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IN

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FROM JANUARY 1, 1903, TO MAY 31, 1904.

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

ALASKAN LANDS—ROADWAY RESERVATION—TIDE LANDS—TRAMWAY.

JESSE C. MARTIN.

Tide lands and the lands reserved as a public highway along the shore line of Alaska are not a part of the public domain, within the meaning of that term as used in section 6 of the act of May 14, 1898, and the Secretary of the Interior is without authority to approve an application for a right of way for a wagon road or tramway over such lands and the construction of a pier or wharf thereon.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 10, 1903.* (F. W. C.)

The Department has considered the appeal by Jesse C. Martin, from your office decision of June 27, last, rejecting his application, made under the act of May 14, 1898 (30 Stat., 409), for a right of way for a—

wagon road or tramway, from a point on the southerly boundary of the original townsite of Valdez on Glacier Avenue or Broadway to the line of ordinary high water mark and to construct thereon and maintain the necessary piers and wharfs for connection with water transportation as described by metes and bounds in the annexed field notes of survey of said wagon road, tramway and wharf, with the right, subject to the supervision and the rates to be approved by the Secretary, to levy and collect toll or freight and passenger charges, on passengers, animals, freight or vehicles, passing over the same for a period not exceeding "twenty years," with the privilege to purchase upon completion of said road, a tract of public land not exceeding "twenty acres at each terminus at" one dollar twenty five cents per acre, such lands when located at or near tide water not to extend more than forty rods in width along the shore line of any navigable water and the title thereto to be upon such expressed conditions as in his judgment may be necessary to protect public interest, and all minerals, including coal, in such right of way or station grounds, to be reserved to the United States.

The map or plat attached to the application shows that the proposed wagon road or tramway extends southwesterly from a point on the south boundary of Valdez townsite, a distance of 228½ feet, to "ordinary high water mark," at which point a pier or wharf is to be constructed to "low water line," a distance of 1,200 feet from the point

of beginning, and thence it is to be continued to deep water, a distance not stated. The location of the land proposed to be purchased is not described in the application. Your office decision calls attention to the fact that the application under consideration indicates that it is in front of a tract included within the Valdez townsite but that the records of your office fail to show any application for such a townsite.

The sixth section of the act of May 14, 1898, being the section under which the application under consideration is made, provides, among other things, as follows:

That the Secretary of the Interior is hereby authorized to issue a permit, by instrument in writing, in conformity with and subject to the restrictions herein contained, unto any responsible person, company, or corporation, for a right of way over the public domain in said District, not to exceed one hundred feet in width, and ground for station and other necessary purposes, not to exceed five acres for each station for each five miles of road, to construct wagon roads and wire rope, aerial, or other tramways, and the privilege of taking all necessary material from the public domain in said District for the construction of said wagon roads or tramways, together with the right, subject to supervision and at rates to be approved by said Secretary, to levy and collect toll or freight and passenger charges on passengers, animals, freight, or vehicles passing over the same for a period not exceeding twenty years, and said Secretary is also authorized to sell to the owner or owners of any such wagon road or tramway, upon the completion thereof, not to exceed twenty acres of public land at each terminus at one dollar and twenty-five cents per acre, such lands when located at or near tide water not to extend more than forty rods in width along the shore line and the title thereto to be upon such expressed conditions as in his judgment may be necessary to protect the public interest, and all minerals, including coal, in such right of way or station grounds shall be reserved to the United States: *Provided*, That such lands may be located concurrently with the line of such road or tramway, and the plat of preliminary survey and the map of definite location shall be filed as in the case of railroads and subject to the same conditions and limitations: *Provided further*, That such rights of way and privileges shall only be enjoyed by or granted to citizens of the United States or companies or corporations organized under the laws of a State or Territory; and such rights and privileges shall be held subject to the right of Congress to alter, amend, repeal, or grant equal rights to others on contiguous or parallel routes. And no right to construct a wagon road on which toll may be collected shall be granted unless it shall first be made to appear to the satisfaction of the Secretary of the Interior that the public convenience requires the construction of such proposed road, and that the expense of making the same available and convenient for public travel will not be less on an average than five hundred dollars per mile: *Provided*, That if the proposed line of road in any case shall be located over any road or trail in common use for public travel, the Secretary of the Interior shall decline to grant such right of way, if, in his opinion, the interests of the public would be injuriously affected thereby.

By the tenth section of that act "a roadway sixty feet in width, parallel to the shore line as near as practicable," of the public land abutting on navigable waters in the district of Alaska, is "reserved for the use of the public as a highway." The term "shore line," as used in said section, has been construed by the Department to mean "high water line" (27 L. D., 248, 263-4), and in the case of Nome Transportation Company (29 L. D., 447, 450), involving an applica-

tion for a permit for the use of a right of way under section 6 of the act of 1898, it was held that, "in order, therefore, that this reservation of a highway for the benefit of the public may not be interfered with, it is necessary that the right of way in question should not, at any point, approach nearer the shore than the distance of sixty feet from the high water line thereof." See also *Ex parte* George N. Wright (29 L. D., 684).

In the application under consideration it is shown that the proposed wagon road or tramway will traverse the sixty-foot reservation bordering upon the shore of Valdez bay, and while the applicant agrees to so construct the proposed road, tramway and wharf and to operate the same in such manner as not to interfere in any way with the public highway, there would, nevertheless, seem to be no authority for the granting of the permit, as the act of 1898 authorizes the issuance of a permit for a right of way only over the public domain, and the lands reserved as a public highway, and the tide lands over which it is proposed to construct a pier or wharf, are not a part of the public domain within the meaning of that term, as so used in said act. (Nome Transportation Company, *supra*, and cases therein cited.) Excluding the sixty-foot reservation along the shore of Valdez bay, and the tide lands, the application is reduced to a proposed road or tramway 168½ feet extending in a southwesterly direction from a point on the southern boundary of the Valdez townsite referred to therein.

In the opinion of this Department this proposed wagon road or tramway is not such a one as is contemplated by the sixth section of the act of 1898, and on account of the construction of which the Secretary of the Interior is authorized to issue a permit for a right of way. It seems rather to be a mere application for wharfage privileges in front of the townsite, and from a consideration of the entire matter the application is denied and herewith returned, with the accompanying papers, for the files of your office.

CHIPPEWA LANDS—COMMUTATION—ACT OF JUNE 3, 1896.

JOHN PURCELL.

Lands in the Chippewa reservation in the State of Minnesota opened to settlement and entry by the act of January 14, 1889, are subject to homestead entry and commutation under the act of June 3, 1896.

Circular of September 17, 1897, 25 L. D., 258, in so far as it prohibits the commutation of entries under the act of June 3, 1896, upon Chippewa lands, overruled.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 4, 1903.* (V. B.)

On September 4, 1901, John Purcell, claiming the benefit of the provisions of the act of June 3, 1896 (29 Stat. 245), made homestead entry,

of the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 13, T. 144 N., R. 37 W., Crookston land district, Minnesota, in lieu of the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and lot 1, Sec. 19, T. 141 N., R. 34 W., St. Cloud land district, Minnesota, for which he had filed, April 24, 1888, preëmption declaratory statement.

On the day the homestead entry was made Purcell gave due notice of his intention to make final proof in support thereof. This proof was submitted October 30, 1901, with tender of the commutation price of the land, and was on the same day rejected. On appeal, your office, July 23, 1902, approved the action of the register and receiver. Purcell appealed here and the case is now before the Department for consideration.

Accompanying the application to make homestead entry were filed the affidavits of Purcell and two other parties, made on final proof forms, to the effect that on the day of filing his preëmption declaratory statement he had settled upon the tract covered thereby, established and maintained residence until December, 1888, built a house and cleared about four acres and made one crop. In the final proof, however, it is stated by Purcell and his witnesses that he remained upon the preëmption claim until August, 1889. This discrepancy is not explained.

The register and receiver rejected the final proof—

because the act of Jan. 14, 1889, under which the lands were opened to settlement and entry, did not permit of the commutation of such an entry, and for the further reason that the act of January 26, 1901, permitting commutation of Chippewa lands, applied only to lands opened to settlement and entry prior to May 17, 1900, while these lands were not opened until December 4, 1900.

The reason for rejecting the final proof, as given in your office decision, is as follows:

The provisions of the act of June 3, 1896, do not apply to land in any of the Chippewa reservations in Minnesota, as the act of January 14, 1889 (25 Stat., 642), under which said lands are disposed of, require that said lands be disposed of to actual settlers only, under the provisions of the homestead laws.

It appears by the record that the tract of land upon which Purcell filed his preëmption declaratory statement is within the limits of the second indemnity belt of the Northern Pacific railroad grant, was selected by the railroad company before said filing and afterwards patented to it.

By the first section of the act of June 3, 1896, *supra*, it was provided, in substance, that persons who, between August 15, 1887, and the first day of January, 1889, for the space of six months settled upon, improved and cultivated any of the lands within said second indemnity belt, with a view of entering the same under the homestead or preëmption laws, being qualified to make such entries, "and were not permitted to make such entries," upon establishing these facts shall be allowed to make homestead entry of a like quantity "of the unappropriated public lands" and shall, when making proof, receive credit for

the settlement, improvement and cultivation upon the indemnity tract: "Provided, That the law in force in eighteen hundred and eighty-nine governing the commutation of homestead entries shall apply to the commutation of entries under this section."

The second section of said act further provides—

That those who are entitled to make the homestead entries prescribed in the preceding section may make such entries of any of the agricultural lands embraced in the provisions of an act entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine, upon condition of paying for such lands the price prescribed in said act.

It is thus made apparent that in preparing your office decision the second section of said act was inadvertently overlooked and error was committed in stating that the Chippewa lands in Minnesota were not subject to entry under the provisions of the act of June 3, 1896, *supra*.

In the circular of September 17, 1897 (25 L. D., 258), in relation to entries on the Chippewa lands under the second section of said act of June 3, 1896, it is declared that such entrymen are entitled to credit for settlement, improvement and cultivation on the indemnity land, as provided in the first section of that act; but it is held that such entrymen are not entitled to the benefits of the provision contained in said section authorizing commutation of such entries.

Upon careful consideration of the legislation in question, the reason given for conceding to entrymen of Chippewa lands under said act a portion of the privileges granted by the first section only, and excluding one of those privileges so specifically granted, is not satisfactory to the Department.

As that act is now read and understood it appears to be the plain intention of Congress to accord to those who may make entry, under said act of 1896, of "unappropriated public lands," the alternative right to make like entry, with all the prescribed conditions and incidents, upon the Chippewa lands, provided they pay the fixed price for the same. Those who had settled upon the indemnity lands had been induced to do so by the erroneous action of the Department, and in this Congress doubtless saw a sufficient reason for favoring them more than other entrymen on the Chippewa lands who had no such claims upon its favorable consideration.

However that may be, the right to enter the public lands, with credit for previous settlement and residence, etc., and the incidental right to commute said entries under the law as it existed at the time of the previous settlement, are all given by the first section of the act, and there is nothing in the second section, authorizing "such entries" to be made upon the Chippewa lands, on paying the proper price, which limits or restricts the rights and privileges given by the first section.

If it was the intention of Congress to permit those described in the first section to make entry of the Chippewa lands only on the same

terms as required of others, it would have made its purpose clear by using the words "under the provisions of said act," instead of the words "upon condition of paying" etc., at the end of the said second section.

When, therefore, this one condition is prescribed it is exclusive of all others than those required in the first section.

It is true that this condition exacts no additional payment from those who commute under the first section; but it exacts one dollar and twenty-five cents an acre, the price of the Chippewa lands, from those who may seek to obtain title by continuing their residence and cultivation upon those lands. Title to the public lands may be acquired, under the first section, by entry, residence, etc., without price, or by commuting and paying \$1.25 per acre. But the price of Chippewa Indian land must be paid under all circumstances and regardless of the manner in which the title is obtained. This is the obvious purpose Congress had in view when the payment clause in the second section was incorporated therein.

Inasmuch as the Chippewa lands were unquestionably open to entry when Purcell made his homestead entry in 1901, it is unnecessary to decide when, prior to that time, those lands became subject to entry.

It results, that in accordance with these views, the circular of instructions of September 17, 1897 (25 L. D., 258), so far as it prohibits the commutation of entries under the act of June 3, 1896, *supra*, upon said Chippewa lands, must be and is overruled.

Your judgment is reversed and the final proof of Purcell, if there be no other objection, will be approved for patent.

ARID LAND—WITHDRAWAL—ACT OF JUNE 17, 1902.

INSTRUCTIONS.

Instructions under act of June 17, 1902, relative to reservation of lands for irrigation works and withdrawal from disposition of lands susceptible of irrigation.

Secretary Hitchcock to the Director of the Geological Survey, February 11, 1903. (W. V. D.) (E. F. B.)

By your letter of January 6, 1903, having reference to the withdrawal of lands provided for by the act of June 17, 1902 (32 Stat., 388), appropriating the receipts from the sale of public lands in certain States and Territories for the construction of irrigation works, you request the views of the Department upon the following questions:

(1) Whether lands may be reserved from public entry of all kinds from time to time for irrigation works.

(2) Whether the preliminary withdrawals of lands susceptible of irrigation may be made subject to a limit of area per entry to be prescribed as a general rule for all such withdrawals.

(3) Whether the preliminary withdrawals of lands susceptible of irrigation may be made subject to a limit of area per entry, as a part of each specific order of withdrawal.

The act authorizes and directs the Secretary of the Interior to make examinations and surveys for and to locate and construct irrigation works for the storage, diversion and development of waters, including artesian wells. To this end it contemplates that preliminary examinations and surveys shall first be made, in order that the Secretary of the Interior may be enabled to determine whether any contemplated project is practicable or advisable. If such determination shall be favorable, he may then cause to be let contracts for the construction of irrigation works, giving notice to the public of the lands irrigable under such project, and the limit of area per entry which, in his opinion, may reasonably be required for the support of a family upon such lands.

It is evident that the purpose of the act can not be successfully accomplished without holding from disposal all lands that may be required for any contemplated irrigation works, and reserving all lands that may be susceptible of irrigation under such project, so far as to subject them to the provisions, conditions and limitations of the act. The first withdrawal provided for by the third section of the act must be made by the Secretary of the Interior before giving notice to the public of the lands irrigable under any project that has been determined by him to be practicable and advisable, but nothing in the law prohibits a withdrawal prior to such determination, with a view to an examination of any particular locality, to obtain information to enable the Secretary to determine whether a contemplated project is advisable or practicable. That both withdrawals provided for by said section may be made preliminary to the examination and survey is shown by the provisions for the restoration to public entry of any lands not required for the purposes of the act, and for the restoration of the lands supposed to be susceptible of irrigation from the contemplated project, if it be determined that such project is impracticable or inadvisable.

It is important to the successful administration of the law that publicity should not be given to the preliminary examination and survey of any locality, without protecting the lands from entry. If, after sufficient general prospecting, or from reliable information obtained otherwise, you should be satisfied that a particular locality presents such advantages for the construction of irrigation works as to make it advisable that a complete examination and survey should be made, with a view to furnishing accurate information from which the Secretary of the Interior may determine whether such project is practicable and advisable, you should report it, with a view to having the lands withdrawn in furtherance of the design and purpose of the act.

