widow and heirs of the said Gervacio Nolan presented another application to the surveyor-general of New Mexico, under the act of 1854, wherein

claim was set up to a different tract of land alleged to have been granted to said Nolan by the Mexican authorities on December 1, 1843. After investigation, the surveyor-general, on October 8, 1861, reported favorably on said grant also, and his report was transmitted to Congress by this Department on May 12, 1862. See House Executive Document No. 112, 2nd Sess., 37th Congress, page 30. The first described claim was No. 9 in the surveyor-general's report, which to prevent confusion was subsequently changed to 39; and the second claim was numbered 48, which number was retained. The claim in which Mr. Pinkerton asserts an interest is the one known as No. 39.

On July 1, 1868, the committee on private land claims of the House, to which had been referred the two Nolan grants and a number of somewhat similar claims, in reporting thereon, said that the Mexican colonization law of 1824 and the regulations thereunder of 1828 limit "the amount of public lands to be granted to a single individual to the areal extent of eleven square leagues." The committee recommended a number of claims for confirmation, because they did not exceed the above area, and because they were prior in date to the Mexican laws quoted. The committee then said:

> The claims of Gervacio Nolan being numbered thirty-nine (39) and forty-eight (48) being of a date long subsequent to said decree and regulations, and as your committee are informed exceeding the limits of said decree, are withheld for further investigation. (H. Report No. 71, 40th Cong. 2d sess., p. 5.)

After this, no mention of claim No. 39 is found among the congressional proceedings, but by act of July 1, 1870 (16 Stats., 646), Congress confirmed grant No. 48 to the extent of eleven square leagues.

By the second section of said act the claim as confirmed is directed to be located in a compact body, the extent or lines thereof being adjusted to the public surveys as far as practicable; and claims of actual settlers within the located tract are to be protected and for the aggregate area of such claims the heirs of Nolan are authorized to locate a like quantity of public lands according to the lines of public surveys within the boundaries of the original grant by the Mexican authorities to Nolan. Section four provided:

> That upon the adjustment of said claim of the heirs of Gervacio Nolan, according to the provisions of this act, it shall be the duty of the surveyor-general of the district to furnish properly approved plats to said claimants, or their legal representatives, which shall be evidence of title, the same to be done according to such instructions as may be given by the commissioner of the general land office: *Provided, however,* That when said lands are so confirmed, surveyed, and patented, they shall be held and taken to be in full satisfaction of all further claims or demands against the United States.

The survey of said grant was duly made, the claims of the settlers and grantees adjusted and patent issued to the confirmees.

On August 2, 1876, Mr. M. W. Mills, claiming to represent a number of settlers on lands within the boundaries of claim No. 39, filed in the General Land Office a protest against the re

said lands on the part of the alleged grantees, on the ground that under the Mexican laws Nolan could obtain but eleven leagues, which had already been confirmed to him by Congress.

The surveyor-general of New Mexico having made a contract, among others, for the survey of said private land claim No. 39, on September 1, 1877, the Commissioner of the General Land Office wrote to him refusing to approve of the said contract because said claim has "no legal status." A copy of this letter marked "A" is herewith sent.

On March 29, 1880, application was made to the Commissioner of the General Land Office for a survey of said tract by Mr. Martin Andrews, who offered to deposit a sum of money sufficient to cover the estimated cost of the survey, and on December 1, 1880, the Commissioner wrote to the surveyor-general to furnish an estimate of the cost of the proposed survey as he, the Commissioner, "has become satisfied that no objection exists to the making of a preliminary survey of said claim under the deposit system." A copy of this letter marked "B" is also sent you. In pursuance of these instructions, a survey of said grant was made and the plat thereof was transmitted to the General Land Office March 7, 1883.

On May 23, 1881, Mr. J. M. Cunningham, claiming to be part owner of said grant, filed a protest against the intrusion of settlers thereon.

On August 21, 1882, Mr. O. P. McMains, claiming to represent settlers upon said grant, filed before the Secretary of the Interior an appeal from the action of the Commissioner of the General Land Office in re-opening the case and ordering a survey. On October 9, 1882, Secretary Teller dismissed said appeal because no final decision had been made by the Land Office from which an appeal would lie. See copy of his decision marked "C."

On May 7, 1883, McMains filed the protest of a number of settlers upon the grant against the approval of the survey, a copy of which protest marked "D" is herewith. On reference of the same to the Commissioner of the General Land Office, he reported adversely thereon on August 19, and 25, 1884. See copy of the two reports, respectively, marked "E" and "F"; and on November 18, 1884, the Secretary concurred in the views of the Commissioner. See Secretary's letter marked "G".

On April 11, 1885, Mr. McMains filed before this Department another application to have the lands within said grant thrown open for settlement, and on reference of the same to the General Land Office the Commissioner, on May 30, 1885, reported favorably, as will be seen by reference to the Land Office report for 1885, p. 121.

On June 23, 1885, Mr. Pinkerton wrote to the Secretary of the Interior protesting against the injustice of the last report of the Commissioner, and stating the grant had been divided among the original grantees, and that he represented the interest of Lucero. A copy of this letter, marked "H", is inclosed.

On January 9, 1886, my predecessor, Secretary Lamar, decided that the lands in question should no longer be held in reservation on account of said grant, and directed them to be thrown open to settlement and entry; a copy of which decision, marked "I", is also inclosed, and will be found reported in volume 4, of the Land decisions, p. 311.

On March 11, 1886, the heirs of Juan Maria Baca claiming, through Nolan, to own one-half of said grant, filed a protest against the departmental decision, and as evidence of their right and title in the premises they produced a copy of the decree of the district court of Mora county dividing said grant between themselves and the heirs of Nolan. A copy of said protest and decree is also sent you, marked "J."

Subsequently an application to the Secretary to review and reverse his said decision was filed, but, on April 5, 1886, after full consideration of the subject, he decided to adhere to his former ruling. A copy of this last decision, marked "K", is sent you, and it is also reported in 4 L. D., p. 479.

In pursuance of the directions of the Secretary in the decision of January 9, 1886, the lands within the claimed limits of said grant have been thrown open and a large number of settlers have located thereon, as alleged.

Mr. Pinkerton, on April 24, 1886, made application to the President to investigate the case and reverse the action of the Secretary in the premises. The matter was referred by the President to the Attorney-General for an opinion, which was submitted by that officer on April 23, 1887, and a copy whereof is furnished you, marked "L."

No action seems to have been taken by the President upon the Attorney-General's opinion, which conflicts with that of Secretary Lamar, as to the construction to be placed upon the act of July 1, 1870, *supra*, confirming the other Nolan grant. Said opinion, I am advised, was informally sent to the Secretary and by him sent to the files of the Department here without action.

There has been much other correspondence between the Land Office, the named, and other parties in relation to said grant. Protests and counter-protests have been filed, particular reference to which has not been deemed necessary in the very full and detailed statement which I send and which is believed to contain a fair narrative of all the matters which may have any bearing upon the claim of Mr. Pinkerton, in the premises, or afford any light in your investigation of the same.

There has also been much litigation in the local courts between the grant-claimants and settlers or intruders upon the disputed territory, of which latter Mr. M. W. Mills, the District Attorney of New Mexico, wrote, on June 13, 1885, to the General Land Office—"There are about a thousand settlers on this grant." He also wrote that hundreds of suits had been instituted against the settlers, many of which were pending, and that of those which had reached a judicial determination, without exception, the decisions were in favor of the settlers. On November 9,

1885, Mr. Mills wrote that one of said cases, that of William Pinkerton *v.* Epifanio Ledaux, had been carried to the United States supreme court, and as he was unable to follow it there, he suggested that the Attorney-General take charge of the case in that court. Acting upon this suggestion, on January 9, 1886, Secretary Lamar wrote to the Attorney-General calling his attention to said case, and requesting him, inasmuch as the interests of the settlers and of the government seemed to be identical, to appear and protect said interests. This case was argued at the October term, 1888, of the supreme court, but the Attorney-General did not appear therein. It is reported in 129 U. S., p. 346.

The judgment of the lower court in favor of the settler was affirmed, mainly upon the ground that the tract in controversy was not clearly shown to be within the limits of the grant. No question as to the validity of the grant or the construction of the proviso in the act of July, 1870, *supra*, was raised, though both of these questions would seem to have been presented by the record. Indeed, the court commented sharply upon the omission to raise and discuss these questions. It said, on page 355:

> This case seems to have been very perfunctorily tried and discussed. There is a question which may be entitled to much consideration, whether the Nolan title has any validity at all without confirmation by Congress. The act of July 22, 1854, before referred to, seems to imply that this was necessary. There is also another act of Congress which may have a bearing on the case. We refer to the act of July 1, 1870, 16 Stat., 646, c. 202, by which another grant to Nolan was confirmed to the extent of eleven leagues. After various provisions with regard to the exterior lines of those eleven leagues, the 4th section declares "that upon the adjustment of said claim of the heirs of Gervacio Nolan, according to the provisions of this act, it shall be the duty of the surveyor general of the district to furnish properly approved plats to said claimants, etc.: *Provided*, that when said lands are so confirmed, surveyed and patented, they shall be held and taken to be in full satisfaction of all further claims or demands against the United States."
>
> Whether this provision was not intended to affect the entire claim of Nolan for any grant of lands in New Mexico may be a serious question. Without expressing any opinion on the subject, it suffices to say that we see no error in the judgment of the supreme court of New Mexico, and it is therefore affirmed.

It is very much to be regretted that the question of the construction of said proviso was not presented to and settled by the court in that case, as it would have prevented further controversy as to the title to the lands within the limits of grant No. 39.

It will be seen from the foregoing statement that the action of the Land Department in relation to the Nolan grant No. 39 has not been entirely consistent. In the first instance the Commissioner (Williamson) refused to approve of a contract for the survey thereof, whereby its reservation would have been noted on the tract books, holding that said grant, under the act of 1870, *supra*, had "no legal status." Three years afterwards, the same officer found no objection "to the making of a preliminary survey of said claim under the deposit system." Four years later, Commissioner McFarland, and Acting Commissioner Harrison,

recommended that the lands within the limits of the grant, as shown by the survey, be suspended from entry and that the petition of the settlers to the contrary be rejected. In this recommendation Secretary Teller concurred. The next year Commissioner Sparks recommended that said lands be thrown open to entry and settlement, and in this view Secretary Lamar concurred. And then there is the opinion of the Attorney-General which conflicts, as to the law, with that of Secretary Lamar, and the *dubitantur* of the supreme court.

The question in the case, which has heretofore been considered by the Department, is purely legal, and arises out of the construction placed upon the statute of July 1, 1870, *supra*, and more particularly the proviso to the fourth section thereof. On the one side it was thought that the proviso only declared that acceptance of patent under that act should be in full satisfaction of all further claims in relation to grant No. 48. It is asserted that said grant was for a much larger quantity of land than the amount for which it was confirmed, and that the proviso was meant to prevent the setting up of any claim thereafter against the government, because of the curtailment of the original area, or because of the recognition of the claims of settlers within the limits of the grant when located. And it is insisted that it is not to be supposed that the government in carrying out its treaty stipulations, confirming a grant made by a former government and securing the citizen the enjoyment of his private property, would exact such a hard condition as a release of "all further claims or demands against the United States" of every kind or description; that even if it were held that under the Mexican laws Nolan could receive but one grant, limited in amount to eleven square leagues, yet, inasmuch as grant No. 39 was made to Nolan, Lucero and Aragon, even if Congress meant to restrict the first to a grant of eleven square leagues under the Mexican law, it is not fair to suppose that the grant to the others was to be obliterated entirely, even though they had exercised their lawful right of selling their interest in said grant to Nolan or any one else.

In this connection it may be as well to mention that said Nolan at the time of his death was also the owner, by transfer from his uncle Antonio Sandoval, of the Estancia grant, situated in Valencia county, New Mexico; that on the application of his heirs the surveyor-general investigated said claim and reported favorably thereon, which report was duly transmitted by this Department to Congress on February 8, 1873, as will be seen by reference to Senate Ex. Doc. No. 40, 42nd Congress, 3rd Session.

On the other hand, it is argued that to arrive at the true intention of Congress the entire act must be read and construed as a whole in accordance with the well-settled rules applicable thereto; that the claim of Nolan was but an equitable claim at most and not a perfect legal right or title to the land in question; that of the extent of the equities Congress is the sole judge, and its judgment cannot be questioned;

that reading the act in this light it is apparent there was no necessity for the exaction of a release from the Nolans on account of the curtailment of the area of grant No. 48, inasmuch as there was no legal claim against the government for more than it had thought proper to recognize by its confirmation; that the release in the proviso cannot properly be construed to be required to protect the government from any claim on the part of the Nolan heirs, because of the recognition of the claims of the settlers within the limits of the grant, inasmuch as lieu lands are awarded therefor to the heirs, and the right of the settlers to make entry of their claims is especially provided for by the third section of said act. In view of this provision, it is asserted, as a familiar rule of construction, that where a statute contains a particular enactment, and a general enactment, which might include the particular one, both should be operative, but the general enactment must be taken to affect only cases outside of those within the particular language. (Endlich on Statutes, par. 399). That the general language of the proviso is not to be construed as applicable to all claims of every nature and kind, but is restricted, by the more specific language with which it is associated, to claims *ejusdem generis* as those designated by the particular words, in the absence of clear intention otherwise. (ibid, par. 405) That under these canons of construction the conclusion is clear that it was the purpose of Congress, as a condition annexed to the acceptance of patents under said act, to require a release of all claims of a like nature as against the United States.

It is not made very clear how, or through whom, Mr. Pinkerton claims title. It appears from the letter of the Mexican Charge, inclosed by you, that he purchased from the Nolan heirs, who are bound to protect and defend him in the possession of the tract sold; whilst Mr. Pinkerton himself states, in his letter herewith sent you, that he purchased the interest of Lucero and now owns the same. It will be observed that in the record of grant 39, sent up by the surveyor-general, it is shown that Lucero sold to Gervacio Nolan his interest in said grant; that Nolan asserted a claim to the whole grant, and the record contains what purport to be conveyances from both, Lucero and Aragon, to Nolan of their interest in said grant, and that the surveyor recommended the confirmation of the whole grant to the heirs of Nolan; and all these matters were of record before Pinkerton claims to have purchased. The decree of the district court of New Mexico seems to have been an amicable suit, and therefore settled nothing except perhaps as between the parties thereto. The claim now made through Lucero would seem to have additional complications connected with it.

Amid these complications and conflicts of opinion, and in view of the fact that Mr. Pinkerton, through the minister of a foreign government, proposes to make reclamation or demand indemnity of the United States for an alleged wrong, claimed to have been caused by the improper action of this Department, it seems to me that it would be perhaps un-

wise f. r me at this time to express an opinion upon the merits of his case, as suggested by you. With every disposition to throw all the light upon the case and its complications, I send this very full statement and the numerous exhibits referred to, and shall be glad to furnish any other information in the possession of the Department which may be desired; but prefer to postpone an expression of opinion upon the case in its present aspect lest it might be a prejudgment in a matter which has not yet assumed definite shape.

I also inclose copy of the report of the Commissioner of the General Land Office made on the reference of your letter to him and marked "M."

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### TIMBER CULTURE CONTEST—RELINQUISHMENT.

### DORRINGTON *v.* DE HART.

A timber culture entry within a section that contains a natural supply of timber trees is illegal and must be canceled.

The right of a contestant to proceed against an entry and secure the results of the contest, is not defeated by a subsequent relinquishment of the entry, and the intervening filing of another.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 28, 1890.*

Your letter of November 6, 1889, transmitted the papers in the case of Albert Dorrington *v.* Henry L. De'Hart on appeal by the former from your decision of February 5, 1889, dismissing his contest against the timber culture entry of the latter for the NW. ¼ Sec. 17, T. 32, R. 57 W., Valentine land district, Nebraska. It also transmitted the papers in the contest case of one Nathaniel Searcy against the same entry, also the affidavit of a contest by L. A. Dorrington upon a very different charge, and also the affidavit of contest of one Frank T. Roxbury against the same entry, also the relinquishment of De'Hart to the entry and notice by the local officers that one Peter Wernsmann had also filed a declaratory statement for the land.

On October 10, 1884, De'Hart made timber culture entry for this land, and on June 21, 1886, Albert Dorrington filed affidavit of contest against the same, alleging—

> That said section contained not less than ten acres of timber land and a good thrifty growth of five acres of timber growing naturally upon the same, composed of cottonwood, ash, box elder and elm trees.

Service of notice was made by publication, and the taking of testimony was fixed for September 28, 1886, before J. A. Wilson, notary public, Chadron, Nebraska. Continuances were had under stipulations until November 26, 1886, when the testimony was taken and on December 20th following the local officers passed upon the case and recom-

mended the cancellation of the entry, from which decision the entryman appealed.

On October 12, 1887, one Nathaniel Searcy filed an affidavit of contest against said entry alleging that "Henry De'Hart has failed to plant trees, tree seeds or tree cuttings during the third year as required by law or up to date of this contest," and he accompanied said affidavit with an application to make homestead entry for said land. This was placed on file to await the result of former contest.

On April 25, 1889, the local officers transmitted said papers with the information: "Entry relinquished and D. S. filing made by Peter Wernsmann. Case dismissed."

On February 18, 1889, L. A. Dorrington filed an affidavit of contest alleging that the entryman has failed to cultivate or cause to be cultivated said tract during the past year and has failed to plant or cause to be planted any trees, seeds or cuttings on the land during the year last past, and that these defects still exist.

On April 22, 1889, Frank T. Roxbury filed affidavit of contest against said entry alleging failure to plant ten acres to trees as required by law, etc., and that the default still exists. Nothing was done with either of the three last named cases except that a memorandum shows Searcy's contest dismissed, and on April 23, 1889, De'Hart filed his relinquishment and Peter Wernsmann filed declaratory statement for the land.

In the mean time on February 15, 1889, your office decided the case of Albert Dorrington *v.* De'Hart and dismissed the contest, from which decision the former appealed to this Department.

On June 28, 1889, in pursuance of your instructions of May 16, Dorrington notified Wernsmann of his appeal and furnished him copy of same.

Wernsmann has not filed any brief in the case nor any statement in regard to his declaratory statement.

The testimony in the case is somewhat conflicting as to the number of trees upon the section, but it appears from the testimony that there were from seven to ten acres of timber thereon and that while the belt of timber follows the trend of a stream running through the section, it extends back upon the upland and grows independent of the water of the stream and its overflow. There appears also to be a grove of ash timber away from the stream. A large number of stumps of various sizes are found upon the land, and the testimony tends to show that men have been taking firewood and some building material off the land for several years, yet it is in evidence that the timber is increasing by natural growth, and rapidly so, since the land has been protected from fire and from cattle that formerly ranged over it.

DeHart did not testify in the case, and produced but one witness. He testified that there was no timber on the section, but the preponderance of the evidence shows that he is mistaken; that nature has supplied and is continuing to supply the section with timber, without planting or cultivation by man.

I have examined the cases you cite and note the fact that in the case of Bartch *v.* Kennedy (3 L. D., 437) the trees on the section were confined to the banks of the Knife River, and that they were "located mostly on the river bank, where the land is subject to overflow." In the other case cited the facts are not given. In case of Box *v.* Ulstein (3 L. D., 143), the testimony showed that the timber was in groves on the tillable land, not confined to the banks of streams, the varieties being, poplar, oak, willow and balm of gilead. It is said in that case:

> The question then is, has nature in this case provided what in time will become an adequate supply of timber for the inhabitants of the section? I think that we find the proper standard of "an adequate supply" in the timber culture act which provides for the planting of ten acres of timber and for the existence of . . . . sixty-seven hundred and fifty trees on a section, or the probability that from the existing natural supply there will be that number in the future.

In the case of Blenkner *v.* Sloggy (2 L. D., 267) the timber grew in the bend of a creek in the extreme corner of the section and partially if not wholly subject to overflow, the remainder of the section being prairie land. Therein it is said:

> It is eminently proper that the situation of the natural growth of timber and its relation to the section should be considered as well as the actual amount and character of the timber itself.

Having carefully considered the testimony in the case at bar, I concur with the local officers that the entry should be canceled. The right of the contestant, Albert Dorrington, is not defeated by the relinquishment of DeHart, and the filing of the declaratory statement of Wernsmann.

See Gardner *v.* Spencer (10 L. D., 398).

Your decision is therefore reversed.

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### SCHOOL LAND—SETTLEMENT BEFORE SURVEY.

JOHN W. JOHNSON.

Settlement on school land, prior to the survey thereof, by one who has exhausted his pre-emptive right, and claims as a homesteader, does not defeat the reservation for the benefit of the Territory, where the survey is made prior to the passage of the act of May 14, 1880.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 29, 1890.*

I am in receipt of your letter of October 24, 1890, relative to the homestead entry of John W. Johnson for the W. ½ of the NE. ¼ and the W. ½ of the SE. ¼ of Sec. 16, T. 13 N., R. 5 E., G. and S. R. meridian, Prescott, Arizona, which was canceled October 28, 1874, and which you recommend to be re-instated, and that authority be given your office to pass upon the final proof submitted by Johnson. From said communication and accompanying papers the following facts appear:

The land is a school section, and was surveyed in 1873. The town-

ship plat was filed in the local office August 6, 1874, and Johnson made homestead entry of the tract August 15, the same year. His entry was canceled by your office October 28, 1874, on the ground that rights under the homestead law attached only at date of entry. Subsequently, the receiver at the Prescott land office addressed a letter to your office, enclosing the corroborated affidavit of claimant stating that he settled upon the land prior to survey, and asked that the entry be re-instated. This application was transmitted to the Secretary, who, on June 18, 1875, affirmed the action of your office canceling the entry, holding that:

> The survey was made before Mr. Johnson made his entry. His entry can take effect only from its date, and at that date the lands were reserved as aforesaid.
>
> Johnson can not take this land as a pre-emptor and allege the actual date of his settlement before survey, for he has already exhausted his privilege as a pre-emptor.

Notwithstanding the cancellation of the entry, Johnson continued in the occupancy of the tract, and, on March 16, 1885, he offered final proof, showing continuous residence for twelve years and improvements, estimated to be worth from $2,000 to $4,000.

In view of the long residence of the claimant and his valuable improvements, and of the act of May 14, 1880, which provides that the homestead right shall relate to the date of settlement, you recommend that the entry be re-instated, and that your office be authorized to act upon the proof offered.

The Department is without authority to grant relief to this settler. Prior to the act of May 14, 1880, no right could be initiated or acquired under the homestead law, except by actual entry at the land office. Said act, which provided that rights under the homestead law may be initiated by settlement upon unsurveyed land as under the pre-emption law, and that the right shall relate back to the date of settlement, did not legalize settlements made prior to its passage, so far as to divest or affect rights that had been acquired prior to entry and before the passage of the act.

This view was plainly and forcibly expressed in the case of Southern Pacific Railroad Company *v.* Lopez, 3 L. D., 130, which involved the question as to whether a settlement upon unsurveyed lands within the limits of the Southern Pacific Railroad Company, made prior to the act of May 14, 1880, with a view to entering the same under the homestead law when surveyed, is such a claim as will except the land from the grant. The Secretary held that the words "occupied by homestead settlers," occurring in the excepting clause to said grant, was deliberately used by Congress for the purpose of excepting from the grant lands settled upon with the intention of entering them under the homestead law when surveyed, knowing that, under the law in force at the date of the grant, no right could be acquired under the homestead law by mere settlement as against the right of the company, without an

express exception and reservation for that purpose. But, in speaking of the scope and purpose of the act of May 14, 1880, he says:

> This act introduced several new features into the homestead law, and among others the initiation of a homestead claim by settlement, whether the land is surveyed or unsurveyed. Prior to the passage of the act, the only lawful initiation of a homestead claim was by an entry or filing (except in cases coming under section 2294, Revised Statutes), and there was no right of homestead upon unsurveyed land. In granting these additional rights to homestead settlers, it is not to be supposed that Congress intended the act to operate so as to divest rights already acquired under other laws; and hence it cannot be held that, in the case before me, it clothed Lopez with any right against the railroad company superior to that which he had at date of the definite location of their line, or that it destroyed any vested interest which they may have thereby acquired in the land.

This has been the uniform ruling of the Department, and I know of no case in which a contrary ruling has been made, or which has held that any right under the homestead law could be acquired by settlement upon unsurveyed lands prior to the act of May 14, 1880.

In the case of Thomas F. Talbot, 8 L. D., 495, the Secretary, in speaking of a settlement made upon school lands in Wyoming Territory prior to and existing at date of a survey made in 1870, said, that such settler as against the rights of the Territory could have perfected a claim under the homestead or pre-emption law, under the act of February 26, 1859 (11 Stat., 358). But this was mere dictum, not necessary to a decision of the case, and from an examination of the question involved and decided, it is evident that the word "homestead" was inadvertently used, and that it was not intended to hold that a settlement made upon a school section prior to survey by a person not qualified to enter it under the pre-emption law, but having the qualifications of a homesteader, would defeat the reservation for school purposes, under the act of February 26, 1859, which provides that "where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settler."

The only question involved and decided in the case of Talbot was, that if a settlement was made upon school lands prior to survey which would except it from the grant or reservation, and such settler subsequently abandoned the land, before indemnity had been taken, the grant or reservation immediately attaches, and the purchase of the improvements of such settler by one who settled subsequent to survey gives no right as against the grant or reservation, either under the act of February 26, 1859, or the act of August 9, 1888 (25 Stat., 393), authorizing the leasing of school and university lands in the Territory of Wyoming. In other words, that such settlement does not except the tract from reservation, except in favor of the settler in actual occupation at date of survey. The question as to the character of settlement was not involved.

At the date of Johnson's entry, the land in controversy had been

designated by survey as a school section, and was then in reservation for school purposes for the Territory of Arizona.

The 5th section of the act of July 22, 1854 (10 Stat., 308), which was extended to and continued in force in the Territory of Arizona by the act of February 24, 1863 (12 Stat., 664), provided:

> 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 created out of the same.

While such reservation does not amount to a grant, or such a dedication in the strict legal sense as to withdraw from Congress the power of disposition over such sections, yet it has all the force and effect of a grant to a State, so far as to withdraw said lands from other disposition or control, except by Congress. Minnesota *v.* Bachelder, 1 Wall., 109; John W. Bailey *et al.*, 5 L.D., 216. The right of the Territory to have sections sixteen and thirty-six held in reservation is statutory, and the Secretary has no power or authority to impair that right by recognizing any claim of the settler, except such as is expressly authorized by law. Thomas F. Talbot, *supra.*

When this survey was made and the township plat filed in the local office, the sixteenth and thirty-sixth sections were reserved for school purposes, subject only to the provisions of the act of February 26, 1859 (Sec. 2275 R. S.), which excepted from reservation such sections upon which settlements *with a view to pre-emption* had been made prior to said survey, and declared that those sections should be subject to the *pre-emption claim* of such settler.

It appears from the decision of the Department of June 18, 1875, that Johnson had exhausted his pre-emptive right, and could not take the land under the pre-emption law; therefore he could not claim the benefits of said section 2275, although he was a settler upon the land prior to and at date of survey.

If this settler is now residing upon the tract and has continuously resided thereon since his alleged settlement, and has made valuable improvements on the land, it would present a case that appeals strongly to Congress for relief, which has the power to authorize the entry of this tract and to require the Territory to select indemnity in lieu thereof; but upon the facts presented in your letter I know of no authority that would authorize the Department to re-instate his entry and allow his proof as against the right of the Territory.

RAILROAD GRANT—SETTLEMENT RIGHTS.

NORTHERN PACIFIC R. R. CO. *v.* POTTER ET AL.

Where possession and occupancy alone, at the time rights under a railroad grant attach, are relied on to except the land from the grant, it must affirmatively appear that the party in such possession had the right, at that time, to assert a claim to the land in question under the settlement laws.

The occupancy and possession of one who has exhausted his rights under the homestead and pre-emption laws do not constitute such a "claim" as will defeat the operation of the grant.

The case of Northern Pacific R. R. Co. *v.* Bowman, cited and distinguished.

*Secretary Noble to the Commissioner of the General Land Office, November 29, 1890.*

On December 23, 1885, William H. Potter made application at the Bozeman, Montana, land office to make homestead entry for the NW. ¼ NW. ¼ of Sec. 29 and the N. ½ NE. ¼ of Sec. 30, T. 1 N., R. 4 E., of that district.

The register and receiver rejected the application, on the ground that part of the tract was in an odd numbered section within the grant to the Northern Pacific Railroad Company, and listed by the same June 27, 1885, list No. 6.

Potter appealed to your office, and, on January 13, 1888, the local officers were directed to order a hearing to ascertain the true status of the land in the odd numbered section, July 6, 1882—the date of the definite location of the line of said company's road opposite the land in question.

On this hearing, from the evidence, they held that said tract in Sec. 29 was excepted from the grant to the company, but as Potter had exhausted his pre-emption and homestead privileges, his application should be dismissed.

From this judgment both Potter and said company appealed, and Potter also gave notice of his intention to withdraw his application to make homestead entry of the land and substitute a timber culture application for the tract in the odd numbered section, retaining intact his pre-emption claim for the land in the even numbered section under his filing made March 20, 1883, and alleged settlement of March 17th of that year.

It was shown at the hearing and so found by the register and receiver, which finding was concurred in by you, that Potter had exhausted his homestead and pre-emption privileges at the date he made application to make homestead entry of the tract in question, and I think this finding is fully warranted by the evidence.

By your said office decision, you also held that the land in question in the odd numbered section is excepted from the grant to the company. From this judgment the company again appealed.

The land is within the forty mile granted limits of the Northern Pacific Railroad Company, and was withdrawn upon filing the map of general route of said road, February 21, 1872.

The map of definite location was filed July 6, 1882, from which date the right of the company attached to the odd numbered sections within the grant.

It appears that on February 21, 1872, Enos Swan filed his declaratory statement for the land above described, including the tract in Sec. 29, alleging settlement thereon October 1, 1869. He was a citizen of the United States, and resided on the tract, with his family, in 1871. He built a house and stable and a half mile of fencing during that year, and cultivated the land. He sold his improvements to one Clauson about the year 1876; and the latter sold to S. H. Murry, from whom Potter obtained possession in 1882, and lived on the place "off and on" till 1883, when he moved his family to it, and has since that time resided on the place. He has raised crops on the land since 1882, and has claimed the land and had no other home.

It has been occupied and cultivated continuously since 1871, and claimed by the parties above named.

At the date of the withdrawal, the land in Sec. 29 was embraced in the filing, *prima facie* valid, and covered by the settlement of Swan, and was therefore free from the operation of such withdrawal. Northern Pacific R. R. Co. *v.* Stovenour, 10 L. D. 645.

The land thereafter was continuously occupied and claimed by other settlers, and at the date of definite location was occupied and claimed by Potter; but since he had exhausted his pre-emption and homestead privileges, and thereby become legally disqualified under the then existing laws from holding or taking the land under the settlement laws of the United States, his settlement and supposed claim could not avail him. The title to the land in the odd numbered section at date of definite location had not been "sold, granted or otherwise appropriated," and was "free from pre-emption or other claims or rights," and thus became subject to the grant to the company. Northern Pacific Railroad Company *v.* Fitzgerald, 7 L. D., 229.

In the case of Northern Pacific R. R. Co *v.* Bowman, 7 L. D., 238, which is relied on by the Commissioner, it was expressly held that Bowman had not exhausted his right of entry under the homestead law, and could have entered the land in dispute as a homestead if he so desired, there being no intervening adverse settlement claim thereto. The statement in that case "that the question as to whether the claim of said Bowman was a lawful claim, cannot enter into the consideration of the case or have any influence in the determination of the issue involved. It is sufficient if he had a *claim* to the land in dispute at the date mentioned of such a nature as the act defines, and any question as to the lawfulness or validity of such claim is immaterial (Newhall *v.* San-

ger, 92 U. S., 761; K. P. R'y *v.* Dunmeyer, 113 U. S., 629)," must be limited to the facts of that case. It is not by any means clear that the cases cited uphold the doctrine so broadly enunciated, and certainly it could not have been the intention of the Supreme Court to announce that any "claim," no matter how shadowy, could except land from the grant. It must at least be a claim capable of being asserted by the party in possession under the settlement laws of the United States; otherwise, the claim of an alien, in possession at the time the railroad company's rights attach, who could never take the land, must except the land from the grant. The Department has expressly ruled against this view in the cases of Southern Pacific R. R. Co. *v.* Saunders, 6 L. D., 98; Central Pacific R. R. Co. *v.* Painter, id. 485; Titamore *v.* Southern Pacific R. R. Co., 10 L. D., 463; Central Pacific R. R. Co. *v.* Booth *et al.*, 11 L. D., 89, and Central Pacific R. R. Co. *v.* Taylor *et al.*, id. 355. It is deemed that the true rule is that where parties rely on an entry or filing of record, the railroad company cannot inquire into the validity of the same, unless it alleges that the filing or entry of record was fraudulent and void ab initio because the alleged settler was not in existence at the date of said record. Northern Pacific R. R. Co *v.* Brown, 10 L. D., 662, and Union Pacific R. R. Co. *v.* Haines, on review, 11 L. D., 224. But that where possession or occupation alone at the time the railroad rights attach are relied on to except the land from the grant, it must affirmatively appear that the party in such possession had the right at that time to assert a claim to the lands in question under the settlement laws of the United States.

It being shown that Potter had exhausted his right of homestead and pre-emption at the time of the definite location of the road, he had no "claim" thereto such as would except the land from the grant. James Brady *v.* Central Pacific R. R. Co., 11 L. D., .

Your said office decision is accordingly reversed.

It appears that on April 10, 1889, Robert Porter made application to make homestead entry of the land in question; this was rejected, for the reason that the land applied for was embraced in this case, then on appeal to your office. Porter appealed. I herewith return the papers, with directions that you pass upon the merits of the case as between Potter and Porter, as to the lands above described in section 30.

RAILROAD GRANT—INDEMNITY SELECTION—CONFLICTING GRANTS.

SOUTHERN PACIFIC R. R. CO. *v.* MOORE.

Lands within the grant to the Atlantic and Pacific company are expressly excepted from the later grant to the Southern Pacific; and the act of Congress forfeiting certain lands granted to the former company confers no rights upon the latter to to select lands never embraced within its grant.

*Secretary Noble to the Commissioner of the General Land Office, November 29, 1890.*

The appeal of the Southern Pacific Railroad Company from the decision of your office of November 21, 1888, holding for cancellation its selection of the E½ NW¼, SW¼ NW¼ (lot 1) and lots 2 and 3 of Sec. 29, T. 4 N., R. 19 W., S. B. M., Los Angeles, California, has been considered.

The land selected is within the indemnity limits of the grant of March 3, 1871 (16 Stats., 579), to the branch line of the Southern Pacific Railroad Company as shown by its map of designated route filed April 3, 1871, and also within the primary limits of the grant of July 27, 1866 (14 Stats., 292), to the Atlantic and Pacific Railroad Company, as shown by its map of designated route filed March 12, 1872.

Mattie Moore made an application, August 10, 1888, for a homestead entry of the same land. Her application was rejected by the local officers on the ground "that the tract was covered by the indemnity selection of the Southern Pacific Railroad Company, No. 5, approved May 25, 1883."

The records show that this selection has never been approved by this Department; and on appeal your office reversed the action of the local officers and held the company's selection for cancellation upon the ground that one company cannot go into the granted limits of another company to seek indemnity, and also under the proviso in section 23 of said granting act to the Southern Pacific. In its appeal to this Department, the railroad company insists upon its right to make the selection. The first ground of objection in said office decision is not tenable, for the company would have the right to go into the granted limits of another company provided the land was excepted from its grant and within its indemnity limits subject to selection. Allers *v.* Northern Pac. R. R. *et al* (9 L. D., 452). But under section 23 of said act of March 3, 1871, *supra*, it is provided "that said section shall in no way affect or impair the right, present or prospective, of the Atlantic and Pacific company, or any other railroad company."

This Department, in construing this section, has repeatedly held that lands within the grant to the Atlantic and Pacific company do not pass under the grant to the Southern Pacific company, but are excepted therefrom. Gordon *v.* Southern Pacific Railroad Company (5 L. D.,

691); and Coble *v.* Southern Pacific Railroad Company (6 L. D., 679), which on review was adhered to (6 L. D., 812).

The act of July 6, 1886 (24 Stat., 123), forfeits and restores to the public domain certain lands within the primary and indemnity limits of the Atlantic and Pacific company, adjacent to and coterminus with the uncompleted portions of its road. The land in contest is part of the land forfeited under this act, but the forfeiture confers no right upon the Southern Pacific Railroad Company to make selection of land never embraced in its grant.

The decision of your office is therefore affirmed, and the selection of said tract by said company will be canceled.

Mattie Moore will be allowed to enter the land under her application on showing compliance with the provisions of the homestead law.

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### MOTION FOR REVIEW.

### CLARK *v.* MARTIN.

Motion for review of departmental decision rendered July 21, 1890, 11 L. D., 72, in the case above entitled, denied by Secretary Noble, December 1, 1890.

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### RAILROAD GRANT—HOMESTEAD ENTRY—ACT OF MARCH 3, 1887.

### UNION PACIFIC RY. CO. *v.* WASLEY.

A homestead entry of record at date of definite location excepts the land covered thereby from the operation of the grant, and it is immaterial whether the entryman subsequently complies with the law, or not.

An application to purchase under section five, act of March 3, 1887, will not be finally considered until presented in accordance with departmental regulations.

*Secretary Noble to the Commissioner of the General Land Office, December 1, 1890.*

This case comes before the Department upon the appeal of the Union Pacific Railroad Company from the decision of your office, holding for cancellation the selection of said company of the N. ½ of the NW. ¼ and the NW. ¼ of the NE. ¼ of Sec. 35, T. 4 N., R. 67 W., Denver, Colorado.

Said tract is within the limits of the grant of July 1, 1862, to the Denver Pacific Railroad Company (12 Stat., 489), now Union Pacific Railroad Company, which was definitely located August 20, 1869. At the date of definite location the tract was covered by the homestead entry of Amos Widner, made April 11, 1866, which was canceled November 6, 1873, for failure to make proof within the statutory period.

The company selected the tract December 31, 1879, but no patent has issued therefor.

Cephas Nyce made timber-culture entry for this land February 7, 1885. William P. Wasley applied to enter the tract under the homestead law March 3, 1885, and at the same time filed an affidavit of contest against the entry of Nyce, charging that said land was not devoid of timber, upon which a hearing was had May 6, 1885. Nyce failed to appear at said hearing, and upon the testimony submitted your office held that the land was not subject to entry under the timber-culture law, from which no appeal was taken by Nyce. Your office further held that the homestead entry of Widner, subsisting at date of definite location, excepted the land from the operation of the grant, and the company's selection was therefore held for cancellation. From this action the company appealed, alleging, substantially, that the Comissioner erred in holding that the entry of Widner excepted the tract from the operation of the grant, for the reason that said entry expired without final proof being made thereon, and there was no evidence that Widner was qualified to make a homestead entry, nor that he ever performed any act whatever in connection with the land, save to file his homestead application. They also alleged, as a further ground of error, the failure of your office to pass upon the protest of the Colorado Mortgage and Investment Company, it appearing from the record that said company claims to be in possession of said lands as purchaser from the railroad company.

The entry of Widner, subsisting at date of definite location, excepted the tract from the operation of the grant, and it is immaterial whether the entryman subsequently complied with the law, or not. Kansas Pacific R. R. Co. *v.* Dunmeyer, 113 U. S., 629; Hastings & Dakota R. R. Co. *v.* Whitney, 132 U. S., 357.

With the record is also an application of the Colorado Mortgage and Investment Company to purchase said land under the fifth section of the act of March 3, 1887 (24 Stat., 556), in which it is alleged:

That the railway company sold and conveyed this land to Margaret J. Metcalf, a native born citizen of the United States, for $800, and that such sale and purchase were in good faith; that Metcalf took possession June 29, 1878; that the land was not, at the date of said purchase, sale and possession, in the possession or occupation of any adverse claimant, and has not since, at any time, been in the possession or occupation of any claimant other than said Metcalf or her grantees and successors; that on November 3, 1878, Metcalf sold an undivided one-half interest in said land to Agnes B. Mitchell, a native born citizen of the United States; also, that on June 2, 1880, Metcalf and Mitchell sold and conveyed the whole of said land to Elizabeth J. Weare, a native born citizen; and also that on 26th January, 1881, said Weare and husband executed a deed of trust to one Jones, for the use of the Colorado Mortgage and Investment Company, to secure payment of their joint note for $5,000 loaned by said company; and that upon default, foreclosure, etc., the said trustee, on September 25, 1882, conveyed the land to said company.

It is further shown that each and all of these purchasers paid a valuable consideration, and that each and all relied upon the title of the railway company; that the Mortgage and Investment Company still owns the land, and that it not only has been in the continuous and uninterrupted possession of said company and its grantors since June 29, 1878, but that it has likewise been in continuous improvement and cultivation.

There is also filed with the papers an abstract of title, showing that the company sold said land to Margaret J. Metcalf and executed to her a deed therefor, dated June 29, 1878, and recorded July 17, 1878; also that the title to said land passed from the said Metcalf through mesne conveyances to the Colorado Mortgage and Investment Company, the present holder of the title, and that all of said conveyances have been duly recorded.

The fifth section of the act of March 3, 1887, under which the company claims the right of purchase, provides—

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

It does not appear from the papers before me that any one is claiming the land by virtue of a settlement existing at the date of the alleged purchase, but the claim of Wasley seems to be predicated upon his contest of the entry of Nyce, and it does not appear whether he has ever settled upon the land.

It is unnecessary at this time to pass upon the question as to the qualification of the present applicant to take as assignee of the original purchaser from the company, or to express any opinion as to the rights of settlers under the second proviso to said section, inasmuch as the party has not made any application to purchase in the manner as directed by the Department in the case of Samuel L. Campbell (8 L. D., 27), and Wasley has had no opportunity to be heard. You are therefore directed to notify the applicant in this case that it will be required to make application to the proper local officers showing its right to purchase in the manner as provided in the case of Samuel L. Campbell, *supra*, and that Wm. P. Wasley shall be specially served to show cause why said application to purchase should not be granted.

RAILROAD GRANT—PRIVATE CLAIM—SURVEY.

DUNCANSON *v.* SOUTHERN PACIFIC R. R. CO.

The survey of a private claim that is not approved by the surveyor general is not effective as against the operation of a railroad grant.

The land reserved for the satisfaction of a private claim having specific boundaries is that found to be within such boundaries, on the survey under which patent issues.

*Secretary Noble to the Commissioner of the General Land Office, December 1, 1890.*

I have considered the appeal of the Southern Pacific Railroad Company from the decision of your office of September 12, 1884, rejecting its claim to lots 2 and 3, Sec. 27., T. 2 S., R. 7 W., S. B. M., Los Angeles, California.

On the 12th of April, 1884, E. E. Duncanson made application for a homestead entry of said lots 2 and 3. His application was rejected by the local officers because the land applied for is within the primary limits of the grant of March 3, 1871 (16 Stats., 579), to the branch line of the Southern Pacific Railroad Company, the rights of which attached April 3, 1871, when its map of designated route was filed in the General Land Office.

On appeal by Duncanson your office reversed the action of the local officers and held that the land was within the claimed limits of the Jurupa Mexican grant at the time that the grant to the railroad company became effective, and therefore was excepted from the railroad grant.

In its appeal from this decision the railroad company contends that the land was never within the out-boundaries of the Jurupa grant.

The records in your office show that the Jurupa grant was one of specific boundaries. It was duly confirmed by the board of land commissioners in California, and affirmed on appeal, by the district court for the southern district of California. Several surveys of this confirmed grant were made. The survey by Reynolds, under which the decision of your office in favor of Duncanson was rendered, was never approved by the surveyor-general, and, consequently, was of no validity. Frasher *v.* O'Conner (115 U. S. op. p. 110).

The survey made by Minto in 1878 was duly approved by the surveyor-general, and under it patent issued. This survey, as approved, and on file in your office, shows that the land in contest was not within the limits of the Jurupa grant, but at the time the grant to the railroad company became effective was subject thereto.

The decision of your office rejecting the claim of the railroad company to the land in question is therefore reversed.

FINAL PROOF PROCEEDINGS—EVIDENCE—PRE-EMPTION.

LEHMAN *v.* SNOW.

The local officers are without authority to accept final proof for land involved in a case pending on appeal.

The want of proper authority in an officer designated to take final proof, will not affect the validity of testimony taken before him, under rule 35 of practice, at the time such proof is submitted.

A temporary removal of the pre-emptor from land of his own, prior to the establishment of residence on his pre-emption claim, will not take such claim out of the second inhibitory clause of section 2260, R. S.

An entry may be allowed with a view to equitable action where the officer designated to take the final proof is not qualified therefor, but the proof is otherwise regular and shows due compliance with law.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 2, 1890.

Rosa A. Lehman filed her declaratory statement No. 21,231 on May 24, 1886, upon the SE. ¼ SE. ¼, Sec. 15; NE. ¼ NE. ¼, Sec. 22, and W. ½ NW. ¼, Sec. 23, T. 27 S., R. 9 E., M. D. M., San Francisco, California, alleging settlement July 3, 1885.

On June 18, 1886, Ernest Snow filed his declaratory statement upon the same land, alleging settlement November 21, 1885. On October 7, 1886, Snow applied to make final proof, and thereupon the register issued his notice that the same would be taken before the "superior judge" of San Luis Obispo county, California, on December 14, 1886, and on the same day the register and receiver issued a summons to Rosa A. Lehman to appear at that time and place, "and contest the claim of Ernest Snow . . . . . and show cause, if any there be, why the said Ernest Snow should not be allowed to make final proof and entry for said land, he having filed due notice of his intention to do so."

On October 18, 1886, Miss Lehman gave notice of her intention to make final proof in support of her claim before the register and receiver on December 9th thereafter; but, on the suggestion of the register, the date was fixed for December 14, and the officer before whom it should be taken, the judge of the superior court of San Luis Obispo county, California, and the notice was published accordingly—thus making the time and place the same as in the published notice of Snow, and also the date and place fixed by the register's summons for Lehman to contest Snow's claim. It does not appear that any formal protest was made by either party.

On the day fixed, both parties with their attorneys appeared, and offered their final proofs; the hearing was also had, in pursuance of the summons to Lehman to contest Snow's claim, and, on June 1, 1887, the register and receiver held that Lehman's final proof should be received, and that Snow's declaratory statement should be canceled.

On June 23, thereafter, Snow filed his appeal from that judgment,

the general ground of error being that he and not Lehman, was the first *bona fide* settler on the land.

On July 26, 1887, Lehman, by her attorney, filed her petition and objection to any further action being taken in the case until such time as she may be allowed to submit final proof in support of her claim according to existing regulations; that she gave notice of her intention to make final proof in support of her claim to said land, said notice reciting that such final proof would be made before the register and receiver at San Francisco county, California; that the local officers did change said notice of intention to make it read that said final proof should be made before the judge of the superior court of San Luis Obispo county, California; that the proofs taken in the contest are irregular, null and void, in so far as they relate to her final entry of said land, because not taken before the register or receiver, nor the clerk of the county, as per circular of instructions of the Commissioner of the General Land Office, of March 30, 1886, and approved by the Secretary of the Interior. She again gave notice of her intention to make final proof in support of her claim before the register and receiver, and asked an order that all proofs and affidavits theretofore filed, which were not before the proper officer, be set aside, and that the decision then made be set aside, except in so far as the respective rights of contestants may be concerned. She asked, however, that the testimony submitted at the hearing and the decision rendered thereon should stand, as between her and Snow, showing her superior right to the land.

On July 30, thereafter, Snow filed his answer to said petition, and objected to any action being taken thereon, on the ground that his appeal from the action of the register and receiver canceling his entry was, at the time and before said petition was filed, pending before your office.

The register and receiver allowed Lehman to make final proof on her petition for that purpose, but directed that the testimony, in so far as it related to the contest with Snow, should not be disturbed or added to, and that "no testimony of any kind shall be taken as to what Snow has, or has not, done since the previous hearing," and the register and receiver sent the same, together with the testimony taken at the hearing, to your office to be considered with Snow's appeal. They did not send the so-called final proof taken before the judge on December 14, 1886.

On June 12, 1889, you rendered your decision in this case and held for cancellation Snow's declaratory statement, "leaving the final proof of Rosa Lehman to be disposed of as the law may direct." Snow again appealed, and assigns, substantially, the following grounds of error:

That said decision is contrary to the evidence and rules of this Department;

That you erred in considering the last proof, taken by Lehman; also in sustaining the action of the register and receiver in granting Leh-

man's motion to "recommit"; also in considering the proof made by Lehman before the judge of the superior court, and finally in awarding the land to Lehman and not to Snow.

Snow's appeal, filed June 23, 1887, from the judgment of the register and receiver, rendered June 1, 1887, removed the jurisdiction of the case from those officers, and the register's action thereafter, permitting Miss Lehman to make final proof anew, while Snow's appeal was pending, was irregular and void. Saben *v.* Amundson, 9 L. D., 578.

No other officer than the register or receiver or the clerk of a court of record of the county in which the land is situated can take proofs in pre-emption cases, except that when the land is in an unorganized county the proofs may be made before the clerk of a court of record in an adjacent county in the same State or Territory. General Circular of January 1, 1889, p. 11.

It follows from this that the final proof made by Snow and Lehman on December 14, 1886, before the superior judge of San Luis Obispo county, California, is irregular because made before an officer not recognized at that time as empowered to take final proofs in pre-emption cases. See Circular, March 30, 1886, 4 L. D., 473.

But the hearing before the superior judge was specially authorized by the register and receiver, under the power given them by rule 35 of the Rules of Practice. The testimony taken at this hearing was very full. The witnesses for both claimants were examined and cross-examined, and the testimony thus taken is complete and in no wise dependent upon the so-called final proofs of the two claimants. This hearing was given specially to enable Lehman "to show cause, if any there be, why the said Snow should not be allowed to make final proof."

The testimony taken in pursuance of this notice relates to the good faith of both parties, and while the formal final proofs of both claimants were also taken, yet such final proofs are not necessary to the determination of the question of the superior rights of either party, the testimony taken at the hearing being ample and complete for that purpose.

I have carefully reviewed this testimony, and find the same substantially set forth in your said office decision. I think it very clear that Miss Lehman has the superior right to the land. She was first to file and first to settle on the land; her improvements showed good faith, while those of Snow were very meager, and his testimony as to his residence is unsatisfactory. Independent of this, I am of the opinion that Snow was not a qualified pre-emptor under the provisions of section 2260 of the Revised Statutes, the second subdivision of which reads as follows: "No person who quits or abandons his residence on his own land to reside on the public land in the same State or Territory" shall acquire any right of pre-emption under the provisions of the preceding sections.

His testimony on this point is as follows:

Q. You say you have a home in Santa Barbara county (California)?
A. Yes, sir.

Q. Do you own any land there?
A. Yes, sir.
Q. How much? A. One hundred and twenty acres.
Q. What kind of land?
A. It is some farming and some grazing land.
Q. Is it deeded-title land, or government land?
A. It is deeded land.
Q. When did you leave there?
A. I left it in latter part of August, 1885.
Q. Why did you leave; for what purpose?
A. For the purpose of moving to San Luis Obispo county.
Q. Why didn't you remain there?
A. I didn't like the country there; I like San Luis Obispo county better.

On cross-examination the following interrogatories and answers were given:

Q. Where were your family in November, 1885, last, the time you said you settled on this land?
A. They were at my father-in-law's.
Q. Where was that. A. About ten miles from there.
Q. When did they go to your father-in-law's?
A. I don't hardly know; we came there when we first came up from Santa Barbara county, last September.
Q. You came from Santa Barbara county for the purpose of abandoning your home and taking up public land, did you not?
A. No, sir.
Q. You left your residence on your own land in Santa Barbara county to come to this county?
A. Yes, sir.

From the above it will be seen that he left his farm in Santa Barbara county, California, the latter part of August, 1885; that he left for the purpose of moving to Obispo county, in the same State, because he liked it better; that he went with his family to his father-in-law's from Santa Barbara county, and his family remained there until he settled on the land in controversy in November, 1885; that he still owned the land in Santa Barbara county when he offered his final proof on his pre-emption claim.

If the act of settlement be followed in proper time by actual residence, the settler is held to have established constructive residence from the date of settlement. (David Lee, 8 L. D., 502.) His residence on the land, therefore, began in November, 1885, when his family was at his father-in-law's, where they had been since he moved from his land in Santa Barbara county. His stay at his father-in-law's was merely temporary, a visit only, so that he really "abandoned his residence on his own land to reside on the public land in the same State or Territory." A temporary removal of the pre-emptor from land of his own, prior to the establishment of residence on his pre-emption claim, will not take such claim out of the inhibition contained in said statute. (Ott *v.* Crawford, 10 L. D., 117.)

Snow's filing will therefore be canceled; and since his disqualification eliminates him from the case, it is only necessary to dispose of it

as between the government and Miss Lehman. She has fulfilled every requirement the law imposed upon her as to residence and cultivation; the irregularity of submitting the final proof before an officer not authorized to take the same was caused by the register who alone was responsible for it. And since the final proof showed she had complied with the law, and had been taken at the time and place and before an officer named in the advertisement, and the register and receiver having recommended that she be permitted to enter the land, new proof will not be required. You will direct the local officers to allow the entry with a view of submitting the same to the board of equitable adjudication for confirmation. (Milton De Shong, 11 L. D., 299; Sylvester Gardner, 8 L. D., 483; Pecard *v.* Camens, 4 L. D., 152.)

Your said office decision is modified.

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### HOMESTEAD CONTEST—RESIDENCE.

HOAGLAND *v.* FAIRFIELD.

The failure of the wife to reside on the land until after notice of contest does not impeach the good faith of the claimant, where it is apparent that her final removal to the land is in compliance with a previous *bona fide* intention of the claimant to make his home on the land.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 2, 1890.

On May 10, 1886, Joseph H. Fairfield, the defendant herein, made homestead entry No. 10,343 for the NE. ¼ Sec. 12, T. 21, R. 54, Sidney, Nebraska. March 5, 1887, Joseph S. Hoagland, plaintiff herein, filed affidavit of contest against said entry, alleging abandonment, change of residence, lack of settlement, cultivation and good faith; that the same was made for speculative purposes, and not for the purpose of settlement and cultivation, but for the benefit of a townsite company.

Notice was served on the defendant March 10, 1887, hearing begun May 17, and concluded May 20, 1887. The register and receiver found in favor of the defendant, and recommended the dismissal of the contest.

On appeal to your office, their decision was affirmed, April 17, 1889. Hoagland now appeals to this Department, alleging, in substance, that your said decision is contrary to law and against the evidence.

A careful examination of the evidence fully sustains the decision of your office, wherein the facts are accurately and succinctly set forth (to which reference is hereby made).

The good faith of the entryman is abundantly shown by the evidence, and, although his wife did not remove to the claim until after notice of this contest was served upon the defendant, yet it clearly appears that such removal by her was in pursuance of and in compliance with a

previous *bona fide* intent on the part of the defendant to make his home on the claim. She had been living with her mother at Plattsmouth, nearly five hundred miles distant, while her husband was preparing a home for her on the claim. Under these circumstances, her failure to reside on the claim should not prejudice the rights of the defendant. Scott *v.* King, 9 L. D., 299.

The decision of your office is affirmed.

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PROCEEDINGS ON FINAL PROOF—APPEAL.

CONNER *v.* STANGELAND.

In proceedings under a protest against final proof a decision of the local office that the claimant is entitled to make new proof is not such an adverse judgment as will, in the absence of appeal, defeat his right to have the judgment of the General Land Office on the sufficiency of the proof already submitted.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 2, 1890.*

I have considered the appeal of B. S. Stangeland from the decision of your office of March 27, 1879, holding that the rejection of his proof by the local officers for the N. ½ of the SE. ¼, the NE. ¼ of the SW. ¼ and the SE. ¼ of the NW. ¼, Sec. 20, T. 34 N., R. 18 W., Valentine, Nebraska, has become final, and allowing the homestead entry of S. M. Conner for said tract to remain intact.

It appears from the record that Stangeland offered to make final proof under his pre-emption declaratory statement for said tract when Conner protested, and both parties offered testimony. The local officers made the following decision:

After a careful examination of the testimony taken at this hearing, we are of the opinion that Stangeland made prior settlement on the tract, and that he has acted in good faith. We would therefore respectfully recommend that the homestead entry of Conner be canceled and that Stangeland be allowed to make new proof.

No appeal appears to have been taken from this decision, and the local officers transmitted the record to your office.

By decision of March 27th aforesaid, your office held that the recommendation that defendant be allowed to make new proof operates as a rejection of the proof offered, and that Stangeland having elected to offer final proof in the presence of an adverse claim, must abide the result. It was then held:

Your decision, therefore, rejecting the final proof offered by Stangeland in support of his D. S. 6883 has become final, no reason to the contrary appearing under Rule 48 of Practice; but your recommendation that he be allowed to make new proof cannot be complied with for the reason already stated.

From this decision Stangeland appealed.

It may be conceded that the recommendation of the local officers that Stangeland be allowed to make new proof operated practically as a re-

jection of the proof offered, but it was not such an adverse decision as would in the absence of appeal forfeit the right to have the judgment of the Commissioner upon the testimony submitted. In fact, the only decision upon the facts made by the local officers was, that Stangeland made the prior settlement, and that he acted in good faith, and it does not appear from their decision why new proof should have been required. The defendant had the right to have the judgment of your office upon the question as to whether from the testimony submitted he had sufficiently complied with the law, especially in view of the fact that the local officers, in submitting it, recommended that the defendant be allowed to submit new proof.

The case is therefore remanded, with direction that the testimony submitted be examined, and a decision thereon he made by your office.

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### TIMBER LAND ENTRY—FINAL PROOF.

EMMA J. WOODBURY.

There is no authority for the submission of proof, under an application to purchase timber lands, at any place except at the local land office.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 2, 1890.*

I have considered the case of Emma J. Woodbury, on appeal from your office decision, dated September 25, 1889, rejecting her application to purchase E. ½ SW. ¼ and W. ½ SE. ¼, Sec. 21, T. 16 N., R. 1 E., H. M., Humboldt, California.

She applies to purchase under the act of June 3, 1878 (20 Stats., 89), and the proof is rejected because not made at the place or before the officers named in the published notice.

In compliance with the law in this case, publication was made that applicant would offer proof in support of her claim before the register and receiver December 20, 1888.

It appears from the record that proof was made before the superior judge of Del Norte county, California, December 20, 1888. The evidence discloses that applicant and all her witnesses lived at Crescent City, Del Norte county, California, which is about a four days' trip from the land office. Within a few days of December 20, 1888, storms occurred which would have rendered travel over the route difficult and dangerous.

This Department has heretofore instructed the local officers to see that the law is strictly complied with in reference to proof, under said act (see instructions, 3 L. D., 84; 7 C. L. O., 52, and 6 L. D., 114), and it does not provide for making proof at any place except at the local land office.

I therefore affirm your decision.

OTOE AND MISSOURIA INDIAN LAND—SETTLEMENT.

FLEMING *v.* BOWE.

The settlement required of a purchaser of Otoe and Missouria Indian lands must be in good faith and permanent in character.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 2, 1890.*

I have considered the case of Albert M. Fleming *v.* Frank E. Bowe on appeal by the latter from your decision of June 26, 1889, holding for cancellation his cash entry for the S. ½ NW. ¼ of Sec. 20, T. 1 N., R. 6 E., in the Otoe and Missouria Indian reservation, for sale at Beatrice, Nebraska land district.

On December 30, 1879, Bowe appeared before Chas. L. Schell, notary public for Gage county, Nebraska with two witnesses and made formal settlement proof for this tract of land, alleging settlement on that day, and said his act of settlement consisted in "quarrying stone for a foundation"—for what is not stated.

On January 2, 1880, he appeared at the Beatrice land office with said "settlement proof" and made application to purchase the tract named, and the settlement proof was indorsed by the local officers "approved and entry allowed" and the entryman thereupon paid one third of the appraised value of the land, and took a receipt therefor. There is no other application or affidavit or any record evidence of any compliance with law than these papers.

On July 3, 1883, he paid the balance of the purchase money with interest and received a final certificate.

On June 22, 1886, Fleming filed an affidavit of contest against said entry or purchase, alleging that Frank E. Bowe was not at the time of said entry or purchase a settler on said land, and that he never had made a settlement thereon, etc.

Service was made by publication and hearing was had before the local officers on March 16, 1887, and the local officers found from the testimony in favor of the entryman and recommended the dismissal of the contest. From this decision the contestant appealed and your office on June 26, 1889, reversed said decision and held said entry for cancellation, from which decision the entryman appealed.

The testimony shows that at the date of this entry, the entryman was a lad, thirteen years of age, living with his father whose home was in Iowa. The father and son went to Nebraska taking with them a drove of cattle, which they herded upon this and other unfenced lands on this reservation. The father, R. L. Bowe, furnished the money to pay for the land. He with his son and two men went on the tract, and laid up some loose stone in the form of a foundation for a house, on the 30th day of December, 1887, and on the same day made what is called "settlement proof." Afterward they took these stones and walled up a spring with them. These are all the acts of settlement on the part of

the entryman and his father, except the grazing of cattle on the land. Their cattle did not do well and they closed up the business and returned to Iowa.

The local officers report that this purchase was made under the act of August 15, 1876, 19 Stats 208, and so indicate upon all the papers in the case. It will be observed that the third section of said act was amended by the act of March 3, 1879, 20 Stat., 471, by the former act these lands could be sold only for cash to actual settlers, but the amendatory act enlarged the provisions of law, and permitted sales

> To actual settlers or persons who shall make oath before the register and receiver of the land office at Beatrice, Nebraska, that they intend to occupy the land, . . . . and who shall within three months after the date of such application make permanent settlement upon the same.