All lands susceptible of irrigation from any works constructed and completed under said act are subject to the limit of area that may be prescribed by the Secretary of the Interior, according to the terms of the act; and all entries of such lands made after withdrawal will be subject to such limit of area. The act, however, does not contemplate that the determination of the limit of area shall be made until the giving of notice of lands irrigable under any project which has been determined by the Secretary of the Interior to be practicable and for the construction of which contracts have been let. The limit of area of any entry must be determined from the conditions peculiar to the particular locality, and should not be indicated in the withdrawal.

RAILROAD GRANT—SETTLEMENT—ACT OF AUGUST 5, 1892.

HICKEY *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

Rights acquired by settlement and improvement upon unsurveyed land, and duly and timely asserted upon filing of the plat of survey, will, as against an intervening indemnity railroad selection, made under the act of August 5, 1892, be protected in its entirety, even though the lands claimed lie in different quarter-sections and the improvements of the settler are shown to be confined to a single quarter-section.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 11, 1903.* (F. W. C.)

Bridget Hickey, the mother of Jerry Hickey, deceased, and as his sole surviving heir, has appealed from your office decision of August 16, 1902, awarding to the St. Paul, Minneapolis and Manitoba Railway Company, lot 12, Sec. 3, and lots 9 and 10 of Sec. 4, T. 60 N., R. 24 W., Duluth land district, Minnesota, under its lieu selection made thereof.

December 31, 1895, the St. Paul, Minneapolis and Manitoba Railway Company filed in the local land office its application to select certain described unsurveyed tracts of land, under the provisions of the act of August 5, 1892 (27 Stat., 390), which selection was accepted by the local officers.

The plat of survey of T. 60 N., R. 24 W., was officially filed in the local land office July 22, 1896, and on that day Jerry Hickey tendered his homestead application for lot 12, Sec. 3, and lots 9, 10, 14 and 15, Sec. 4, alleging in support of said application that he had made settlement thereon March 27, 1893. As it appeared that this application would conflict with the selection filed by the railway company December 31, 1895, Hickey's application was rejected, from which action he duly appealed.

On the same day the plat was filed the railway company also proffered a supplemental list of selections, adjusting its previous selections of December 31, 1895, to the lines of the public survey, which supple-

mental selection was rejected because it conflicted with the pending homestead application by Hickey, and the company also appealed.

Hearing was subsequently held, but prior thereto Hickey had died. Upon the testimony adduced the local officers found that Hickey had settled as alleged long prior to the filing of the township plat and that his settlement claim was maintained up to the time of his death in 1897, but that from the testimony it appeared that his improvements were confined to lot 15 of Sec. 4, and that his claim against the railway company must be restricted to the lands within the technical quarter-section in which said lot 15 fell, there being no evidence showing that he had improved or in anywise indicated his claim outside of said quarter-section. His claim therefore was recognized only as to lots 14 and 15 of Sec. 4. Upon appeal your office decision of August 16, 1902, affirmed the decision of the local officers, from which an appeal has been taken to this Department.

The railway company's claim rests under its list filed while the land was yet unsurveyed and its supplemental list adjusting its selection to the lines of the public survey, both of which were made under the act of August 5, 1892, by the terms of which the Manitoba company, in lieu of its relinquishment of other lands to which it had been held by the courts to be entitled, but which the United States had disposed of as public lands in disregard of the railroad claim, was granted a right to select—

an equal quantity of (non mineral public lands, so classified as non mineral at the time of actual government survey which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection) lying within any State into or through which the railway owned by said railway company runs, to the extent of the lands so relinquished and released.

The third section of this act provided, among other things, that—

In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty, and within the period of three months after the lands including such tract shall have been surveyed, and the plats thereof filed in the local land office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract as originally selected and described in the lists filed in the local land office shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to produce such conformity.

As the company was restricted in its selections to lands "to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection," the only question in this case is: Had Hickey initiated a claim to the land in question, within the meaning of the act of 1892, prior to the selection thereof by the railway company?

The act of May 14, 1880 (21 Stat., 140), extended to settlers upon

unsurveyed public lands the right to make entry of the lands settled upon, under the homestead laws, within three months after the filing of the township plat and to have the right under such entry relate back to the date of settlement, the same as had been theretofore allowed under the pre-emption laws.

That Jerry Hickey, in 1893, made settlement upon an unsurveyed tract with intention of making claim thereto under the homestead law, and that he duly improved the same by the erection of a dwelling house in which he resided until his death in the spring of 1897, is in nowise questioned in this record. Upon the very day that the plat of survey was officially filed in the local land office he made record of his claim, as before described, claiming his settlement thereon and thereby declaring that the land applied for was that claimed by him from the date of his settlement. The land included in his application is not in excess of 160 acres, is in a compact body, and the only objection to allowing the entry in its entirety, as applied for, is that it was shown at the hearing that his improvements were confined to lot 15 of Sec. 4, and because of the intervening selection by the railway company his claim was limited to the legal subdivision upon which his improvements were situate.

That in the adjustment of conflicting settlement claims the notice given by improvements made upon a tract of land prior to the survey thereof is limited to the technical quarter-section in which the same is shown to be, upon survey, is held in a long line of departmental decisions; but the railway company is not in the position of a conflicting settlement claimant, and when making its selection it was bound to take notice of Hickey's improvements and to ascertain the land claimed by him. The surveyor, working in the interest of the company, and who examined this land prior to selection, admits that he found Hickey's improvements, but in its selection the company entirely disregarded Hickey's claim to the technical quarter section embracing his improvements as well as to the adjoining land.

It is well to note that the witnesses offered at the hearing, namely, Frank Smith and W. E. Myers, both resided in the township in question and close to the land in dispute during the year 1893, and were well apprised of Hickey's claim, for when asked to give the exact description thereof included in their answers all the lands covered by his application as presented. It thus seems that his claim was well recognized by those residing in the neighborhood of the land in question as early as 1893.

Two cases are relied upon by the railway company in support of its contention that Hickey's claim as against the selection should be restricted to the technical quarter-section including his improvements, namely, *Brown v. Central Pacific R. R. Co.* (6 L. D., 151), and *Union Pacific R. R. Co. v. Simmons* (ib., 172). In both those cases, however, the lands were in the primary or place limits of the railroad grant and

the limitations upon the grant were not the same as those attaching to the right of selection granted the Manitoba company by the act of 1892. Further, in neither case was the claimant against the railroad company the person whose settlement was relied upon to defeat the grant, nor was it shown that such prior settler had ever filed any formal application in the land department including the tract there in question within his claim.

In *Tarpey v. Madsen* (178 U. S., 215, 220), in considering the rights of a settler upon public lands prior to survey in conflict with a right claimed under a railroad land-grant, it was said by the court:

And in this respect we must notice the oft-repeated declaration of this court, that "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon." *Ard v. Brandon*, 156 U. S., 537, 543; *Northern Pacific Railroad v. Amacker*, 175 U. S., 564, 567. With this declaration, in all its fulness, we heartily concur, and have no desire to limit it in any respect, and if Olney, the original entryman, was pressing his claims every intention should be in his favor in order to perfect the title which he was seeking to acquire.

The entire matter considered, it is the opinion of this Department that the record made in this case shows that Hickey had, prior to the selection of the land by the railway company, initiated a claim under the homestead laws to the entire tract embraced in his homestead application; that such right was duly and timely asserted and was a bar to the selection of said land by the Manitoba company under the act of August 5, 1892. The decision of your office is therefore accordingly reversed, and upon completion of entry for this land by the heir of Hickey, the selection by the company as to the land here in question will be canceled.

PRIVATE CLAIM—RIGHT OF PURCHASE—ACT OF JANUARY 14, 1901.

LYNN ET AL. *v.* MILES.

The right of purchase accorded by the act of January 14, 1901, to purchasers from the Algodones Grant claimants, is limited to *bona fide* settlers and residents on the land, having a permanent home thereon of which they might have been deprived but for said statute.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) February 14, 1903. (A. S. T.)

John Lynn and George H. Miles have each appealed to this Department from your office decision of September 27, 1902, in the case of John Lynn and Martha L. Theilman *v.* George H. Miles, holding for cancellation the homestead entry of Miles for the NE. $\frac{1}{4}$ of Sec. 6, T. 9 S., R. 23 W., G. and S. R. M., Tucson land district, Arizona, allowing the application of Theilman to purchase the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said tract under section 1 of the act of January 14, 1901 (31 Stat., 729), and allowing the homestead application of Lynn for the remainder of said tract under section 2 of said act.

The act of January 14, 1901, *supra*, is as follows:

Whereas the title to the lands in that section of the country in the county of Yuma and Territory of Arizona, and included within the boundaries of the old Mexican land grant known as the Algodones grant, was tried by the United States Court of Private Land Claims, created for the settlement of titles to such grants, in the years eighteen hundred and ninety-five and eighteen hundred and ninety-six; and

Whereas in the hearing of said contest before said court the alleged grantees under said grant were successful and their title thereto by said trial court confirmed, and immediately thereafter the said alleged grantees, for large and valuable considerations, sold to numbers of people, citizens and *bona fide* settlers on said lands, in tracts of less than forty acres to each, and said settlers, then believing that they had a *bona fide* title to said lands sold, made lasting and valuable improvements and permanent homes thereon; and

Whereas the government of the United States appealed said cause from the decision of said court below, and on said appeal the said decision of the said court below was reversed, and the title to said grant in said alleged grantees adjudged to be void, and that the said lands included within the boundaries of said grant, and sold as aforesaid, belonged to the United States; and if said settlers, citizens, and occupants of said lands who so purchased the same as aforesaid be not permitted to retain the same, and pay the government therefor, they will be deprived of their homes, at ruinous consequences to them: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where such persons in good faith and for valuable considerations purchased from the grant claimants prior to May twenty-third, eighteen hundred and ninety-eight, portions of the land covered by the said grant, and have occupied and improved the same, such persons may, within six months from and after the passage of this act, or within three months after the said lands shall be restored to entry, purchase the same at the price of one dollar and twenty-five cents per acre, upon making proof of the facts required by this act under regulations to be provided by the Commissioner of the General Land Office and approved by the Secretary of the Interior, joint entries being admissible where two or more persons have purchased lands on the same forty-acre tract: *Provided,* That no one person shall purchase more than forty acres, and no purchase shall be allowed for a less quantity than that contained in the smallest legal subdivision.

Sec. 2. That where persons duly qualified to make entry under the homestead or desert-land laws have occupied any of said lands with the intention of entering the same under the homestead or desert-land laws, such persons shall be allowed three months from and after the passage of this act, or after the said lands shall be restored to entry, within which to make their entries, and the fact that such persons have improved or reclaimed such desert lands shall be no bar to their making such entries.

The application of Theilman to purchase the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said tract was made under the first section of said act, and the applications of Lynn and Miles to make homestead entries for the entire quarter section were made under the second section of the act.

The material facts in regard to the claims of each party are correctly stated in your said decision and need not be recited here. It is clear that Lynn was a *bona fide* settler and resident upon the land at the time of the passage of said act and for several years prior thereto. It is equally clear that neither Miles nor Theilman nor any one under

whom Theilman claims had at that time ever resided upon the lands claimed by them respectively. Miles claims to have purchased Lynn's interest in the land, but the proof fails to sustain such claim, and your said decision holding his entry for cancellation is correct and is affirmed.

Theilman in support of her claim produced deeds from the Algodones Company, the grant claimants, to Marable, and from Marable to herself, for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said tract, and the proof shows that Marable had possession of said tract and cultivated it for about four years, but it is not shown that he or any one else ever resided upon it.

It is insisted in behalf of Lynn that only the immediate grantees or vendees of the grant claimants are entitled to purchase from the government under said act, and that Mrs. Theilman, being only a remote grantee of said claimants, has no such right of purchase. This position is not believed to be tenable. If she had purchased the interest of one who as the grantee of the original claimants had a right to purchase the land from the government, she would certainly have the same right by virtue of her purchase notwithstanding she was only a remote grantee.

In determining who are entitled to purchase from the government under said statute reference must be had to the preamble to the statute, since the right to purchase is conferred upon "such persons" as are described in the preamble. The preamble recites that the grantees, "for large and valuable considerations, sold to numbers of people, citizens and *bona fide* settlers on said lands, . . . and said settlers, then believing that they had a *bona fide* title to said lands sold, made lasting and valuable improvements and permanent homes thereon." Having thus described the class of people intended to be benefited by said act, the preamble proceeds to point out the injury which was likely to result to said people and to remedy which the act was passed, as follows: "and if said settlers, citizens, and occupants of said lands who so purchased the same as aforesaid be not permitted to retain the same, and pay the government therefor, *they will be deprived of their homes*, at ruinous consequences to them." The act expressly describes those to be benefited thereby as citizens and *bona fide* settlers on the lands purchased from the grantees and as settlers who had "made lasting and valuable improvements and *permanent homes*" on the lands, and the injury likely to result to them, and to prevent which the act was passed, was that "they will be deprived of their *homes* at ruinous consequences to them."

One who had merely purchased land from the grantees does not fill the description found in the preamble to the act; he must be a *bona fide* settler who has made lasting and valuable improvements and estab-

lished a permanent home on the land. If he had not established a home on the land there was no danger that he would "be deprived" of his *home*.

It is therefore held that to entitle one to purchase said lands from the government he must have been a purchaser from the grantees and a *bona fide* settler and resident on the land, having a permanent home there of which he might have been deprived but for said statute. Neither Mrs. Theilman nor her grantor ever resided or had a home on the land, and therefore she does not come within the purview of said act. Your said decision allowing her to purchase the tract applied for by her is therefore reversed and her application is rejected. Miles's entry will be canceled and Lynn will be allowed to make entry for the entire quarter section.

HOMESTEAD—SOLDIERS' ADDITIONAL—ASSIGNEE.

JOHN S. MAGINNIS.

The widow of a deceased soldier who made entry in her own right for less than one hundred and sixty acres prior to the adoption of the Revised Statutes is entitled to an additional right of entry.

The right of additional entry granted to the widow of a deceased soldier by section 2307 of the Revised Statutes, if not exercised by her during her widowhood, is lost by her remarriage.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 14, 1903.* (A. S. T.)

John S. Maginnis has appealed to this Department from your office decision of May 13, 1902, in the case of John S. Maginnis, assignee of Nannie E. Rose, formerly Nannie E. Eaton, widow of John Eaton, deceased, rejecting his application to enter, under sections 2306 and 2307 of the Revised Statutes, the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 6, T. 56 N., R. 13 W., and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, or lot 4, Sec. 31, T. 57 N., R. 13 W., Duluth land district, Minnesota.

Your said decision holds—

that said original entry does not constitute a proper legal basis for the right claimed by the applicant for the following reason: the original entry was made by the widow of the soldier after his death, and conferred on her no additional right. (See the case of William Deary, 31 L. D., page 19.)

In addition to this she has remarried, and thereby forfeited any additional right to which she might have been entitled as the widow of said soldier.

It appears that John Eaton, the soldier, died on or about December 1, 1871, and that thereafter, to wit, on January 10, 1874, which was prior to the adoption of the revised statutes of the United States, his widow, the said Nannie E. Eaton, made homestead entry of forty acres of land, at the Jackson land office, Mississippi, which was after-

wards canceled. She remarried some time prior to March 14, 1901, the date of the assignment of her alleged additional homestead right, under which Maginnis claims.