Counsel for the entryman claim that the decision of your office is based upon a misunderstanding of the facts proven, and that it is contrary to the law. To my mind it is clear that the father attempted to have his son purchase this tract as a settler, not however with any intent of his making it a "permanent settlement" or home. The terms "settlement," and "settler," are too well understood as applied to public land entries to require any comment at this time. I call attention to the fact, however, that in said statute, Congress evidently to prevent purchases of the kind at bar, qualified the term "settlement" by providing that it should be a "permanent" one.

The attempt to construe the law to mean that going upon the land, and going away again, is all that was contemplated by it, is frivolous, and the claim of counsel that a thirteen year old child living with his father, whose home is in Iowa, can make an entry of this tract under said act by going with his father and two hired men upon the land, and helping to lay a few loose rock in the form of a foundation for a house thereon, and then going about his business, is untenable and can not be upheld by this Department.

Your decision is affirmed and the entry held for cancellation.

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### ALABAMA LANDS—ACT OF MARCH 3, 1883.

### WILLIE W. THORNTON.

The report of a special agent, made prior to the act of March 3, 1883, that land is valuable for coal, excludes such land from subsequent entry under the homestead law until after public offering.

Land thus reported, but covered by a homestead entry at the passage of said act, becomes subject thereto on the cancellation of such entry.

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

I have considered the appeal of Willie W. Thornton from your office decision of November 8, 1888, rejecting his application to make home-

stead entry for the N. ½ SW. ¼, Sec. 4, T. 17 S., R. 3 W., Montgomery, Alabama.

It appears from the record that this tract was formerly covered by the homestead entry of one Mack Holmes, which was held for cancellation by your office decision of November 24, 1886, on testimony taken in a contest. On appeal said decision was affirmed by the Department on August 13, 1888. Holmes filed a motion for review, which was denied on November 22, 1890.

On August 20, 1888, Thornton made application to enter which was rejected by the local officers because of the existing entry of Holmes and because "the land had been classed as of the class reported as valuable for coal." On appeal your office affirmed the action below on the ground that the tract belongs to that class of lands comprehended in the provisions of the act of March 3, 1883 (22 Stat., 487), providing for a public offering.

It appears from your said office decision that on February 7, 1882, special agent Perdue reported the tract as valuable for coal.

Said act of 1883 provides that all public lands in Alabama shall be subject to disposal only as agricultural lands, provided "that all lands which have heretofore been reported to the General Land Office, as containing coal and iron shall be first offered at public sale."

Appellant urges that the mere report of a special agent is not such a one as is contemplated by said act, and that the law does not apply to this tract, for the reason that Holmes' entry, subsisting at the date of the act, took the tract out of the category of "public lands." Both points must be decided against appellant on the authority of the case of Thomas J. Jackson (2 L. D., 36). The tract therein involved had been reported as valuable for coal by a special agent, and was covered by an entry at the date of the act. Nevertheless, it was held that it must be offered under said act. See also Lorenzo D. Evins (9 L. D., 635).

Said decision is accordingly affirmed.

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### PRE-EMPTION CONTEST—ILLEGAL CLAIM.

### SHIRLEY *v.* JONES.

A pre-emption claim initiated and maintained in the interest of another is illegal, and the filing made thereunder must be canceled.

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

On the 16th of September 1878, Jacob Harshberger made timber culture entry for the N. ½ NE. ¼ SE. ¼ NE. ¼ and NE. ¼ SE. ¼ Sec. 12, T. 11 S., R. 6 W., Salina, Kansas.

This entry was canceled by relinquishment September 17, 1885, and

the same day Henry Jones, the defendant herein filed his declaratory statement No. 20517 for said tract alleging settlement the day before.

May 26, 1886, William J. Shirley, plaintiff herein, made homestead entry No. 24090 for the same land.

August 12, 1886, Shirley filed in the local office a complaint in the nature of a contest against the filing of Jones, alleging that he was not a citizen of the United States; that prior to his filing he had exhausted his pre-emption rights; that his filing was not made in good faith, and that he had not improved the land, nor resided thereon as the law required.

August 21, 1886, both parties appeared, and by consent the case was continued to October 12, 1886, at which time Shirley verified his complaint by his corroborated affidavit. Both parties appeared attended by counsel.

The register and receiver recommended the cancellation of Jones' filing for lack of residence and improvement, and because the evidence showed that he was not a citizen of the United States at the time Shirley's rights attached.

On appeal by Jones, your office by its letter of February 2, 1889, reversed the decision of the local officers, and held that the residence and improvements of Jones were sufficiently established; that he had not exhausted his pre-emption rights, but being in doubt as to the evidence of citizenship your predecessor directed this point to be reserved until Jones offered his final proof when more satisfactory evidence might be introduced as to the matter, and allowed Jones ninety days in which to submit the final proof and satisfactory evidence of citizenship.

From this decision Shirley appeals.

I can not concur in the decision of your office in its finding as to the residence and improvements of Jones. The evidence shows that for three or four years prior to the relinquishment of Harshberger and the filing of Jones he had been in the employ of Harshberger as a hired hand, having "nothing except what he worked for." That Jones and Harshberger went together to the local office when the former relinquished his timber culture entry, and Jones immediately filed his declaratory statement for the land. They both testify that sometime afterwards Jones executed and delivered to Harshberger his promissory note for five hundred dollars. This note was not produced on trial and neither Jones nor Harshberger could remember its date.

Jones constructed a box house on the land twelve by fourteen feet, Harshberger paying for the lumber. It had no floor, no glass in the window, no stove, chimney, not even an aperture for a stove-pipe. Jones claims to have slept there except in the cold weather in winter, when he slept at Harshberger's. After his filing he continued to work for Harshberger as a hired hand at eighteen dollars a month and his board, and was still so employed at the time of the hearing. Prior to the hearing Jones had raised about four acres of corn on the land, his

cornfield being in the same inclosure with that of Harshberger's, all plowed and cultivated together with no lines or boundary between them. Harshberger used Jones' pasture in common with his own. There was no "well, pig-pen, chicken house or coop, stable, corncrib, granary" nor other outhouses on the land, in fact nothing but the house (which was not habitable) to indicate that Jones had made any calculations or preparations to occupy this land as a home, his only occupancy of the house consisting in sleeping there when the weather would permit.

I think all the evidence together shows that Harshberger and not Jones is the real party in interest. He says himself that he relinquished his timber culture entry because he was satisfied that he could not hold the land longer under his entry, and from the evidence I have no doubt that he procured Jones to file on the land in order that he might in the end procure the title himself under the filing of Jones.

From this view of the evidence it is not necessary to discuss the other charges in the contest affidavit.

The filing of Jones will be canceled. The decision of your office is therefore reversed.

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### RANCHO PUNTA DE LA LAGUNA—CIRCULAR INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, December* 1, 1890.

*To the Registers and Receivers of the U. S. Land Offices, California.*

GENTLEMEN: Your attention is directed to the provisions of an act of Congress approved October 1, 1890, entitled "An act relative to the Rancho Punta de la Laguna," a copy of which is herewith enclosed; and will be found also in the latest volume of the Statutes at large, page 644.

It is found that the allegation in the preamble of said act is sustained by the evidence; and the record submitted shows, *prima facie*, that the following named persons are the beneficiaries, and entitled respectively to select the quantities of land set opposite their names, viz:

| | Acres. |
|---|---|
| W. L. Adam | 424.99 |
| J. L. Shuman | 424.99 |
| Erminia Dargie, formerly Erminia Peralta | 424.99 |
| Josefa P. Van Vrankin, formerly Josefa Peralta | 424.99 |
| Isaac Goldtree | 849.99 |
| J. B. Arellanes | 849.99 |
| W. E. Dargie | 849.99 |
| J. H. Rice | 212.49 |
| Eliza Dutard, wife of Hippolyte Dutard | 212.49 |
| L. M. Kaiser | 219.49 |
| S. I. Jamison | 173.86 |
| Estate of A. Toguazzini | 38.63 |
| Total | 5099.89 |

William E. Dargie, of Oakland, California, one of the parties in interest, has been constituted attorney in fact of all the other parties above named, except in the matter of the estate of Antonio Tognazzini, deceased.

The right of Mr. Dargie, under his powers on file in this office, to make all the selections, under the terms of the act, except 38.63 acres due the Tognazzini estate, will be recognized.

There are several minor children of said Tognazzini, and an administrator of his estate has been appointed.

The said administrator, or a duly authorized guardian of said children may make the selection for "the heirs of Antonio Tognazzini, deceased." A full forty acre tract may be taken at whatever district land office in California the application to select is made, and cash paid for the excess over 38.63 acres; and the usual "cash excess receipts," in duplicate, will be issued.

The lands to be selected under the law, and these instructions, must be unoccupied, unappropriated, and unreserved public lands of the United States in the State of California, not mineral, surveyed or unsurveyed, "and in tracts not less than the subdivisions provided for in the United States land laws."

These selections, therefore, may be made at different land offices, for the smallest legal subdivisions, or larger ones. Compact form, or contiguity, is not required by the act.

If unsurveyed land is applied for, immediate steps will have to be taken to ascertain the exact quantity and character of the land which the party desires to select.

All these selections must be made within one year next after October 1, 1890.

The act is mandatory upon this point, and the land department has no authority to extend the time so prescribed by Congress.

The enclosed forms, "A" and "B" may be used in effecting the selections. They may be used in manuscript or printed form, and adapted to the number of legal subdivisions applied for at one time in your office.

Form "A" is an application to select.

Form "B" is a certificate of entry, with a register's and receiver's number. These certificates will be issued in duplicate; one to be transmitted to this office (with the application), and the other delivered to the person making the selection.

A new series, commencing with No. one, will be used, at each land office in California in this matter, and a separate docket must be kept of all selections made under the aforesaid act at your office. The said applications and certificates connected with any such selections, will be reported to this office, regularly, together with a separate abstract thereof, with your monthly returns.

Care must be taken to keep the selections made by, or for, each of the above named beneficiaries, "entirely separate and distinct."

A tract in part satisfaction of the amount due one party, as hereinbefore indicated, cannot be coupled in an application, or certificate, with a tract desired by another of the parties named."

In case any application to select under said law, and these instructions, is denied or rejected by you, for any cause whatever, the application and facts will be at once reported to this office in a special letter, for appropriate action.

Very respectfully,

LEWIS A. GROFF,
*Commissioner.*

Approved.
JOHN W. NOBLE,
*Secretary.*

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### RAILROAD RIGHT OF WAY MAP OF LOCATION.

### LONGMONT, MIDDLE PARK, & PACIFIC RY. CO.

A map filed under the right of way act within twelve months after definite location of the line of route delineated thereon, showing a section of road over surveyed public land, which is returned for amendment, will be held to have been filed in time, though the statutory period may expire before the perfected map is filed in the local office.

A map filed under said act will not be approved where the statements in the certificate, and affidavit, accompanying the same are not in accordance with the conditions surrounding the case.

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

With letter of July 10, last, the Department returned to you a map theretofore submitted, and filed by the Longmont, Middle Park and Pacific Railway Company under the right of way act (March 3, 1875, 18 Stat., 482), with a statement that approval thereof was withheld because the map was not filed within the time required by the act, without allusion to other objections. In a subsequent letter, that of September 6, last, you stated that two maps had been filed in 1881 by the Longmont, Middle Park and Pacific Narrow Gauge Railway Company, now known by the name above mentioned, which were returned to the company because of defects, and that no action had been taken in the premises till the present map was filed. You submitted the matter for directions, and, on the 1st ultimo, re-submitted the map.

In reply and for your guidance, I have to state, generally, that a map filed under this act within twelve months after the definite location of the line of route delineated thereon and showing a section of road over surveyed public lands, which is returned to the company filing it because of imperfections, will be held to have been filed within the statutory period although the legal limit may have elapsed before the

perfected map, or a similar one in its stead, is again filed in the local office.

Laches as respects the re-filing of this map would not operate against favorable action thereon, according to the above view, and in the light of the statements in your letter of September 6, if the map were otherwise properly executed and authenticated and accorded with the facts as presented.

Your letter states that Longmont, the eastern terminus of the section of road, is in section 10—2 N.—69, W., while the map shows it to be in section 3; and that Ward, the western terminus, is in section 1—1, N.—73, W., while that town is not noted on the map, but the section of road ends at a point on the west line of section 18—1, N.—72, W. The statement in the certificate attached to the map is not in accordance with the conditions surrounding the case and such is true respecting the affidavit which precedes the certificate.

By reason of the foregoing objections the map is herewith returned unapproved.

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### PRACTICE—EVIDENCE—PRE-EMPTION CONTEST.

### CONN *v.* CARRIGAN.

An affidavit filed with an appeal to the Department cannot be received as evidence in a contested case.

The temporary removal of the claimant from land of his own, prior to the establishment of residence on his pre-emption claim in the same State will not take such claim out of the second inhibitory clause of section 2260 R. S.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 4, 1890.

I have considered the appeal of James Carrigan from your office decision of May 17, 1889, holding for cancellation his pre-emption cash entry, made October 19, 1886, for the SW. ¼ Sec. 21, T. 6 N., R. 34 W., McCook, Nebraska.

On March 15, 1887, Leslie Conn made application for a hearing, in which he alleged that "James Corrigan has moved his family, himself, and dwelling-house, from deeded land of his own in this State to reside on the above described pre-emption cash entry, which deeded land was his deeded homestead, which is contrary to the ruling of the Land Department."

The hearing was duly had by your order of June 6, 1887, and the register and receiver, from the evidence submitted thereat, found that the claimant had acted in bad faith and recommended the cancellation of his entry, and on his appeal you affirm that judgment.

The entryman appeals therefrom to this Department, alleging, among other things, as grounds of error, that your decision is contrary to law

and unsupported by the evidence. The facts are substantially set forth in your opinion.

The land in controversy corners on the southwest with the NE. ¼ of Sec. 29, in the same township. On October 22, 1885, Mr. Corrigan made his final homestead proof on the last described tract, and on November 12, 1885, filed his declaratory statement for the land in question, alleging settlement thereon October 28, 1885. His witness, William Liston, testifies that he thinks the claimant removed from his homestead to Culbertson, Nebraska, on November 8, 1885; that about February 20, 1886, he made his first act of settlement on the land in question, and about April 1, thereafter, he moved with his family from Culbertson to his pre-emption claim.

He further swears that claimant told him "inside of two or three weeks after he made final proof" that he (claimant) "did not want any more land," and did not want to pre-empt the land in controversy. Claimant told the same in substance to his witness, Bullard. It was exactly three weeks from the time he made his final proof on his homestead entry until he filed his declaratory statement for the land in controversy, so that his statement to Liston was probably not sincere. If, as Liston says, he moved from his homestead to Culbertson on November 8, he made the filing within four days after such removal.

The evidence further shows that he moved the house from his homestead claim to his adjoining pre-emption claim, and after he had proved up on that (October 19, 1886,) he moved the same house to his timber culture claim in section 31, of the same township, where he was living at date of hearing. He failed to testify at the hearing as to what his intentions were when he moved from his homestead; and the statements made in his affidavit, accompanying his appeal, as to such intentions, can not now be considered. Rule 72 of the Rules of Practice; Crow *v.* Andrus, 5 L. D., 425; Knox *v.* Bassett, 5 L. D., 351. It is shown that he moved from his homestead to a house he caused to be built in Culbertson, where he staid about four months; thence he removed to his pre-emption claim; and it is insisted that these acts do not constitute an abandonment of his residence on his own land to reside on the public land, and therefore not inhibited by the second subdivision of section 2260 of the Revised Statutes.

I think from all the facts and circumstances in this case, that claimant's residence in Culbertson was intended to be only temporary, and, if so, his temporary removal from land of his own prior to the establishment of residence on his pre-emption claim will not take such claim out of the inhibition contained in said statute. Ott *v.* Crawford, 10 L. D., 117.

I am also of the opinion that this removal to Culbertson was a mere subterfuge to evade the provisions contained in the inhibitory clause in said statute. I am strengthened in this opinion by the fact that his alleged settlement on the pre-emption claim antedated his removal from

his homestead, and whatever the facts really are, he should not be permitted to deny his own statement, which he caused to go on record, in order to avoid the effect of the same in his efforts to secure more government land. It can hardly be said, when he moved from his homestead to Culbertson, on November 8, that he did not intend at that time to move to the pre-emption claim, when he filed on the same four days later. On the contrary, the facts warrant the conclusion that he did intend such removal.

I concur in the conclusions reached in your decision that this entry should be canceled. It is so ordered and the judgment appealed from is affirmed.

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### PURCHASE UNDER THE ACT OF JUNE 15, 1880—AFFIDAVIT.

GRAHAM *v.* GARLICHS.

An affidavit of identity is not required of the original entryman where he applies to purchase under section 2, act of June 15, 1880, and the duplicate receipt accompanies the record.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 5, 1890.

December 8, 1879, Julius Ipsom made homestead entry for the NW. ¼ Sec. 15, T. 4 S., R. 22 W., Kirwin, Kansas. May 19, 1884, he executed a power of attorney, authorizing Hugh McCredie, in his name and for his use, to make final proof for the same "under the 2d section of the act of June 15th, 1880, 21 Stat., 237." June 24, 1884, McCredie, in virtue of his said power of attorney, made and subscribed the cash proof affidavit required of the entryman, and received final certificate in the name of Julius Ipsom.

The land was several times transferred, and on the 21st of April, 1886, was conveyed by warranty deed to Garlichs, appellant herein. April 18, 1885, the said cash entry was suspended by your office, because the required cash proof affidavit was made by a person other than the entryman.

March 20, 1888, George Graham applied to contest the said cash entry, alleging the proof to be insufficient by reason of the affidavit aforesaid. His application was held to await the action of Garlichs, in relation to the suspension of Ipsom's cash entry.

June 14, 1888, Garlichs filed with the register and receiver an abstract of the record showing his ownership of the land, and an affidavit to the effect that he was an innocent purchaser, without notice of the defective affidavit, or of the action of the Commissioner in suspending the entry, and that he had made diligent inquiry to learn the whereabouts of Ipsom, with a view to procuring from him a proper affidavit, but had been unable to find him, and asked that the personal affidavit

of Ipsom be dispensed with, the cash proof already on file accepted, and the land passed to patent. This application was referred to the Commissioner, and, on October 17, 1888, the Commissioner allowed him sixty days (additional) in which to procure and file Ipsom's affidavit.

Garlichs failed to furnish the required affidavit, whereupon your office, by its letter of June 1, 1889, held the said cash entry for cancellation, and Garlichs now appeals.

The affidavit of identity, etc., is required only when the original homestead party applies to enter and "has lost his duplicate receipt." General Circular of January 1, 1889, page 19.

In the case at bar, Ipsom's duplicate receipt accompanies the record. The affidavit was therefore unnecessary.

Graham's contest is dismissed, and you will direct a patent to issue to Garlichs.

Your decision is reversed.

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### SUSPENDED ENTRY—SEGREGATION.

### MELVIN P. YATES.

The suspension of an entry does not relieve the land covered thereby from reservation, hence during such suspension the entry of another for said land cannot be allowed.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 5, 1890.*

I have considered the appeal of Melvin P. Yates from your office decision, dated February 16, 1889, rejecting his application to make homestead entry on the NE. ¼ of Sec. 28 T. 7 S., R. 28 W., Oberlin, Kansas.

The record shows that on November 21, 1884, Horace G. Pearson filed pre-emption declaratory statement for above described tract, and on June 24, 1885, he made cash entry for the same. His proof shows that he had resided on the tract since December 1, 1884, cultivating and improving it. June 16, 1888, your office suspended said cash entry for insufficient residence and improvements, and allowed Pearson sixty days, without republication of notice to file additional evidence.

It also appears that notice of said suspension was sent to Pearson's last address at Hoxie, Kansas, but he was then living in Pasadena, California. September 5, 1888, a second notice was sent to Pasadena, which he received.

September 24, 1888, Melvin P. Yates, applied to make homestead entry upon the same tract, which was rejected same day, by the local land office for the reason that said tract is covered by cash entry of Horace G. Pearson.

Yates appealed from this action to your office, where, on February 16, 1889, you affirmed the decision appealed from. Thereupon he still further prosecutes his appeal to this department.

At the time this application was made, Horace G. Pearson's entry of the tract was of record, uncanceled and was notice to this claimant and all the world of his claim to this land.

His entry, though suspended temporarily, is nevertheless an entry, and withdraws the land embraced therein from market until such time as the same may be finally acted upon. See Henry Cliff (3 L. D., 216).

A mere suspension of Pearson's entry until he could furnish the additional proof called for does not open this land for entry to the public. And the allowance of sixty days' time for furnishing such proof does not necessarily mean that at the end of that time his entry should be canceled. Circumstances might have arisen during the allotted time which in the discretion of the Commissioner of the Land Office, would be sufficient cause for granting more time.

In this case it appears by reason of Pearson's change of residence the sixty days' time was consumed before he received notice of the action of the General Land Office. The notice was sent to him September 5th and on October 16th, 1888, he began to take steps to comply with the order of the Land Office, ordering him to furnish additional proof.

There could not be two entries at the same time on the same land. Russell *v.* Gerold (10 L. D., 18); Geer *v.* Farrington (4 L. D., 410). It therefore follows that the application of Melvin P. Yates to make homestead entry was rightly rejected.

Your office decision is affirmed.

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### ALABAMA LANDS—ABANDONMENT.

### JAMES E. JOLLY.

An additional homestead entry of land reported, prior to the act of March 3, 1883, as containing coal, can not be allowed until after public offering.

An entry of a less amount than that covered by settlement operates as abandonment of the land not included within the entry.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 6, 1890.

I have considered the appeal of James E. Jolly from your office decision of October 14, 1889, rejecting his homestead application to enter the SE. ¼ of NW. ¼ Sec. 22, T. 14 S., R. 3 W., Huntsville, Alabama.

The record shows that applicant made entry for the S. ½ of NE. ¼, Sec. 22, T. 14 S., R. 3 W., in 1876; and that he has resided thereon with his family ever since. In his present application he asks the privilege of entering the tract above as additional to his original entry of 1876.

July 24, 1889, the local office rejected this application for the reason that he did not allege settlement prior to March 3, 1883, and that the land is classed as mineral.

Your office affirmed the decision of the local office. Whereupon applicant appealed to this Department.

According to the statements of your office the tract sought to be entered had been reported as containing coal prior to the act of March 3, 1883 (22 Stat., 487).

It must, therefore, have been offered at public sale before it is subject to entry. The tract in dispute had not been offered at public sale prior to this homestead application. It follows that unless applicant's rights attached to this land before the act of March 3, 1883, he can have no right now.

The question therefore arises did James E. Jolly make settlement on the tract in controversy before March 3, 1883.

His application is dated July 23, 1889, more than six years after the passage of said act. The attorney for applicant argues that settlement should date back to the time of the original entry in 1876 under the act of May 14, 1880. I do not believe the argument is well taken, because if applicant claims settlement now he must have claimed settlement of this tract at the time of his entry of the original eighty acres in 1876. If so, his entry of the eighty acres will operate as an abandonment of the tract now in dispute. See Cayce *v.* St. Louis and Iron Mountain Railroad company (6 L. D., 356); see also Nix *v.* Allen (112 U. S., 129).

Your office decision is affirmed.

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PRACTICE—CERTIORARI—APPEAL.

SMITH *v.* NOBLE.

An application for the writ of certiorari will be denied, if it appears that the applicant has not sought relief by appeal.

*Secretary Noble to the Commissioner of the General Land Office, December* 6, 1890.

I am in receipt of your letter of September 11, 1890, transmitting an application for certiorari filed by Robert Smith in the case of said Smith against Spencer V. Noble.

It appears that on August 7, 1882, Noble made "mineral entry No. 116, for placer claim No. 1, above discovery and upper one hundred feet of discovery and hill claims adjoining on southeast" Deadwood series, now Rapid City, Dakota, and that subsequently on June 16, 1890, the local officers forwarded a protest filed by Smith, alleging that he was the owner of a portion of said claim by purchase, that he has resided thereon and cultivated it for ten years, "that the part so occupied by him is thirty feet above the remainder of the claim, and of the placer ground on Whitewood Creek; that no placer mining had been done thereon other than prospecting, since he has resided thereon and for years previous; that no one has made any claim to said premises, set

stakes, or posted notices thereon since his settlement;" that Noble has sold all that portion of the placer claim to a railroad company, "which the company is now leveling for machine shops and round houses," and that the ground claimed by him is not valuable for mining purposes.

By letter of July 18, 1890, your office found that the evidence showed the claim to have been owned and worked as a placer by Noble and his grantors, since 1876; that not less than $5000, had been expended thereon for that purpose and that several thousand dollars worth of gold had been taken from the claim; that Noble had given legal notice of his application for patent, and that Smith had failed to file an adverse claim under the statute; that Smith had not alleged that valuable mineral had not been discovered on the claim, and concluded that your office would not be warranted in ordering a hearing.

The protest was accordingly dismissed.

Thereupon protestant instead of seeking relief by appeal, filed this application for certiorari.

By your said letter of September 11, you call attention to the fact that no appeal has been taken in the case, and that the right of appeal has not been denied.

The rules of practice contemplate that any person aggrieved by a ruling of your office shall seek relief by appeal to the Department. This is the ordinary and orderly practice. It does not appear why the applicant failed to pursue this course. The Department will not countenance a resort to the extraordinary remedy of certiorari when an observance of the usual methods of practice furnishes ample relief. Protestants in mineral cases are, under certain circumstances, entitled to appeal. Bright *v.* Elkhorn Mining Co. (8 L. D., 122). Inasmuch as applicant has not sought relief by appeal, the application is denied.

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### HOMESTEAD SETTLEMENT—CONFLICTING CLAIMS.

### BERRY *v.* WEBSTER.

A valid settlement claim under the homestead law, can not be made by one who is at the same time maintaining a settlement claim for another tract under the preemption law.

No rights, as against others, are acquired by the cultivation of a tract under authority from a railroad company that has no right thereto under its grant.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 8, 1890.

The land in controversy was formerly embraced within the limits of a withdrawal for the benefit of the Atlantic and Pacific Railroad Company, but, on May 24, 1886, it was restored to the public domain, in accordance with the decision of the Department of March 23, 1886, in the case of the Atlantic and Pacific Railroad Company (4 L. D., 458), hold-

ing that the company was not entitled to a grant of lands between San Buenaventura and San Francisco, and that the withdrawal of said lands was therefore without authority and void.

On May 24, 1886, the said lands were opened to entry by the order of your office.

Robert Webster filed declaratory statement for the NW. ¼ of Sec. 25, T. 25 S., R. 12 E., M. D. M., San Francisco, California, and on the same day John S. Berry made homestead entry of the same tract. On December 16, 1886, Berry offered final proof, pursuant to notice, which was contested by Webster, and testimony was offered by both parties upon which testimony the local officers held that Webster was the prior settler and should be allowed to make final proof, and that Berry's entry should be canceled. Upon appeal, your office affirmed this decision, and Berry appealed.

It appears from the testimony that Berry cultivated the land for eight years prior to restoration, claiming the land under the authority of the railroad company. On May 8, 1886, he moved a house upon the land, and established his residence with his family, having moved from his adjoining pre-emption claim, upon which he offered final proof in April preceding.

Webster first made settlement upon the claim in June 1885, by sleeping on the land, and then left the claim to purchase lumber and to qualify himself to enter the land by filing his declaration of intention to become a citizen of the United States. He returned to the land the latter part of June of that year and slept on the land in the gulches. On July 4, Webster hauled some lumber on the land, which was removed by Berry after he had ordered Webster to remove it, who refused to do so. In November Webster built a cabin, and resided therein until the date of the hearing, his wife having lived with him from May 22, 1886, when she came from England and joined her husband in this country.

It will be seen from the record that Berry did not make final proof upon his pre-emption claim until April, 1886, and in his testimony he states that he first made settlement and residence upon the land on May 8, 1886. He could not make a valid settlement until after he had offered proof on his pre-emption claim, without abandoning that claim, nor did his cultivation of the claim under the authority of the railroad company give him any right over others, inasmuch as the company had no right to the land.

I think the proof clearly shows that Webster actually settled and resided upon the land from November, 1885, up to the time of the hearing, and warrants the finding of the local office and of your office that Webster was the first *bona fide* settler upon the land, and the decision of your office holding the entry of Berry for cancellation and allowing Webster to make final proof is affirmed.

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

## SYNDICATE LODE MILL SITE.

A mill site location not made for the use or occupancy of the applicant, but for the benefit of another, cannot be passed to patent.

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

I have considered the appeal of A. E. Wannemaker from so much of your office decision, dated September 3, 1889, as holds for cancellation the Syndicate mill-site mineral entry No. 437, made October 7, 1885, at Durango, Colorado.

The record shows that the Syndicate lode claim was located by W. E. Steele September 28, 1880.

January 14, 1884, Steele conveyed to Alice F. Wannemaker the claim. Alice F. Wannemaker and W. E. Steele on October 8, 1884, conveyed the same to A. E. Wannemaker.

October 11, 1884, A. E. Wannemaker located the Syndicate mill-site known as the Syndicate lode mill-site.

October 7, 1885, A. E. Wannamaker made entry for the Syndicate lode and mill-site.

September 3, 1889, your office held for cancellation applicant's mineral entry to the extent of the mill-site lot No. 2185 B., embracing five acres.

Section 2337, under which applicant seeks for patent is as follows:

Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. 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 this section.

The evidence, upon examination discloses that ever since the mill-site in dispute was located by Wannemaker it has been occupied by coke ovens for the manufacture of coke from bituminous coal for the use of the Grand View Mining and Smelting company's smelter at Rico, Colorado.

At the time applicant located the Syndicate mill-site he agreed to deed the same to the above named company as soon as he could obtain patent therefor. This arrangement seems to have been made because the Grand View Mining and Smelting company was not at that time the owner of any lode or mine and could not therefore obtain patent for a mill-site while applicant, Wannemaker, being the owner of Syndicate lode could obtain a patent for a mill-site to be used in connection therewith.

It seems, therefore, that said mill-site was not located for the use and occupancy of applicant, but was to be conveyed to the above named company. In his location certificate applicant said that the Syndicate Mill-site was to be used and occupied as a mill-site in connection with the Syndicate lode. In fact, it has never been used or occupied for any such purpose, but on the contrary, it is admitted by the evidence, that it has been continuously used by the Grand View Mining and Smelting company. These facts show conclusively that the land is not used or occupied for the purpose for which it was located or for any purpose in connection with the Syndicate lode.

Whatever improvements are upon the mill-site were not placed there by Wannemaker.

The claimant has not shown such use and occupation of the land in question as is contemplated by Sec. 2337, R. S. See Charles Lennig (5 L. D., 190); Le Neve Mill-site (9 L. D., 460).

Your office decision is affirmed.

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### PRE-EMPTIVE RIGHT—SECOND FILING—MINOR.

JOHNSON *v.* ROUNTREE.

A minor who files a declaratory statement with full knowledge of his disqualification under the law, and subsequently sells his relinquishment of the claim, exhausts thereby his pre-emptive right, and can not be allowed to make a second filing.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 8, 1890.

I have considered the appeal of Lourain Johnson from the decision of your office of May 11, 1889, allowing the final proof of Charles J. Rountree upon his pre-emption claim for the E. ½ of the NW. ¼ and the W. ½ of the NE. ¼ of Sec. 25, T. 3 S., R. 24 W., Kirwin, Kansas.

It appears from the record that on August 5, 1885, Rountree offered proof upon said claim, when Johnson protested, alleging an adverse and superior claim to the land by virtue of his declaratory statement, filed July 13, 1885. Upon this protest a hearing was had, and the local officers found in favor of defendant, from which decision the protestant appealed, alleging error in said decision in holding: (1) that the defendant did not exhaust his pre-emption right by his filing made April 8, 1880; and (2) in holding that he had complied with the law as to residence and cultivation. Your office affirmed said decision, and held:

As to the 1st error assigned, the testimony shows that when he was eighteen years of age, defendant made or procured another man to make for him a D. S. filing on a certain tract of land, that he only held said filing a few weeks, and then sold it and relinquished all his right to it for $10. His filing at that time was of no legal effect, as he was not a qualified pre-emptor, and is consequently not a bar to his exercise of his right under the pre-emption law after he had become qualified to do so.

Your office further held that, as to residence and improvements on the tract, he had complied with the law.

The controlling question in this case is, whether the defendant, with a full knowledge of the fact that he was a minor and not qualified to make a pre-emption filing, did, notwithstanding such knowledge, make a filing and sell the relinquishment of his claim. If he did, he has exhausted his right, and it is unnecessary to consider the question as to whether he has complied with the law.

In his testimony, he says that he did make a filing in 1880 for another tract of land, when he was eighteen years old, and that it was made for him by a man named Harman. He says:

> I paid him $3.00 for making said filing. I asked him to do it. I broke five acres of prairie on this land, is all I done. I done nothing with the land afterward. Mrs. Right has that land now. She paid me $10.00 for my paper on that land. I signed my name on back of papers.

This case is controlled by the decision of the Department in the case of Allen *v.* Baird, 6 L. D., 298. In that case the Secretary said "In the first filing Allen stated that he was 'over twenty-one years' of age, when he knew that statement was untrue." "The land was subject to settlement and entry, and Allen can not now be heard to say that his first filing was illegal."

In the case at bar, it does not appear that Rountree was prevented from perfecting his entry, and, although he was disqualified from making filing or entry, yet he might have perfected his claim upon attaining majority. His attempt to acquire title, knowing that he was under age, and his speculation on the land by the sale of his relinquishment, has exhausted has right, and his filing should be canceled.

Your decision is reversed.

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### MINING CLAIM—CHARACTER OF LAND.

### MORRILL *v.* MARGARET MINING CO.

A mineral application will not be allowed if the mineral character of the land does not satisfactorily appear.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 8, 1890.

I have considered the case of Benjamin G. Morrill *v.* The Margaret Mining company on appeal by both parties from your office decision of May 20, 1889, finding that the land in controversy, being unsurveyed public lands in Seattle land district, King Co., Washington, has no value for either mining or agricultural purposes.

The record shows that on the 26th day of August, 1886, the Margaret Mining company filed in the local office its application to purchase the Gray Eagle Mining claim being survey No. 52, situated in King county, Washington Territory, on unsurveyed public land.

On May 14, 1886, and afterwards on June 25, 1886, Benjamin G. Morrill filed in the local office his protest against the allowance of a mineral entry for said land by the Margaret Mining company or any one else alleging his settlement upon and improvement of a claim on unsurveyed lands in March, 1885. That subsequently a mining company located a mineral claim embracing the same lands, called the Gray Eagle. That the object and purpose of said mining company is to obtain title to some hot springs. That "there is no valuable mine on the claim, and they make no pretensions to one outside of obtaining a patent to Sulphur Springs." He further alleges that he was an occupant of the land in question before any parties interested in the said mining company. That he had erected buildings on the claim and that it had been his home for the past eighteen months.

On the 12th day of November, 1886, a hearing was ordered by the local officers to determine the character of the said "Gray Eagle mining claim." In pursuance thereof the testimony was in part taken before a notary public in King county, Washington Territory, partly in the form of depositions, and the remainder before the local officers.

From the evidence introduced in the case the local officers, on the 7th day of November, 1887, refused the application of said Margaret Mining company, from which said company appealed to your office, which on the 20th day of May, 1889, found "that said claim has not been proven to be of any value for mining purposes, neither is it of any value for agricultural purposes. Hence it must be held to be most valuable for its hot springs thereon and therefore subject to sale under the general laws, and not under the acts relating to the sale of mineral lands."

From your said decision both parties appeal.

It appears from the evidence that prior to the organization of said Margaret Mining company, said Benjamin G. Morrill made a settlement upon, and was improving a claim upon unsurveyed public land. That after the organization of the mining company it located the Gray Eagle Lode mining claim upon land embraced in Morrill's claim. In the boundaries of said mining claim there is what the witnesses denominate as the "Hot Springs of Green River," the waters of said springs are supposed to contain valuable medicinal qualities. The value of said springs is not shown by the evidence in this case but Morrill and said mining company seem to value them highly. In fact the acquisition of said springs seems to have been the object of Morrill's settlement, and of the organization of said mining company. After the organization of said company and the location of said mining claim, Morrill was ejected from the land by an officer under some sort of proceedings had before a court at the trial before which he swears he made no appearance, since which time he has been out of the possession. Morrill's improvements consisted chiefly in buildings near said hot springs erected for the accommodation of guests and people visiting said springs for their health, and the breaking and clearing of about an acre of ground which he planted to garden vegetables and potatoes.

The claim crosses Green River and is shown to be generally covered with timber and brush. It is shown to be broken and rocky generally yet there is a portion of it that can be cultivated successfully and has some value as agricultural lands. Morrill's improvements are shown to have been worth from $800 to $1000.

As to the mineral character of the land embraced in the Gray Eagle claim, the evidence fails to satisfactorily show that mineral in paying quantities exists, or has been found on said claim.

It appears that very little effort has been made by the mining company to develop the mineral resources of the claim, the mineral claimants having turned their attention to the mineral springs, which appear to be their sole incentive for acquiring title to the land. The sole issue presented for determination was the right of the mineral applicants to purchase the land and inasmuch as the land is not shown to be mineral in character, your office decision in rejecting their application to purchase was right and to that extent is hereby affirmed.

The rights of Morrill in the tract can properly be determined when he makes application therefor under the law.

Your said office decision is accordingly modified.

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PRACTICE—REVIEW—REHEARING.

CLINE *v.* DAUL.

An allegation of additional evidence, not newly discovered, if made for the first time on review comes too late to justify a rehearing.

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

Frederick Daul has filed a motion for review and reconsideration of departmental decision of June 28, 1890, in the case of Mary Cline *v.* Frederick Daul, involving a part of Sec. 2, T. 8 N., R. 19 W., Grand Island land district, Nebraska.

The ground of said motion is "that said decision of the Honorable Secretary in canceling the entry was contrary to law and contrary to evidence;" that "the evidence of several witnesses introduced by said contestant . . . . . was false and untrue;" that "the said contestee was taken by surprise at the said trial by the evidence of said contestant and contestant's witnesses."

No attempt is made to show wherein said decision was "contrary to law and contrary to evidence." It is not stated whose testimony was false, nor wherein it was false. No explanation is made of the manner in which the entryman was "taken by surprise." The affidavit of the entryman, and two other persons, Levi P. Wells and his wife Jennie M. Wells, are given, to the effect that the entryman has resided on the tract in question continuously since April 1, 1884. It is not necessary

to analyze the statements contained in these affidavits, and compare them with the testimony taken at the hearing. At best they are but cumulative, and insufficient, when taken in connection with the evidence adduced at the hearing, to authorize a reversal of the former decision. But "affidavits filed after judgment, as a basis for or accompanying applications for review, are to be received with great caution" (Thorp *v.* McWilliams, 3 L. D., 344). The entryman made no application for a continuance of the hearing on the ground of the absence of the witnesses; no application before your office for a rehearing for that cause; and as this evidence—being in no sense newly discovered evidence—has never been offered before, it comes too late when produced for the first time on motion for review. Should this motion be granted on the grounds here presented, it would encourage the trial of cases piecemeal, and allow a party to keep back a portion of his evidence for an emergency—a course which would be unjust to the opposing party, and a practice not tolerated in courts of law. The motion is without merit, and must be dismissed.

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### TIMBER CULTURE CONTEST—DESTRUCTION OF TREES AFTER FINAL PROOF.

BROWNING *v.* FRY.

A timber culture entryman who has complied with the law, submitted proof, and received final certificate thereon, is not required by law or any regulation of the Department to replant the tract where the trees are subsequently destroyed by fire.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 10, 1890.

I have considered the case of William F. Browning *v.* Stephen J. Fry, upon appeal by the latter from the decision of your office dated May 25, 1889, holding for cancellation his timber culture entry for the SE. ¼ Sec. 23, T. 5 S., R. 16 W., Kirwin land district, Kansas.

May 26, 1876, Fry made timber culture entry for said tract under the provisions of the act of March 13, 1874.

June 2, 1884, in accordance with published notice he offered final proof before the register and receiver (under the provisions of the act of June 14, 1878), which was approved, and final certificate issued for the land February 14, 1887, Browning initiated contest against Fry's entry, alleging substantially as follows:—That the final proof was fraudulently made; that at the date thereof there was not the required amount of thrifty growing timber on said tract, and that the timber had not been cultivated and protected as contemplated by the timber culture act.

Hearing was ordered and had, the local officers found in favor of

contestant and recommended the entry for cancellation, whereupon claimant appealed.

May 25, 1889, your office affirmed the action of the local office, and claimant again appealed alleging the following grounds of error, viz:—

1. In concluding that the lack of fire-breaks evidenced bad faith.
2. In treating the breaking of the tract denuded of its timber by fire after proof as evidencing bad faith.
3. In concluding that the planting of about two thousand additional trees before proof on an addition to the timbered tract evidenced an intention to prepare for proof in evasion of law.
4. In not considering the equities of Fry.
5. In not concluding that there were a sufficient number of thrifty trees on the land at date of proof to entitle Fry to a patent.
6. In not applying the well known departmental rule that the matter of the acceptance of the proof after entry is governed by the rules in force when the proof was made.

On the trial both parties were personally present, attended by their respective attorneys. A large amount of testimony was offered by them, and therefrom it appears that at the time claimant offered final proof he had about thirty acres under cultivation, and about twelve acres planted to timber ranging from six inches to twelve feet in height, and numbering about thirteen thousand trees.

Several of contestant's witnesses did not know claimant and had not seen the tract in dispute until several years after he had made his entry. Contestant admitted that he first saw section 31, October 13, 1886, and that he had no personal knowledge regarding claimant's efforts to comply with the requirements of law before he proved up on his claim. Joseph Edwards, one of contestant's witnesses testified that he resided for over ten years within forty rods of the tract in dispute; that claimant had about twelve acres planted to timber; that the trees growing thereon June 2, 1884, would average from six inches to twelve feet in height consisting of cottonwood, box elder and walnut; they were planted four feet apart each way; he believed fifteen hundred of them were over nine feet high; that one third or more of all the timber was from five to six years old; the larger trees were growing all over the plat. Witness had personal knowledge that the timber was cultivated both in 1883 and 1884 and that it was in a thrifty condition and compared favorably with other tree claims in that neighborhood, and that at the time of final proof there were at least six thousand seven hundred and fifty trees from six inches to twelve feet in height growing on this claim; and that the land was in a good state of cultivation. The undisputed evidence also shows that claimant had repeatedly replanted or refilled his tree plat with either tree seeds or cuttings whenever he discovered that the seeds or cuttings previously planted had failed to germinate or grow.

The weight of affirmative evidence shows that claimant had broken a fire guard around three sides of his tree plat prior to 1888, but that no

ordinary fire guard could have stopped the ravages of the fire which destroyed his timber in the fall of the year 1884.

It is shown by uncontradicted evidence that the fire which destroyed claimant's timber started on land owned by one C. B. Nichols about three miles northwest from the tract in dispute. There was a strong wind blowing at the time which carried the burning tumble weeds and grass along, destroying everything combustible in its track.

In the case of Reynolds *v.* Sampson (2 L. D., 305) it was held that the entryman should not be held responsible for the results of incendiarism nor for the destruction caused by floods; and in the case of Hupp *v.* Overall (7 L. D., 11) it was held that if a claimant was in good faith attempting to comply with the law, under which his entry was made, and that a devastating fire had swept over the land destroying the major portion of his trees, it appearing that no ordinary precaution could have prevented such destruction, that his entry should not be cancelled.

Upon review of the record in the case at bar, I am convinced that claimant's final proof was honestly made; and as it was accepted by the local officers, and final certificate had issued thereon, he was not required by law nor by any rule of this Department to replant the tree plat destroyed by fire, and as it appears that final certificate was issued to claimant in accordance with the rules then in force (Jacob E. English, 10 L. D., 409), I must reverse the decision appealed from and direct that the entry pass to patent.

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RAILROAD GRANT—WITHDRAWAL—ENTRY—SETTLEMENT CLAIM.

STEWART *v.* NORTHERN PACIFIC R. R. CO.

The withdrawal on general route does not take effect upon land covered by a homestead entry, even though the statutory life of such entry may have expired prior to said withdrawal.

When occupancy alone is relied upon to except land from a railroad grant it must be affirmatively shown that the person in possession could have asserted a claim to such land under the settlement laws.

*Secretary Noble to the Commissioner of the General Land Office, December 11, 1890.*

This is an appeal by the Northern Pacific Railroad Company from your office decision of November 18, 1887, wherein you affirm the local office and reject the company's claim to the E. ½ NW. ¼ and E. ½ SW. ¼ Sec. 21, T. 18 N., R. 1 W., W. M., Olympia, now Seattle, land district, Washington Territory, "with a view to allowing" the application of William A. Stewart to file a pre-emption declaratory statement for the tracts named.

The land involved is within the limits of the withdrawal upon the map of general route of the company's road filed August 13, 1870, and

also within the limits of the grant as designated by the map showing the definite location of said road filed May 14, 1874. Said land was also embraced in homestead entry No. 330 made by John C. Wood, July 11, 1863. This entry as shown by the records of your office was canceled December 21, 1871, for abandonment.

On May 3, 1886, the applicant Stewart, presented at the local office his pre emption declaratory statement alleging settlement the same day and the same was, on August 26th following refused for conflict with the company's grant.

By letter of August 13, 1886, your office directed the local officers "that if Stewart can allege that the land was claimed or occupied May 14, 1874" *i. e.*, the date of definite location, to order a hearing to determine the fact.

On October 4, 1886, the applicant Stewart filed in the local office his affidavit (not corroborated) wherein he averred upon information and belief "that said land was cultivated during the years 1874, 1875, and 1876, and that it was claimed during said period by settlers thereon."

A hearing against which the company protested alleging *inter alia* that it was based upon an insufficient showing, was had (after continuance) in pursuance of your said office letter at the local office on January 8, 1887, when both the applicant Stewart and the company appeared.

The testimony submitted was that of two witnesses for the applicant who resided in the neighborhood and who had been familiar with the land for a number of years.

One witness stated that in June 1874 the homesteader, Wood, had asked him (witness) to help him repair fences on the land, and also that he (Wood) had continued to claim the land up to the time last mentioned. The other witness, who lived about a mile and a half from the tract, stated that he knew Wood claimed the land from 1871 to 1874 "by talking with him." This witness also stated that "there was a man that farmed the place claiming that he had rented the place of Mr. Wood in 1874. In 1875 there was a man by the name of Charles Zell who rented the place in the same way." Witness however supposed that Wood only rented "what was under fence." He (witness) also stated that from 1871 to 1874, Wood lived a portion of the time in Olympia and a portion of the time in the country," and also that Wood died about three years before the hearing.

The land involved was, on August 13, 1870—the date of said withdrawal—embraced in the homestead entry of Wood. This entry was made on July 11, 1863, and consequently the statutory period of seven years during which Wood should have made proof in support of his claim had elapsed prior to the withdrawal mentioned. This, however, so far as it might affect this case is not material.

When the said entry was made the land became thereby segregated from the public domain, and so remained until such entry was canceled

of record. It therefore follows that the said withdrawal could not affect the land during the record existence of the entry referred to.

The tract in question being excepted from said withdrawal, it only remains for me to consider the status of the land on May 14, 1874, the date of definite location. If at that time the land was free from a preemption or other claim or right it passed by the grant, and if not it was excepted therefrom.

While the evidence shows that Wood was "claiming" the land in question at the date of the definite location of the road, yet it is not shown that he had not at that time exhausted his rights under the settlement laws of the United States. When occupation alone is relied on to except lands from the grant, it must be shown that the person in possession could have asserted a claim to the land under the settlement laws.

The decision of your office is accordingly modified. The case will be remanded for further proceedings, and the applicant will be required to affirmatively show, at a hearing before the local office, after due notice to the company, that said Wood was qualified to claim said land under the settlement laws of the United States, at the date of the definite location of the company's road. Northern Pacific Railroad Company *v.* Potter (11 L. D., 531). Upon the receipt of the evidence taken thereat, and the report of the local officers thereon, your office will re-adjudicate the case.

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### PRACTICE—APPEAL—ACT OF JUNE 15, 1880.

### PARKER *v.* GRAY.

An applicant under section 2, act of June 15, 1880, who fails to appeal in time from the rejection of his application, is concluded thereby, in the presence of an intervening adverse right.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 11, 1890.

I have considered the appeal of Isadore C. Parker from the decision of your office of June 18, 1889, holding for cancellation her homestead entry for the NW. ¼ Sec. 34, T. 8 S., R. 23 W., Kirwin, Kansas and allowing the application of Wm. R. Gray to purchase said tract under the act of June 15, 1880.

Gray made entry of the tract December 23, 1879, which was canceled for abandonment October 25, 1885. November 16, 1885, Francis Metz filed for said land, and on May 15, 1888, transmuted said filing to homestead entry which was canceled June 30, 1886, and Isadore Parker on the same day made homestead entry of the tract.

On April 24, 1886, while the filing of Metz remained intact, Gray applied to purchase the land, and said application was rejected for the reason that the original entry of Gray had been canceled for abandon-

ment and the tract was then covered by the filing of Metz. From this decision Gray on July 26, 1886—more than three months after his application had been rejected—filed an appeal to your office from the refusal of the register and receiver. Upon this appeal your office reversed the action of the local officers, holding that they erred in not allowing the application to be placed of record subject to the filing of Metz. Your office therefore directed that Gray be allowed to perfect entry within thirty days from notice of this decision, from which action Mrs. Parker appealed.

While the local officers erred in not allowing the application of Gray to be placed of record, yet he is concluded thereby, not having appealed therefrom within the time required by the rules, and not until after the entry of Mrs. Parker had been allowed.

Your decision is reversed and the homestead entry of Mrs. Parker will remain intact.

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RAILROAD GRANT—SETTLEMENT RIGHTS—HOMESTEAD OCCUPANCY.

BOSS *v.* CENTRAL PACIFIC R. R. CO.

The failure of a settler to place his claim of record will not defeat it as against the United States, and the land covered thereby, at the date when a railroad grant becomes effective is excepted therefrom.

The claim of a qualified settler, who has for a long period maintained a residence on unsurveyed land, and is, at the date of withdrawal on designated route, in the actual occupation and possession of such land, though not then residing thereon, is sufficient to except it from the operation of a grant that protects the occupancy of a homestead settler.

*Secretary Noble to the Commissioner of the General Land Office December 11, 1890.*

I have considered the case of E. D. Boss *v.* Central Pacific Railroad Company, on appeal by the former from the decision of your office of December 23, 1886, involving the S ½ NW ¼, SW ¼ NE ¼, and the NW ¼ SE ¼ of Sec. 33, T. 15 N., R. 6 E., M. D. M., Marysville district, California.

It appears from said office decision that "said land is within the limits of the grant of July 1, 1862 (12 Stats., 489) as enlarged by the act of July 2, 1864 (13 Stats., 356), to the Central Pacific Railroad Company, and of the withdrawal ordered for the benefit of said grant, August 2, 1862. The map of definite location of the line of said company's road, opposite the land in question, was filed March 26, 1864."

The said "S. ½ of the NW. ¼" of said Sec. 33, was listed by the company October 23, 1883, but at the date of the filing of the map of definite location (March 26, 1864) it was part of a tract upon which one Richard Hamilton had settled in 1862, having previously bought the improvements and possessory interest of a prior settler, and which said Hamilton had cultivated and improved and had claimed and lived upon

as a home from the time of his said settlement in 1862 to the summer of 1866.

The township plat of survey was not filed until February 3, 1871, and Hamilton could not place his claim upon record until that time, and it appears that he has never done so; but

It is well settled by departmental rulings, that the omission to put a claim of record, while it might defeat such claim as against a subsequent settler who duly files, will not defeat it as against the United States, and the land covered thereby will be excepted from the operation of any withdrawal for the benefit of a railroad, subsequent to the inception of the settlement right. (Northern Pacific R. R. Co. *v.* Evans, 7 L. D., 131 and cases therein cited.)

Lands "to which a pre-emption or homestead claim may have attached at the time the line of the road is definitely fixed" are excepted from said grants to the Central Pacific Railroad Company. (12 Stat., 356; 13 Stat., 489). Your office properly held, therefore, that said land being embraced in said claim at the time the company's right vested under the grant, was excepted therefrom. The subsequent listing of the land by the company, October 23, 1883, did not affect the status of the land. (Roeschlaub *v.* Railroad Company, 6 L. D., 750).

But it is further stated in said decision, that said S. ½ of the NW. ¼ is also within the limits of the grant of July 25, 1866, to the California and Oregon Railroad Company (now a branch of the Central Pacific Railroad), as shown by said company's map of designated route filed September 13, 1867, in accordance with which there was an order of withdrawal October 29, 1867, received at the local office, November 25, 1867.

Your office holds, that while said tract was excepted from the grant to the Central Pacific Railroad Company, by the settlement or pre-emption claim of said Richard Hamilton, yet, that said Hamilton had abandoned said claim at the date September 13, 1867, when the right of the California and Oregon Railroad Company vested under its grant, and that therefore it was subject to the latter grant.

Said Hamilton, as stated above, bought the improvements of a prior settler on the tract embracing said S. ½ of the NW. ¼ in 1862, and lived upon and claimed said tract as a home from 1862 to the summer of 1866. His improvements were valued at $300, and were of such a character as to indicate a settlement for the purpose of establishing a home on said tract to the exclusion of any other. In the summer of 1866, his father (A. Hamilton) died, and Richard Hamilton moved to his father's residence, about a mile distant on an adjoining tract in the same section, "to take care of the family," but he still claimed the said tract from which he had moved, kept it under fence, and used it for stock, and such was the status of the said S. ½ of the NW. ¼ as a part of said claim at the time when the California and Oregon Railroad Company's rights vested under its said grant.

The said act of July 25, 1866 (14 Stat., 239) excepts from the grant lands which "shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of."

Your office holds that "his claim had terminated" at the date the company's right vested under its grant, namely, September 13, 1867, because of his removal in the summer of 1866 to his father's residence on an adjoining tract in the same section. With this conclusion I can not concur.

The record shows that Richard Hamilton had actually resided on the land nearly five years, occupying it as a home to the exclusion of any other, and was both a qualified pre-emptor and homesteader, having exhausted neither his pre-emption nor homestead right, and the land had not been surveyed so as to be open to entry or filing of record.

I am, therefore, of the opinion that Hamilton's claim excepted the said S ½ of the NW. ¼ from the grant to the California and Oregon Railroad Company as well as that of the Central Pacific Railroad Company.

As to the remainder of said land involved in this case, namely, the SW. ¼ of the NE. ¼ and the NW. ¼ of the SE. ¼ of said Sec. 33, it appears, that it also was embraced within the limits of said grants to both said railroad companies, but at the said dates when their rights vested under their respective grants, was covered by the pre-emption claim of A. Hamilton and was therefore excepted from the operation of said grants. This does not seem to be disputed by the railroad company. (Northern Pacific R. R. Co. *v.* Potter et al., 11 L. D., 531.)

All said lands being, according to the views above expressed, excepted from the grants to both said railroad companies, it follows, that said Richard and A. Hamilton having respectively abandoned their claims thereto, they became public land subject to appropriation by the first legal applicant. Talbert *v.* Northern Pacific R. R. Co., 2 L. D., 536; Northern Pacific R. R. Co., *v.* Burt, 3 L. D., 490; Holmes *v.* Northern Pacific R. R. Co., 5 L. D., 333; Roeschlaub *v.* Union Pacific Ry. Co., 6 L. D., 750.

While such was the status of said lands, December 3, 1885, E. D. Boss, the appellant, filed an application to make homestead entry thereon, together with an affidavit that "at the date the grant to the railroad company took effect, valid pre-emption claims" (those of said Richard and A. Hamilton) "had attached to said land." A hearing was had, on which the facts above set forth as to the claims of said Richard and A. Hamilton were established and thereon the local officers denied the application of Boss. On appeal, your office held that said S. ½ of the NW. ¼ was subject to the grant to the California and Oregon Railroad Company as above stated, and that the said SW. ¼ of the NE. ¼ and the NW. ¼ of the SE. ¼, were excepted from the grants to both said companies, and subject to disposal as public land. From this decision Boss now appeals to this Department.

The application of said Boss being in all respects in conformity to law and the land embraced therein being subject to entry, said application should be allowed and I so direct.

The decision of your office is accordingly so modified.

PRACTICE—NOTICE BY REGISTERED LETTER.

JOHN P. DRAKE.

Notice of a decision by mail, whether by registered or unregistered letter, will not bind the party to be served if such notice fails to reach him; but the failure to thus receive notice can not be set up by one whose own laches has prevented service in the manner prescribed.

This rule is specially applicable as against a successful contestant, where the land has been entered by another after the expiration of the thirty days, and without notice of any defect in the service.

*Secretary Noble to the Commissioner of the General Land Office, December* 11, 1890.

This is an application filed by John P. Drake for an order directing your office to certify to the Department the record in the matter of his application to enter the NE. ¼ of Sec. 34, T. 17 S., R. 31 W., Wa-Keeney, Kansas, as successful contestant of the timber-culture entry of Virgil N. Howe, making the following case.

The tract for which he applied to enter was embraced in the timber-culture entry of Virgil N. Howe, which was canceled August 25, 1887, upon the contest of the applicant. On September 1, 1887, the local officers at Wa-Keeney, Kansas, sent notice of the cancellation of said entry to Drake, by registered letter, addressed Dighton, Kansas, which not being called for, was returned to the land office at Wa-Keeney. He alleges that his post office address at the time of the initiation of the contest was and has been ever since at Fellsburg, Edward county, Kansas, and the first knowledge he had of the cancellation of the entry was by letter received from the register, dated November 17, 1888, in reply to a letter of inquiry made by applicant, and on December 18, thereafter, he made formal application to enter the land, which was rejected because of the entry of Samuel S. Kelly for said land, which had been allowed November 12, 1887. Notice of his rejected application was mailed to him December 18, by unregistered letter, but which he received, and on January 26, 1889, his attorney mailed to the local office an appeal to the Commissioner of the General Land Office, which was dismissed by your office on January 9, 1890. From this action he appealed in due time, but your office declined to transmit said appeal, for the reason that the appeal from the local officers rejecting the application was not filed within the time prescribed by the rules.

With said application is filed a copy of the letter of your office of January 9, 1890, dismissing the appeal of Drake, and also a copy of the letter of your office of August 6, 1890, declining to transmit his appeal from your said decision of January 9, 1890.

By reference to the decision of your office dismissing his appeal, it appears that in his affidavit of contest he gave his post office address as "Dighton, Lane County, Kansas," and which was his last known address at the local land office.

In his application he states that his address at the date of the initiation of the contest, and at the date when notice was mailed to Dighton, was at Fellsburg, Edwards county, Kansas, but he does not deny that the address he gave the local officers in his affidavit of contest was Dighton, Lane county, Kansas, and that no other address was given to them by him.

Service by mail, whether by a registered or unregistered letter, will not bind the party to be served, if it be shown that such service failed to reach him, but if by his own laches he has put it out of the power of the officials charged with such duty to serve him in the manner prescribed by the rules, he will be charged with such notice if it be sent in that manner, whether he received it or not, and will not be permitted to plead failure of notice which is due solely to his own laches. Especially will this rule be enforced where the land has been entered after the expiration of the thirty days allowed the successful contestant to enter without notice of any defect of service.

The application is denied.

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### TIMBER CULTURE CONTEST—PRACTICE—EVIDENCE.

### HEARTLEY *v.* RUBERSON.

A charge that an entryman "has failed to comply with the law" is a statement of the contestant's opinion, and not of any fact to be proved, and where objection is made thereto before trial, an amendment of such charge should be required.

A citizen may contest an entry regardless of his own right to enter the land.

Motions to dismiss, and applications to take depositions on interrogatories, should not be filed with an officer designated to take testimony, but when so filed, and forwarded with the testimony to the local office, should be considered on the day of hearing.

Where a new hearing is ordered the failure of a witness at the former hearing to sign his testimony may be cured by his signing the same, after due examination thereof, and making oath thereto.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 11, 1890.

I have examined the record and proceedings in the case of George C. Heartley *v.* James B. Ruberson, on the appeal of the latter from your decision of April 10, 1889, holding for cancellation his timber culture entry for the E. ½ SE. ¼ and E. ½ NE. ¼ Sec. 12, T. 6 R. 38 W., Oberlin, Kansas land district.

On April 20, 1880, Ruberson made timber culture entry for said land and on November 26, 1886, Heartley filed affidavit of contest against the same alleging that "James B. Ruberson has wholly failed to comply with law as to timber culture, and that there is no timber growing on said land at the present time."

Thereupon the entryman was served personally with notice of said contest, the hearing being set for February 3, 1887, and L. M. Harwood

notary public of Sherman county, Kansas, was appointed to take testimony on January 22, 1887, at his office in Voltaire, Kansas.

On the day fixed for taking testimony, the parties appeared before the notary public, and the attorney for contestee filed a motion to dismiss the contest.

The notary public having no authority to pass upon the motion, sent it with the papers to the local office. The contestant introduced his witnesses and at the close of his testimony the contestee by his attorney filed an affidavit substantially in compliance with rules 23 and 24 of Rules of Practice, and accompanied it with interrogatories, a copy of which was served on the adverse party, as appears by indorsement on the papers, setting forth that three witnesses whose names and residences were given were material to him, etc., and that they would not attend before the notary to give their testimony; a fourth was named who lived more than fifty miles distant, and upon this showing he asked an order that depositions be taken in the case, but the notary having no authority to make an order in the case, transmitted the application, with the testimony, to the local office. The contestee was sworn in his own behalf, and some other witnesses, and the taking of depositions closed on January 25, 1887.

On February 3, the day set for hearing, nothing was done in the case, nor was any action taken until June 22, following, when the local officers passed upon the case and recommended the entry for cancellation, from which the entryman appealed, and on April 10, 1889, your office affirmed said decision and held the entry for cancellation; he thereupon appealed to this Department.

Appellant, by his attorneys, assigns the following errors which are material:

First. The register and receiver erred in overruling the motion asking that the case be dismissed, etc.

Second. In deciding the case in the absence of defendant's evidence, when he had applied to have depositions taken, etc.