The Department does not concur in your said holding to the effect that the original entry constitutes no valid basis for the right claimed because it was made by the soldier's widow after his death. In the case of William Deary (31 L. D., 19), cited in your said decision, the application was rejected because the original entry was made by the soldier's wife *before* his death.

In the case of Homer E. Brayton (31 L. D., 443), this Department held that where the widow of a deceased soldier, prior to the adoption of the revised statutes, made an entry in her own right for less than one hundred and sixty acres, she was entitled to an additional right of entry. (See also Sierra Lumber Company, 31 L. D., 349.)

Section 2307 of the Revised Statutes allows the widow of a deceased soldier, who would have been entitled to the benefits of Section 2304, all the benefits enumerated in that chapter, the right of additional entry being one of the benefits, but this is allowed her on the express condition that she be unmarried.

In the case at bar the widow was entitled to an additional right of entry so long as she remained unmarried, but having failed to exercise the right during her widowhood, it could not be asserted by her during coverture.

Your said decision rejecting said application for that reason is therefore affirmed, and the application is rejected.

FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

JOHN T. MURPHY.

The reservation of a right of way thirty feet in width along each side of all section lines, for a public highway, in all conveyances of swamp lands made by the State of Oregon, does not constitute such an incumbrance upon lands so situated and embraced within a forest reserve as to render them unacceptable as bases for the selection of other lands in lieu thereof under the provisions of the act of June 4, 1897.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 21, 1903.* (F. H. B.)

July 10, 1899, John T. Murphy, claiming as grantee by sundry mesne conveyances from the State of Oregon, executed deed (recorded July 15, 1899) in favor of the United States, which purports to relinquish and reconvey the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 35, T. 34 S., R. 6 E.; the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 2, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 11, T. 35 S., R. 6 E., W. M., situate in the Cascade Range Forest Reserve, Oregon, and filed selections (among

others) in lieu thereof, under the act of June 4, 1897 (30 Stat., 11, 36), as follows:

No. 1406, December 4, 1899, in the Helena, Montana, land district, for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 33, T. 26 N., R. 4 W., M. M., in lieu of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 35, T. 34 S., R. 6 E., W. M.

No. 3336, August 25, 1900, in the Missoula, Montana, land district, for the unsurveyed NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 10, T. 26 N., R. 34 W., M. M., in lieu of the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 2, T. 35 S., R. 6 E., W. M.

No. 4126, August 28, 1900, in the Miles City, Montana, land district, for certain unsurveyed land (described in your office decision), in lieu of the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 11, T. 35 S., R. 6 E., W. M.

October 28, 1902, your office rejected said selections, for the stated reason, in substance, that by the laws of Oregon an easement of thirty feet in width along each side of all section lines is reserved, for the purposes of a public highway, in all conveyances of swamp lands made by the State, and that, therefore, the title to the base lands which were acquired by the State under the swamp land grant is clouded by the easement and not the equivalent of the title sought under the lieu selections. Your office cited, in support of its decision, the cases of F. A. Hyde *et al.*, on review (28 L. D., 284, 290), Edgar A. Coffin (30 L. D., 15), and *Ex parte* Kehl (unreported).

Murphy has appealed to the Department.

In the Hyde case, *supra*, the title to the base land offered was not in the lieu selector, and it was held that he had nothing therein to relinquish and therefore no right of selection. In the cases of Coffin and Kehl, a perpetual easement, by the grant to private persons of a permanent right of way over and across the land offered as a base for the selection, had in each instance been charged upon said land. This was held to so far subtract from the complete legal title, and to involve such a possible incompatibility with the use and control of the land encumbered therewith as a part of a forest reservation, as to render an exchange inadmissible.

In the case at bar the right of way, if it in fact still exists, is of a public character and, by the terms of its creation, may be enjoyed only to the extent of thirty feet in width along the section lines. Situated as these tracts are, within the confines of the forest reservation, it is doubtful if the contemplated highway will be accessible or available during the lifetime of such reservation; and the servitude is not, in any event, of such character or extent as to be incompatible with the use and control of the burdened lands for the purposes for which the forest reserve was created. The easement is reserved expressly for the benefit of the public, the real grantee under the deed of relinquishment, and in consonance with its possession of the land, and is thus essentially different from those involved in the cases

cited by your office, which were in the sole right and for the sole benefit of private grantees and adverse to the possession of the owner of the fee, and which could apparently be enjoyed at random and in such manner upon the lands burdened therewith as to seriously militate against the use of the latter for the preservation of the timber growing thereon. The way in question is not considered by the Department to constitute such an encumbrance upon the offered tracts as to render them unacceptable as bases.

Your office decision, so far as it holds the selections for rejection because of said public right of way, is reversed, and, in the absence of other or further objection, the selections will be approved.

INDIAN LANDS—ALLOTMENTS—SEC. 4, ACT OF FEBRUARY 8, 1887.

INSTRUCTIONS.

Instructions relative to Indian allotments made under section 4 of the act of February 8, 1887, as amended by the act of February 28, 1891.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 21, 1903.* (C. J. G.)

The Department is in receipt of your office letter of December 4, 1902, with accompanying papers, including a report from the Commissioner of Indian Affairs under date of January 26, 1903, relative to Indian allotments that have been made, especially in the Susanville, California, land district, under section 4 of the act of February 8, 1887 (24 Stat., 388), as amended by the act of February 28, 1891 (26 Stat., 794).

After referring to and discussing at length the supposed purpose of said section 4 of the general allotment act and the requirement as to settlement imposed thereby on the allottee, the condition of the allotments in question and the relation of the allottees thereto, as shown by the reports of special agents of your office and the Indian office, which in the opinion of both offices render an investigation of said allotments necessary; the desirability of modifying the existing rule which in practice forbids the allotment under said section 4 of lands chiefly valuable for the timber thereon; the manner in which these allotments were made and the practice that has heretofore prevailed in administering the law and in the investigation of allotments generally; your office submits the following recommendations in which the Commissioner of Indian Affairs has in the main concurred:

(1) That the Office of Indian Affairs and this office be instructed to investigate each allotment made under the fourth section of the general allotment act, with a view of ascertaining whether the land included in such allotments is suitable for a home for the Indian, and whether the applicant has complied with the requirements of the law as to settlement.

(2) That this office be authorized and instructed to cancel every such allotment where it is found that the land is not suitable for an Indian home, or is mineral in character, or where the applicant has not made the settlement required by the law and after having the requirements of the law explained to him, fails to make such settlement; or that the allottee is not legally entitled to an allotment.

(3) That the term "settlement," as used in the general allotment act, be held to require that where an adult Indian applied for an allotment for himself, or for his minor child, he must first have established his actual residence upon the tract applied for for himself, with the *bona fide* intention of making it his permanent home, and of abandoning his tribal relations; and that it be held also that where such settlement has been or shall be made by an applicant for allotment, and the tract applied for contains sufficient arable land to support an Indian family, and is, on the whole, suitable for a home for the allottee, it is subject to allotment under the fourth section.

(4) That after any allotment shall have been examined in the manner set forth above, and it has been found that the required settlement has been made, and that the land is of a character subject to allotment, no contest against the same shall be allowed by a private individual, except upon a claim of priority.

Upon the representations made the Department is in accord with the proposition that an investigation of these allotments is requisite, and that the same should be made under the joint supervision of your office and the Indian Office. It approves generally of the suggestions made as to the manner and scope of the proposed investigation. The Department has from time to time issued instructions and prescribed regulations for the disposition of allotment applications under section 4 of the general allotment act, as well as for the investigation of claims to the public lands, by special agents. Regulations of June 27, 1899 (28 L. D., 569); Instructions of August 18, 1899 (29 L. D., 141). See also in this connection regulations of April 10, 1901 (30 L. D., 546), governing the investigation of charges against allotments upon which first or trust patents have issued; and additional instructions of May 10, 1902 (Ind. Div.). In the nature of things the details of such an examination as the one proposed must rest largely in the sound judgment and discretion of the offices immediately charged with the direction of the work. Because of the necessity of leaving some things to the judgment of the officers making the investigation and of the principles and rules announced and laid down by departmental decisions and regulations now in force, it is not believed advisable or necessary at this time, aside from some general observations in line with the recommendations made, to formulate new or more specific regulations for guidance in the proposed investigation.

Referring to recommendation numbered 2, in those cases where the special agents find that the allotments ought to be canceled, if they have been approved, or first or trust patents have been issued thereon, the papers in the case will be transmitted, with appropriate recommendation, for action by the Department.

As to recommendation numbered 3, it must be remembered that settlement, by the very terms of the act, is a prerequisite to allotment

under section 4 of the act of February 8, 1887. It is held that said act is, in its essential elements, a settlement law; and that "to make such act effective to accomplish the purpose in view, it was doubtless intended it should be administered, so far as practicable, like any other law based upon settlement." Indian Lands—Allotments (8 L. D., 647). When the evident purpose of the act is considered, the term "settlement" therein, must inevitably be construed to mean practically the same it does under the homestead law, where the essential requirement is actual inhabitancy of the land to the exclusion of a home elsewhere. While this is true it would seem to be entirely consistent and just, in examining the acts and determining the intention and good faith of an Indian allottee in this respect, to give proper and reasonable regard to the habits, dispositions and nomadic character of the race, and to allow more leniency in applying and enforcing the rule applicable to the white settler. This course would doubtless sufficiently safeguard the purpose of said act.

As settlement under section 4 of the general allotment act is in great measure subject to the same requirements and determinable in the same manner as settlement under the homestead law, there would appear to be no substantial reason why the same character of lands should not also be subject to allotment under said section. Lands valuable for the timber thereon are, under certain circumstances, subject to homestead entry and may be taken as allotments under said section, subject to the same conditions, limitations and restrictions as when entered under the homestead law, that is, the mere fact that a tract of land has growing upon it some valuable timber is not of itself sufficient to absolutely prevent such tract being taken as an Indian allotment. The practice of forbidding allotments under section 4 of the general allotment act, of lands valuable for the timber thereon, is not based upon any decision of the Department laying down a well-defined rule, and there is no good reason for such prohibition provided the allotment contains sufficient arable land to support an Indian family and is on the whole suitable for a home for the allottee and is applied for in good faith for that purpose.

With respect to recommendation numbered 4, the general rule is that Indian allotments are subject to examination upon charges of invalidity, but hearings upon such charges, especially where a first or trust patent has issued, will be ordered only after a preliminary investigation as to the truth and merits thereof has been made by a special agent; and the charge is dismissed unless there appears to be a strong probability that it is true and will require cancellation of the allotment. Regulations of April 10, 1901 (30 L. D., 546). In practice the same preliminary examination is made in cases where the first or trust patent has not issued, and such is the proper practice as no distinction in this respect is warranted or advisable.

Third parties are never invited to attack allotments with the expectation or hope of securing any advantage by reason of such attack. Such parties must assume and pay the expense of a hearing, but at the same time they acquire no preference right to enter the land in the event of the cancellation of the allotment, and this whether a first or trust patent has issued or not. *Collins v. Hoyt* (31 L. D., 343). In view of the great care now exercised and the existing precautionary measures for protecting the interests of the allottee, there would seem to be no good reason for making an absolute exception at this time to the general rule as suggested by your office in case of the allotments in question. It may be stated, however, that after the contemplated examination of these allotments has been made, and final action thereon has been taken, any charge presented against the same will be very carefully scrutinized in connection with the reports, recommendations and actions based on such examination; and a clear rebuttal of this showing would have to be made to warrant the cancellation of the allotment, or even to procure an allowance of a hearing.

Of course, pending the investigation as to the validity of these allotments, no entry will be allowed for the land embraced in the allotment nor will any one be allowed to intervene on any account against the same. *William Kalmbach* (26 L. D., 207); *Bradley v. Lemieux et al.* (28 L. D., 196); *Morton v. Laveasch* (28 L. D., 519).

There are some paramount features that readily suggest themselves in determining the scope of the proposed investigation, into which strict inquiry should be made; such, for instance, as the allottee's settlement to be determined in the light of suggestion contained herein, his qualifications to take an allotment, the character of the land, and whether the allotment was made for his exclusive benefit. The investigation should have reference, so far as possible, to the time the allotment application was made, especially as to the character of the land covered thereby. It should be borne in mind that the purpose of the investigation is primarily in the interest and for the protection of the allottee himself. Every precaution should be taken to insure that notice shall reach the allottee of the investigation, its purpose and scope, and that he be made to understand the nature of the requirements laid upon him by such notice. Too much stress can not be laid upon this feature. As was said in the case of *Lizzie Bergen* (30 L. D., 258, 266-267):

The authority of this Department is not to be exercised arbitrarily and without giving the parties interested notice of proposed action and an opportunity to be heard, or, in other words, without due process of law. . . . In all cases involving the investigation of Indian allotments every precaution should be taken to insure that notice of the proceedings shall reach all the parties, and in cases like this, involving the allotment of a minor, it would seem well that the guardian, if there be one, and both parents, as well as the allottee, should be notified. In all cases the Commissioner of Indian Affairs should be given information of the action taken and contemplated and the investigation should proceed as in the case of an

investigation of an allotment before the issuance of the first or trust patent. All matters of procedure as to which the regulations for investigating Indian allotments prescribe no specific rule, the instructions of August 18, 1899 (29 L. D., 141), as to the procedure in special agents' reports against the validity of claims to the public lands, should be observed.

In case an allotment is recommended for cancellation, the allottee should be given notice of that and should be carefully informed of his right to further defend his claim before the Department.

With the suggestions and modifications herein indicated; the recommendation of your office that a joint investigation of the allotments in question be had, is hereby approved.

A copy of this letter will be transmitted by the Department to the Commissioner of Indian Affairs.

RAILROAD GRANT—ADJUSTMENT—ACTS OF MARCH 3, 1857, MARCH 3,
1865, AND MARCH 3, 1871.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. AND ST. PAUL AND
NORTHERN PACIFIC RY. CO.

The grants to the State of Minnesota in aid of the construction of a railroad "from Stillwater, by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch *via* St. Cloud and Crow Wing, to the navigable waters of the Red River of the North," made by the acts of March 3, 1857, March 3, 1865, and March 3, 1871, are in effect one grant and should be adjusted as an entirety.

Departmental decisions of June 10, 1891 (unreported), and October 1, 1891 (13 L. D., 353), recalled; and the decision of February 26, 1889 (8 L. D., 255), accepted as stating the correct rule of adjustment.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 25, 1903.* (F. W. C.)

With your office letter of January 15, 1900, was submitted a re-adjustment of the grants made by acts of March 3, 1857 (11 Stat., 195), March 3, 1865 (13 Stat., 526), and March 3, 1871 (16 Stat., 588), to the Territory and State of Minnesota, in aid of the construction of a railroad "from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch *via* St. Cloud and Crow Wing to the navigable waters of the Red River of the North," which grants were, by the Territory and State of Minnesota, transferred to the St. Paul and Pacific Railroad Company, a corporation organized under the laws of that State.

The legislation by the United States and the State, relative to the grants for the main and branch lines of this road, are fully set forth in the several decisions of the Department, heretofore rendered, bearing upon the adjustment of these grants and need not be here repeated. It is sufficient to state that the main and branch line grants have

always been treated by the State as an entirety; were so recognized by this Department until long after this entire system of roads had been constructed (see 8 L. D., 255), and it was only because of the construction placed upon the decision of the supreme court in *St. Paul and Pacific R. R. Co. v. Northern Pacific R. R. Co.* (139 U. S., 1), by this Department, that directions were given to adjust the grants for the "new" lines provided for in the act of March 3, 1871, *supra*, separately from those for the "old" lines found in the acts of March 3, 1857, *supra*, and March 3, 1865, *supra*. See departmental decisions of June 10, 1891 (not reported), and October 1, 1891 (13 L. D., 353).

The adjustment now before the Department was made under and in accordance with said last-mentioned decisions and both the St. Paul, Minneapolis and Manitoba Railway Company and the St. Paul and Northern Pacific Railway Company, present claimants under these grants, have protested against the approval of the adjustment as submitted and they have been heard both orally and by brief upon said protests.

From a more careful consideration of the decision of the supreme court in the case referred to, the Department believes that error was made in construing that decision as authorizing a change in the plan of adjustment of these grants.

It is true that in said decision it was said (pages 15 and 16)—

the act of 1871 does not purport in any sense to be an amendment of the act of 1857. It simply authorizes the St. Paul and Pacific Railroad Company to change its lines in consideration of the relinquishment of certain lands. The old lines were to be given up, and all the benefits attached to them, in consideration of which new lines were authorized. The old lines were not amended, but were abandoned. There was no partial release of the accompanying grants, but whatever rights attended the original lines were to be surrendered.

In that case there were conflicting claims asserted to the same lands predicated on grants made in aid of the construction of railroads, and as in such cases it had been settled by a long line of decisions that within conflicting limits priority was determined by the date of the act making the grant, it became necessary to inquire as to when the grant, including the lands within the conflict, was made to each company. The St. Paul company claimed that the grants made by acts of March 3, 1865, and March 3, 1871, were to be considered simply as amendments to that made by the act of March 3, 1857, and to be given operation as of that date, and it was in disposing of this contention that the language above quoted was used. This is made clearer when considered in connection with what was said by the court relating to the act of 1865:

The act of March 3, 1865, as already stated, is expressly restrained from in any way interfering with any lands previously reserved by Congress or any competent authority to aid in any work of public improvement. Consequently, under that act no claim could be asserted that would in any way interfere with the grants to the Northern Pacific Railroad Company.

Fairly considered, therefore, the language first quoted from in said opinion and made the basis for the former decisions, should be limited to the matter at issue between the contending grantees and not extended.

By the act of July 1, 1862 (12 Stat., 489), Congress granted the Union Pacific Railroad Company odd-numbered sections falling within ten miles of its line of road, and by the act of July 2, 1864 (13 Stat., 356), increased the grant to like sections within twenty-mile limits. Speaking of these acts in *Missouri, Kansas and Texas Ry. Co. v. Kansas Pacific Railway* (97 U. S., 491, 497), the United States supreme court said:

It is true that the act of 1864 enlarged the grant of 1862; but this was done, not by words of a new and an additional grant, but by a change in the original act substituting for those there used words of larger import. This mode was evidently adopted that the grant might be treated as if thus made originally; and, therefore, as against the United States, the title of the plaintiff to the enlarged quantity, with the exceptions stated, must be considered as taking effect equally with the title to the less quantity as of the date of the first act. (*United States v. B. & M. R. R.*, 4 Dill. 305.)

It will thus be seen that as against the United States an enlargement of a grant may take relation as of the date when the original grant was made, and yet this would not be so as against intermediate grants, and no good reason appears why the same rule should not be held to apply to a change permitted in the location of the road in aid of the construction of which the grant was originally made and intended.

The entire matter considered, therefore, and after most mature deliberation, the Department recalls the directions contained in its decisions of June 10, and October 1, 1891, *supra*, requiring these grants to be adjusted separately, and directs that a new adjustment, prepared in accordance with the decision in 8 L. D., 255, be submitted for departmental approval.

With the record herewith returned will be found a conditional relinquishment by the St. Paul, Minneapolis and Manitoba Railway Company, which, in view of this decision, is effective; said relinquishment being as follows:

Now therefore, in consideration of the premises, the St. Paul, Minneapolis and Manitoba Railway Company offers, in the event of all of said main line, branch and extension grants being adjusted as an entirety, to relinquish to the United States all its claim to any lands heretofore awarded or patented to settlers pursuant to the rulings of your office and lying within the indemnity limits of that part of the grant pertaining to the main line from St. Paul to Breckenridge and which lie outside of the place and indemnity limits of the grant for said St. Vincent extension line.

It is believed that this relinquishment will protect all those having made entry of any of these lands under the directions heretofore given requiring adjustment of these grants separately, and that the action herein taken will render consideration of many of the objections raised by counsel to the adjustment, as submitted, unnecessary.

RAILROAD GRANT—MINERAL LAND—ACT OF FEBRUARY 26, 1895.

NORTHERN PACIFIC RY. CO. *v.* LEDOUX ET AL.

The classification of land under the sixth section of the act of February 26, 1895, does not take effect, and is in no sense final, until approved by the Secretary of the Interior.

The Secretary has the power to disapprove a classification made under said section 6, even though no protest be filed against the same, if such classification does not correctly represent the character of the land.

The act of 1895 does not have the effect of suspending mineral locations made prior to its passage, nor does it apply in cases where, prior to the approval of the classification, claimants under the mining laws have *prima facie* established, through proper proceedings, the mineral character of the land, and their claims have passed to entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 25, 1903.* (A. C. C.)

In March, 1898, the commissioners appointed under the act of February 26, 1895 (28 Stat., 683), classified and reported as non-mineral unsurveyed Sec. 1, T. 2 S., R. 9 W., Helena, Montana, land district, said section being within the limits of the grant to the Northern Pacific Railroad Company. The required statutory notice appears to have been published, but the report of the commissioners classifying said section as non-mineral in character has not been submitted to the Secretary of the Interior for his approval.

It appears that a protest, as provided for by the act and within the time therein prescribed, was filed against such classification, but was subsequently dismissed for want of prosecution.

April 18, 1901, Narcisse Ledoux *et al.* made mineral entry, No. 4019, of the Hecla lode mining claim, survey No. 6083, including land within said section, upon original location made May 10, 1891, and amended location of August 19, 1893. August 1, 1902, your office directed the local officers to advise the Northern Pacific Railway Company that it would be allowed sixty days from notice within which to show cause why the said classification, to the extent of said mining claim, should not be set aside and the mineral entry passed to patent. Notice was accordingly given to the company. September 19, 1902, in response to the notice, the company filed an answer, requesting that the report of the commissioners be submitted to the Secretary of the Interior for his consideration and approval, and contending, in effect, that in the absence of a protest as prescribed by the act, the classification made by the commissioners is final and conclusive as between the railway company and third persons claiming adversely to it, but conceding, that if such classification is not final and conclusive as contended for, your office had authority to direct a hearing to determine the character of the land involved. October 14, 1902, your office denied the

request of the company, and directed the local officers to order a hearing to determine the character of so much of said section 1 as is embraced in said mining claim.

The company has appealed to the Department. It now contends, in effect, that the classification made by the commissioners, in the absence of a protest such as prescribed by the act, is final and conclusive as between the company and mineral claimants, and that it is the duty of the Secretary of the Interior to approve such classification, unless the mineral claimants now file a protest against the same, or fraud in making the classification is alleged and shown. This contention is not tenable.

Section 6 of the act vests in the Secretary of the Interior the power to approve or to disapprove the classification made by the commissioners. The classification does not take effect, has no binding force, and can not, in any sense, be considered as final, until approved. By virtue of the power vested in him by said section and by virtue of the superintending and supervising power conferred upon him by the general land laws, the Secretary of the Interior may disapprove the classification made by the commissioners, even where no protest is filed, if it appears that the classification does not correctly represent the character of the land. *Knight v. U. S. Land Association* (142 U. S., 161, 177); *Wisconsin Central Railroad Co. v. Price County* (133 Id., 496, 511); *Williams v. United States* (138 Id., 514, 524); 14 Op. A. G., 50, 52; *Lamb et al. v. Northern Pacific R. R. Co.* (29 L. D., 102-4).

From the record it seems that, prior to the passage of the act in question, and at the time the commissioners examined and classified the land in controversy, the Hecla lode mining claim was a subsisting mining location thereon; that after the passage of the act, and subsequently to the time the commissioners classified the land involved, but before approval of that classification, mineral claimants, under their patent proceedings, established, *prima facie* at least, the mineral character of said land under the procedure provided by the mining laws and the rules and regulations made in pursuance thereof; and said mining claim passed to entry.

The act in question does not have the effect of suspending mineral locations made prior to its passage, nor, pending the approval by the Secretary of the Interior of the classification made by the commissioners, does it apply in cases like the one under consideration (see *Sweeney v. Northern Pacific Railroad Co.*, 21 L. D., 65-6); hence the action of the land department with respect to the said mining claim was fully authorized. The allowance of the entry by the land department was obtained upon proofs to the effect that at that time the land in controversy was of known mineral character, and that the mining laws, and the rules and regulations thereunder, had been substantially complied with by the mineral claimants. Entry having been made, it

should be passed to patent, unless it is shown that the same was improperly allowed.

The hearing ordered by your office was based, manifestly, upon the answer of the Northern Pacific Railway Company above referred to; but that answer does not allege that at the time the entry was made the land embraced therein was not of known mineral character; nor does it appear, from any of the papers submitted, that said land was not of known mineral character at that time; or that the entry, for any reason, was improperly allowed. It was therefore error on the part of your office to treat the matters stated in the entry papers as controverted and to order a hearing thereon.

As to that part of your office decision denying the request of the railway company to submit the classification as made by the commissioners to the Secretary of the Interior, the same is affirmed; and as to that part ordering a hearing to determine the character of the land included in the entry, the same is reversed.

FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

C. W. CLARKE.

It is essential to a lieu selection under the act of June 4, 1897, that the land intended as a base for the selection should be specifically designated.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 27, 1903.* (J. R. W.)

C. W. Clarke appealed from your office decision of September 17, 1902, rejecting his application under the act of June 4, 1897 (30 Stat., 36), to select the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 8, T. 23 N., R. 12 E., M. D. M., Susanville, California, in lieu of "forty (40) acres in the northwest quarter of section sixteen (16)," T. 20 S., R. 33 E., M. D. M., in the Sierra forest reserve, California.

July 23, 1902, Clarke, by mail, presented his application and accompanying papers at the local office, which were rejected, because "there was no evidence whatever accompanying said application showing any title or ownership to the base land." Clarke appealed to your office, and your office decision affirmed the rejection of the application because—

there was no proper description in the application of the land surrendered as a basis for his selection. . . . There are four 40 acre tracts in the NW. $\frac{1}{4}$ of Sec. 16, T. 20 S., R. 33 E., M. D. M., and the application should state which 40 acres it is desired to surrender as a basis for this selection.

Your office decision also held that the application should be rejected upon the ground that at the date of the application the base was being used under another application then pending, No. 2779, your office

series. This part of your office decision is strenuously assailed in the brief of appellant by an extended review of former selections based upon all or part of the northwest quarter of section 16, township 20 south, range 33 east, M. D. M.

A lieu selection under the act of June 4, 1897, is essentially an exchange, and it is essential to a selection under the act that the base for the selection should be specifically indicated. A right to make selection arises only by relinquishment to the United States of good title to a tract of land within a forest reservation, and if such right has arisen and exists, it is essential to good administration and to avoid confusion of public business that the government should know as to what land so relinquished the right to make such selection is satisfied. In school indemnity selections it is required that they shall—be so presented that the tract selected may be connected with a specific section or subdivision of a section as the basis of the selection in order that the validity of the selection, with reference to its basis, may be determined with directness and without complication.

Circular, 4 L. D., 79; State of California, 30 L. D., 484, 486; Instructions, October 29, 1902, 31 L. D., 438, 439.

Every reason for such requirement in respect to school indemnity selections applies with equal force to selections under the act of June 4, 1897. Clarke's application was therefore not such as was entitled to be received. This renders it unnecessary to consider any other matter presented by the brief upon appeal, as being immaterial upon the record as presented.

Your office decision was without error.

It is insisted, however, in the brief upon appeal, that it was error in your office decision not to have called upon the selector "to designate the particular 40 acres referred to in his application" as the base therefor, and an extended review of former selections, based upon all or some part of the northwest quarter of section 16, township 20 south, range 33 east, M. D. M., is therein made. This is properly matter for review by your office where the records lie which are referred to and are necessary to be examined.

In the absence of any intervening claim for the land applied for a selector may complete his selection, and in this case it would seem entirely proper to allow Clarke to perfect his selection by a definite assignment of base therefor, his rights being determined as of the date his application is so completed. The appeal herein is dismissed and the case is remanded to your office. You will give Clarke notice that he will be allowed thirty days from receipt thereof to make and present to your office a formal definite assignment of base in support of such selection. If he shall make such assignment you will, upon receipt thereof, readjudicate the case as then presented, but in the event of his failure to make such assignment the decision of your office of September 17, 1902, will stand affirmed.

RAILROAD GRANT—SELECTIONS UNDER ACT OF MARCH 2, 1899.

DAVENPORT *v.* NORTHERN PACIFIC RY. CO.

When the field notes and surveyor's return make no notation whatever of minerals in the land being surveyed, such lands are considered and treated as given a non-mineral classification by the surveyor.

Lands "classified as non-mineral" at the time of the government survey, are of the class of lands subject to selection under the act of March 2, 1899, and the character of lands so classified and selected will not be investigated on a protest presented after the survey and selection and alleging the present mineral character of the lands.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 28, 1903.* (F. W. C.)

By act of March 2, 1899 (30 Stat., 993), certain described lands in the State of Washington, theretofore included in the Pacific forest reserve, were set aside as a public park, to be known as the Mount Ranier National Park. The provisions of sections 3 and 4 of the act are as follows:

SEC. 3. That upon execution and filing with the Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States: *Provided*, That any settlers on lands in said national park may relinquish their rights thereto and take other public lands in lieu thereof, to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks.

SEC. 4. That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed, in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity.

This act, as will be observed, is a special one and is in some respects essentially different from the general legislation upon the subject

embraced in the acts of June 4, 1897 (30 Stat., 11, 36), and June 6, 1900 (31 Stat., 588, 614).

June 6, 1900, the Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company (hereinafter called the company), filed, under said section 3, its selection list, No. 91, for the SE. $\frac{1}{4}$ of Sec. 19, T. 8 S., R. 21 E., Bozeman, Montana, land district, in lieu of what will be, when surveyed, the SE. $\frac{1}{4}$ of Sec. 3, T. 13 N., R. 10 E., W. M. Presumably the fees prescribed by section 4 of the act were paid by the company at the time of the filing of said list, as there is nothing in the record to the contrary, but this should be inquired into by your office.

The township in which the selected tract is situated was surveyed in the field in August, 1888, and the survey was approved December 28, 1888. The tract forming the basis of the selection is within the primary limits of the Northern Pacific Railroad Company's grant and also within the boundaries of said Pacific forest reserve, opposite said company's constructed road. Said tract and all other lands, the release and conveyance of which are provided for in section 3 of the act, were released and conveyed by the company to the United States by deed dated July 25, 1899, and accepted by this Department July 26, 1899.

April 4, 1901, a coal declaratory statement was offered by W. W. Davenport under section 2348 of the Revised Statutes, for the tract selected, and was rejected by the local officers because of such selection. April 30, 1901, Davenport appealed, and, May 1, 1901, filed a protest against the selection, alleging that the land embraced therein is chiefly valuable for its coal deposits.