Third. That the record shows that the notary omitted ten pages of the testimony from the files.

Fourth: That one McClusky did not sign his testimony after it was written out.

Other assignments are made which in my view of the case are not material.

The motion to dismiss is based upon two grounds: First that the affidavit does not allege in what particular defendant had failed to comply with the timber culture law; and Second: That contestant was plaintiff in another contest pending before the United States land office.

In referring to this motion, your office letter says it is "frivolous and not entitled to consideration," yet the first ground of the motion was well taken.

The charge that an entryman "has failed to comply with law," is simply a statement of the contestant's opinion, and does not state any fact to be proven, and where objection is made before trial the contest affidavit should be amended.

The second ground of the motion was not well taken because a citizen may contest an entry regardless of his own right to make entry for the land.

The local officers should have sustained the motion, unless an amend ment had been made to the affidavit, but nothing appears of record to show that it was ever considered by the local officers, although transmitted to them by the notary with the testimony.

Each of these papers, the motion and application was improperly filed with the notary who had no jurisdiction over the case, but only a clerical duty to perform; but when forwarded to the local office they should have been considered on the day of hearing, and while there is nothing to show that the motion was ever "called up" for hearing, the attorney states that the application to take depositions was "called up" and that "on two different occasions he was informed that the order would be issued as soon as the office could find time to do it, and he supposed the order had been issued and the depositions taken and on file in the case."

There is nothing in the record to show that the application was ever considerd by the local officers; certain it is, they issued no order to take the depositions as they should have done, and it is quite apparent that they misled the entryman and his attorney in regard to the matter.

I have examined the testimony on file and am satisfied by inspection of the testimony of the witness, from whose testimony the ten pages appear to have been omitted, that the mistake is a mere clerical error in numbering the pages, and that none were omitted.

In the matter of McClusky's testimony, which he neglected to sign, it is sufficient to say that the statute provides that the deposition shall be subscribed by the deponent.

I have not considered the case upon the testimony transmitted with the papers. I feel that justice and good practice require that the finding and judgment of your office should be set aside, the action of the local officers reversed and the case returned for a full and fair hearing.

The case will therefore be returned to the local office, and notice will be given the parties of the action of the Department. A day will be set for hearing, and upon the contestant amending his affidavit as herein indicated, setting forth the facts as of the date of his original charge, the contestee will be permitted to take depositions under the rules of practice, and the case will be re-adjudicated in accordance with law and departmental regulations. The testimony being regularly taken except the McClusky unsigned testimony, will be considered as

on file, and the testimony of McClusky may be cured, if upon reading it or having it read to him he is willing to say upon his oath that it is his testimony and he shall then sign it.

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NATURALIZATION—FINAL PROOF—EQUITABLE ADJUDICATION.

JOHN B. BURNS.

Naturalization of the father during the minority of the son inures to the benefit of the latter and makes him a citizen.

In the absence of protest, final proof taken at the time and place designated, but not before the officer named in the notice, may be referred to the board of equitable adjudication.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 11, 1890.

I have considered the appeal of John B. Burns from your office decision dated July 26th, 1888, rejecting his pre-emption proof for the SE. ¼ of Sec. 15, T. 114 N., R. 65 W., Huron, Dakota.

The record shows that about May 20, 1883, he settled upon said tract and built a frame house thereon eight by ten feet, with board roof, floor, door and window, and broke about six acres, backset a part of it, and raised three acres of corn, one acre of potatoes and made hay on about nine acres.

About July 15, 1883, while he was absent from his claim for a few days his house and all his furniture were stolen and taken away.

He then built a sod house eight by nine feet inside, in which he continuously lived until February 16, 1884, the date of entry. He was born in Ireland but came to the United States with his father, when quite young.

His father, James Burns, became a citizen of the United States by naturalization at a time when claimant was a minor living in the United States.

Applicant published notice that on February 5th, 1884, he would make final proof before the clerk of the district court at Old Ashton, D. T., and that to prove his continuous residence upon and cultivation of said land he would, the same day before D. N. Hunt, a notary public in and for Spink county, D. T., at Redfield, examine James Gage, George Beaty, Duncan McMillan of Redfield, and Edward Hyde of Altoona, D. T.

February 5th, D. N. Hunt was absent from the county and the testimony was taken at the time and place published, but before Z. W. Craig, notary public.

The proof was accepted by the local office as sufficient.

Your office decision of July 26, 1888, rejected said proof and allowed

entryman ninety days within which to furnish new proof. From this order he appeals to this department and assigns errors.

1st, In rejecting the proof because of meagre improvements, short periods of residence and small area broken and cultivated.

2d, Decision is against the law and evidence.

From an examination of the questions involved I think that claimant's proof of the citizenship of his father, by naturalization, during claimant's minority, is sufficient proof of his naturalization, and that he was a qualified person to make entry under the law. See James H. Robertson *et al.* (9 L. D., 297); Bartl *v.* West (8 L. D., 289).

It is shown by the testimony that his means are limited yet he built a house of lumber on this tract, and when it was removed by a trespasser during his temporary absence, he at once erected a sod house. It is true that the improvements upon the land are not extensive. It is also true that the claimant is a man of limited means. He persistently combatted with adverse circumstances, which, with his continuous residence for nearly eight months, before offering proof, is, it seems to me, evidence of good faith.

The final proof was taken at the time and place mentioned in the notice of the offering of final proof but not before the officer named in the notice. Upon the day set for taking the same, no one appeared to object to his evidence, and in my judgment, it should stand. The proof not having been taken before the officer named in the notice, the case will be referred to the Board of Equitable Adjudication. Eden Merryman (8 L. D., 406).

I therefore, direct its reference to that tribunal for its action.

Your decision is accordingly modified.

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### PROCEEDINGS ON THE REPORT OF SPECIAL AGENT.

### UNITED STATES *v.* SAWBRIDGE.

In proceedings against an entry by the government where the proof leaves it doubtful whether the claimant in good faith complied with the law, his refusal to testify justifies an adverse conclusion.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 11, 1890.

John Sawbridge made pre-emption cash entry of the SW. ¼ of the NW. ¼ of Sec. 9, the S. ½ of the NE. ¼ and the SE. ¼ of the NW. ¼ of Sec. 8, T. 61 N., R. 51 W., Duluth, Minnesota, November 5, 1885. His entry was held for cancellation upon the report of a special agent, April 8, 1886, and a hearing was had thereon.

At said hearing Special Agent Naff was the only witness examined for the government. He testified that he examined the land in August,

1887, and found an unoccupied log house, which bore evidence of having once been occupied. There were about four and a half acres of land broken that had been cultivated, two of which appeared to have been cultivated in 1886. About thirty acres of timber had been cut and removed from the land, and the land was rough, rocky and contained a number of holes as if it had been prospected for ore. There was no well or fence on the premises.

The only witness offered by claimant was Patrick Roche, who testified that he assisted in clearing the land; that they cut the trees from twelve or fifteen acres, and burnt the brush off six or seven acres, which they sowed to timothy; that he helped to clear the two acres near the house, and planted it in potatoes. As to residence, he testifies that he first saw Sawbridge on the land in February, 1885, and last saw him there in October, 1885, and saw Sawbridge and his family living on the land during the months of June, July, October and November. During this time Sawbridge was carrying on business in Tower, a few miles from the claim.

The claimant also offered in evidence the special agent's report, and he was then called upon by the government to testify, but declined to testify, either for the government or in his own behalf. The counsel for the government in offering him as a witness stated that he expected to prove by him that he did not establish an actual residence on the premises on January 10, 1885, or at any time prior to making final proof, and that before making final proof he had not used the land for a home, or for cultivation, and at the time of his entry he was a resident of and engaged in the hardware business in the village of Tower, and has been ever since a resident of that place.

The local officers found from the testimony that he had not complied with the law, and your office affirmed that decision, from which the claimant appealed, alleging the following grounds of error:

First. The honorable Commissioner erred in concurring with the honorable register and receiver in their conclusions.

Second. The honorable Commissioner erred in holding the entry for cancellation.

This appeal might be dismissed, for the reason that no specific error is alleged, but from the record before me I find no error in the decision.

It may be conceded that claimant occupied the premises from the time covered by his entry, but it was at least questionable from the testimony submitted, whether that occupancy was for the purpose of taking the tract for a home, and when he declined to be sworn to testify upon the question as to whether he actually made a home upon the tract, after it had been charged that his home was elsewhere, instead of removing the doubt, he solved it against himself. It is true, that if the testimony showed conclusively that he had complied with the law, the fact that he declined to testify would not affect the case. But there was a grave doubt as to the bona fides of his residence, and no one

better than himself could have settled this question. His refusal to do so justified the holding of the local office and of your office, that the entry was made for speculative and fraudulent purposes, and it is hereby affirmed.

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### PROCEEDINGS ON FINAL PROOF—MORTGAGEE.

### WILLIAM SPRIGGS.

A mortgagee may cure a defect in final proof, caused by the substitution of a witness, by due advertisement of the names of the witnesses who testified, and such proof may then be accepted in the absence of protest.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 10, 1890.

On December 8, 1884, William Spriggs filed his declaratory statement for the E. ½ of the SE. ¼ of Sec. 32, T. 114 N., R. 80 W., Huron, Dakota, alleging settlement thereon the 4th of that month. He made final proof thereon June 4, 1885, payment was accepted and final certificate duly issued.

On May 31, 1888, you required claimant to make new advertisement and new proof, because the improvements "are insufficient to show the good faith of the pre-emptor;" also because one of the witnesses who testified in the final proof was not mentioned in the published notice. Notice of this requirement was sent to claimaint by registered letter at Okobojo, Dakota Territory, and was returned unclaimed. The same was again sent to him at Pierre, D. T., and again returned unclaimed. Diligent inquiry failed to disclose his whereabouts, and on June 29, 1889, the Western Loan and Trust Company appealed from your said office decision. It appears that said company took a mortgage on the land for a loan of money after the issuance of the final certificate.

This appeal presents the question of the sufficiency of claimant's improvements, as shown by the final proof.

There were no improvements on the land at date of filing. Claimant built a house, ten by twelve feet, broke three acres of land, and cultivated the same to corn and potatoes. The improvements are valued at $75. His residence was continuous, at least from December 4, 1884, until June 4, 1885, and his house was necessarily a comfortable one for his existence in the same during the winter months in Dakota. In the absence of any showing as to claimant's ability to place greater improvements on the land than those herein described, I do not feel justified in holding his cash entry for cancellation.

Two witnesses testified in the final proof—one of them was not advertised.

Under Rule 4, of the rules to be observed in passing on final proofs (9 L. D., 123), the company will be required to make new advertisement

of the names of the witnesses who do testify, and, if no protest or objection is then filed, the proof theretofore submitted may be accepted. Allow sixty days from notice of this decision for compliance with this order.

Your said office decision is modified.

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### RAILROAD GRANT—MAP OF DEFINITE LOCATION.

MORGAN *v.* SOUTHERN PACIFIC R. R. CO.

The grant of March 3, 1871, not only contemplates a preliminary designation of the general route, but also a map of definite location, and by such map the primary limits of the grant are determined.

*Secretary Noble to the Commissioner of the General Land Office, December* 12, 1890.

I have considered the appeal of William C. Morgan from the decision of your office of January 2, 1889, rejecting his application to make homestead entry of the E ½ of the NW ¼ and W ½ of the NE ¼ of Sec. 9, T. 6 S., R. 2 W., S. B. M., Los Angeles, California.

Morgan's application to make entry of this land bears date November 20, 1888, and was rejected by the local officers "as being in conflict with the grant to Southern Pacific Railroad Company March 3, 1871" (16 Stats., 579).

On appeal, your office affirmed their decision, and Morgan now appeals to this Department, alleging the following errors: 1. In refusing to allow said entry; 2. In rejecting said application, and 3. In holding that said land was reserved by reason of the application of the Southern Pacific Railroad Company to select said land as a part of its primary grant, when it appears that the land is outside of the primary limits.

The map of designated route was filed in your office April 3, 1871, in accordance with which lands were withdrawn by letter of April 21, 1871, which was received at the local office on the 10th of the following May.

On the 24th of July, 1876, a duly certified map was filed in the General Land Office showing the definite location and construction of that part of the road opposite the land in contest, and the lands were again withdrawn for the benefit of said grant. According to the first map, this land is within the indemnity limits of the grant; but, according to the second map, it is within the granted limits. Both maps show it to be either within the primary or the indemnity limits, and it was "selected by the Southern Pacific Railroad Company May 25, 1883, per list 11."

Morgan was advised that the said land was within this list and claimed by the railroad company at the time he made his application for a homestead entry of the same tract. His application was rejected

on the ground of the railroad company's claim. But he contends, through counsel, that the map of definite location filed July 24, 1876, is of no validity, and that the land he claims is not within the primary limits of the grant.

The supreme court, in the case of Buttz *v.* Northern Pacific Railroad Company (119 U. S., 55–71), says, in effect, that the granting act not only contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry or pre-emption of the adjoining odd sections within forty miles on each side until the definite location is made, but it contemplates the filing by the company in the office of the Commissioner of the General Land Office of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not at that time been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant or other claims or rights.

The grants to the Northern Pacific and Southern Pacific are almost identical. Under the decision of the supreme court in the case above, the map of July 24, 1876, showing the definite location of the line on which the Southern Pacific Railroad opposite the land in contest was constructed, is fully authorized, and according to this map the land is within the primary limits of the grant to the said company.

The decision of your office is therefore affirmed.

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### MOTION FOR REVIEW.

HENRY W. LORD.

Motion for review of the departmental decision rendered July 7, 1890, 11 L. D., 18, in the case above entitled denied by Secretary Noble, December 12, 1890.

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### RAILROAD GRANT—HOMESTEAD CLAIMS.

NORTHERN PACIFIC R. R. CO. *v.* SALES.

Land under cultivation by a qualified homesteader at date of definite location is excepted from the grant to this company even though the claimant did not at such time reside on the land.

*Secretary Noble to the Commissioner of the General Land Office, December 12, 1890.*

This appeal involves the right to the NE. ¼ of the SW. ¼, the SE. ¼ of the NW. ¼, the SW. ¼ of the NE. ¼ and the NW. ¼ of the SE. ¼, Sec. 23, T. 2 S., R. 4 E., Bozeman, Montana, lying within the primary limits of the grant to the Northern Pacific Railroad Company.

At the date of withdrawal, February 21, 1872, the tract was covered

by the homestead entry of James Hildebrand, which was canceled December 11, 1879.

The line of the road opposite the tract in question was definitely located July 6, 1882.

On January 12, 1886, Charles A. Sales applied to make homestead entry for said tract, alleging that it had been continuously occupied and claimed by a qualified settler from 1871 to the date of his application, which was rejected by the local office, for the reason that the tract was within the limits of the grant to said road, and had been listed by the road June 27, 1885, as part of its grant. From this action Sales appealed, and your office, holding that the entry of Hildebrand having excepted the tract from the operation of the withdrawal, ordered a hearing to ascertain the status of the tract July 6, 1882, the date of definite location. Upon the testimony taken on this hearing the local officers found in favor of the applicant, which was affirmed by your office, and from said decision the railroad company appealed, alleging the following grounds of error:—

1. Error to find that John Nye had such a claim to the land at date of definite location of the road as excepted it from the grant.
2. Error in awarding the land to Sales and in not awarding it to the company.

The testimony shows that at the date of definite location the tract was being cultivated by John Nye, who was qualified to make homestead entry, and, although he did not reside on the land, he had then such a claim to it as would except it from the operation of the grant. Northern Pacific R. R. Co. *v.* Potter *et al.*, 11 L. D., 531.

The decision of your office is affirmed.

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### RAILROAD GRANT—OCCUPANCY CLAIM.

### NORTHERN PACIFIC R. R. CO. *v.* BECK.

Occupancy of a tract within the limits of the grant prior to, and at date of definite location, by a person qualified to enter it under the settlement laws excepts the tract from the operation of the grant, but such qualification must affirmatively appear, as well as occupancy at the date when the grant attached.

*Secretary Noble to the Commissioner of the General Land Office, December 12, 1890.*

This appeal involves the right to the NE. ¼ of the SE. ¼ of Sec. 15, T. 1 S., R. 5 E., Bozeman, Montana, which lies within the primary limits of the grant to the Northern Pacific Railroad Company, as shown by map of general route filed February 21, 1872, and as definitely located July 6, 1882.

Herman Kohle filed declaratory statement for said tract August 10, 1871, alleging settlement August 7, and was in possession of said tract at the date of filing of map of general route, which excepted said land from the operation of the withdrawal.

John B. Beck made timber culture entry of said tract March 15, 1883, and filed with his application the affidavit of John Volkers, alleging that the land was settled upon and claimed by Kohle prior to and at date of filing of map of general route, and that Beck had been in possession of said land since 1875, and was then in possession of it.

Your office, on July 23, 1889, held that the timber culture entry of Beck should remain intact, subject to appeal by the railroad company. From this decision the company appealed, alleging the following grounds of error:

I. Error to rule that Beck's timber culture entry should remain intact because he had been in possession of the land since 1875.

II. Error to have found that Beck was so in possession in the ex-parte statement of Volker.

III. Error not to have ruled that mere occupancy of the land does not, of itself, except the tract from the grant. Starkey *v.* Burnham, 21 Pac. Rept., 624; Buxton *v.* Traver, 130 U. S., 412.

IV. If mere occupancy does so except, then it was error to decide the case on ex-parte evidence and not to have accorded the company a hearing in the case.

Although the tract was excepted from the withdrawal, it was error to have allowed the entry of Beck after the definite location of the road upon a mere affidavit that it was occupied by him, but a hearing should have been ordered to determine the truth of the allegations, and the company should have been cited to appear to show cause why the entry should not be allowed, especially since it does not appear from the record before me whether Beck was qualified to enter the tract under the settlement laws.

Occupancy of a tract within the limits of the grant prior to and at date of definite location by a person qualified to enter it under the settlement laws excepts the tract from the operation of the grant, but such qualifications must affirmatively appear, as well as occupancy at date when the right under the grant attached.

You will therefore order a hearing, of which all parties will be notified.

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### PRE-EMPTION PROOF—CULTIVATION.

### FRED NICKERSON.

Proof of breaking, and the use of the land for grazing purposes, is satisfactory proof of cultivation where it is shown that the land is suitable only for pasturage.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 12, 1890.

I have considered the appeal of Fred Nickerson from your office decision of June 26, 1889, holding for cancellation his pre-emption cash entry for the SW. ¼ of Sec. 24, T. 3 S., R. 29 W., Oberlin, Kansas.

He filed his declaratory statement March 1, 1884, alleging settlement February 1, of that year. He made his final proof before the register

and receiver November 21, 1884, and on the same day paid for the land and obtained the final certificate.

On May 26, 1887, your office directed that claimant be notified to furnish an affidavit, duly corroborated, showing "whether he continued to reside upon the tract after making final proof and payment, and the extent of the improvements and cultivation made after that date."

In your said office decision, holding said entry for cancellation, I find the following statement:

"February 20, 1889, you transmit evidence of service of notice, and report no action."

On examination of the letter, from which the above quotation is made, I find you are in error. The register in his letter of February 20, 1889, advised your office that a registered letter, containing notice of your requirement of May 26, 1887 (above set out), was sent to claimant at the post-office nearest the land, "but the letter was returned unclaimed." In addition to this, claimant testifies that he never received such notice.

Accompanying the appeal is an affidavit of claimant, duly corroborated, stating that the land in question is fit only for grazing, and that he had used it solely for that purpose. In the final proof claimant swears that he used the land "principally for grazing about one thousand head of sheep."

The improvements are shown to consist of a house, twelve by fourteen feet, stable, a well of good water, and five acres broken. The improvements are variously estimated at $25, $30, $50, and $75.

Since the land is shown to be suitable only for grazing purposes, and was so used by claimant in raising sheep which is an agricultural pursuit, further evidence of cultivation is not required. Mary A. Taylor, 7 L. D., 200. I am therefore of the opinion that his improvements are sufficient, as shown by the proof and supplemental affidavits.

But there is filed in this case an affidavit, duly corroborated, by Daniel H. Smith, sworn to before the register, on November 2, 1889, stating that affiant knew the present condition of the land, and that claimant "made fraudulent proof upon the land in this, that he never resided upon said land the six months prior to making proof thereon, nor at any other time; that he did not have to exceed three and three-quarters acres broken and cultivated upon said tract at the time of making said proof, viz: November 21, 1884, nor did he have a habitable house thereon at any time . . . . . and he has made no improvements thereon since date of proof." He asks for a hearing to enable him to prove the above charge.

The question of the entryman's residence is raised for the first time by this affidavit, and since the case instituted by the government against the entry has failed, and the allegations in the affidavit attacks directly the good faith of the entryman in a matter not hitherto raised by the government, I direct that a hearing be ordered on the matters alleged

in said affidavit, and that all parties be duly notified of the time and place of such hearing. United States *v.* Scott Rhea, 8 L. D., 578.

Your said office decision is modified.

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HOMESTEAD—ACT OF JUNE 15, 1880—PERSONAL AFFIDAVIT.

MACFARLAND *v.* ELLIOTT.

A cash entry under section 2, act of June 15, 1880, allowed on the affidavit of the entryman's attorney, will not be disturbed, where after transfer of the land, the entryman refuses to make the affidavit required by the regulations.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 12, 1890.

I have considered the appeal of J. D. Macfarland, transferee, from your decision requiring Ezra Elliott to make a personal affidavit in support of his cash entry for NW. ¼ of Sec. 5, T. 4 S., R. 24 W., Kirwin, Kansas.

The facts in this case are as follows:—

Elliott made homestead entry for said tract June 2, 1879.

On May 15, 1884, he executed a power of attorney appointing J. L. Miller his attorney in fact, and in his name and to his use, to deed and convey the land above described, and giving him full power to do any thing necessary to be done in order to obtain a title to said land under the second section of the act of June 15, 1880, 21 Stat., 237.

On June 4, 1884, Miller made affidavit in which he stated that he was well acquainted with the facts concerning the homestead entry of Elliott, that he was qualified to make the same, and had never transferred the land, and that he made application for the same under the second section of the act of June 15, 1880. The cash entry was allowed by the local officers on the affidavit and final certificate issued June 5, 1884.

Said entry was suspended by your office on April 18, 1885, and Elliott was called upon to make a personal affidavit in support of the same. In response to your letter of February 7, 1889, allowing him sixty days in which to furnish said affidavit, he, by written statement before the register on May 8, 1889, refused to furnish the same.

The record shows that Elliott on June 6, 1884, by deed executed by his attorney James L. Miller, transferred said land to Wm. E. Crutcher; and Crutcher, on July 7, 1884, transferred the same to Frank L. Sheldon, who, on November 12, 1885, transferred it to J. D. Macfarland, who makes affidavit that he paid the sum of $625, for the land and purchased the same in good faith, without any knowledge, direct or indirect, of any fraud, irregularity or omission on the part of the entryman or his agent, and without any knowledge that the entry had been suspended by your office.

In various letters written by Elliott, he alleges that he was induced to execute the power of attorney to Miller by false representations by one Loomis, who assured him that he had no right to the land as he had abandoned it for so long a time, and that he would give him $50 for the power of attorney. This offer appears to have been accepted by Elliott who does not assert that the statements made by Miller in support of the cash entry were false.

In the case of George T. Jones (9 L. D., 97), it was held that "a cash entry under the act of June 15, 1880, allowed on the affidavit of the entryman's attorney, will not be disturbed, where, after transfer of the land, the entryman refuses to make the personal affidavit required by the regulations." In said case it was stated that "Such cases as those of Falconer *v.* Hunt (6 L. D., 512): Addison W. Hastie (8 L. D., 618), and Daniel R. McIntosh (8 L. D., 641), show it to be an already established rule, that the seller of a final certificate will not be allowed to take advantage of an irregularity in his proof, to ignore rights which he himself has conferred, and dispose again of property already once assigned."

The case at bar comes under these rules. Your decision is, therefore, reversed.

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### RAILROAD LANDS—ACT OF MARCH 3, 1887.

### CENTRAL PACIFIC R. R. CO.

The act of March 3, 1887, is mandatory in character, and calls for judicial proceedings for the recovery of title, where the record shows that land has been patented to a railroad that was in fact excepted from the grant.

*Secretary Noble to the Commissioner of the General Land Office, December 12, 1890.*

By your office letter, dated June 24 last, were transmitted certain papers relative to the action taken by your office looking to the institution of proceedings under the act of Congress, approved March 3, 1887 (24 Stat., 556), to set aside the patent issued to the Central Pacific Railroad Company, on June 23, 1883, for N. ½ of the SW. ¼ of Sec. 15, T. 12 N., R. 8 E., M. D. M., California.

It appears that the Department, on September 17, 1888 (Lands and Railroads, vol. 83, p. 132), in the case of Jefferson T. Thatcher *v.* Benjamin Bernhard, involving the SW. ¼ of the SW. ¼ of said section, found that the land was within the limits of the grant to said company by the act of Congress approved July 1, 1862 (12 Stat., 489); that on May 28, 1883, said Bernhard offered to file his pre-emption declaratory statement for the N. ½ of the SW. ¼ and the SW. ¼ of the SW. ¼ of said section 15; that at the same time he filed affidavits, alleging that said tracts were settled upon and improved "at the date of the grant to the railroad company;" that a hearing was duly had, and upon the evidence submitted the local officers decided in favor of Bernhard, from

whose decision the company did not appeal; that the company selected said N. ½ of the SW. ¼, on July 26, 1882, upon which patent issued on June 23, 1883; that your office, upon consideration of Bernhard's said application, allowed him to file for said SW. ¼ of the SW. ¼ of said section, but held that "the record being clear of conflicting claims, at the date of the examination of the railroad selections, this office could know nothing of the application of Bernhard and the hearing at the local office. The appellant having slept upon his rights, the land was properly patented to the railroad company," and that "the attention of your office is called to the allegation in the record that the N. ½ of said SW. ¼ of Sec. 15, was settled upon and improved prior to the date of the grant to the railroad company, with the suggestion that an investigation be made with a view to recommending suit to set aside the patent to the company for said tract, if the facts justify such recommendation."

Acting upon said suggestion, your office, on May 6th last, issued a rule to said company to show cause why said proceedings to recover title of said tract should not be duly instituted.

The company, on June 4th following, through its resident attorney, filed its answer, in which it alleged, in brief, that the Department has no jurisdiction to institute proceedings under said act, for the reason that at the date of its selection and at the date of the issuance of said patent, there was no claim of record for said land, and said Bernhard, if he made any settlement in 1865, as alleged, "was under legal obligation to present his claim at the local land office, in accordance with law, within three months after settlement."

This contention can not be maintained. The record shows that said N. ½ of said SW. ¼ was settled upon and occupied by a *bona fide* settler, both at the date of the grant and also continuously to the date of the definite location of its road, when its right attached, as well as when said "selection" was made and patent issued. It was therefore excepted from the operation of said grant and was improperly patented to the company. Emmerson *v.* Central Pacific R. R. Co., 3 L. D., 271; Pointard *v.* Central Pacific R. R. Co 4 L. D., 353; Ramage *v.* Central Pacific R. R. Co. 5 L. D., 274; Central Pacific R. R. Co. *v.* Shepherd, 9 L. D., 213; Icard *v.* Central Pacific R. R. Co., 10 L. D., 464.

Since said act of March 3, 1887, is considered to be mandatory (9 L. D., 649), the recommendations of the present claimants of the land that the patent to the company should not be disturbed can not prevail, and the recommendation of your office, "that a demand be made on the company to reconvey said land to the United States," is concurred in by the Department; and you are hereby directed to demand from said company a reconveyance to the United States of said N. ½ of the SW. ¼ of said section 15, and at the expiration of ninety days from date of such demand, you will make due report to this Department of the action of the company in the premises.

RAILROAD LANDS—ACT OF MARCH 3, 1887.

WELLS *v.* SOUTHERN PACIFIC R. R. CO.

An application under section 5, act of March 3, 1887, to purchase lands erroneously patented to a railroad company can not be entertained until the government has secured a reconveyance of the title.

*Secretary Noble to the Commissioner of the General Land Office, December 12, 1890.*

I have considered the appeal of C. M. Wells from the decision of your office dated November 19, 1888, rejecting his application to purchase all of Sec. 21, T. 7. N., R. 14 W., S. B. M., Los Angeles, California, under the provisions of the act of Congress approved March 3, 1887 (24 Stats., 556); for the reason that the land applied for was patented to the Southern Pacific Railroad Company on January 9, 1885, per list No. 9, as being within the primary limits of the grant to said company (branch line) by act of Congress approved March 3, 1871 (16 Stats., 573). Your office decision also states that the land in question is within "the primary limits of the forfeited grant to the Atlantic and Pacific Railroad Company;" that, although said patent was erroneously issued, yet, pending the result of the proceedings intended to secure a reconveyance of said land to the United States, the land can not be disposed of under the fifth section of said act of 1887.

The appellant asks that, in the event that it shall be decided that said application is premature, the rejection of the same "shall be held in abeyance until the proper time for presenting the same shall have arrived, and that it then be allowed."

The application is clearly prematurely made, but this will not prevent the applicant from renewing the same when the land shall be subject to disposal by the United States. Said appeal is accordingly dismissed without prejudice to the appellant's right to renew his application at the proper time.

RAILROAD GRANT—MINERAL LANDS—SUIT TO VACATE PATENT.

BULLOCK ET AL. *v.* CENTRAL PACIFIC R. R. CO. ET AL.

On the allegation duly corroborated that certain land patented to a railroad company was in fact excepted from the grant, by reason of its known mineral character, a hearing may be directed to ascertain whether the facts justify judicial proceedings for the recovery of title.

*Secretary Noble to the Commissioner of the General Land Office, December 12, 1890.*

By your office letter dated August 20, 1890, was transmitted the petition of W. H. Bullock, D. W. Spear, R. Greenwood, and J. S. Rees, filed in the Sacramento, California, land office and forwarded to your office on August 5th, last, asking that proceedings be instituted by the United

States to set aside a patent issued to the Central Pacific Railroad Company on April 30, 1885, for lot No. 12 of the SE ¼ of Sec. 23, T. 14 N., R. 10 E., M. D. M., on the ground that said tract was known to be mineral long prior to and at the date of the grant to said company, and also at the date when the rights of said company attached to its granted lands, and was therefore excepted from its grant.

Your office letter states that said lot 12 contains an area of 22.75 acres and covers the SE. corner of the SE. ¼ of said section; that it is within the primary limits of the grant to said company under the acts of Congress approved July 1, 1862 (12 Stats., 489), and July 2, 1864 (13 Stats., 356); that the township plat of survey was duly approved on June 9, 1870, and said section was returned as agricultural land; that said lot 12 was listed by said company on July 29, 1884, per list 6, and patented to said company on April 30, 1885, per list 43; that there was nothing upon the records of your office to show that said land was mineral, and in the absence of any objection said patent was regularly issued.

Your office further finds that "the petitioners allege possession and ownership of said lot through succession to the title thereto from the original locators, whom they allege located the same as a placer in the year 1885;" that said patent issued on April 30, 1885; it does not appear that any mineral claim was initiated prior thereto, or that, at the date of said patent, there was any adverse right thereto; that it is not alleged that the Mayflower Gravel Mining Company purchased said lot from said railroad company with a knowledge of any fraud having been perpetrated on the part of said railroad company in procuring title thereto, and the presumption must be that it "is a bona fide purchaser without notice, in which event proof of the fraud must be clear and convincing to justify the cancellation of the patent."

Your office, therefore, in view of the insufficiency of the petition and upon the principles enunciated by the United States supreme court in San Jacinto Company (125 U. S., 273), and United States *v.* Beebe (127 U. S., 338), declines to recommend the institution of suit to set aside said patent.

The affidavits filed in support of the petition allege that

> said lot 12 now is and for said (the last) twenty-eight years has been well known valuable mineral land bearing gold; that the same was held, claimed and possessed under the mining laws and customs at the time of the passage of the act granting lands to the Central Pacific Railroad Company of California, and that the same has yielded a larger amount of gold than almost any other tract of like area in the State of California, reaching probably from $5,000 to $10,000 per acre, and that the same is yet very highly valuable mineral land. That the same at the time of the attachment of the grant to the railroad company, and of the survey thereof and of the issue of the patent thereto in 1885 to said company was actually claimed and worked as mining land and was notoriously known to be valuable as such.

The affiants, twelve in number, swear that they have resided in the vicinity of said tract for the last twenty-eight years and know each part thereof.

If said allegations as to the known mineral character of said lot be true, then the land was expressly excepted from the grant to said company, and the United States has an interest in the land which would fully warrant the institution of proceedings to set aside said patent under the mandatory act of Congress approved March 3, 1887 (24 Stats., 556). McLaughlin *v.* United States, 107 U. S., 526; Western Pacific R. R. Co. *v.* United States, 108 U.S., 510; Mullan *et al. v.* United States, 118 U. S., 271; Winona & St. Peter R. R. Co., 9 L. D., 649; Central Pacific R. R. Co. *et al. v.* Valentine, 11 L. D., 238.

The petitioners offer to bear the necessary expenses, and, in my judgment, they should have an opportunity of establishing the truth of said allegations at a hearing to be duly had before the local office in order that the Department may have the requisite evidence to warrant the institution of proceedings to set aside said patent. (Alexander Moore *et al.*, 2 L. D., 761).

You are therefore directed to cause a hearing to be had before the local land officers, after due notice to all parties in interest, and upon receipt of the testimony taken thereat, together with the report of the local officers thereon, you will consider the same and make due report to the Department.

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### TIMBER CULTURE CONTEST—RELINQUISHMENT.

ROBERTS *v.* GASTON ET AL.

A contest against an entry that appears of record through the failure of the local office to act upon the previous relinquishment thereof, must fail where the party filing such relinquishment has thereafter proceeded in compliance with the timber culture law in the honest belief that his application to enter thereunder has been allowed, and the contestant begins proceedings with full knowledge of the facts.

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

I have considered the case of James Roberts *v.* Thaddeus B. Gaston and Washington I. Anderson, upon appeal by Roberts from the decision of your office dated June 10, 1889, dismissing his contest against Gaston's timber culture entry for the NE. ¼ Sec. 33, T. 24 S., R. 10 W., Wichita, land district, Kansas.

January 23, 1879, Gaston made timber culture entry for said tract and on February 5, 1887, Roberts initiated contest against said entry, alleging as follows:

That he was well acquainted with the tract of land embraced in said timber culture entry and knows the present condition of the same; also that said Thaddeus B. Gaston failed to do any breaking in the years of 1879, 1880, 1881, and 1882, and that he sold his claim to Thos. Anderson who has done or caused to be done all the work that has been done on said claim, and that there has never been ten acres broken on said claim to this date.

Hearing was ordered and set for March 15, 1887, and Gaston was notified of the same.

On the day appointed for the hearing, Gaston failed to appear either in person or by attorney, but Washington I. Anderson appeared in person and by attorney and having first disclosed on oath the nature of his interest in the tract as required by rule 102 of the Rules of Practice, he was made a party defendant, and on motion of contestant the case was continued to April 14, 1885, at which time both the contestant and intervenor appeared and submitted testimony, and on April 22, 1887, the local office found in favor of contestant.

The intervenor appealed, and your office dismissed the contest and decided that Anderson was entitled to make entry for the land, whereupon contestant appealed.

The record of the hearing shows that contestant testified he resided at Sylvia, Reno County, Kansas, and had known the tract in dispute since September 1886; that before he initiated this contest he had heard that Washington I. Anderson was the owner of this tree claim, but that the record of the local office showed Gaston's entry to be still uncanceled.

On his cross examination he admitted that on the day he went to serve Gaston with notice of this contest, Gaston informed him that he had sold his improvements to Anderson, and had executed and delivered to Anderson a relinquishment of his interest in the land years before, receiving from Anderson two cows as payment therefor. He further admitted that he induced Gaston (by paying him twenty-five dollars) to execute and deliver to him (contestant) February 5, 1887, a second relinquishment of his timber culture entry, and that Gaston at the same time had promised to testify at the hearing that he had not done any work on the claim since he sold it in 1881; that Gaston afterwards declined to do so.

Only one other person was sworn and examined on the part of contestant, and the most material part of his testimony was to the effect that there were not more than about three thousand trees growing on this claim at the time of the hearing.

The intervenor and several other persons were sworn and testified on his behalf, and their testimony shows that about October 18, 1881, the intervenor purchased of Gaston his improvements on the tract in dispute consisting of five acres of plowed land, paying therefore the value of about one hundred dollars, viz: two cows and two calves. At the same time Gaston executed a relinquishment of his said entry before a justice of the peace in and for Stafford county, Kansas, which relinquishment was written on a portion of the back of the duplicate receiver's receipt.

October 26, 1881, Anderson went to Hutchinson, Kansas, and there employed a firm of reputable lawyers to prepare the usual application to make entry for said tract under the act of June 14, 1878 (20 Stat.,

113). After executing his application he gave his attorneys Gaston's relinquishment and eighteen dollars to pay the fees and commissions at the land office, as well as other expenses incurred. About five days thereafter the intervenor's attorneys transmitted to the local office a letter purporting to contain his application, the relinquishment, and legal fees.

November 4, 1881, the register wrote to the intervenor's attorneys as follows:

Gents:

The enclosed relinquishment will not answer. Mr. Gaston must acknowledge the relinquishment before some court of record, a J. P. will not answer. You state that you enclose application and fees of Anderson, the fees came through all right, but there was no application enclosed.

A clerk in the attorney's office says he notified Anderson by mail of the requirements of the local office, but Anderson testified that he never received any such notice, and had always supposed his attorneys had duly entered the tract for him until after the initiation of this contest; that as soon as he heard of the contest he went to his attorney's office and informed them of what he had heard, and upon inquiry made by them, they discovered that the application and relinquishment had remained in the law office since the fall of 1881. February 15, 1887, Anderson got Gaston to acknowledge his former relinquishment before a notary public and to certify as follows:

This relinquishment is made to cure an alleged defect in relinquishment of said entry dated October 18, 1881, made before S. H. Tedford, a justice of the peace of Stafford county, Kansas, and delivered to Washington I. Anderson.

The evidence shows that in the fall of 1881, the intervenor took actual possession of the tract in dispute, and in the spring of 1882, he broke ten acres, and during that season he planted ten acres to thirteen thousand five hundred cottonwood trees from one to two years old and from eighteen inches to two feet high. During 1883, the weeds were pulled and the trees were hoed. In the spring of 1884, the ground between the tree rows was listed and the ten acre tree plat was refilled with cuttings wherever needed and so as to have the trees four feet apart each way.

The intervenor continued to cultivate and protect the timber and at the time of the hearing he had about six thousand one hundred trees growing upon the tract in an apparently thrifty condition.

April 16, 1887, at 9.30 a. m., the intervenor offered to file Gaston's original relinquishment and at the same time applied in proper form to enter the tract, and ten minutes thereafter contestant applied to make entry for the tract, the register refused both applications, but held them to await the final result of this contest.

Gaston's original relinquishment transferred unconditionally to the United States all of his right, title and interest in and to said tract, and was acknowledged before a person having authority to take ac-

knowledgements under the provisions of section 1118 of the Statutes at Large of the State of Kansas. (Vol. 1—p. 357).

The local officers should have received said relinquishment when presented in 1881, as it was executed in accordance with the requirements of circular of May 25, 1880, relating to relinquishments and contests of pre-emption, homestead and timber culture claims under the act of May 14, 1880, wherein the local officers were instructed—

> Not to accept or act upon any relinquishment unless made before you, which has not been duly subscribed by the claimant on the back of his duplicate receipt, and acknowledged, witnessed, and executed in a manner which under the laws of the State or Territory in which the land is situated, would be sufficient as a valid transfer of real estate.

Upon review of the record herein while I find that the intervenor or his attorneys were negligent, yet there is not the least indication of bad faith on his part, and as it sufficiently appears that Gaston's relinquishment was not the result of Roberts' contest, he can not properly claim anything thereunder; and as it further appears that Roberts was fully aware of the intervenor's occupancy of the land and of the facts in the case when he began his contest, and simply sought to take advantage of the condition of affairs and as this Department will not knowingly be made a party to the accomplishment of an act of injustice whereby a citizen would be deprived of the fruits of his honest labor, the decision appealed from is accordingly affirmed.

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RAILROAD GRANT—INDEMNITY SELECTIONS—EXPIRED FILINGS.

LITTLE ROCK AND MEMPHIS R. R. CO.

No action should be taken on indemnity selections for land covered by expired filings until after notice to the claimants to assert any rights they may possess.

*Secretary Noble to the Commissioner of the General Land Office, August 28, 1890.*

I am in receipt of your letter of the 15th instant, transmitting for my approval list No. 8, containing one thousand four hundred acres of lands selected by the Little Rock and Memphis Railroad Company, as indemnity.

You state that the lands are within the State of Arkansas and are of the same character as those embraced in list No. 7, approved by the Department on August 2, 1890 (11 L. D., 168), and were selected at the same time, but were excluded from said list 7 because in conflict with certain pre-emption filings of record.

You further state that said filings have now all been cleared from the record, except certain ones which have expired by limitation of law. It appears you have taken no steps to clear the record of these latter filings, and in this particular you state you were guided by the rule

announced in Northern Pacific Railroad Company *v.* Stovenour (10 L. D., 645), to the effect that the presumption is such claims have been abandoned.

The lands in this list were selected by the Little Rock and Memphis company within the indemnity limits of the Little Rock and Fort Smith road, both being branches of the road provided for in the grant of February 9, 1853 (10 Stat., 155). The odd sections within the indemnity limits of said latter branch had been withdrawn for the benefit of the grant, for many years, but on March 21, 1883, the withdrawal was revoked. From that time these lands have been open to settlement. It appears it has been the practice of your office to exclude from such lists submitted for approval all tracts covered by expired filings. In view of these facts the proper practice in this case, before you approve of this list, would be to notify these claimants to assert their rights, if any they have. There is nothing in the Stovenour case to prevent this. While the rights under the filings have ceased, settlement, if continued, would defeat the right of selection. Northern Pacific Railroad Company *v.* Anrys (8 L. D., 362).

The list is accordingly returned for such action.

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RAILROAD GRANT—HOMESTEAD—ACT OF JUNE 15, 1880.

NORTHERN PACIFIC R. R. CO. *v.* KILLIAN.

The right of purchase under section 2, act of June 15, 1880, existing at the date when a railroad grant becomes effective, excepts the land covered thereby from the operation of the grant.

*Acting Secretary Chandler to the Commissioner of the General Land Office, December* 15, 1890.

I have considered the appeal from the decision of your office of June 24, 1889, approving for patent the cash entry of Henry Killian for the NW. ¼ SW. ¼ S. ½ SW. ¼ and SW. ¼ SE. ¼ Sec. 11, T. 5 N., R. 4 W., Helena, Montana, made under the act of June 15, 1880.

This land is within the primary limits of the grant of the Northern Pacific Railroad Company as definitely located July 6, 1882, and is also within the limits of withdrawal from the benefit of said road, which became effective February 21, 1872.

From the facts as recited in your letter and which are not controverted by the company, it appears that at the date of withdrawal on general route the tract was covered by the homestead entry of Peter Riley made November 13, 1871, which was canceled February 21, 1879.

On June 18, 1876, Henry Killian purchased Riley's interest in the tract, and on December 19, 1883, he purchased the tract under the act of June 15, 1880, which was approved by your office.

From this decision the company appealed, assigning error in not hold-

ing that Killian having failed to avail himself of the benefit of the act prior to the vesting of the right of the company July 6, 1882, could not thereafter make entry of the tract.

The facts in this case are in all essential respects the same as those in the cases of Northern Pacific R. R. Co. *v.* Burt (3 L. D. 490); Holmes *v.* Northern Pacific R. R. Co. (5 L. D. 333) and Northern Pacific R. R. Co. *v.* McLean (Ib., 529) and must be ruled thereby.

Your decision is affirmed.

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TIMBER CULTURE CONTEST—RELINQUISHMENT.

BLANK *v.* CENTER.

A charge of relinquishment is not established by evidence showing that an informal relinquishment of the entry has been placed in the hands of another, but not filed, nor executed for such purpose, but as security for the payment of note.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 17, 1890.

I have considered the case of David D. Blank *v.* Gibson S. Center, upon the appeal of the former from your office decision of May 22, 1888, dismissing his contest against the timber culture entry of Center for the SW ¼ of Sec. 24, T. 110 N., R. 65 W., Huron, South Dakota.

The record shows that Center made timber culture entry for the above described land January 26, 1885. January 5, 1886, David D. Blank applied to enter the same tract and under oath alleged that "said tract has been relinquished, and said relinquishment is in the possession of one M. W. Coykendall, and by him held in violation of the timber culture laws, said relinquishment being made and executed by said Gibson S. Center."

March 30, 1886, a hearing was had before the register and receiver, who, on May 28, 1886, decided against contestant, dismissing his contest.

Thereupon he appealed to your office, where, on May 22, 1888, you affirmed the judgment of the register and receiver. Blank appealed to this Department.

I have examined all of the questions involved in this case, and all of the evidence in the record. From this examination I find that the findings in your said office decision are correct. It is clear that the proof does not show a relinquishment by the contestee. He merely placed his informal relinquishment in the hands of a friend to be held by him as a pledge that he would pay off a note or arrange security for it at a certain time, at which time this paper, purporting to be a relinquishment, was to be returned to him. It is not shown that Center ever intended to have this relinquishment filed in the land office, and it never has been filed there.

A paper purporting to be a relinquishment is of no legal value until it is filed in the land office. (Vandivert *v.* Johns, 9 L. D., 609).

Said decision is accordingly affirmed.

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HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

EDWARD H. BURFORD.

The erroneous allowance of a cash entry under section 2, act of June 15, 1880, during the pendency of a contest, is an error that can only be taken advantage of by the successful contestant.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 15, 1890.

I have considered the appeal of Edward H. Burford from the decision of your office refusing to order a hearing to determine the right to the S. ½ of the NW. ¼ and Lots 3 and 4 of Sec. 4, T. 31 S., R. 27 W., Garden City, Kansas.

From the record before me it appears that this tract was embraced in the homestead entry of William Y. Buchanan, and made May 1, 1879, and was held for cancellation by decision of your office February 6, 1886, upon the contest initiated against said entry by Columbus Brundage, from which decision Buchanan appealed.

Prior to the decision of your office, to wit: on January 26, 1885, Buchanan made cash entry of the tract under the act of June 15, 1880.

On March 24, 1888, the Department considered the appeal of Buchanan, and held that the local officers had no authority to allow said cash entry, for the reason that Brundage having proved the allegations of his contest was entitled to the preference right of entry, but directed that since the local officers had allowed said cash entry, it should be suspended and held subject to the right of Brundage to make entry of the land, and if he failed to make entry within thirty days from notice of said decision, the cash entry of Buchanan will be relieved from suspension.

After the cash entry of Buchanan had been allowed, and while the case of Buchanan *v.* Brundage was pending before the Department on appeal, Edward M. Burford made homestead entry of the tract.

Brundage having failed to avail himself of his preference right to make entry of the tract, your office, on October 12, 1888, relieved the cash entry of Buchanan from suspension and held the homestead entry of Burford for cancellation, because of conflict with said cash entry. From this action the applicant appealed, alleging, substantially, the following grounds of error:

(1) Because an entry under the act of June 15, 1880, can only be allowed in the absence of an adverse right.

(2) Because Burford's entry was a valid adverse right that attached before the expiration of the thirty days' preference right of entry of Brundage, the successful contestant, and should take precedence of all other applications.

(3) Because it was error to allow the cash entry of Buchanan under the act of June 15, 1880, until after the expiration of the thirty days allowed to the successful contestant to make entry.

Although the cash entry was erroneously allowed, yet it was an error that could only be taken advantage of by the successful contestant. His right of purchase was good against every one but the successful contestant, or an adverse claim initiated prior to his cash entry. At the date Burford's entry was allowed, the land was not subject to entry, because of the cash entry of Buchanan that segregated the land, and which could only be annulled by the successful contestant.

The decision of your office is affirmed.

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### TIMBER LAND APPLICATION—PRELIMINARY AFFIDAVIT.

### L. W. WALKER.

The departmental regulation requiring a purchaser under the act of June 3, 1878, to personally examine the land prior to application is within the intendment of said act.

Where the applicant in his preliminary affidavit falsely states that he has personally examined the land, and knows from his personal knowledge that it is of the character contemplated by said act, the right of purchase should be denied.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 18, 1890.

I have considered the case of L. W. Walker on appeal from your decision of July 3, 1884, affirming the action of the local officers in rejecting his proof on timber land application under act of June 3, 1878, 20 Stat., 89, for the purchase of the SE. ¼ Sec. 12, T. 20 N. R. 10 W., Seattle, Washington land district.

On November 10, 1888, he made said application and made his affidavit upon the usual form for the purchase of timber and stone lands, and stated therein that:

> I have personally examined said lands and from my personal knowledge state that said land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements; nor as I verily believe any valuable deposit of gold, silver, cinnabar, copper or coal, etc.

On July 11, 1889, he, having given the notice by publication required by law, appeared at the local office to make proof and pay for the land. On being sworn and examined he stated that he had never been on the land at the time he made his application; that a man named Wing had made an inspection of the land for him, but he had been upon it after his application was made.

The local officers rejected his proof because by his testimony he had not examined the land prior to making his application. From this decision he appealed, and your office on July 3, 1889, affirmed said action and held his filing for cancellation, because the same was fraudulent in

its inception. He again appealed and brought the case before the Department.

The appeal assigns error as follows:

1st. It was error for said Commissioner to find that the application of said claimant was fraudulent because of the fact that he did not examine the land applied for prior to filing his application therefor.

2d. It was error to conclude from facts appearing in the record that "the attempted entry of claimant was fraudulent in its inception" or at any time since its inception.

The third and fourth assignments amount to one and say it was error to reject the application.

Counsel for appellant contend that the law does not require the appellant to examine the land, or testify from personal knowledge that it is of the character contemplated by the act of June 3, 1878, and he cites the letter of Secretary Vilas to Commissioner Stockslager, dated January 5, 1889 (8 L. D., 20), which says—

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

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

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

The said phrase should therefore be stricken out of said affidavit.

The act referred to in the above letter is unlike the act providing for "timber and stone entries" (approved June 3, 1878, inasmuch as it prescribes the form of the preliminary affidavit while the latter does not. Were the acts identical the letter would apply to the case at bar, although subsequent to it, for if the phrase was inserted without warrant of law, it would be impertinent to the issue and immaterial and could be disregarded by the deponent, but this is not the case.

The statute under which claimant seeks to acquire title to this tract, requires the applicant to file with the register a statement in relation to the land which he desires to purchase, and it will be observed that this is divided into two clauses: First he must state that the land is unfit for cultivation, uninhabited and unimproved. This statement he makes upon his corporal oath and this necessarily implies personal knowledge. Secondly: He must on like oath state, as he verily believes, that it contains no valuable deposits of gold, etc. This part of the oath may of course by the law be made on information. It is quite clear that Congress intended to distinguish between those conditions affecting the character of the land, which could be certainly known by ordinary diligence and observation, and those that could not be so known or determined and as to the latter, the applicant was permitted to base his oath upon his belief.

In thus stating the matter, in the act, Congress took care to include

that which could be taken on information and belief, and by the well known maxim, *inclusio unius est exclusio alterius*, the statements in regard to cultivation, inhabitancy and improvements are excluded from that part of the affidavit based on mere belief. In these he must know whereof he affirms.

The third section of the act provides that the applicant after giving notice, etc., shall "furnish to the register of the land office satisfactory evidence . . . . that the land is of the character contemplated in this act." The local officers can therefore examine the applicant and witnesses as to their means of knowing the character of the land; thus to ask if the applicant had examined the land or been upon it, would be pertinent to the issue, and a relevant and competent inquiry, and the statement in this affidavit "I have personally examined this land," is simply the equivalent of such an examination at the hearing. It is contemplated by the statute that the applicant would know whereof he affirmed, and it is certainly within the province of the Department to ascertain whether the oath is made upon the applicant's knowledge, or on his belief, or rashly "with no probable cause for believing," and it is not an unreasonable requirement on the part of the Department, that whoever offers to purchase this class of land, must show that he has had an opportunity of knowing that the statements that he was by law required to make concerning its character, are true in fact when so made. The phrase in the affidavit adds no condition or limitation to the character of the land, as defined by the statute, nor does it conflict with the statute in any of its forms. The statute prescribes certain facts to be sworn to, but it does not give any form of oath, and the only limitation that it fixes is that as to valuable minerals.

Besides these considerations there is nothing in the act in question, which removes this class of land from under the general supervisory control of the land department, or exempts purchasers of the same from the general rules and regulations thereof.

I am of opinion that the Department had full authority to insert the phrase in question in the preliminary oath, that when so inserted it was pertinent, material and binding upon the applicant who should subscribe to the oath, and with this view of the law I concur in your conclusions.

Your decision is affirmed.

### HOMESTEAD CONTEST—RESIDENCE.

### FARRELL *v.* LINDE.

The establishment of residence on a homestead claim within six months after entry is required by departmental regulation, and, in the face of a contest, no amount of improvements will excuse a failure to comply therewith, or cure default therein.

Residence under the homestead law can not be established through the acts of another.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 18, 1890.

May 26, 1886, Frederick Linde made homestead entry, No. 2754, for lots 2 and 6, and the SW. ¼ of the NE. ¼ and the NW. ¼ of the SE. ¼ of Sec. 2, T. 4 N., R. 16 W., Los Angeles, California.

January 12, 1887, Robert Farrell instituted a contest against the same, alleging that defendant had never established residence thereon.

Hearing was had March 15, 1887, and on July 12, 1887, the register and receiver found in favor of the plaintiff. On appeal, your office, by letter of January 19, 1889, affirmed the action of the local officers, and held the entry for cancellation.

Linde appeals from your judgment. I have examined the evidence and it shows that defendant had not resided on the claim up to the time of the contest, more than seven months after he made his entry, but had all the time resided with his family at Los Angeles, where he was in business as a jeweler. He had hired one Lowe to improve the claim. Lowe had built a house and improved and cultivated the land. Claimant would occasionally visit him to give directions about the improvements but maintained his residence at Los Angeles.

The establishment of residence on a homestead within six months after entry is required by the regulations, and no amount of improvements will excuse a compliance therewith or cure the default in the face of a contest.

Such residence must be personal. Renting the land to a tenant, or having some one else to reside on it, will not satisfy the law.

The decision of your office is affirmed and you will cancel said entry.

SURVEY SUB-DIVISION OF SECTIONS.

CIRCULAR.

The circular instructions of June 2, 1887, 5 L. D., 699, re-issued by Commissioner Groff, December 9, 1890.

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RAILROAD LANDS—ACT OF MARCH 3, 1887.

E. D. RAND.

An application to purchase under the act of March 3, 1887, can not be allowed for lands embraced within an outstanding patent to a railroad company.

In such a case a statement and application, duly corroborated, as required by departmental regulations, may be presented for consideration with a view to the institution of judicial proceedings to set aside the patent.

*Secretary Noble to the Commissioner of the General Land Office, December 19, 1890.*

I have considered the case arising upon the appeal of E. D. Rand from your office decision of August 3, 1889, rejecting his application, made June 8, 1889, to purchase, under the act of March 3, 1887 (24 Stat., 556), Sec. 17, T. 7 N., R. 13 W., S. B. M., Los Angeles land district, California.

The tract described lies within the primary limits of the grant, by act of March 3, 1871 (16 Stat., 579, Sec. 23), to the Southern Pacific Railroad Company; and the ground of the rejection of the application was, that said tract had previously (to wit, on January 9, 1885,) been patented to said company.

The applicant alleges, as ground of appeal, that your office decision—

does not in any way settle the matter. Either the land in question belongs to the railroad company or to the United States. If it belongs to the United States then the right of the undersigned to purchase under said act of Congress is perfect, and the application should be allowed. The Commissioner does not enter into the merits of the case, in that he does not decide whether the land belongs to the railroad company under its grant, or to the appellant herein under the act of March 3, 1887.

The sole question presented to your office, upon the presentation of Rand's application to enter, was whether said application could properly be accepted and filed. Your office very properly decided that, as the title to the tract applied for had passed, by patent, to the railroad company, the government was no longer owner thereof, and that you had no alternative except to reject the application. (See United States *v.* Schurz, 102 U. S., 378; see also Horace B. Rogers *et al.*, 10 L. D., 29). Your office also, very properly, did "not enter into the merits of the case," and did "not decide whether the land belongs to the railroad company under its grant, or to the appellant," for the very obvious reason that these questions were beyond your jurisdiction, and must be decided by an entirely different tribunal.

Before any one can purchase from the United States the tract described, the title thereto must be restored to the United States.

You will inform the applicant that if he will prepare a statement and application, supported by corroboratory affidavits, as required by departmental circular instructions of February 13, 1889 (8 L. D., 348), and supplemental instructions of August 30, 1890 (11 L. D., 229), and transmit the same to the Department, through the proper channel, such statement and application will be duly considered, with a view to recommending to the Honorable Attorney General the institution of suit to cancel and set aside said patent, as provided for in Sec. 2 of the act of March 3, 1887 (*supra*).

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PRACTICE—DEATH OF DEFENDANT NOTICE—ATTORNEY.

DRISCOLL *v.* JOHNSON.

Where a party dies prior to hearing his attorney is without authority to enter appearance, or thereafter prosecute an appeal in the name of the decedent.

The rules of practice do not authorize the service of notice of contest on a resident defendant by registered letter.

Where the entryman dies prior to the service of notice, his heirs and successors in interest should be made parties to the action, and duly served with notice thereof.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 19, 1890.

May 5, 1886, Edmund P. Johnson made homestead entry for the NE. ¼, Sec. 17, T. 27 N., R. 46 W., Chadron, Nebraska.

December 31, 1887, Edward Driscoll filed an affidavit of contest against the same. Notice of contest was served upon Johnson by registered letter, in which the hearing was set for February 15, 1888, testimony to be taken before a notary public at Box Butte, Nebraska, on February 10.

On said last date, at 8 o'clock A. M., the defendant was killed by the accidental discharge of a gun, but the contestant proceeded with his testimony before the notary. On the return day (February 15) Johnson's attorney appeared before the register and receiver and moved to dismiss, because of defective service of notice. The motion was overruled, and the contestant allowed to "file supplemental affidavit and proceed against the heirs." From this action Johnson's attorney appealed.

Your office decision of June 30, 1888, affirmed the action of the register and receiver, and Johnson's attorney again appealed.

Johnson having died prior to the hearing, his attorney had no authority to appear for him. The relation of attorney and client ceased on the death of the client. Nor can a dead man appeal by attorney. Consequently, there is no appeal pending here.

Johnson was never properly served with notice. The rules of practice

provide for but two methods of service of notice of contest: 1st, Personal service, which is made by delivering a copy of the notice to the defendant. 2d, When the defendant is a non-resident of the State or Territory, or can not be served personally, notice may be served by publication, as provided in Practice Rules 11, 13, and 14.

There is no provision for service by registered letter.

As this is the first time within my observation that service of notice of contest on a resident defendant has been attempted by registered letter, and as the language of some of the decisions of this Department may seem to authorize such manner of service, I deem it advisable to refer to these decisions, with a view to reconcile them, if possible, to the rules and regulations governing practice before the district and General Land Offices.

In the case of Anderson *v.* Tannehill *et al.*, 10 L. D. 388, an order of publication was made against the claimant; whereupon Stenson, his transferee, appeared and disclosed, under oath, his ownership of the land in controversy; he was allowed to intervene, and moved to dismiss the contest because no publication had been made against Tannehill, the original claimant. New notice was then issued, and publication made, fixing a later date for the hearing, at which date Stenson again appeared and moved to dismiss all proceedings, because the record failed to show that the notice was posted upon the land. This motion was sustained, and a new order of publication made, November 27, 1887, fixing January 11, 1888, as the day of hearing, when Stenson appeared for the third time and moved to dismiss the contest, because no personal service had been made upon him (Stenson), although he was a resident of the State. Upon a showing that notice had been given Stenson by registered letter, which had been received by him more than thirty days before the day set for hearing, his motion was overruled, and the Secretary in affirming the action of the Commissioner says: "In the first place, this objection is purely technical; as a matter of fact transferee was notified by registered letter, and upon said notice appeared to move a dismissal," etc.

This holding was undoubtedly correct, for Stenson, not having disclosed his ownership of the land prior to the commencement of proceedings against the entry, was not entitled to be served with notice as an original defendant, and when he afterwards appeared and made oath to his ownership, he thereby was in court, asking to be allowed to defend against the contest. This was an appearance to the merits, so far as he was concerned, as transferee of the claimant. He found "no fault with notice to the entryman, but only contended that he was entitled to the same kind of personal service as the entryman would be if living within the State.

The last clause of said decision, that "Service by registered letter is personal service, as required by Rule 15 of Practice," being unnecessary, may be regarded as *obiter dictum*.

Rule 15, referred to, has no reference to the mode or manner of personal service, but relates exclusively to the manner of *proving* such service, and says that it "shall be (that is, *proof* of service, as prescribed in Rule 9, shall be) the written acknowledgment of the person served, or the affidavit of the person who served the notice attached thereto, stating the time, place, and manner of service."

The manner of making personal service, as prescribed in Rule 9, consists "in the delivery of a copy of the notice to each person to be served." That this service has been so made can be proven by the written acknowledgment of the defendant or by the affidavit of the person serving him, as per Rule 15. This acknowledgment by the defendant, under the practice that obtains in nearly all courts of law, is endorsed on the back of the notice, or a copy thereof, and dispenses with the return of the officer serving the same. This is the kind of written acknowledgment contemplated by Rule 15, and it was never contemplated that service by registered letter is equivalent to personal service.

The distinction is clearly recognized in Rule 17, which provides that "Notice of interlocutory motions, etc., may be served personally or by registered letter through the mail."

By Rule 18 proof of service by mail is not shown by the receipt alone, but such receipt must be accompanied by "the affidavit of the person who mailed the notice."