October 29, 1901, your office, upon Davenport's appeal, affirmed the action of the local officers in rejecting his declaratory statement and held the selection for rejection, upon the ground that the selected land had been classified as mineral in character by the government survey.

The case is before the Department on the appeal of the company. The company contends (1) that the government survey classifies the selected land as non-mineral in character, and (2) that such classification absolutely fixed the character of the land as non-mineral, in so far as concerns the right of the company to select the same and have the selection approved. This contention is based upon the theory that the act was intended to provide for an exchange of lands, and that the classification mentioned in the act was intended to operate as a rule of evidence and, as to the lands selected thereunder, to supersede the usual and ordinary methods of ascertaining the character of public lands by the land department.

The first question presented by the record for determination is: Was the selected land "classified as non-mineral" by the return of the surveyor-general at the time of the government survey?

The survey of said township 8 does not in terms designate any part

thereof either as mineral or as non-mineral, except as indicated in the following extract from the field notes of survey found in the return:

This township is largely broken and rough lands. The northern part contains some fine coal land lying in the basin at or near the head of Bear creek. On Bear creek are several settlers, as also in the agricultural basin on Grove creek, where some lands are irrigated and good crops of wheat and oats were grown this season. No mineral except coal has been discovered in this township. In the SE. $\frac{1}{4}$ of Sec. 8 is a coal mine with a $5\frac{1}{2}$ foot vein of good coal, which dips to the SW. $\frac{1}{4}$ 9° $30'$, on which a drift has been run 150 ft.; also in the NE. $\frac{1}{4}$ of Sec. 7 is a 6 ft. vein of the same quality which dips 8° to the SW. on which is a drift of 100 ft.

Your office decision holding the selected land to have been classified as mineral, is based entirely upon the language employed in this extract from the surveyor's return, but in the opinion of the Department this ruling is not justified by the facts stated or the language employed in the surveyor's return. The land in question at its nearest point is one mile and a half distant from the portion of section 8 in which coal was reported, and two miles distant from the portion of section 7 reported as containing coal. It is south and not north of the line separating the south half of the section from the north half, and is about three miles distant from the basin at or near the head of Bear Creek, as the same is shown upon the official plat of the township and as it is described in the field notes. The land in question is also by the field notes shown to be separated by ridges of considerable height from the lands where coal was reported. Upon the whole it seems very clear that the SE. $\frac{1}{4}$ of section 19 was not given a mineral classification at the time of the actual government survey. Nor does the phrase "so classified as non-mineral at the time of the actual government survey," as the same is employed in section 3, refer only to lands which the survey affirmatively states or shows are non-mineral. It is the uniform custom in surveying public lands to make in the field notes and surveyor's return, notation of mines, out-croppings and evidences of valuable mineral deposits where found, and to say nothing upon the subject of minerals where no mines, out-croppings or evidences of valuable mineral deposits are found. When, therefore, the field notes and surveyor's return make no notation whatever of minerals in the land being surveyed, such lands are considered and treated as given a non-mineral classification by the surveyor. *Bedal et al. v. St. Paul, Minneapolis and Manitoba Railway Co.* (29 L. D., 254, 255). The land in question was, therefore, classified as non-mineral by the government survey.

So far as shown, therefore, this land was properly subject to selection on June 6, 1900, under the act of March 2, 1899.

In said protest it is alleged that coal declaratory statement was offered for this land on April 4, 1901, and that the land contains large and valuable deposits of coal, which, when mined, will be of a merchantable quality, but the filing of a coal declaratory statement nearly

a year after a lieu selection under the act of March 2, 1899, is regularly presented can not of itself affect the lieu selection, nor is such a selection affected by a protest filed nearly a year thereafter in which it is stated, not that the land was known to be mineral at the time the selection was presented, but only that at the time of the filing of the protest it then contains valuable mineral deposits which when mined will be of merchantable quality.

The case is controlled by the decision in the case of *Bedal et al. v. St. Paul, Minneapolis and Manitoba Railway Co.*, *supra*, and for the reasons therein given the protest is dismissed.

FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

FRANK H. HEREFORD.

Where the owner of lands within a forest reserve in the State of California executes and acknowledges outside of said State a deed purporting to convey said lands to the United States, with a view to making selection in lieu thereof under the exchange provisions of the act of June 4, 1897, he must furnish the certificate of a clerk of a court of record of the county or district where such deed was executed and acknowledged, certifying to the official character, qualification and signature of the officer before whom the acknowledgment was taken.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) December 31, 1902. (J. R. W.)

Frank H. Hereford filed a motion for review of departmental decision of November 26, 1902, requiring him to obtain a certificate by the clerk of a court of record of Pima county, Arizona, to the official character, qualification and signature of the notary public who took the acknowledgment of his deed conveying to the United States the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 3, T. 20 S., R. 30 E., M. D. M., in the Sierra forest reserve, Tulare county, California, assigned as base for his application under the act of June 4, 1897, to select the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 1, and the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 2, T. 13 N., R. 2 W., M. D. M., Visalia, California, and after such certification to re-record his deed and extend his abstract of title.

It is insisted in briefs and arguments of much cogency that no certification to the official character, qualification and signature is necessary. The statutes upon which this question arises, so far as here material, are in the civil code of California, viz: (1) Section 1161 provides that before an instrument conveying title to land can be recorded its execution must be acknowledged and the acknowledgment or proof certified in the manner prescribed by article III of the same chapter; (2) section 1182 designates the officers who, within their several jurisdictions in the United States outside of California, have power to take acknowledgment of deeds, among whom are justices or judges of any

court of record of the United States or of any State, a notary public, or any officer of the State authorized by local law to take acknowledgments; (3) section 1189 prescribes the form for acknowledgments that must be substantially observed. February 26, 1897 (acts 1897, p. 45), there was added to this section an amendment in the words following:

Provided, however, That any acknowledgment taken without this State in accordance with the laws of the place where the acknowledgment is made, shall be sufficient in this State: *And provided further,* That the certificate of the clerk of a court of record of the county or district where such acknowledgment is taken, that the officer certifying to the same is authorized by law to do so, and that the signature of the said officer to said certificate is his true and genuine signature, and that said acknowledgment is taken in accordance with the laws of the place where the same is made, shall be *prima facie* evidence of the facts stated in the certificate of said clerk.

The form of acknowledgment of Hereford's deed was the statutory one. It is urged that the entire amendment applies only to deeds acknowledged according to extra-territorial forms and not to deeds extra-territorially executed in accordance with the statutory form.

Without doubt the purpose of the first clause of the amendment was to give validity to deeds executed in form according to extra-territorial law, but it could not have been the purpose to limit the effect of the second or "provided further" clause of the amendment to such deeds only as were acknowledged in some form other than the statutory one. The provision that the clerk shall certify to the authority of the officer taking the acknowledgment, and to his signature, would seem to be as necessary in case of an acknowledgment in statutory form as of one in extra-territorial form. That part of the certificate is obviously for another purpose than merely to evidence the sufficiency of the acknowledgment as to form under extra-territorial law. It could have no bearing on the question of the sufficiency of the act as conforming to local law and could have no other purpose than to evidence that the person taking the acknowledgment was in fact the officer he represented himself to be, a fact of which no evidence would exist in California where the deed was to be operative, but of which fact the officer required to certify would have official knowledge.

The legislature was considering the general subject of deeds extra-territorially executed. In doing so they authorized forms of execution good according to local law. That is clearly the object of the first provision. As to evidence of the official character of the officer taking such acknowledgment it would be somewhat remarkable if the mere use of a statutory form should have the effect to prove, even *prima facie*, the official character of a person in another State by his merely signing that form of certificate, while his official character had to be proven by a certificate if another form was used. There would be no difficulty in the fabrication of forged deeds purporting to be acknowledged before the chief justice of the supreme court of the United

States, or of any of the States, or before any of the numerous justices of the Federal or State courts of record, if such certificate is dispensed with. All that would be necessary would be to obtain, or draft, a statutory California blank. But if the seal of the court of record of the local jurisdiction, with the official signature of the officer keeping it, attests the official character and signature of the officer taking the acknowledgment, the act is given an evidential value far higher than the mere obtaining or use of a statutory form.

Diligent search fails to disclose any construction of this act by the courts of California. In absence of any such construction the Department must necessarily construe the act according to its own view of its purpose. In the view taken by the Department the certificate required extends to all extra-territorial acknowledgments of deeds and not to those only which are not in the California statutory form.

In this proceeding the land department acts administratively as agent for the government in accepting a conveyance and title tendered. Acting in that capacity, it is its duty to scrutinize the title offered and to solve reasonable doubts favorably to the government that good title may be assured to the United States in cases of exchange of lands under the act of June 4, 1897, *supra*.

The motion therefore presents no reason to recall or modify the departmental decision of November 26, 1902, and none appearing otherwise, the motion is denied and said decision is adhered to.

RIGHT OF WAY—PURCHASE—TIMBER AND STONE ACT.

JOHN W. WEHN.

Rights of way under the acts of March 3, 1875, and March 3, 1891, are mere easements, and an applicant to purchase lands over which they pass, under the timber and stone act, will be required to pay for the entire area of the legal subdivisions applied for, notwithstanding such rights of way.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 3, 1903.* (C. J. G.)

An appeal has been filed by John W. Wehn from the decision of your office of October 25, 1902, sustaining the action of the local officers in rejecting his application to purchase, under the act of June 3, 1878 (20 Stat., 89), as amended by the act of August 4, 1892 (27 Stat., 348), lot 1 of Sec. 10 and lot 1 of Sec. 11, T. 23 N., R. 58 W., Alliance, Nebraska, because of the insufficiency of the payment tendered.

The tract applied for contains 97.20 acres. The applicant filed his timber and stone sworn statement August 19, 1901, and submitted proof thereon October 5, 1901, at which time he tendered the sum of \$133.00 in payment, claiming that since the original survey and prior to his

application to purchase, 22.50 acres of said tract were granted to the Nebraska, Wyoming and Western Railroad Company for a right of way, and 21.50 acres to the Farmers' Canal Company for the same purpose, or a total of 44 acres that ought to be deducted, thus leaving only 53.20 acres to be paid for.

The records of your office show that each of the companies named has a right of way through the tract in question, the right of the railroad company having been granted under the provisions of the act of March 3, 1875 (18 Stat., 482), and that of the canal company under the act of March 3, 1891 (26 Stat., 1095).

It is well established that the right of way through the public lands granted to railroads and canals under these acts is in the nature of a mere easement. As stated in the regulations issued under the act of March 3, 1875, *supra* (27 L. D., 663, 664):

The grant made by this act does not convey an estate in fee in the lands used for right of way or for station grounds. The grant is merely of a right of use for the necessary and legitimate purposes of the roads, the fee remaining in the United States.

All persons entering public lands, to part of which a right of way has attached, take the same subject to such right of way, the latter being computed as part of the area of the tract entered.

It was similarly stated in the regulations issued under the act of March 3, 1891, *supra* (30 L. D., 325, 327), as follows:

The act is not in the nature of a grant of lands; it does not convey an estate in fee in the right of way. It is a right of use only, the title remaining in the United States. All persons settling on a tract of public land, to part of which right of way has attached for a canal, ditch, or reservoir, take the same subject to such right of way, and at the full area of the subdivision entered, there being no authority to make deduction in such cases.

The decision of your office in this case was proper and is hereby affirmed.

SCHOOL LAND—INDEMNITY SELECTION—DOUBLE MINIMUM LAND.

STATE OF CALIFORNIA.

Where a school indemnity selection was made and approved under an existing ruling of the land department limiting the selection to one acre of double minimum land for each two acres of single minimum land lost to the grant and designated as a base for the selection, and such ruling was thereafter vacated and selection permitted acre for acre, whether single or double minimum land, and the grant being yet in process of adjustment, the State, even though it may have acquiesced in such prior selection, will be permitted to make re-arrangement of the base specified for the selection already made and approved, making the lost and selected lands equal in area, and when thus adjusted the base lands remaining may be used in the selection of other lands.

Departmental decision of March 31, 1896, in the case of State of California, 22 L. D., 428, overruled.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 3, 1903.* (F. W. C.)

The State of California has appealed from your office decisions of February 27, June 18, and November 9, 1901, holding its selection of the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 26, T. 2 N., R. 13 W., S. B. M., Los Angeles land district, California, made July 19, 1898, in lieu of an undescribed tract of forty acres within section 16, T. 21 S., R. 30 E., M. D. M., California, for cancellation upon the ground that the State had been fully indemnified for the loss of the entire section 16 described.

From data furnished by your office relative to selections made on account of said section 16, it appears that the State originally selected 640 acres, on account of the loss of said section which was at that time included within the limits of the Tule River Indian reserve. The lands selected being portions of the alternate reserved sections within the limits of a railroad land-grant, and thus increased to the double minimum price, the State was for that reason required to reduce its selection one-half, so that the selection would stand as a selection of one acre of double minimum land for each two acres of the base lands, the latter being single minimum land. The State reduced its selection, which was thereafter included in what is known as list No. 4, which received departmental approval March 16, 1878.

August 3, 1878, the Tule River Indian reserve was reduced so that the section 16 above described fell without said reserve, but it is now included in the Sierra forest reserve as established by proclamation of February 14, 1893 (27 Stat., 1059).

In the case of *State of California v. Smith* (5 L. D., 543), the Department denied the right of the State to make selection under its school grant of double minimum lands in lieu of single minimum lands lost in place, but in the case of *State of Oregon* (18 L. D., 343), said decision was overruled and it was therein held that the State is entitled under its school grant to select for lands lost in place other lands, acre for acre, regardless of price, whether single minimum or double minimum, and said decision has since been adhered to and followed in the administration of the grants made to the several States in aid of the common schools.

It results that the list which received departmental approval on March 16, 1878, did not fully reimburse the State of California for the loss of section 16, T. 21 S., R. 30 E., as it only passed title to other lands in lieu thereof amounting to about 320 acres.

Your office decisions appealed from deny the right of the State to make further selections on account of the loss of said section because of departmental decision in the case of the *State of California* (22 L. D., 428), wherein it was held that a school indemnity selection of double minimum land amounting to one-half of the acreage of the single minimum loss assigned therefor, and which was a full satisfaction of said base under the ruling of the Department in force at the time

of the approval of the indemnity selection, exhausts the right of the State to use said loss as a base for indemnity selection, the theory of said decision being that as the State acquiesced in the selection as approved, the adjustment thereby affected will not be disturbed under a subsequent and more liberal interpretation of the school grant under which a greater selection would be possible on account of said loss.

After a careful consideration of the matter the Department refuses to follow the holding made in said decision. This Department is charged with the adjustment of all land grants, and, as held in *Leavenworth, etc., R. R. Co. v. United States* (92 U. S., 733, 740), they "should be neither enlarged by ingenious reasoning, nor diminished by strained construction." No mere lapse of time, or enforced acquiescence on the part of the State in an erroneous decision, should operate to prevent the State from receiving the full measure of its grant, where the matter is wholly one between the State and the United States and no intervening rights or claims are affected.

So far as concerns the particular tracts eliminated from the original selection of 1877 under the direction which required that selection to be reduced one-half, the State waived any claim thereto and would not now be heard to assert a right under said selection as against an intervening claim made to said land. If, however, it appears that the State has not received a full equivalent for the losses assigned and made the base for the selections which have received departmental approval, the entire grant being yet unadjusted, it is only right and proper that the error formerly made should be corrected.

It seems that without explanation two lists of school indemnity selections have received departmental approval since 1878 on account of a loss in said section 16, namely: list No. 9, approved February 19, 1898, covering the fractional SW. $\frac{1}{4}$ of Sec. 8, T. 18 S., R. 19 E., 46.40 acres, and list No. 10, approved March 26, 1900, covering SW. $\frac{1}{4}$ of Sec. 4, T. 39 N., R. 2 W., 160 acres, and lot 3 of Sec. 4, T. 41 N., R. 4 W., covering 40.36 acres. So far as shown by the data furnished by your office these lists were passed on account of unspecified bases in said Sec. 16, in this respect being like the selection now under consideration.

The Department does not approve of this manner of adjusting the school grant, and therefore directs that the State be required to make a re-arrangement of its bases for the selections made and approved on account of the loss of said section 16, so as to specify a particular tract for each selection, making the selected lands and the base lands agree as to acreage, and when thus adjusted the remaining lands in said section 16, if any there be, will be subject to use by the State in the selection of other indemnity lands.

Your office decisions appealed from are set aside and departmental decision in the case of State of California, reported in 22 L. D., 428, is hereby overruled.

on August 1, 1902, a decision was rendered affirming the action of the local officers. Notice of said decision was sent to the parties by registered mail on August 14, 1902, and on October 1, 1902, the defendant filed in the local office his appeal to this Department.

The only question to be determined is, whether or not the service of the notice of contest by publication was sufficient under the circumstances, or, in other words, was the affidavit of the contestant sufficient to warrant such service.

Rule nine of Practice requires that: "Personal service shall be made in all cases when possible, if the party to be served is a resident in the State or territory in which the land is situated."

Rule eleven authorizes service by publication, "when it is shown by affidavit presented on behalf 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.

It is not sufficient for the affidavit to state that due diligence has been used, and that personal service can not be made, but the contestant must show what degree of diligence has been used. He must show what efforts he has made to procure personal service, and from such showing the local officers are to determine whether or not due diligence has been used.

The affidavit in question states that the contestant made inquiry of the postmaster nearest the land in controversy and of others living in the immediate vicinity of the land, and from the information thus acquired, and from his own personal knowledge, he stated that the defendant had left the land and gone to some place to him unknown. It is not shown when he made this inquiry, which would seem to be important in determining the degree of diligence used, since if the inquiry was made several months before filing the affidavit proper diligence would require a more recent inquiry. It is not stated that the defendant was not a resident of the State, and it is not shown that any inquiry was made at his record address, nor any effort to procure personal service of the notice there. The records of the local office showed his address to be Lakota, which is in the State of North Dakota. The very object and purpose of keeping his address is that he may be served with notice of proceedings affecting his entry, and proper diligence required that the contestant should make an effort to procure service of the notice at that place, if the defendant was not found elsewhere.

For these reasons it must be held that the affidavit in question was insufficient to warrant service of the notice by publication, and therefore that the defendant has not been legally served with notice of the contest.

The contestant asks that the appeal be dismissed on the ground that

it was not filed within the time allowed by the rules of practice, but the record shows that it was filed within the required time.

Your said decision is therefore set aside, and you are directed to cause the contestant to be notified that he will be allowed sixty days from notice hereof in which to proceed anew to serve notice of his contest, and in default of such action on his part within that time his contest will be dismissed without further notice to him.

SCHOOL LAND—INDEMNITY SELECTION—MINERAL CHARACTER.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 6, 1903.

Registers and Receivers of United States Land Offices.

SIRS: The following rules and regulations will be observed in the adjustment of the grants to the several States and Territories made in aid of the support of common schools, where the mineral or non-mineral character of the lands sought to be selected as indemnity, or those made the base for an indemnity selection, is involved:

Rule 1. When a school section is identified by the government survey and no claim is at the date when the right of the State would attach, if at all, asserted thereto under the mining or other public land laws, the presumption arises that the title to the land has passed to the State, but this presumption may be overcome by the submission of a satisfactory showing to the contrary. Applications presented under the mining laws covering parts of a school section will be disposed of in the same manner as other contest cases.

Rule 2. The State will not be permitted to make selection in lieu of land within a school section alleged to be mineral in character and for that reason excepted from its grant, whether returned by the surveyor-general as mineral or otherwise, in the absence of satisfactory proof that the base land was known to be chiefly valuable for mineral at the date when the State's right thereto would have attached, if at all. The proof must show the kind of mineral discovered upon the land and the extent thereof, when and by whom the discoveries were made, as far as practicable, whether any claim to the land was asserted under the mining laws at the date when the State's right thereto attached, if at all, and if so by whom, the nature and extent of the mining improvements placed upon the land by the mineral claimant, and what efforts have been and are being made to develop the land in good faith for mineral purposes. If, in any case, the proof does not clearly show that the base land was known to contain valuable mineral

deposits, and to be chiefly valuable on account of such deposits, at the date the State's right would have attached thereto, a selection in lieu thereof will not be permitted. A certificate of the proper authorities that the base lands have not been sold, encumbered or otherwise disposed of must also be furnished.

Rule 3. Where the land sought to be selected in lieu of land within a school section has been returned by the surveyor-general as mineral, notice of the proposed selection must first be given by publication for sixty days, with posting in the local land office during the same period, and satisfactory proof submitted as to the non-mineral character of the selected land. Upon compliance with this requirement and in the absence of allegation that the land is mineral, the selection may be received, if otherwise regular, certified and forwarded as required by rule 7 hereof.

Rule 4. Where land sought to be selected in lieu of land within a school section has not been returned by the surveyor-general as mineral, but is alleged by way of protest to be mineral, or where application for patent therefor is presented under the mining laws, the proceedings in such cases will be in the nature of a contest, and will be governed by the rules of practice in force in contest cases.

Rule 5. Where land sought to be selected has not been returned as mineral but is within a township in which there is a mining location, claim or entry, publication thereof must be made, at the expense of the State, for a period of sixty days, with posting for the same period in the district local land office, and during such period of publication the local land officers may receive protests or contests as to any of the tracts claimed to be more valuable for mining than agricultural purposes.

Rule 6. A determination by the land department that a portion of the smallest legal subdivision in a school section is mineral land, will place that entire subdivision in the class of lands that may be used as a basis for indemnity or lieu selection.

Rule 7. No application which involves the mineral or non-mineral character of land sought to be selected or made the base for such selection, will be received and forwarded by you, until the preliminary requirements, hereinbefore indicated, have been complied with. Upon the State conforming to these requirements, you will receive the selection, certify as to the date of filing thereof, and the condition of the tracts selected or bases used as shown by your records, and forward the same, together with all showing made either for or against the selection, to this office by special letter, without further action upon the selection. The legal fees payable upon selection will not be received until you are advised by this office that the selection may be admitted. In the meantime, you will take no action looking to a disposal of the land.

These instructions are in lieu of and to take the place of the regulations on this subject of May 27, 1891 (24 L. D., 548), in so far as those regulations deal with the question of mineral lands involved in school indemnity selections, and all previous regulations in conflict herewith are hereby set aside.

W. A. RICHARDS, *Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

MAYBURY ET AL. *v.* HAZLETINE.

Where the owner of lands within a forest reserve makes reconveyance of the same to the United States, with a view to selecting other lands in lieu thereof under the exchange provisions of the act of June 4, 1897, no act should be done or permitted by the government looking toward the disposal of said lands until the title tendered has been examined, found satisfactory, definitely accepted, and noted on the records of the local office; but where an application for the land, otherwise regular, has been accepted by the local officers prior to such time, it will be treated as attaching immediately upon the receipt of notice by the local office that the title tendered has been accepted and selection of other land in lieu thereof allowed, if there be no other valid adverse claim.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 7, 1903.* (J. R. W.)

William J. Maybury and B. F. and Ella Jones appealed from your office decision of June 11, 1902, rejecting Maybury's homestead application for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 5; NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and lot 10, Sec. 6; and lot 2, Sec. 7, T. 28 N., R. 13 W., W. M., Seattle, Washington; and also B. F. and Ella Jones's application under the act of June 4, 1897 (30 Stat., 36), to select the same land, except lot 2, Sec. 7, in lieu of land relinquished to the United States in a forest reserve.

The land had been entered and patented and title by mesne conveyances vested in C. B. Ayres, who filed for record his deed under the act of June 4, 1897, *supra*, reconveying title thereto to the United States at a time when said land was within the Olympic forest reserve. On October 10, 1899, he made due selection of land in lieu thereof, which was approved by your office October 29, 1901, and notice of such approval was received by the local office and minuted on its record November 5, 1901. April 7, 1900, an executive proclamation (31 Stat., 1962) excluded township 28 north, range 13 west, W. M., from such reserve and restored the public lands therein to settlement from that date and to entry, filing, or selection after ninety days' notice by publication, notice of which was complete and became effective September 10, 1900.

November 26, 1900, A. J. Hazletine applied at the local office to

select said land under the act of June 4, 1897, *supra*, in lieu of land reconveyed to the United States in the Washington forest reserve. March 22, 1901, Hazletine's application was transmitted to your office by the local office, which had held it to that time "under suspension to await instructions from your office as to reconveyance of the land described." April 11, 1901, your office rejected the application because Ayres's selection was then still pending unapproved. June 22, 1901, Hazletine moved for a reconsideration of that decision, which, January 24, 1902, your office suspended to await action upon matters pending in the Department affecting the principle involved.

August 7, 1901, Maybury applied for homestead entry of the same land, alleging settlement on that day and improvements—a house and barn valued at \$25.00—which the local office rejected for conflict with Hazletine's application, and Maybury appealed.

November 5, 1901, B. F. and Ella Jones applied under the act of June 4, 1897, *supra*, to select the same land, except lot 2, Sec. 7, in lieu of land reconveyed to the United States in the Cascade Range forest reserve, which the local office, November 12, 1901, transmitted to your office without action.

June 11, 1902, your office, having the three applications before it, vacated its decision of April 11, 1901, rejected Maybury's and the Joneses' applications, and directed the local office to note of record Hazletine's selection as subsisting. The subsequent applicants separately appealed.

Ayres's application not having been approved and his reconveyance to the United States of the land in question and abstract of title thereto not having been examined, it could not be known whether the title claimed to have been conveyed to the United States would prove to be good. The act of June 4, 1897, proposes an exchange with "the owner" of lands in a forest reserve. If from mistake as to the completeness of his title, one supposing himself to be complete owner of land in a forest reserve makes a conveyance to the government of an imperfect title for which it is not authorized to give land in exchange, it would manifestly be improper for the government to make any disposal of such lands or to do or authorize to be done any act that would render it more difficult to restore to the grantor whatever title he had attempted to relinquish. It is due such a proponent of a conveyance that no act shall be done or permitted by the government which can impair or cloud his right until the title tendered is examined, found satisfactory, and is definitely accepted, and noted on the local office record. This not having been done in respect to Ayres's conveyance, the local office should have rejected Hazletine's application immediately upon its presentation. It had no authority to make any disposal or to permit any entry or selection of it until November 5, 1901, when informed by your office that Ayres's reconveyance had been found satisfactory. Had the local office so done, Hazletine might have exercised his right

elsewhere. This by the erroneous receipt and suspension of his selection he was prevented from doing.

It was held in *Barbour v. Wilson et al.* (28 L. D., 61, 70.) that:

In the administration of the public land laws it is uniformly and wisely held that an entry of land held in reservation or for other reason not subject to entry, made and maintained in good faith under color or claim of right will, if the land has since become subject to that class or character of entry, be permitted to remain intact as having attached when the land became subject to entry, if there be no adverse claim. (*Richard Griffin*, 11 L. D., 231; *Thunie v. St. Paul, Minneapolis and Manitoba Ry. Co.*, 14 L. D., 545; *John W. Imes*, 15 L. D., 546; *Settoon v. Tschirn*, 19 L. D., 1; *James M. Dewar*, 19 L. D., 575; *Oscar Sassin*, 20 L. D., 12.)

And in *Arden L. Smith* (31 L. D., 184), a case analogous to that at bar, it was held (*ib.*, 186) that:

By receiving Smith's selection and holding it to await action on the prior and pending selection of Clarke, the local officers, in effect, justified Smith in believing that if Clarke's selection should be eventually rejected Smith's selection would be recognized and given effect, if, upon examination, no other objection appeared.

It appears in the record here that the local office March 22, 1901, transmitted the application to your office, and that it was permitted by your office to remain not finally disposed of until after Ayres's selection was finally approved. By so receiving and holding Hazletine's application, he was deprived of power to select other land in satisfaction of his right, and was justified in relying upon the probable allowance of his application for these lands whenever Ayres's conveyance should be found satisfactory. Under such circumstances, his application, which was complete and accompanied by the required affidavits of the nonmineral character and unoccupied condition of the land, should be treated as attaching to the land immediately upon notice to the local office of the approval of Ayers's selection.

No sufficient reason appears why it should not be so treated. The title being *sub judice* when Maybury's alleged settlement was made and his application for entry was presented, he could get no right thereby. He does not allege that at the time of the approval of Ayres's selection he was in actual occupancy of the land, or that he followed up his settlement by establishing residence upon the land, or gained or maintained an actual occupancy of it. His application gave him no right as against Hazletine's suspended application for selection. *Porter v. Landrum* (31 L. D., 352).

The Jones application for the same reason and because not accompanied by the required proofs of the character and condition of the land was properly rejected.

Hazletine's counsel has filed a motion to dismiss Maybury's appeal because filed too late. Maybury was served by registered mail from the local office on September 20, 1902, with notice of your office decision. His appeal was filed October 3, 1902. No ground exists for the motion, and the same is denied.

Your office decision is affirmed.

HOMESTEAD—SOLDIERS' ADDITIONAL—MISSOURI HOME GUARDS.

EDGAR A. COFFIN.

Members of the Missouri Home Guard are not entitled to the soldiers' additional homestead right conferred by section 2306 of the Revised Statutes, by reason of service performed in said organization.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 16, 1903.* (A. S. T.)

Edgar A. Coffin, assignee of Nancy J. Hair, widow of John B. Hair, deceased, has appealed from your office decision of April 11, 1902, rejecting his application to make soldiers' additional homestead entry for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 7, and lot 2 of Sec. 24, T. 62 N., R. 24 W., 4th P. M., Duluth land district, Minnesota, under section 2306 of the Revised Statutes, based on service of John B. Hair for more than ninety days in the army of the United States during the civil war, and on homestead entry made by said Hair on September 14, 1866, for the S. $\frac{1}{2}$ (lots 2 and 3) of the SW. $\frac{1}{4}$ of Sec. 19, T. 34 N., R. 16 W., Boonville land district, Missouri.

In response to a request of your office for information relative to the military service of said John B. Hair, the War Department, on February 28, 1902, reported that—

the records of the allowances made by the Hawkins Taylor Commission, appointed under the joint resolution of Congress of July 12, 1862, and February 16, 1863, on file in this office, show that on the claim of John B. Hair, P'v't, Capt'n James M. Moore's (Ind'p't) Co., Stone County R'g't, Mo. H. G., for services between May 4, 1861, date of organization, and November 15, 1861, date of discharge, the period of 4 months and days was allowed as actual military service rendered the United States.

Your office thereupon rejected said application on the ground that "service in the Mo. Home Guards does not constitute a military service in the United States army."