In the case of William W. Waterhouse, 9 L. D., 131, the defendant was a non-resident, and an attempt was made to notify him by publication. The notice was not published for the proper length of time, but it having been shown by the "return card" that he had received notice of the hearing by registered letter—received by him at Oshkosh, Wisconsin, the land being in Dakota—the notice was held sufficient.

The sending of notice by registered letter is provided for where notice is given by publication (see Rule 14), whereas no such provision is made when personal service is required.

This case is not parallel with the one at bar, nor is it authority for serving a resident defendant by registered letter; neither are the cases therein cited.

In Crowston *v.* Seal, 5 L. D., 213, the defendant was a non-resident.

In the case of the New Orleans Canal and Banking Company *v.* State of Louisiana, cited in support of Waterhouse, *supra*, the notice under discussion was a notice of appeal and not of contest, and the Rules of Practice provide for serving notice of appeal by registered letter, and in that case it was merely held that notice sent by unregistered letter was sufficient, when receipt of such unregistered letter was admitted by the party to whom it was sent and who was the party entitled to notice.

The other case of Ida May Taylor, 6 L. D., 107, there cited, has reference to notice of the decision of the Commissioner canceling an entry, notice of which may also be made through the mail.

While notice of interlocutory motions, orders, and nearly all proceedings occurring after jurisdiction is once obtained, may be made through the mail, there is no provision in the Rules of Practice for acquiring jurisdiction over resident defendants through such service. Nor in my judgment should there be.

The notice of contest takes the place of a writ of summons in common law courts, which is a "due process of law," without which no man may be deprived of his property. This writ of summons, in all the States to which my research has extended, is required to be served by a sworn officer of the law.

This Department has so far departed from this general rule of practice as to allow notice of contest to be served by persons other than officers of the law, but it has not authorized service by mail of a writ which confers jurisdiction to deprive a defendant of all his property.

Johnson having died before he was served with notice, the local officers obtained no jurisdiction of his person. There being no action pending at his death, it could not be revived against his heirs.

It follows that the action of the local officers was right in allowing a new affidavit to be filed, making his heirs and successors in interest parties defendant, and directing notice to be issued against them, in compliance with the Rules of Practice, above noted.

The decision of your office is affirmed.

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RAILROAD GRANT—CONFLICTING LIMITS—ADJUSTMENT.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RY. CO.

The definite location of the Northern Pacific road did not take effect upon lands within the previous indemnity withdrawal made under the act of May 5, 1864.

Where the primary limits of one company conflict with the indemnity limits of another, and both derive their grants from the same act, the former is entitled to the lands in question, without regard to priority of location or construction.

The second proviso in section 5, act of March 3, 1887, applies only to the case of lands, which at the date of the passage of the act had been settled upon after December 1, 1882, by parties claiming in good faith a right to enter the same under the settlement laws, in ignorance of the rights or equities of others in the premises.

In the final adjustment of a grant the Department must be controlled by statutory authority, and can not depart therefrom to protect parties claiming rights under an alleged purchase from the company.

Previous instructions for the restoration of indemnity lands modified, and directions given for the disposition of applications to purchase under the act of March 3, 1887.

*Secretary Noble to the Commissioner of the General Land Office, December 19, 1890.*

On February 12, [11] 1890, I approved for patent lists 13, 14 and 15 of lands for the benefit of the Chicago, St. Paul, Minneapolis and

Omaha Railway Company, and sent them to you, with a letter of instructions bearing even date, 10 L. D., 147. Before any action was taken by your office in the premises, you were verbally directed to return said lists and letter of instructions to me: which was accordingly done. The reasons which actuated me in thus suspending action as above stated, no longer existing I herewith forward to you said lists and letter, with directions to carry out the instructions in said letter, as modified herein.

You were informed that this action closed the adjustment of the congressional land grants for the benefit of said road, and you were directed to restore to the public domain and throw open to settlement the surplus lands theretofore withdrawn for indemnity purposes, under the grants for said road. It was provided, however, that—

the order of restoration shall not affect rights acquired within the primary or granted limits of any other congressional grant;" nor "take effect or be so construed as to authorize the acquisition or recognition of any rights to said lands or any portion thereof until thirty days after notice thereof, through advertisement, shall have been previously given by the officers of the district land office.

Afterwards two letters were received from you, dated respectively the 10th and 14th of February last, in relation to the revocation of said withdrawal. In the letter of the 10th, which was received after mine of the 12th was sent, you call attention to the fact that of the surplus lands to be restored a portion lie within the fifteen mile or indemnity limits of the Omaha grant, under the act of June 3, 1856 (11 Stat., 20), and a portion within the twenty miles or indemnity limits of the grant to said company under the act of May 5, 1864 (13 Stat., 66); and that the primary limits of the Wisconsin Central Railroad, under the same grant of May 5, 1864, *supra*, and the primary limits of the Northern Pacific Railroad under its grant of July 2, 1864 (13 Stat., 365), in regard to portion of said lands, overlap the aforesaid limits of the Omaha road; and you desire a determination of the respective rights of the different roads within these conflicting or overlapping limits.

Upon particular inquiry at, and a more careful examination into the matter by, the Railroad Division of your office, it is learned that there will be no surplus lands within the fifteen miles limit of the Omaha road, which are covered by the primary limits of the Northern Pacific Railroad—such lands having been dealt with in the adjustment heretofore made. But there are lands within the twenty mile limits which are covered by the primary limits of the Northern Pacific road, as stated by you.

As before said, the Omaha grant was made May 5, 1864; that of the Northern Pacific July 2, 1864; and the indemnity withdrawal of the Omaha Company was made February 28, 1866, and the definite location of the Northern Pacific on July 2, 1882. Consequently, at the date of the definite location, the lands in question were set apart by executive order for the indemnity purposes of the Omaha grant. And the question is, did this condition except them from the operation of the Northern Pacific grant?

The third section of Northern Pacific act grants the designated section, on each side of the railroad—

whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, etc.

The force and effect of an executive withdrawal, for indemnity purposes under one grant, in excepting lands from the subsequent attachment of rights under another grant, have been fully and exhaustively discussed by this Department in several cases arising under this Omaha grant. See cases of Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 6 L. D., 195; Wisconsin Central R. R. Co., 10 L. D., 63; which cases are quoted and the rulings therein concurred in by Mr. Justice Harlan in the opinion of the court in the unreported case of the Wisconsin Central R. R. *v.* Forsythe, decided last September in the U. S. circuit court for the western district of Wisconsin.

In pursuance of those decisions, I must hold that the lands in question were at the date of the definite location of the Northern Pacific "reserved" and "otherwise appropriated," and consequently excepted from said grant. Therefore, there is no proper conflict with rights of the Northern Pacific in the described limits.

With regard to the overlapping limits of the Wisconsin Central Railroad within the fifteen miles indemnity limits of the Omaha road, that question was definitely decided adversely to the Central Company in the cases before quoted, and it is not necessary to say anything more on the point.

But as to the conflict between the primary limits of the Wisconsin Central and the twenty miles indemnity limits of the Omaha Company the rule is different. Both companies deriving their grant from the same act, the Wisconsin Central is clearly entitled to the land in question, without regard to either priority of location or construction. This rule is well settled. See St. Paul *v.* Winona R. R. Co. 112 U. S., 720–727; Sioux City R. R. Co. *v.* Chicago Ry. Co., 117 U. S., 406–8.

This disposes of the questions in relation to the conflicts described in your letter of the 10th of February.

But in that letter and the one four days later, it is stated that a large portion, if not all, of the surplus land within the indemnity limits of the Omaha grant, about to be restored to the public domain, is "covered by claims based upon settlements made during the last year or two, growing out of applications to enter, presented and rejected during that period;" and that, it has also come to your knowledge "the company had, years ago, disposed of a large amount of these lands," the transferees of some of which have been permitted by the local officers to make proof, and to purchase the same, under the provisions

of section five of the adjustment act of March 3, 1887 (24 Stat., 557); against some of which purchases protests have been filed by parties claiming to be settlers.

In your letter of February 14th, you also call attention to the fact that the departmental instructions, approving the final adjustment of the Omaha grant and directing the restoration of the surplus land to the public domain, made no provision for the protection of purchasers from the company under said section and act; and you invite attention to the conflicts likely to arise between the claims of such purchasers and those of parties claiming as settlers, subsequent to December 1, 1882, under the second proviso of said section. And in this connection the question is asked, "does the last proviso of the section include settlements made after the passage of the act, and, if so, might it not defeat the object of the section entirely?"

The section and proviso referred to are as follows:

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

If the language of this proviso is to be taken literally it would dominate the whole section, and being repugnant to the other provisions would make the section inconsistent with and destructive of itself. The purview and scope of the section is, (1) to protect such as were in the *bona fide* occupation, under the settlement laws, of lands of the character described, at the time the same were sold by the company, and which occupants, if they have not voluntarily abandoned their claims, it is expressly declared are to be allowed to perfect proofs and receive patents; and (2) if there are no such settlers or claimants, then *bona fide* purchasers from the company on paying the price to the government are to receive patents. But the second proviso, if literally accepted, changes all this, and declares that said section shall not apply to lands "settled upon" subsequent to December 1, 1882. So that if, after adjustment of a railroad grant it is found that surplus

lands are in the occupation of claimants who were there prior to December, 1882, and had remained continually in possession, their claims could be defeated by other settlers who might go upon the land after 1882. And the same would be true as to parties who purchase from the company at a time when there was no other claimant to the land in question, and who might have extensive improvements thereon. Indeed, that proviso, literally taken, would be an invitation to parties to settle upon such lands at any time in the future, and thereby defeat the equities of prior claimants.

I can not bring myself to believe that Congress intended to legislate to such an end. The proviso here should be treated as in the nature of a saving clause, restricting in certain cases only the operation of the more general language of the preceding clauses of the section. In such a case "The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause and proviso, taken and construed together, is to prevail." 1 Kent Com. 463, note "a." And in the case of the United States *v.* Dickson, 15 Peters, 141–165, the supreme 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 exception must establish it as being within the words as well as within the reason thereof.

The whole scope of the act in question is undoubtedly remedial. "Its intent is to relieve from loss settlers and *bona fide* purchasers, who, through the erroneous or wrongful disposition of the lands in the grants, by the officers of the government or by the railroads, have lost their rights or acquired equities which in justice should be recognized." Opinion of Attorney General, 6 L. D., 272.

Applying these rules of construction and keeping in view the scope of the act, as above stated by the Attorney General, it is my opinion that said proviso applies only to the case of lands, which at the date of the passage of the act had been "settled upon" subsequent to December 1, 1882, by parties claiming in good faith a right to enter the same under the settlement laws, in ignorance of the rights or equities of others in the premises. Such parties the law was, in my opinion, intended to protect: not those who may endeavor at any time after December 1, 1882, to "jump" the claim of another under pretense of an intention to enter the same; or who, in violation of the law which authorizes the placing of lands in railroad limits under reservation, for the purpose of effectuating the grant, invade the reservation in an effort to obtain precedence over other and law-abiding citizens. Such invaders can not be regarded as acting in good faith.

In your letter of February 14th it is suggested that a time be fixed within which purchasers under said act should be required to come for-

ward, make proof and otherwise comply with the requirements thereof.

I have no doubt of my authority, in the administration of the law, to make such a requirement, and approve of your suggestion to that effect.

Accordingly the order heretofore issued on February 12, 1890, directing the restoration of the surplus lands heretofore withdrawn for indemnity purposes of the Omaha grant, is modified so as to extend the time when said restoration is to take effect until after ninety days notice thereof, through advertisement, shall have been previously given by the district land officers, which advertisement shall also contain a notice to parties claiming as purchasers under said act, requiring them to come forward during said period of ninety days, submit their proof, and make payment, in pursuance of the requirements of the official circular of February 13, 1889 (8 L. D., 348–351); and that a failure to submit proof and payment within the time named would be treated as a waiver of claim; all land not so claimed to be subject to entry under the settlement laws by the first legal applicant at the expiration of the aforesaid period of ninety days.

In the case of those parties who, you say, have been allowed by the local officers to make proof and purchase improvidently, that is, prior to the "final" adjustment of this grant, they should be notified that they will be required to give a new notice, under the circular, within the prescribed period, and if, at the proper time, no adverse claimant appears, then the proof heretofore submitted, if otherwise correct, may be accepted. Notice should also be given to those parties who have made applications to enter any portions of said lands that such applications, whilst the lands were in a state of reservation, conferred upon them no right to the lands applied for; that all such applications have been rejected, and that upon the date mentioned in the notice all the restored lands will be thrown open to entry without regard to said applications.

On November 22, 1890, Messrs. E. A. Shores, H. C. Henry and H. F. Balch filed here a petition, with a number of exhibits, seeking the interposition of this Department to protect them in certain asserted rights and protesting against the proposed action of the Department in throwing open to settlement and entry certain lands to which the petitioners claim a right.

From said petition and papers it appears that an agreement was made in February, 1884, between the Omaha and the Wisconsin Central railroad companies in relation to the overlapping limits of their respective grants, wherein it was stipulated that "the Central Company shall have" certain lands, among which are described, in item 2: "all that part of the four mile strip outside of the six mile of Omaha, and within the ten mile limit of the Central Company' grant, and within township 45, 46 and 47 ranges 4 and 5 west."

It was further stipulated that the Omaha Company was to apply

to the State for patents to the described lands, and, on obtaining the same, was to execute and deliver a quit claim deed therefor to Henry F. Spencer. It is not alleged, nor does it appear that said patents were issued; but what purports to be a deed from said company to Spencer is filed, dated April 15, 1884, and conveying to him the land in question "in consideration of the sum of one dollar and other valuable considerations." Copies of other deeds are produced conveying said lands from Spencer to the petitioners. It is further stated that the Omaha Company, having constructed its road, earned the lands in question, included the same in lists filed in the General Land Office as of its granted lands; but for some unknown reason said lists were subsequently canceled, so that no patent will be issued by the United States to the Omaha company for said lands, but it is proposed to throw the same open for settlement and entry. All of which, it is alleged, will do the petitioners great wrong and injustice; and it is asked that a patent, in due form of law, may be issued for said lands to the Omaha company, or the State of Wisconsin, for its use and benefit, in order to perfect the record evidence of petitioners' title to the described tracts of land.

The "strip" of land above described and claimed to have been purchased, is situated east of the branch line of the Omaha company outside of the six miles limits of its grant under the act of 1856 but within the additional four miles limit under the grant of 1864, and is also within the ten miles limit of the Central company under the last act. Being thus within the lapping limits of two grants made by the same act, at the time of the alleged contract between the two companies, it was evidently supposed that each was entitled to one undivided moiety of said lands, and that, as usual, a patent for the whole would be issued to the State which would make division between the companies. The contract, then, seems to have been made with a view to promote the amicable and just division of said lands between the parties entitled; and in listing the lands within the granted limits, it was proper that the Omaha company should claim each of the designated sections, of which it supposed it was entitled to the undivided half, being then without authority of law to pick out particular tracts as its one half of the grant. But when afterwards that grant came before this Department for adjustment, and it was held in effect, as shown in the cases heretofore cited, that the Wisconsin Central could not go within fifteen miles of the Omaha road for any lands whatever, because the lands within those limits were reserved from the Central grant, a different condition from the ordinary lapping of the granted limits of two roads under the same grant was presented; and it was held, under these circumstances, that the Omaha company was only entitled to the one undivided half of the lands within said granted limits, and that the other half belonged to the government. Therefore it being impossible to issue for the benefit of said company a patent for an undivided

moiety of said lands, or patent to the State for the whole for the joint benefit of said company and the United States, it became necessary to reject the former lists, presented by the company, and to require it to specify particular tracts, which in the aggregate would amount to one half of the lands within its granted limits so that patents conveying full title to the same might be issued therefor.

The adjustment has been made on these principles; lists have been prepared and approved for patent, and the adjustment is practically closed. It is not perceived there is anything improper in the mode adopted, or that any wrong has been done to the petitioners for which the government is in any way responsible. If they have thought proper to purchase lands to which they supposed the company was entitled, and now find themselves mistaken, the United States is not to blame. It has administered and adjusted said land grant in accordance with the law and contract under which it was made, and can not undertake now to open the same to gratify the views or protect the rights of persons who may see therein a remote or resulting injury to themselves. However much it might be desired that all parties should be protected and exact justice done, those charged with the adjustment of the grant are officers of the law, who can not deviate from its rule because obedience thereto may seemingly inflict individual hardships.

Had the Department been aware of the truth of the matters stated in the petition before the adjustment of the grant, it is hardly probable that it would have required the Omaha company to list and take patents for the described land, in order to force it to comply with the spirit of its contract with the Central company. For the officers of the government thus to go outside of their legitimate duties to settle disputes and enforce contracts between parties to which the United States is in no way privy, would be entering upon an undertaking of more vast proportions than the business of the government itself. The questions and complications of law and facts incident to such an inquiry would be endless, and, as probably the railroad company has sold, or contracted to sell, other lands, more perhaps than it will receive patents for, if the door is thrown open under the present application doubtless other petitioners would set up like claims with equal or even greater equities, and the executive department, organized for the administration of the public laws, would be converted into a tribunal for passing upon, determining and enforcing private rights.

It may be that these parties are amply protected in their purchases by the provisions of the acts of January 13, 1881 (21 Stat., 315), or of March 3, 1887 (24 Stat., 556), if they choose to take the necessary steps to that end.

But, without expressing an opinion on that subject, which I am not now called upon to do, I am clear in my convictions that the prayer of the petitioners should be rejected, which is accordingly done, and of which you will notify them, and file the petition which is sent to you for that purpose.

RAILROAD GRANT—INDEMNITY—WITHDRAWAL—SUSPENSION OF PROCEEDINGS.

WISCONSIN CENTRAL R. R. CO. (ON REVIEW).

The lands reserved by executive order for indemnity purposes under the grant of June 3, 1856, are excluded by express terms from the grant made by section 3, of the act of May 5, 1864; and the lands so withdrawn and reserved, but not required as indemnity, do not become subject to the latter grant on the final adjustment of the former.

Application for suspension of action under the departmental decision of January 24, 1890, pending judicial proceedings denied.

*Secretary Noble to the Commissioner of the General Land Office, December 19, 1890.*

On October 15, 1888, your office held for cancellation certain lists of land presented by the Wisconsin Central Railroad Company and claimed as part of its granted lands under the act of May 5, 1864 (13 Stat., 66). From said cancellation the company appealed; and, on January 24, 1890, the action of your office was approved by this Department (10 L. D., 63). On May 17, 1890, the said company filed here a petition setting forth that the lands listed as above are valuable for the timber thereon, are adjacent to, and one tract within the limits of the city of Ashland, in the State of Wisconsin; that petitioner, relying upon its supposed title thereto, has sold and conveyed divers portions of said lands; that petitioner has instituted cases in the United States circuit court for the western division of Wisconsin against William O. Forsythe and others, for the purpose of obtaining a judicial determination of its rights to the lands in question; that a decision is expected at the June term, 1890, of said court, when it is expected that Mr. Justice Harlan, of the United States supreme court, will be present and preside. Wherefore, in view of the complications which may arise, if the lands in question are thrown open to the public before title to the same shall be settled and adjudicated in the court, the great embarrassment, confusion and ultimate loss which will occur to parties settling thereon under the land laws, should the right and title thereto be determined to be in the company under its grant, it is asked that no action be taken by the Department looking to the restoration of said lands to the public domain, and making them subject to settlement and entry, until said cases or some of them may be determined, and rights definitely ascertained in respect to the same.

The lands here referred to are those within the overlapping limits of the Omaha Railway grant and that of the said Wisconsin Central Company.

On June 2, 1890, the attorney for the Wisconsin Central filed here a supplemental petition, setting forth reasons why in its judgment the lands in question should be awarded to it, and why no action should be taken under the departmental decision, until the courts shall have passed upon the issues involved.

Inasmuch as this last paper sets forth reasons why the lands in question should be awarded to the Central Company, after the Department had decided in 10th L. D., that said lands should *not* be awarded to that company, the application, to that extent, is a motion for review; and not having been filed within the time required by the rules might be properly disregarded.

One of the reasons urged in favor of the review is, that it having been announced in 10 L. D., 147, that the Omaha grant had been finally adjusted and fully satisfied, and that surplus lands were left after said adjustment and satisfaction, the grant of 1864 in favor of the Central Company is now clearly operative upon said surplus lands, and in fact has been all the time, to the extent that they might not be required to satisfy the claims of the Omaha Company.

The case of the Wisconsin Central Railroad Company *v.* Forsythe, before referred to, was tried at the June term of the United States circuit court for the western district of Wisconsin, but has not yet been reported. On September 15, 1890, Mr. Justice Harlan delivered the opinion in that case, which was, in effect, an appeal to the court from the previous decisions of this Department in respect to the Omaha grants and the grant to this company and their relations to each other. In an exhaustive opinion, the whole subject, in all its aspects, was discussed, the departmental decisions quoted, and the views therein expressed were concurred in. The point here presented, as to the right of the Central Company to the surplus lands, after the satisfaction of the Omaha grant, was pressed in that case and was fully answered by Justice Harlan, in his opinion, a copy of which is now before me, as follows:

> Another contention upon the part of the plaintiff is that, even conceding that the lands in dispute were reserved by virtue of their being withdrawn prior to 1864 for indemnity purposes, yet as the object for which the withdrawal was made, namely, to supply deficiencies in the place limits of the Bayfield road, were fully satisfied (before the defendant made his entry), by the final adjustment of the land grant for the Omaha road, the lands, so withdrawn, would be affected by the granting clause in the third section of the act, and so become and be the property of the Central Company under that section. This view is in opposition to many adjudged cases. Whatever force it might have in the case of two contemporaneous grants to different companies, covering the same land, in neither of which an exception was made of lands "reserved to the United States," it can have no application where, as in the present case, the statute expressly reserves and excludes from its operation any and all lands so reserved. If these lands were reserved when the act of 1864 was passed, they certainly were not granted by the third section of that act to the Central road and could not get into the grant to, and become the property of the Central Company, by reason simply of their not being required for the adjustment of a different grant made for another road. This view is illustrated by several cases.

And the cases of Kansas Pacific Railroad *v.* Dunmeyer 113 U. S., 629, Bullard *v.* Des Moines R. R., 122 U. S., 167–176, and Hastings, and Dakota Ry. *v.* Whitney, 132 U. S., 357, were quoted in support.

After discussing another question, the opinion continues:

It was stated at the bar that the decision of this case and two other cases in ejectment, tried at the same time and depending upon the same facts, would indirectly affect the title to large tracts of land, in the same situation as the particular lands here in dispute, and which have been heretofore sold in good faith, by the Central Company, to bona fide purchasers in the belief that they were embraced in the grant in the third section of the act of May 5, 1864, and not excluded from the operation of that act by the sixth section relating to lands reserved to the United States; and that a decision in favor of the defendant in the present case would produce great confusion and trouble among such purchasers. In view of this statement the court has felt it to be its duty to embody in this opinion all the material facts shown in evidence, and to state fully the grounds upon which its conclusion rests. That conclusion is:

That the lands in dispute were not granted by the United States for the benefit of the road mentioned in the third section of the act of May 5, 1864, and that the grant for the benefit of the railroad beginning at a point on the line from the St. Croix River or Lake to the west end of Lake Superior, and extending to Bayfield, described in the first section of that act, having been fully adjusted by the United States with the only company that was entitled to the benefit of such last named grant, the lands in dispute became part of the public domain, in virtue of the orders subsequently made by the Secretary of the Interior, and were thereafter opened to entry under the homestead and pre-emption laws of the United States.

In view of this clear exposition of the law by so eminent a jurist, and my own convictions, I am not persuaded by the theory of counsel to reverse the former decisions of the Department in this case.

That portion of the application which asks that the lands in question be retained in reservation until the final adjudication, by the courts, of the claims and pretensions of the Central Company, raises a question of administrative policy; upon the full consideration whereof, I am not disposed to accede to the request made.

The matter of the rights of the Omaha and Central Companies under their respective grants, and their relations to each other, has been the subject of consideration and reconsideration by this Department for a number of years. My predecessor, Secretary, now Mr. Justice, Lamar gave them a most careful examination, as will be seen by his opinions in 6 L. D., 190, and 195. My own decision in 10 L. D., 63, was made after a careful review of the whole subject, and I have no doubt about its correctness; and it is now re-inforced by that of so eminent a jurist as Mr. Justice Harlan. Under these circumstances, I am impressed with the belief that it would be unwise, if not a grave dereliction of duty, to interfere with the regular course of administration by retaining in reservation, for an indefinite period, some 200,000 acres of land, which my predecessor, myself, and Mr. Justice Harlan have held to be public lands, and ought to be thrown open to settlement and entry. If such action should be taken in the present instance, it is not seen how it could well be refused, where any claim is set up to a tract of land. Any one, claiming rights as a settler or entryman, which have been passed upon adversely by this Department, would have a right to expect that the particular tract claimed by him should be held in reser-

vation until he had his rights finally adjudicated by the supreme court of the United States.

The application of the Central Company is denied, of which you will inform it; and the papers relating thereto are herewith sent you.

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PRACTICE—REHEARING—NEWLY DISCOVERED EVIDENCE.

McKINNIS *v.* STATE OF OREGON.

An application for rehearing on the ground of newly discovered evidence should be supported by the affidavits of the persons by whom the applicant expects to prove the alleged additional facts.

A rehearing will not be granted on the ground of newly discovered evidence where due diligence is not shown in making known the alleged discovery and taking action thereon.

The failure of the applicant's attorney to properly conduct the case does not furnish ground for a rehearing.

Where the local office, the General Land Office, and the Department, concur in a finding of fact, and that fact is the only issue in the case, a very strong and clear showing is required to justify a reversal of said decisions on review.

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

Charles McKinnis has filed a motion for review of departmental decision of March 31, 1890, in the case of said McKinnis *v.* The State of Oregon, involving the E. ½ of the SW. ¼ of Sec. 8, and the E. ½ of the NW. ¼ of Sec. 17, T. 41 S., R. 25 E., Willamette Meridian, Lakeview land district, Oregon.

The sole question in issue is whether the tract in question is swamp-land within the meaning and intent of the acts of September 28, 1850 (9 Stat., 519) and March 12, 1860 (12 Stat., 3).

McKinnis offered his declaratory statement June 23, 1885, but it was refused by the local officers because the tract therein described had previously (January 6, 1883,) been included in a list of selections of swamp lands filed by said State. McKinnis thereupon filed affidavit of contest; a hearing was had; and on the evidence adduced the local officers decided (August 13, 1886,) that the tract was swamp-land. McKinnis appealed to your office, which (January 2, 1889,) affirmed the decision of the local officers. He then appealed to the Department, which, after a careful examination of the voluminous testimony taken at the hearing, on March 31, 1890 (*supra*), affirmed the decision of your office.

The sole ground of review is that of newly discovered evidence. Accompanying the application are a number of affidavits embodying said evidence—sworn to by Woodson Garrard, Thomas Wheeler, David Lodge, Peter Peterson, R. C. Clark, and Filander Bonnom.

Besides those above named, the applicant refers to P. H. Dolan and Henry Coleman, as persons whose residence he has but recently dis-

covered, and who would, if a re-hearing were allowed, testify to the effect that the land is not swamp in character.

An affidavit of an applicant as to what some witness would testify if called upon, does not furnish sufficient ground for review. In view of the rule that "such affidavits after judgment, are to be received with great caution, for the reason that they are apt to encourage fraud" (Caledonia Mining Company *v.* Rowen, 2 L. D., 720; Thorpe *v.* McWilliams, 3 L. D., 344), far less weight should be given where no affidavits are filed from the parties whose testimony is relied upon to reverse the decision, the only affidavit being that of the applicant, alleging what they *would* testify if called upon. The motion and affidavit of an applicant must be "supported by the affidavits of the persons by whom he expects to prove the same" (Swanson *v.* Anderson, on review, December 27, 1889—not reported). "A statement of what an applicant expects to be able to prove is no ground for review" (Cobby *v.* Fox, 10 L. D., 483). This disposes of so much of applicant's motion as refers to said Dolan and Coleman.

The applicant in his affidavit states:

> That he had no knowledge that he could prove the facts he now expects to prove by said Thomas Wheeler until on or about the 23d of September, 1886; that he had no knowledge that he could prove the facts he now expects to prove by P. H. Dolan until on or about the first day of October, 1886; that he had no knowledge that he could prove the facts that he now expects to prove by Henry Coleman until on or about the 10th day of May, 1887; that he had no knowledge that he could prove the facts he now expects to prove by R. C. Clark until September 22, 1890; that he had no knowledge that he could prove the facts he now expects to prove by Filander Bonnom until the first day of October, 1890.

The above showing does not indicate "due diligence" in making known to your office or to the Department the facts which he now acknowledges he knew on or before the first day of October, 1887. Between that date and March 31, 1890—the date of the departmental decision complained of—he allowed two and a half years to elapse, and not until after said decision against him was rendered did he give any intimation that he had in reserve valuable evidence having a bearing on his case. Such evidence can not now be considered as "newly discovered evidence." To grant a rehearing upon the basis of such evidence would encourage the trial of cases by piecemeal, and allow a party to keep back his most conclusive proof for an emergency—a course which would be unjust to the opposing party, and a practice not tolerated in courts of law.

McKinnis alleges that at least a portion of the evidence herein referred to would have been offered at the hearing, or placed before the Department at an earlier date, but for the failure of his counsel to perform his duty; "that his counsel in Oregon has seemingly retarded his case, and obstructed rather than aided and assisted him in getting the case before the Department in due time and proper form." But the fact "that applicant's attorney did not conduct the case as skilfully as it

might have been conducted affords no ground for review or rehearing" (Cobby *v.* Fox, 10 L. D., 483).

There remain, as proper to be considered by the Department in connection with the motion for review in the case at bar, only the affidavits of R. C. Clark and Filander Bonnom.

R. C. Clark in his affidavit states:

That I am acquainted with Coleman Valley, Oregon; that I was there in 1863; . . . . . that the country through which I passed at that time was as dry then as it has been the past seven or eight years; and that the vegetation growing upon Coleman Valley in 1863 was much larger than at the present time, said vegetation at that time being rabbit-brush, grease-wood, rye-grass, and some native grasses suitable for pasture or hay; that from my knowledge and observation of Coleman Valley, and of lands in general in its vicinity, I am able to judge with reasonable certainty that the lands in contest were no more swampy on March 12, 1860, than in 1863, when I saw them first.

Filander Bonnom in his affidavit states:

That he knew the land in Secs. 8 and 17, T. 41 S., R. 25 E., W. M., Oregon (more commonly known as Coleman Valley, Oregon,) in the month of June, 1863; at that time the vegetation growing on a greater portion of the land was rye-grass, sage-brush, and grease-wood; that willows were growing in bunches along the creek; also a strip of meadow-land from one to two hundred yards in width adjoined the creek; that the land looked as if it needed irrigation rather than reclamation; that he saw nothing to indicate that the land was swamp or overflowed; that it had more the appearance of being of a desert character than that of a swamp; that from his personal knowledge and observation of the land in 1863, it could not have been swampy on March 12, 1860. He further states that he has recently seen the said land, and that it is of the character above described.