Section 2306 of the Revised Statutes, under which this application is made, provides:

Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

Section 2304 of the Revised Statutes provides that—

Every private soldier and officer who has served in the army of the United States during the recent rebellion, for ninety days, and who was honorably discharged, and has remained loyal to the government, including the troops mustered into the service of the United States by virtue of the third section of an act approved February thirteenth, eighteen hundred and sixty-two, shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres.

The question presented is whether or not John B. Hair served for a period of ninety days *in the army of the United States*, during the war of the rebellion, or served for such period, having been "mustered into the service of the United States by virtue of the third section of an act approved February thirteenth, eighteen hundred and sixty-two."

The third section of the act of February 13, 1862 (12 Stat., 339), provides:

That no volunteers or militia from any State or Territory shall be mustered into the service of the United States on any terms or conditions confining their service to the limits of said State or Territory, or their vicinities, beyond the number of ten thousand in the State of Missouri, and four thousand five hundred in the State of Maryland, heretofore authorized by the President of the United States, or Secretary of War, to be raised in said States.

This legislation was prohibitive in character and forbade the mustering into the service of the United States of any volunteers or militia from any State or Territory on any terms or conditions confining their services to the limits of such States or Territories, except the number of ten thousand in the State of Missouri and four thousand five hundred in the State of Maryland, previously authorized by the President or Secretary of War to be raised in those States; but as to the number thus excepted there was no such prohibition, so that they might still be mustered into such service notwithstanding said statute.

From a history of the Missouri Home Guards, as given in Senate Document No. 167, First Session, Fifty-seventh Congress, it appears that on June 11, 1861, the Secretary of War issued to General Lyon, commanding the Department of the West, the following order:

WAR DEPARTMENT, *Washington, June 11, 1861.*

General LYON:

You are authorized to enlist in the service of the United States such loyal citizens of the State of Missouri as you think proper, who shall not receive pay except when called into active service by this Department.

SIMON CAMERON, *Secretary of War.*

It appears that under this authority a large number of men were enlisted and organized into what was known as the Missouri Home Guards.

General Lyon was succeeded in said command by General Fremont, and shortly thereafter the question of payment of these Home Guards for their services was brought to his (General Fremont's) attention, and it seems that he declined to order such payment.

On October 25, 1861, the Adjutant General of the army addressed a letter to the Paymaster General cautioning him against the payment of Home Guards and other troops organized in the vicinity of St. Louis for duty in limited localities or upon certain contingencies.

On November 9, 1861, Major-General Halleck was assigned to the command of the Department of the Missouri, and he was instructed

by Major-General McClellan, commanding the Army of the United States, to examine into the legality of the organization of the troops serving in the department, and where he found illegal, unusual, or improper organization, to give to the officers and men an opportunity to enter the legal military establishment under the general laws and the orders of the War Department.

On December 13, 1861, General Halleck reported to the Adjutant General of the Army that the Home Guards were not a regular organization and that he had offered them an opportunity to be mustered in according to law, so as to cover their past services, or to be mustered out and receive pay only for active service in Missouri away from their homes.

On December 19, 1861, General Halleck reported to General McClellan that the Home Guards were being disbanded as rapidly as he could supply their places, and within a few days thereafter all of the Home Guard organizations formed by Generals Lyon and Fremont had ceased to exist. They did not accept General Halleck's offer to be regularly mustered into the United States service and were therefore disbanded. It does not appear that they were ever mustered into the service of the United States, either under the general laws or under the third section of the act of February 13, 1862. They were disbanded prior to the passage of the act of February 13, 1862.

It appears, therefore, that Hair is not included in the terms of section 2304 of the Revised Statutes, as having been mustered into the military service of the United States by virtue of the third section of the act of February 13, 1862, inasmuch as his service, of whatever character it was, had terminated prior to the passage of said act.

The only remaining question is, Did he serve ninety days or more "*in the army of the United States?*"

By an act of Congress approved March 25, 1862 (12 Stat., 374), it is provided—

That the Secretary of War be, and he is hereby, authorized and required to allow and pay to the officers, non-commissioned officers, musicians and privates who may have been heretofore actually employed in the military service of the United States, whether mustered into actual service or not, where their services were accepted and actually employed by the generals who have been in command of the department of the West, or the department of the Missouri, the pay and bounty as in cases of regular enlistment.

And by the same act pensions were allowed to those who had been disabled in such service.

By joint resolution of Congress approved July 12, 1862 (12 Stat., 623), the Secretary of War was authorized and directed to suspend payments under said act, and the President was authorized to appoint a commission to examine all claims arising under said act and report the same with the facts connected therewith to the Secretary of War. Under the authority of said resolution, the commission, known as the

“Hawkins Taylor Commission,” was appointed and proceeded to examine into said claims, and in due time made their report to the Secretary of War. Amongst the claims examined and reported upon by said commission was that of John B. Hair, who was reported to have actually been in the military service of the United States four months.

By act of May 15, 1886 (24 Stat., 23), the Secretary of War was—authorized and directed to furnish, upon their several applications therefor, a certificate of discharge to each and every member of the Missouri Home Guards whose claims for pay were adjudicated by the Hawkins Taylor commission.

Under this authority Hair was honorably discharged on October 7, 1886, to date November 15, 1861.

The Hawkins Taylor commission was charged with the duty of ascertaining who were entitled to pay under said act of March 25, 1862, as having been in the *military service of the United States*, and not whether the claimant had served *in the army of the United States*, and their report seems to have been accepted as conclusive of that matter, though it does not appear upon what evidence said report was based. However, it seems to be well settled that Hair was in the military service of the United States, that fact having been determined by the commission appointed by authority of Congress to investigate the matter, and its report having been accepted as conclusive by Congress and by the Secretary of War.

It is argued in behalf of the applicant that Hair, having been in the military service of the United States, should be included within the terms of said section 2304 of the Revised Statutes, the contention being that there is practically no distinction between being in the military service and being in the army of the United States. This position is not believed to be tenable. Congress evidently recognized such a distinction, as appears from the language of said section 2304 of the Revised Statutes. Its benefits were conferred upon two classes of persons: (1) Those who had served ninety days *in the army of the United States*; and (2) those who were mustered into the military service of the United States by virtue of the third section of the act of February 13, 1862. If Congress had understood that the latter class were *in the army of the United States*, it would not have been necessary to make the special provision contained in said section for their benefit, since they would have been clearly embraced in the other class.

It can not be said that every one who *renders military service* to the United States is *in the army of the United States*. One may accompany the army, wear the uniform, and perform the duties of a soldier, and yet not be in the army in the sense of said statute, *i. e.*, he may not be a member of the army, may not belong to the army, may be under no legal obligation to remain with the army or to perform military service.

Congress, by special legislation, has seen fit to provide that those members of the Missouri Home Guards who actually performed military service for the United States should be paid for such services, whether they had been mustered into the service or not, and that those who were disabled in such service should receive pensions, but such legislation did not bring them within the descriptive terms of section 2304 of the Revised Statutes.

Whether the men who served for a few months in these organizations in the vicinity of their homes, without being under any legal obligation to perform such service, are justly entitled to the same recognition and consideration due to those who were regularly mustered into the army, submitted themselves to its authority, left their homes, went wherever ordered, and served the government for three or four years, is a question which this Department is not called upon to answer. Suffice it to say, that Congress has not seen fit to give them such recognition, and this Department must be governed by the law as Congress has made it.

It does not appear that John B. Hair served in the army of the United States, or that he was mustered into the military service of the United States by virtue of the third section of the act of February 13, 1862, or otherwise.

The result is that your said decision is affirmed and said application is denied.

This question has been here considered as if it were one of first impression, but the conclusion sustains former departmental rulings. (See Wilson Miller, 6 G. L. O., 190; William French, 2 L. D., 235; Chauncey Carpenter, 7 L. D., 236; William Jamison, 8 L. D., 235; Smith Hatfield *et al.*, 6 L. D., 557; 17 L. D., 79.)

RAILROAD GRANT—MINERAL LAND.

UNION PACIFIC RAILROAD CO.

Directions given for the suspension, until December 1, 1903, of all proceedings for the patenting, under the Union Pacific railroad land grant, of the odd-numbered sections in certain designated boundaries within the limits of said grant, and also for the suspension until said date, from location and disposition of every character under any of the public land laws, other than the mining laws, of certain other lands within said designated boundaries, all in the Evanston land district, Wyoming, with a view to permitting such lands to be prospected and explored for oil deposits supposed to be contained therein.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 16, 1903.* (A. B. P.)

In a communication addressed to your office by this Department June 3, 1902, it was ordered that action upon requests by the Union

Pacific Railroad Company for the issuance of patents to the unpatented alternate odd numbered sections of land within the limits of said company's grant in the Evanston land district, Wyoming, be deferred for the time being, to permit such investigation and consideration as would enable the Department to determine whether, to what extent, and for what time, the further issuance of patents to said company for lands in said district shall be withheld in order that such lands may be prospected and explored for oil deposits supposed (as contradistinguished from known) to be contained therein, by persons who may, in good faith, wish to undertake such prospecting and exploration.

Subsequently to the date of said communication, an investigation of said alternate odd numbered sections was made, under the direction of this Department. As a partial result of that investigation, your office was instructed, by departmental communication of December 30, 1902, that the consideration of requests for patent by said company need no longer be deferred as to any odd numbered sections of land within its grant lying east of range 112 in said land district; that as to all such lands the administration of the company's grant should be proceeded with the same as though the order of June 3, 1902, had not been made; and that requests for patent to alternate odd numbered sections within the company's grant lying west of range 112 in said land district should remain suspended until more definite direction could be given with respect thereto. More definite direction will now be given.

As the result of a full and careful examination and consideration of the evidence taken in the investigation before named, your office is directed as follows:

(1) To suspend until December 1, 1903, all proceedings looking to the patenting, under the Union Pacific railroad land grant, of any lands within the following limits in said Evanston land district, to-wit: Beginning on the western boundary of the State of Wyoming at the point where the same intersects the south line of township 13 north, and running thence east along said township line to its intersection with the eastern line of range 117 west, and running thence north along said range line to its intersection with the southern line of township 15 north, and running thence east along said township line to its intersection with the eastern line of range 115 west, and running thence north along said range line, with its off-sets, to its intersection with the north line of township 21 north, and running thence along said township line to its intersection with the said western boundary of the State of Wyoming, and running thence south along said State boundary to the place of beginning.

(2) To withhold and suspend, until December 1, 1903, from entry, location and disposition of every character, under any of the public land laws other than the mining laws, all public lands within the limits hereinbefore specifically described; but this shall not, of itself, delay

or prevent the recognition or perfection of any *bona fide* claim heretofore initiated under any of the public land laws to any public lands within said limits.

(3) To relieve from the orders of June 3, 1902, and December 30, 1902, before named, all the odd numbered sections within said railroad land grant which are not embraced within the limits hereinbefore specifically described, and as to the lands so relieved, to proceed with the administration and adjustment of said land grant as if the restrictive orders of June 3, 1902, and December 30, 1902, had not been issued.

(4) Upon and after December 1, 1903, and without awaiting further direction, to proceed with the administration and adjustment of said railroad land grant as to the alternate odd numbered sections within said land grant which are also within the limits hereinbefore specifically described, and in so doing to consider and determine, in due course and according to the usual rules, the then known character of the lands within said limits sought to be patented under said railroad land grant, and to consider and determine, in due course and according to the usual rules, all claims asserted under the mining laws to any of said lands.

(5) Upon and after December 1, 1903, and without awaiting further direction, to treat the public lands within the limits hereinbefore specifically described as relieved from this order of suspension, and to permit entry, location and disposition thereof according to their nature and in conformity with law.

The purpose of this order is to permit, encourage and protect, so far as the Department can do so, but within the time herein named, the exploration and exploitation of the unpatented alternate odd numbered sections within said railroad land grant which are within the limits hereinbefore specifically described, and of the public lands within said limits, for the purpose of ascertaining and demonstrating whether, as claimed, such lands or any of them are mineral in character, in that they are chiefly valuable for their oil or other mineral deposits; but in justice to the railroad company, whose line of railroad has long since been completed in conformity with the land grant act, and in justice to others who may desire to take any of the public lands within said limits under any of the public land laws other than the mining laws, it is necessary that this order of suspension shall not be operative longer than until December 1, 1903, that being deemed ample time within which, in addition to the exploration and exploitation heretofore had, to fairly develop the character of these lands.

The direction herein given should be promptly communicated to the local land officers by telegraph, as well as by letter, but such direction will not in any manner apply to any lands heretofore patented to the railroad company or to others.

The papers relating to the investigation herein referred to are herewith transmitted for the files of your office.

RAILROAD GRANT—INDEMNITY SELECTION—RESERVATION..

SOUTHERN PACIFIC RAILROAD CO.

A selection made under a railroad or other grant, in accordance with existing regulations, and duly accepted or recognized by the local officers, is a "lawful filing" within the meaning of that term as used in the excepting clause of the proclamation of June 29, 1898, creating an addition to the Pine Mountain and Zaca Lake forest reserve.

Departmental decision of April 14, 1899, 28 L. D., 281, in the case of Southern Pacific Railroad Co., recalled and vacated.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 16, 1903.* (F. W. C.)

The Department has considered the appeal by the Southern Pacific Railroad Company from your office decision of June 30, last, holding for cancellation its indemnity selection list of February 16, 1898, as to the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 3, T. 7 N., R. 16 W., S. B. M., Los Angeles land district, California.

The tract in question is within the indemnity limits common to the grants made by the act of July 27, 1866 (14 Stat., 292), in aid of the construction of the Atlantic and Pacific railroad and the Southern Pacific railroad, main line.

The grant in aid of the construction of the Atlantic and Pacific railroad in this vicinity was forfeited for nonconstruction of the road by the act of July 6, 1886 (24 Stat., 123), and, so far as shown by the records, the tract in question was on February 16, 1898, when selected by the Southern Pacific Railroad Company, free from all adverse claim, and the selection was presented in conformity to the existing regulations, and was duly accepted and recognized by the local land officers, but it has not been approved by the Secretary of the Interior as a basis for the issue of patent on account of the grant.

Your office decision holding said selection for cancellation is based upon the fact that this land was included in the addition to the Pine Mountain and Zaca Lake forest reservation made by the President's proclamation of June 29, 1898 (30 Stat., 1776), a little more than four months after the selection of the land by the Southern Pacific railroad company. This cancellation was rested by your office upon the decision of the Department in *Ex parte* Southern Pacific Railroad Co. (28 L. D., 281), wherein it was held (syllabus):

Until the approval of a railroad indemnity selection no rights are secured thereunder that can be asserted against the government; and the creation of a forest reservation under authority of the act of March 3, 1891, prior to the approval of a selection embraced within the limits of said reservation, is such a disposition of the land as to defeat the selection thereof, even though the tract was subject thereto when selected by the company.

The words "entry" and "filing" used in the proclamation of February 14, 1893, establishing the Sierra forest reserve, to describe lands excepted from such reservation, must be taken in their proper technical meaning, and as applicable only to record claims made under the general land laws, and not including a railroad indemnity selection.

The appeal under consideration was filed for the purpose of securing a reconsideration and reversal of said departmental decision.

It is proper to state that the proclamation creating the addition to the Pine Mountain and Zaca Lake forest reserve contains the following clause, viz:

Excepting from the force and effect of this proclamation all lands that may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and all mining claims duly located and held according to the laws of the United States and the rules and regulations not in conflict therewith;—

and the disposition of this case must rest upon the construction placed upon the terms "legal entry" and "lawful filing duly of record" found in this clause.