Counsel for McKinnis contend that the foregoing is newly discovered evidence, and that it is not cumulative evidence, because it reaches back to an earlier date than that of any witness examined at the hearing; and that "if proof is made at a rehearing, as stated in said affidavits, it will conclusively overcome all testimony heretofore offered tending to prove the contrary. . . . . The condition of the land at a date nearest to the date of the grant is presumed to be its condition at the date of the grant." In support of this position they quote from the departmental decision of April 9, 1885, in the case of the State of Oregon (3 L. D., 476, last paragraph), and that of Millard *v.* State of Oregon (5 C. L. O., 179). In view of said decisions it is contended that, in the case at bar, the testimony of Clark and Bonnom ought to be held as overcoming that of the witnesses for the State introduced at the hearing already had; hence, that a new hearing should be had, at which said Clark and Bonnom should be afforded an opportunity to testify.

A careful perusal of the affidavits hereinbefore quoted shows that, so far as appears, the said Bonnom was on the land but once until "recently," to wit, "in the month of June, 1863;" and that the said Clarke was on the land but once, to wit, as he passed through the country "in 1863," not specifying the month.

The field-notes of survey shed no light on the character of the land, further than that the land is "subject to annual inundation."

Where the local officers, your office, and the Department, have all concurred in a finding as to a given fact, and that fact the only issue in the case from the beginning, a very strong and clear showing is indispensable before such a uniform line of decisions will be reversed—the more so when such reversal would involve a violation of established precedents in similar cases which have previously, after full and careful consideration, been decided by the Department (Boyd *v.* Oregon, 10 L. D., 315).

Even conceding that, in case another hearing were had, said Clark and Bonnom were to testify as set forth in their affidavits, in my opinion it would not, in connection with the testimony adduced at the hearing already had, be sufficient to warrant a reversal of the departmental decision a review of which is now sought.

The application for a rehearing is therefore denied.

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PRACTICE—APPEAL—NOTICE.

HORACE H. BARNES.

An appeal from the rejection of an application to enter will not be entertained, in the absence of notice to an adverse claimant of record.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 20, 1890.

Your letter of November 8, 1889, transmitted to this Department the appeal of Horace H. Barnes from your ruling of August 17, 1889, affirming the action of the local officers in rejecting his application to make timber culture entry (not homestead entry as stated in your decision) for the NE. ¼ Sec. 7, T. 1 N., R. 48 W., Denver, Colorado land district.

On June 8, 1889, Barnes made application to make timber culture entry for this land and the same was rejected by the local officers "for the reason that said tract is covered by the timber culture entry of John A. Burrows No. 2808 made July 21, 1885," from which ruling Barnes appealed to your office and on August 17, 1889, you sustained said action and from this ruling of your office he appealed to this Department.

It appears that on July 21, 1885, one John A. Burrows made timber culture entry for this tract, the affidavits, including the non-mineral, being insufficient, his entry was held for cancellation, and on August 25, 1887, he filed supplemental timber culture and non-mineral affidavits, also an explanatory sworn statement in which he sets forth among other matters that when he made the entry he was ignorant of the law; that he had not seen the land, but had been advised that the non-mineral affidavit could be based on information and belief, etc., and he asked to substitute the said affidavits for the original, and that his entry be allowed to stand, as a valid entry.

On April 28, 1888, your office passed upon the case thus presented and said: "After a careful consideration of all the papers presented I can not think that Burrows made this entry in good faith and the entry is therefore held for cancellation, subject to appeal within the usual time."

No appeal was taken from this decision and on June 17, 1889, in reply to your office inquiry the local officers informed your office that "the party was duly notified, but has failed to appeal from said decision."

On June 8, 1889, the appellant Barnes, made application to make timber culture entry for said land and the same was rejected as herein before stated, from which he appealed to your office, on July 12, 1889.

On July 6, 1889, your office sent to the register and receiver at Denver land office a letter in which you refer to their letter of August 25, 1887, transmitting Burrows' supplemental affidavits, also to your office letter of April 28, 1888, in which you held his entry for cancellation, also to their letter of June 17, 1889, notifying your office that he had not appealed, and proceeding, you refer to the decision of the Department in the case of Griffith W. McMillan (8 L. D. 478) and conclude by saying: "In view of this decision I have decided to change the former action of this office and allow the entry of Burrows to remain intact on the record."

On August 17, 1889, your letter to the local officers at Denver land office, acknowledged the receipt of their letter transmitting the appeal of Barnes from their rejection of his application to make timber culture entry for the land, and you affirmed their action because the records of your office showed the entry of Burrows to be intact, from which Barnes appealed to this Department. This is the case as it appears of record.

This statement of facts shows that Burrows is, by reason of his subsisting entry, a claimant of record for the land involved and as such is entitled to notice of the appeal herein. Such notice not having been served on him, this Department will not, under the circumstances, consider the appeal. If Burrows' entry ought to be canceled that end may be attained by a proper procedure on the part of Barnes or any other interested party.

The appeal of Barnes, for the reasons set forth, is dismissed.

PRACTICE TRANSFEREE—REVIEW.

JAMES ROSS.

If the showing made by the transferee would not entitle the entryman to be heard on review, the application therefor, on behalf of the transferee, must be denied.

Motions for review must be accompanied by an affidavit of the party, or his attorney, that the motion is made in good faith, and not for the purpose of delay.

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

I have before me a motion for review of the departmental decision dated May 19, 1890, in the case of James Ross, involving the commuted homestead entry of said Ross for the NE. ¼ of Sec. 12, T. 135 N., R. 51 W., Fargo, Dakota.

On the 2nd day of August, 1886, your office rejected Ross' commutation final proof for the tract and held his homestead entry for cancellation from which he appealed, and on the 4th day of August, 1888, the Department found, that "the facts presented by the final proof not only fail to show that the claimant ever in good faith established a residence on this land, but when taken in connection with his total abandonment of the land on the same day he received final certificate therefor, convince me that he was acting in bad faith in this matter, and was endeavoring to obtain title to this tract of land without complying with the requirements of law," and thereupon affirmed said decision of your office.

A motion for review and reconsideration of said departmental decision was filed by Ross and on the 12th day of February, 1890, upon full consideration was denied.

Upon receipt of said decision by Ross' attorneys they, as the attorneys for "The Colonial and United States Mortgage Company, Limited," of London, England, transferee of said James Ross, applied to your office for the issuance of an order for new publication and submission of new proof by said transferee. This application your office refused on the ground that as a final decision had been rendered by the Department, and the case closed, your office had no jurisdiction in the premises.

Thereupon said attorneys applied for a writ of certiorari on the ground that the several decisions hereinbefore referred to against *the entryman* have "no bearing whatever as to the rights of *the transferee*, who has never been heard nor had his day in court," which application was upon full consideration denied on the 19th day of February, 1890. October 2, 1890, the same attorneys filed the motion for review of said decision of February 19, 1890.

There is but a single question presented by the motion under consideration which is stated by the attorneys representing the motion, to be: "Did not the company by virtue of the mortgage given by Ross to them, acquire some interest in the premises?" This question was

passed upon in the opinion sought to be reviewed, at least so far as the same is material. That a transferee or mortgagee is injured by the decision is no ground for review, as his rights are in no sense other or different from those of the entryman. A. A. Joline (5 L. D., 589); Chas. W. McKallor (9 L. D., 580).

If the showing made by the transferee would not entitle the entryman to be heard on review, the application must be denied. The entryman appeared and hotly contested every point therein, and nothing could be gained by going over the same ground at the instance of the transferee.

The motion under consideration does not conform to the Rules of Practice. Rule 78, requires that: "Motions for rehearing and review must be accompanied by an affidavit of the party, or his attorney, that the motion is made in good faith and not for the purpose of delay."

While there is such a statement as Rule 78 requires attached to the motion, there is no evidence of it having been sworn to. In view of the foregoing the motion is denied.

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### APPLICATION FOR REPAYMENT—WAIVER OF APPEAL.

### UNICORN PLACER.

An appeal from a decision holding an entry for cancellation is waived by a subsequent application for the repayment of the purchase money.

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

Your letter of December 2, 1889, transmitted the appeal of Theodore F. Van Wagenen, trustee, etc., in the matter of the Unicorn placer claim (mineral entry No. 2884), from your decision holding for cancellation said mineral entry for the Unicorn placer claim, embracing the S. ½ of S. ½ of NE. ¼ of SE. ¼, the N. ½ of S. ½ of SE. ¼, the N. ½ S. ½ SW. ¼ of SE. ¼ the S. ½ of NW. ¼ of SE. ¼, the NE. ¼ of SW. ¼ the S. ½ of SW. ¼ of NW. ¼, and the N. ½ of NW. ¼ of SW. ¼ of Sec. 35, T. 11 S., R. 80 W., 6th P. M., Leadville, Colorado land district.

Your letter of August 11, 1890, transmitted an application by the Twin Lakes Hydraulic Gold Mining Syndicate, for repayment of the purchase money paid on this entry, and on entry No. 2802, the Capricorn placer claim, decided by this Department June 7, 1890 (10 L. D., 641), and on entry No. 2883, the Ritchie Patch placer claim. The latter two, like this, having been made by said Van Wagenen.

It is claimed by Van Wagenen that he is the trustee for the Twin Lakes Hydraulic Gold Mining Sydicate. a corporation, but it was held in the case of Capricorn placer claim *supra*, that "The trustee in this case as disclosed by the record is merely the agent, for a special purpose, of an alien corporation." The same is true of the trusteeship in the case at bar, and the action of the principal (the corporation) in ap-

plying for a repayment of the purchase money is in effect an abandonment or waiver of the appeal of the agent (trustee) it being really the appeal of the corporation, and the appeal herein is therefore dismissed. See Michael Shannon (9 L. D., 643).

The application for repayment not having been considered by your office, because of the pendency of two of the cases in this Department, is returned to your office for your consideration.

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### RAILROAD LANDS—FORFEITURE ACT OF SEPTEMBER 29, 1890.

### INSTRUCTIONS.

The language in section 2 of said act authorizing "a second homestead entry" refers only to those persons who had theretofore made a homestead entry but failed from any cause to perfect the same. The object of such provision being to allow any one qualified, who had not theretofore secured a piece of land under the homestead law, to obtain a tract of the forfeited land under said law, and at the same time to take said land out of the operation of the pre-emption law.

In establishing the terminals separating the granted lands from those forfeited on the main line of the Northern Pacific between Wallula and Portland the lines should be run at right angles to the general course of the last twenty-five miles of the road.

Under the provisions of section 6, of said act the Northern Pacific Company should be called upon to elect as to the alternate odd numbered sections it will take in satisfaction of the moiety for its constructed branch line where the limits of such line overlap the limits of the forfeited main line, and the remaining odd sections be restored to the public domain.

The Gulf and Ship Island road should be called upon to indicate the exact point where its line will cross the New Orleans and Northeastern road.

Directions given for a rule on certain companies to show cause why the indemnity withdrawals made for their benefit should not be revoked.

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

By letter of October 28, 1890, you submitted for my approval a draft of a circular letter of instructions under the forfeiture act of September 29, 1890 (26 Stat., 496).

Section 1 declares a general forfeiture of granted lands opposite the unconstructed portions of land-grant railroads.

Section 2, of said act provides:

That all persons who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited and are otherwise qualified, on making due claim on said lands under the homestead law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such actual settlers from the date of actual settlement or occupation; and any person who has not heretofore had the benefit of the homestead or pre-emption law, or who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act.

You state that a strict construction of this language would exclude from the privilege of a second homestead entry granted by this section, any person who had perfected title to land under either the homestead or pre-emption law, and would confer the privilege only upon those who had made an entry under either law, and failed from any cause to perfect title to the same, but that this construction is repugnant to the idea of a second homestead entry, "for unless the settler had heretofore made a homestead entry, the necessity for the privilege of a second homestead entry does not arise." You then express the belief that "the intention of this act is to permit a second entry where the party has not heretofore perfected title under both homestead and pre-emption laws, thus to permit him to acquire, in the aggregate three hundred and twenty acres under both of said laws."

It is clear that the first clause of the section allows the actual settler, if qualified, to make a homestead entry of the tract upon which he has made settlement, and this as a preference right to be exercised within six months after the passage of the act. While the language of the second clause is somewhat ambiguous, I have concluded that the language authorizing "a second homestead entry" refers only to those persons who had theretofore made a homestead entry but failed from any cause to perfect the same. The object is to allow any one qualified who had not theretofore secured a piece of land under the homestead law to obtain a tract of these forfeited lands under that law, and at the same time to take these lands out of the operation of the pre-emption law.

I suggest that the circular instructions under the third section of the act be in the words of the act itself, with the addition of the instructions now in the circular as to the provisos to said section.

By the first section of the act the grant to the Northern Pacific railroad company appertaining to the main line between Wallula, Washington, and Portland, Oregon, is forfeited.

This renders it necessary to establish terminals separating the granted lands from those forfeited, at these points.

On August 13, 1885, the question of fixing the terminal limit at Wallula was considered by the Department (5 L. D., 459), and it was held that the line should be run at right angles to the general course of the last section (of twenty-five miles) of the road.

By the fourth section of the grant for said company it is enacted:

> That whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed, in a good, substantial and workmanlike manner, as in all other respects required by this act, the Commissioners shall so report to the President of the United States; and patents of land as aforesaid shall be issued to said company, confirming to said company the right and title to said lands, situated opposite and coterminous with said completed, section of said road. . . . . And so, from time to time, whenever twenty-five additional consecutive miles shall have been constructed. (13 Stat., 367).

Referring to these provisions the Secretary in his decision of 1885 said:

From these provisions as the railroad company completed each consecutive twenty-five miles of road, upon report of the commissioners, the grant must be confirmed by patents for the land on each side of the road corresponding with the section of the road completed. If it is to be confirmed by patent, as each twenty-five miles is constructed, a determination of boundary must precede the patent, the presumption would arise that either at or before the time the inspection was made, the law contemplated that the terminal limit of the twenty-five miles inspected was to be fixed. By the provisions of the grant, such inspection would fix the terminal limit of land to be patented and thus, for purposes of patenting, the road as constructed, would be divided in patenting sections of twenty-five miles each, the boundary of each of such sections fixed at or before the time of inspection.

The grant then having divided the road into sections of twenty-five miles for purposes of boundary and patenting, in fixing the boundary of this last section by the provisions of the grant alone, (excluding all extraneous facts,) as the courses of the road are various, some general course must be adopted from which to fix the terminal line.

The subject of the course to be fixed was considered in a decision rendered by Secretary Thompson, on the 23d of February, 1858, reported in 1st Lester, page 527, also in the case of the Flint and Pere Marquette Railroad, by Secretary Kirkwood, on September 1, 1881 (1 L. D., 394); and also was incidentally discussed by the supreme court of the United States in the case of the United States *v.* Burlington and Missouri River Railroad, (8 Otto, 334). The substance of the rulings in the several cases is: "The land is taken along such line in the sense of the statute, when taken along the general direction or course of the said road within lines perpendicular to it at each end."

Then if this rule is to be applied (as it has been already shown, only the last twenty-five miles of the road under the terms of the present grant can be considered) the terminal line should be run at right angles to the general course of the last twenty-five miles of the road.

Under this decision it is clear that the Department held the company to be entitled to patents for the road then constructed, down to the line so established and no farther. Assuming this conclusion to be correct, (and the forfeiture act in no way interferes with it) there is no reason now presented for changing the same. On the contrary the terms of the forfeiture act are in line with that decision. Said section four of the granting act, *supra*, directed patents to issue for lands "*opposite to and coterminous with* said completed section of said road; . . . . . and so on as fast as every twenty-five miles of said road is completed as aforesaid:" the first section of the forfeiture act restores to the United States the title to "all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad *opposite to and coterminous with* the portion of any such railroad not now completed." If the line fixed in 1885 separated the lands then earned by the company, by the construction of the road, from those not so earned, it does so now, as no more road has since been built. In other words that line divides the lands "opposite to and coterminous with" the portion not constructed, from those earned by the constructed road. The line of 1885, will, therefore, be adhered to.

The same principles apply to the line at Portland.

Section 6 of the act provides:

> Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared to the benefit of the completed line.

You state that "the grant appertaining to the main line of the Northern Pacific Railroad, forfeited by this act, is overlapped by the limits adjusted upon the constructed branch line of said road, and as to such overlap the grant is of a moiety on account of each line;" that the map of general route of the main line opposite said conflict was filed and a legislative withdrawal made thereon prior to the location of the branch line and that the withdrawal continued in force at the date of the passage of the forfeiture act. You conclude that within the conflict "every alternate odd-numbered section" should be reserved for the branch line, and the remaining odd sections restored to the public domain under said section 6, and suggest that the company be called upon to elect which of such alternate odd-numbered sections it will take in satisfaction of the moiety for its branch line. All of this meets with my approval.

The company urges that as the main line had not been definitely located, between Wallula and Portland, the lands within the withdrawal on general route for that distance cannot be treated as granted lands, and are therefore not subject to said provisions as to moiety lands within the overlapping limits.

This contention cannot be sustained. In the first place there was a grant along said route, which lacked only action on the part of the company to consummate. Furthermore, a reading of the entire act leaves no room to doubt that a forfeiture along said stretch of the main line was contemplated, and the lands so forfeited are described in the first section of the act as "granted" lands. If this be not true, there has been no forfeiture at all on that part of the line, a conclusion which even the company does not maintain. It is equally apparent that the word "granted" in said section 6, is used in the same sense as in section 1, and, therefore, refers to the lands upon which the forfeiture operates. These are the lands withdrawn along said line.

You will, accordingly, notify the company to indicate within thirty days from notice what alternate odd-numbered sections it will elect to take. If the company elect to take sections 1, 5, 9, 13, etc., of the various townships then sections 3, 7, 11, 15, etc., will remain to the government and be restored to the public domain or *vice versa*. Should the company fail to make its election within said time then your office will act in that capacity in its stead.

Section 7, provides that upon certain conditions the forfeiture shall not operate for one year as to so much of the grant for the Gulf and Ship Island Railroad as lies south of a line drawn east and west through

the point where said road *may* cross the New Orleans and Northeastern Railroad in the State of Mississippi. It appears from inquiries made by your office that the former road will not cross the latter at the point indicated by the map of definite location. You accordingly request instructions "as to where the terminal shall be established in order to separate the lands upon which the act operates immediately from those saved from forfeiture for one year." I suggest that you direct said company to notify you, within thirty days, of the exact point at which the line will cross the New Orleans road.

After the submission of said circular, by letter of November 7, 1890, you submitted an opinion in reference to the operation of section 8, of said act upon the grant for the Mobile and Girard railroad in Alabama. Inasmuch as the questions therein involved are peculiar, I suggest that the instructions under said section be omitted from the circular and I will communicate with you later on the subject.

You state that section 4, of the act repeals certain sections in acts making grants to aid in the construction of certain railroads, in so far as said sections require the Secretary of the Interior to reserve lands within the indemnity limits of such grants, and recommend the formal restoration of any such lands now remaining withdrawn.

On August 13, and 15, 1887, the lands within indemnity limits of most of the land grant roads were restored to the public domain. (6 L. D., 84 and 92). Certain exceptions, however, were made of roads to which you now refer. See 6 L. D., 328, and 456. To the end suggested by you, you will notify each of said companies to show cause within thirty days why the withdrawal of indemnity lands made for its benefit, should not now be revoked and the lands therein embraced restored to settlement. This practice is in accord with that in the former restoration.

Otherwise than as herein indicated the proposed circular will meet my approval. Herewith are returned the papers.

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### RAILROAD LANDS—ACT OF MARCH 3, 1887.

### NICHOLAS COCHEMS.

An application to purchase under section 5, act of March 3, 1887, made by one claiming under a grantee of a railroad company, can not be entertained until it has been finally determined that the land in question is in fact excepted from the grant.

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

I have considered the appeal of Nicholas Cochems from the decisions of your office of March 1, 1889, and June 24, 1889, refusing his application to purchase under the act of March 3, 1887 (24 Stat., 556), Sec. 33, T. 8 N., R. 14 W., S. B. M. Los Angeles California land district.

The second decision was made solely because of an error in the first in the description of the land.

Cochems as the purchaser from the grantee of the Southern Pacific Railroad Company of this land, which it is stated by you falls within the granted limits of the grant to said company by act of March 3, 1871 (16 Stat., 573), and is also within the indemnity limits of the grant to the Atlantic and Pacific Railroad Company by act of July 27, 1866 (14 Stat., 292), asks to be allowed to purchase this land from the United States under the provisions of the fifth section of said act of March 3, 1887. This application was refused by your office on the grounds that it has not yet been finally determined that lands situated as this tract is, were excepted from the grant to the company under which Cochems claims. By decision of this Department of June 23, 1888, (6 L. D., 816) lands of this class were continued in reservation "pending adjudication by the courts, or until such time as the Department may deem it proper to remove the reservation." No further action has been taken by this Department nor has the question involved been finally determined by the courts. Under these circumstances the application to purchase can not be allowed and the decision refusing the same is affirmed.

This action will not prevent the favorable consideration hereafter of an application, if it shall be determined that said land was excepted from the said grant and a proper showing to bring the applicant within the provisions of said act of March 3, 1887, shall be made.

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PRACTICE—APPEAL—JURISDICTION.

VANN *v.* WOOD.

The validity of the appeal from the local office will not be considered by the Department, where the case is submitted on its merits to the General Land Office, and without objection to its jurisdiction.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 27, 1890.*

I have considered the case of Perry C. Vann *v.* Robert Wood on appeal by the former from your decision of June 1, 1889, dismissing his contest against the homestead entry of the latter for the N. ½ of SE. ¼ and SE. ¼ of NE. ¼ Sec. 14, T. 16 S., R. 2 W., Montgomery, Alabama.

The first error assigned by appellant is that the appeal to your office from the decision of the local officers, was made by one Samuel Thompson, attorney, who being a United States commissioner, was debarred from practicing before the Land Department. This objection, however valid when properly taken, was not made before your office when the case was there pending, but the attorneys appeared of record and filed an argument on the merits of their case and closed by saying: "Wherefore . . . . appellee prays the Hon. Commissioner of the General

Land Office to affirm the decision of the register and receiver and that said entry of Robert Wood be held for cancellation."

There was no motion filed to dismiss the appeal, nor question made as to your jurisdiction, and counsel having taken their chances and invoked your judgment on the merits of the case, will not be heard to complain, now that they have lost, that there was no proper or valid appeal. Your jurisdiction did not depend upon the validity of the appeal, as the manifest error of law by the local officers, would have given your office authority under the 2d paragraph of Rule No. 48 Rules of Practice, to consider and determine the case, in regular course of business, even if no appeal had been taken.

Your decision states the record and testimony fairly and substantially, and having carefully reviewed the record, I do not find any reason for disturbing your decision, and the same is accordingly affirmed.

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### RESIDENCE—LEAVE OF ABSENCE—ACT OF MARCH 2, 1889.

### HARRY C. SEWARD.

The leave of absence accorded to settlers under section 3 of the act of March 2, 1889, can only be allowed on a duly corroborated showing that such absence is made necessary by sickness, failure of crops, or other unavoidable casualty.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December* 29, 1890.

On April 29, 1889, Harry C. Seward filed an application for leave of absence under the provisions of the act of March 2, 1889.

May 2, 1889, the local office rejected his application for the reason that he failed to show that by reason of unavoidable casualty he had been unable to secure a support upon his claim, and also that the corroborating affidavits were not shown to have been made by disinterested witnesses as required by circular of March 8, 1889.

Claimant appealed.

June 26, 1889, your office affirmed the action of the local officers and directed them to notify claimant of his right of appeal, and the same time to advise him—

That while the extraordinary relief provided by the act (March 2, 1889) is afforded only in the particular class of cases therein specified, yet in cases generally, the temporary absence of a settler from the land for the purpose of obtaining employment, will not invalidate his claim when good reason therefor appears and he is found to be seeking in good faith to make his home on the land.

Claimant again appealed in which he merely alleges that "said finding and decision are contrary to law and contrary to the facts set forth in my application."

While I am of the opinion that these allegations are insufficient and do not comply with the requirements of rule 88 of the Rules of Practice,

yet as the question to be decided is one between the applicant and the government, I will waive the informality of the appeal and consider the case on its merits.

Section 3 of the act of March 2, 1889 (25 Stat., 854), provides:—

That whenever it shall be made to appear to the register and receiver of any public land office, under such regulations as the Secretary of the Interior may prescribe, that any settler upon the public domain under existing law is unable by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty to secure a support for himself, herself, or those dependent upon him or her upon the lands settled upon, then such register and receiver may grant to such settler a leave of absence from the claim upon which he or she has filed for a period not exceeding one year at any one time, and such settler so granted leave of absence shall forfeit no rights by reason of such absence: *Provided*, That the time of such actual absence shall not be deducted from the actual residence required by law.

In pursuance of the foregoing act this Department on March 8, 1889, 8 L. D., 314 issued its circular of instructions to registers receivers of the United States land offices, directing them that:

The applicant for such permission will be required to submit testimony to consist of his own affidavit, corroborated by the affidavits of disinterested witnesses, . . . . setting forth in detail the facts on which he relies to support his application, and which must be sufficient to satisfy the register and receiver, who are enjoined to exercise their best and most careful judgment in the matter, that he is unable by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty to secure a support for himself or those dependent upon him upon the land settled upon. In case a leave of absence is granted the register and receiver will enter such action on their records, indicating the period for which granted, and promptly report the fact . . . . transmitting the testimony on which their action is based. In case of refusal the applicant will be allowed the right of appeal on the usual conditions.

Following is a copy of claimant's application, viz:—

Territory of Wyoming)<br>County of Converse) ss.

Harry C. Seward of said county and Territory, being first duly sworn according to law, on his oath deposes and says: That he is the identical Harry C. Seward who made (filed) pre-emption entry (declaratory statement) No. 5091, on the 7th day of April A. D., 1888, for the southwest quarter of section number twenty-one township number thirty-two north, of range number sixty-five west of the sixth principal meridian. Affiant settled on said land March 31, 1888, he built a house thereon, moved there with his family, has resided there during the last year and resides there now. He dug a well on said land to a depth of thirty-six (36) feet, the last three feet of which was through rock that required blasting; he did not obtain water, and is without the necessary means to purchase blasting powder to complete said well. As a result he has been compelled to have water hauled from the nearest well a distance of five and a half miles; affiant has no team or farm implements, and has been compelled to hire water hauled and other farm work done that required a team. He has been unable to obtain work, and finds it impossible to continue his residence on said land and support himself and family. He therefore requests the honorable register and receiver of said land office that he be granted a leave of absence of one year from

said land, that he may go where he can obtain employment to support himself and family, and earn the necessary means with which to return to said land and complete his residence and settlement thereon.

HARRY SEWARD.

Subscribed and sworn to before me this 29th day of April, A. D., 1889.

HARRY L. HIGBY,
*Notary Public.*

Also appeared at the same time and place John H. Foster and William R. Dryer, who being duly sworn depose and say that they reside in the vicinity of the land herein described; that they have known Harry C. Seward, applicant, since he settled on said land, and that the statements made in the foregoing affidavit are true, of their personal knowledge.

JOHN H. FOSTER,
WILLIAM R. DRYER.

Subscribed and sworn to before me this 29th day of April A. D., 1889.

HARRY L. HIGBY,
*Notary Public.*

As it clearly appears from the record herein that the applicant failed to show by his affidavit corroborated by the affidavit of two disinterested witnesses that he was suffering by reason of a total or partial destruction or failure of crops, or sickness, and as I think that the mere failure to find water at the depth of thirty-six feet was not of itself such a casualty as is contemplated by statute, so as to entitle him to a leave of absence, therefore and in view of the additional circular issued September 19, 1889 (9 L. D., 433), explanatory of the circular of March 8, 1889, the decision appealed from is accordingly affirmed.

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### RAILROAD GRANT—PROCEEDINGS ON FINAL PROOF.

### NORTHERN PACIFIC R. R. CO. *v.* HARRENDRUP.

The failure of a railroad company to respond to a settler's notice of intention to submit final proof for land within its primary limits, is a waiver of said company's right to deny the facts as set up in said proof; but if the record does not affirmatively show that such land is excepted from the grant the entry can not be approved.

*Secretary Noble to the Commissioner of the General Land Office, December 29, 1890.*

I have considered the case of the Northern Pacific Railroad Company *v.* Peter L. Harrendrup, as presented by the appeal of the company from the decision of your office, dated March 13, 1889, rejecting the claim of the company for the SW. ¼ of Sec. 29, T. 9 N., R. 9 W., Helena, Montana.

The record shows that your office, on July 26, 1888, examined preemption cash entry No. 1656, made July 11, 1884, by said Harrendrup of said tract at Helena, Montana, and found that the land was within

the statutory withdrawal on filing map of general route, of February 21, 1872, and also within the primary limits of the grant to said company by act of Congress, approved July 2, 1864 (13 Stat., 365); that one George L. Harrendrup filed pre-emption declaratory statement No. 2563 for said land on April 24, 1872, alleging settlement November 15, 1871; that said Peter L. Harrendrup filed pre-emption declaratory statement No. 5287 for said land on May 21, 1883, alleging settlement on the same land April 6, 1883, and after due notice made final proof and received final certificate No. 1656 for said tract; that said final proof shows that the entryman purchased the possessory right and improvements of his brother, said G. L. Harrendrup, valued at $1,000; that there was nothing before your office showing the status of said land, or the qualifications of said G. L. Harrendrup at the date of said withdrawal on general route, or July 6, 1882, the date of the definite location of the road, and the local officers were directed to order a hearing, giving all parties in interest due notice thereof.

The entryman filed in the local office an appeal from said decision of your office, and with his said appeal filed affidavits, alleging that said G. L. Harrendrup was a qualified settler and in the possession of said land at the date of withdrawal on general route, and also at the date of definite location of the road. But your office, on January 22, 1889, refused to accept said appeal, and directed the local officers to proceed with said hearing.

On March 13, 1889, your office examined said cash entry, and finding the facts as above stated held that the failure of the railroad company to appear at the time the cash entryman offered his final proof and protest against the same, was conclusive against its claim, citing as authority the case of Brady *v.* Southern Pacific Railroad Company (5 L. D., 407). But this land, being within the granted limits, is differently situated from that in the Brady case (*supra*). Besides, in the case of Randolph (9 L. D., 416), the Department held that "By the failure of the company to respond to notice of intention to submit final proof, it waives all right to deny the facts set up in said proof;" but the record must affirmatively show that the land was excepted from the grant, or the entry would not be approved.

In the case at bar, the final proof does not affirmatively show that the land was occupied at the date of the withdrawal on general route by a qualified pre-emptor, and the company has had no opportunity to contest the truth of the allegations made in the subsequent affidavits filed in the case. A hearing will accordingly be ordered, after due notice to the parties, and the affidavits filed with the appeal from the decision of your office ordering said hearing should be returned to the local office as a basis for said hearing. Upon receipt of the testimony taken at said hearing and the report of the local officers thereon, your office will re-adjudicate the case.

The decision of your office is modified.

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