It will be noted that in this excepting clause the words "entry" and "filing" are each used twice, the exception being: first, of all lands "*prior to the date hereof* embraced in any legal entry or covered by any lawful filing duly of record;" and second, of lands "upon which any valid settlement has been made pursuant to law, *and the statutory period within which to make entry or filing of record has not expired.*" The last use of the words "entry" and "filing" is clearly limited to an entry or filing made pursuant to and in assertion of a settlement claim which had not been carried to entry or filing at the time of the proclamation and where the time for so doing had not expired. This last use of the words "entry" and "filing" is restricted, but in their first use they are not employed in connection with other restrictive terms and are not intended to have a restricted meaning. To attempt to accord them the same meaning in both places and limit them to settlement claims would either render the two phrases descriptive of excepted lands contradictory in that one would require that the entries or filings be of record and the other would dispense with this requirement, or would make the two phrases identical in meaning and thereby make one of them useless. But there are many means of acquiring public lands without settlement, namely, by desert entry, warrant location, scrip location, soldiers' additional entry, etc., and as the clause under consideration is what is called a saving clause, intended to protect all rights lawfully initiated at the date of the proclamation, it should be fairly construed and given such operation as will make it uniform in its application and enable it to accomplish its purpose. It seems clear therefore that, properly considered, the words "legal

entry" and "lawful filing," first employed, should be held to be generic terms intended to embrace all classes of claims lawfully asserted and of record at the date of the proclamation.

Was a railroad indemnity selection, presented in accordance with the act making the grant and in conformity with departmental regulations, of record at the date of the proclamation and awaiting only departmental consideration and approval, a lawful filing within the meaning of that term as used in the excepting clause?

It is provided by section 3 of the act of 1866, making the grant in aid of the construction of the Southern Pacific railroad, that whenever, prior to the definite location of the line of road—

any of said sections or parts of sections shall have been otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers.

Under this legislation the company was, by the direction or regulations of the Secretary of the Interior, required to present at the local land office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the local office. When this was done the selections became lawful filings; and while, until approved and patented, they would remain subject to examination, and to rejection or cancellation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records.

There is no question in this case as to the sufficiency of the loss assigned, or as to the formality and regularity of the selection.

What effect has been given to a pending railroad indemnity selection?

Prior to 1887 the rights of a railroad company within the indemnity belt of its grant were protected by executive withdrawal, but on August 15, that year, these withdrawals were revoked and the land restored to settlement and entry; but such orders, although silent upon the subject, were held not to restore lands embraced in pending selections. (*Dinwiddie v. Florida Railway and Navigation Co.*, 9 L. D., 74.) In the circular of September 6, 1887 (6 L. D., 131), issued immediately after the general revocation of indemnity withdrawals, it was provided that any application thereafter presented for lands embraced in a pending railroad indemnity selection, and not accompanied by a sufficient showing that the land was for some cause not subject to the selection, was not to be accepted, but was to be held subject to the claim of the company under such selection. In fact, a railroad indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers,

has been uniformly recognized by the land department as having the same segregative effect as a homestead or other entry made under the general land laws; and the proclamation reserving these lands having been drafted in this Department, the terms employed therein were evidently used with due regard to this uniform recognition.

Upon a more careful and mature consideration, it is the opinion of this Department that the construction given in the decision in 28 L. D., 281, to the words "entry" and "filing," found in the excepting clause to the proclamation creating this and other forest reservations, was too narrow and limited, and that a selection made under a railroad or other grant in accordance with existing regulations and duly accepted or recognized by the local officers, is such a claim as is clearly embraced within the exception. Said departmental decision is therefore hereby recalled, and all selections of this character existing at the time of the inclusion of the selected lands within a forest reservation will be considered and disposed of as though such reservation had not been made.

SWAMP LAND GRANT—ADJUSTMENT.

MORROW ET AL. *v.* STATE OF OREGON ET AL.

The swamp land grant of September 28, 1850, is not in terms confined to lands subject to the overflow of large streams, but includes "the whole of those swamp and overflowed lands, made thereby unfit for cultivation, which shall remain unsold at the passage of this act;" thus making the condition of the land, from whatever cause, the criterion in determining whether it falls within the words of the act descriptive of the character of the land granted.

The act of the surveyor in meandering lands as a lake, which are not in fact covered by a permanent body of water, even though approved by the land department, does not conclusively establish the character of the area beyond the meander line as a lake or exclude lands within that area from the swamp land grant.

Selection by the State of indemnity school lands in lieu of lands claimed to have been lost in place because covered by a lake, precludes the State from claiming the lands in place under the swamp grant, but in no wise affects the right of the State to claim any other lands in the same township as swamp lands.

A settlement or filing under the pre-emption law, or both such settlement and filing, do not constitute a sale or disposal of the lands covered thereby, within the meaning of the act of March 12, 1860, extending to the State of Oregon the swamp act of September 28, 1850, so as to except such lands from the swamp land grant.

Lands claimed by the State under the swamp grant, and embraced in a pre-emption entry regularly perfected prior to the confirmation of title in the State, are excepted from the grant to the State.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 16, 1903.* (J. R. W.)

The State of Oregon and the Warner Valley Stock Company appealed from your office decision of March 2, 1901, rejecting the

State's swamp land selections under the act of March 12, 1860 (12 Stat., 3), embraced in lists 30, 31, and 39, of lands described in your office decision, situate in townships 39 south, ranges 24 and 25 east, and township 40 south, range 24 east, W. M., Lakeview, Oregon.

The former history of the contentions concerning these lands is more fully recited in *Morrow et al. v. State of Oregon* (28 L. D., 390), to which reference is here made. May 13, 1899 (28 *Ib.*, 395), the Department, for reasons there stated, ordered that—

all decisions respecting the character of these lands, or any of them, heretofore rendered by the Department, your office or the local office, are set aside, with a view to a full and fair hearing, after due notice to all concerned, . . . which hearing shall be conducted in accordance with the stipulation in writing filed herein by counsel for the respective parties May 4, 1899. In addition to the lands embraced in said lists 30, 31 and 39, this decision and the hearing and proceedings herein directed shall extend to and include any and all other lands described in said stipulation of May 4, 1899.

The stipulation provided that if a rehearing was ordered upon pending proceedings all claims adverse to the State and to the Warner Valley Stock Company, involving certain described lands, should be consolidated and tried, so far as possible, as one case, the State and the stock company to have the burden of proving the swampy character of the land, March 12, 1860, by general evidence as to all the lands, and any further evidence as to specific tracts.

July 17, 1899, a hearing was had at the local office, in which the parties fully participated and a great volume of evidence was introduced. February 3, 1900, the local office found that all the land in controversy March 12, 1860, was the bed of an apparently permanent lake. Upon appeal, November 6, 1900, your office decision reversed the local officers and held that "the lands involved were not in 1860 covered by the waters of a permanent lake," and that neither the condition of the land nor its settlement or other adverse filings and claims thereto are "of such a character as to prevent the approval of the land to the State as swamp land." November 20, 1900, this decision was recalled, and March 2, 1901, your office vacated such former decision, and held that—

The lands included in lists 30, 31, 39, and all others described by the . . . stipulation filed . . . May 4, 1899, were not as a whole, nor as to the greater portion of the smallest legal subdivision, swamp and overflowed on March 12, 1860, and that the State of Oregon, and those claiming under it, has no title, interest, or estate in and to any part of said lands by or through the provisions of the act of March 12, 1860 . . . Said claims are hereby rejected and said lists held for cancellation.

The controversy as to these lands has pended in one form or other, in the courts, in your office, and this Department, for many years. (See 5 L. D., 369; 17 L. D., 571; 19 L. D., 254; 23 L. D., 178; 28 L. D., 390.) A survey of townships 39 south, ranges 24 and 25 east,

was made in the field in June, 1875, in the returns of which a large part of the two townships was described and meandered as a lake. The field-notes and general description are very meager and give no light as to the character of the body of water therein spoken of as "Warner Lake" and "lake." A survey of township 40 south, range 24 east, was made in the field in July and August, 1879, in the returns of which a large portion of the township was described as marsh or lake, and was defined by a meander line running through "land marshy along lake covered with tules and flag grass;" "tules in and along lake;" "these lands are subject to overflow by the creek and lake, covered with tules, grass, and flag;" "tules and flag grass in lake." The meander line referred to is one traced through sections 6, 7, 18, 19, 29, 16, 15, 10, 11, 1, and 2. The general description accompanying the field-notes as to the lake or marsh is that:

The marsh or lake, if properly drained, is first class muck land. This lake or marsh is reported much lower at this time than ever before, and yet it covers a large portion of the township. It having no outlet is filled up to overflowing each spring by the melting of the snows and the spring rains. The meander lines are run on the line of the overflow, which is defined by the marsh and tules.

The meander line in this township connects with that in township 39 and together they enclose an area of about 22,000 acres.

Subsequently complaints were made by settler claimants that the surveys were fraudulent and included within the meander lines a large area of *dry land*. They asked that the public surveys be extended over the so-called lake, so that they have opportunity to present proper applications for the land they occupied and to protect their settlement rights. After examination and report by a special agent it was so ordered, January 17, 1887 (5 L. D., 369). Such surveys were made in August and September, 1887.

Substantially all the land thus surveyed was claimed by the State and her grantees under the swamp land grant of September 28, 1850 (9 Stat., 510), extended to Oregon by the act of March 12, 1860, *supra*, and was included in list 61, presented December, 1888. Many tracts were claimed by individuals under the laws for disposal of agricultural lands and many controversies over them arose in the courts and land department. March 21, and November 16, 1892, your office prepared and submitted clear lists 30 and 31 to the Department for approval, which were approved April 9, and December 3, 1892, "subject to any valid adverse rights that may exist to any of the tracts therein described," which is the uniform character of approval given to all swamp land lists. This action was revoked March 3, 1893. December 19, 1893, upon the papers then before the Department, it was held that at the date of the grant all the lands in said lists were covered by Lake Warner and were not of the character contemplated

by the swamp land grant, and this decision (17 L. D., 574) directed, but not in pursuance of any consent or stipulation of parties, that—

all decisions, recommending or holding for cancellation entries or declaratory statements, upon the ground that the lands in contest were granted to the State of Oregon as swamp and overflowed lands, by the act of March 12, 1860, to be set aside and annulled, and the cases reinstated; and all contests based upon said ground, alone, to be dismissed.

December 13, 1894, your office transmitted clear list 39, made up of the tracts in lists 30 and 31 not within the area surveyed in 1887. This was rejected and canceled by departmental decision of August 4, 1896 (23 L. D., 178), which held that—

The lands embraced in said lists 30, 31 and 39 were not on March 12, 1860, swamp and overflowed lands made unfit thereby for cultivation.

This decision was recalled August 11, 1896, and no definite further action was taken therein until the order of May 13, 1899, *supra*, upon which the hearing now pending was had.

At the initiation of this controversy the agricultural claimants asserted that at the date of the swamp land grant to the State the land in controversy was dry and suitable for agriculture without reclamation. At the recent hearing they contended that at the date of the grant the land was the bed of a lake, or apparently permanent body of water, and did not pass by the grant, and that the lake has since receded.

Before the hearing began the swamp land claimants moved a continuance for absence of witnesses named in an affidavit filed, setting forth the names of the witnesses and facts to which they would testify. The adverse claimants admitted the persons named would so testify, and the hearing proceeded. The affidavit was to the effect that one of the parties named would testify that he was in the Warner Valley in 1864; two others that they were there in 1865; and six others that they had known the basin from 1866 to 1872, and that each would testify that these lands when first seen by them were swamp, marsh lands, covered by a rank growth of tules, flags, and swamp grass, and were too wet for cultivation, but not covered by the water of a permanent lake. One of these parties afterward testified, and the testimony of four others theretofore given in other proceedings concerning these lands was read by the swamp land claimants. The testimony taken at the hearing and testimony so theretofore taken, with the affidavit, comprise that of two witnesses who first saw the lands in 1864, three in 1865, five in 1866, three in 1867, two in 1868, and one in 1869, or sixteen during that decade, and eleven others from 1871 to 1879, inclusive, a total of twenty-seven witnesses who observed the condition of the lands in those years, many of whom were familiar with them for the greater part of the period covered by the testimony.

The agricultural claimants produced no evidence as to the condition of the land at or about the date of the grant, but relied upon testimony formerly adduced by the swamp land claimants, when the contention was as to the dry or the wet or submerged condition of the land at the time of the grant.

Without giving the testimony of witnesses in detail it suffices to say that the material facts established by the evidence are, substantially, as follows:

The evidence on behalf of the swamp land claimants shows that the lands lie near the south end of a depressed valley or fracture of the earth's crust, about sixty or more miles long from north to south, and three to six miles wide, without drainage outlet, surrounded by walls of brown basalt, often one thousand feet high, divided into the upper and lower Warner valleys by narrows where it is contracted by a comparatively near approach of its precipitous sides. The floor of the valley near its south end slopes eastward and declines to the north, where its surplus water passes through the narrows into North Warner Valley. The entire basin has been somewhat indiscriminately described as Warner Lake, Warner Lakes, Warner Marsh, and Warner Valley, from about 1849. The water of South Warner Valley mainly comes from two streams—Twenty Mile Creek and Deep Creek—fed principally by melting snows of the surrounding mountains entering the basin near its south end. In 1864, when the witnesses testifying first observed the valley, the lands in controversy, as well as nearly all the floor of the basin, except small patches or streaks of open water, were covered by a rank growth of tules, canes, flags, and swamp grasses, the streams losing themselves in the marsh without any channels. The soil was muck, or peat, several feet thick, formed from decay of many years' vegetable growth. The spongy nature of the soil, with the dense standing and fallen vegetation, greatly retarded the flow of water over the surface of the valley towards the narrows, which had a fall of somewhat less than thirty-three feet, in a distance of about twenty-nine miles, or perhaps about eighteen feet in the last eighteen miles.

White settlers began to come into the valley about the fall of 1876, and some 7,000 or 8,000 head of cattle and several thousand hogs were taken there the winter of 1876-77, and thence forward it was a winter range for stock. The muck and fallen vegetation became more compacted as stock penetrated and ranged in further and further from the edges of the morass. Some of the waters of Twenty Mile Creek were diverted into Surprise Valley, California, and irrigating ditches were taken out of Deep Creek for reclamation of arid lands, the surplus finally discharging into Pelican Lake some miles down the valley from the mouth of the creek. From large parts of the marsh the tangled and fallen vegetation was burned. Stock paths served the water for channels. For some periods of several years there was less snow and

rain-fall upon the mountains and less flow of water into the valley. From these causes a marked change came over the marsh and large parts of it are very productive of hay and may be mown, and parts of it are arable. But at all times there were only comparatively small spaces covered by water which was free of vegetable growth, and now there are two bodies of water in the basin, known as Cook's Lake and Pelican Lake, not however embracing any of the lands in controversy. The latter includes about three-fourths of Sec. 10, T. 39 N., R. 24 E., with a rocky or gravel bottom, devoid of vegetation. The former, or Cook's Lake, is nearly two miles farther north, about two miles long and one wide, the character of the bed of which is not disclosed by the evidence. These are the only permanent bodies of water shown by the evidence to exist in the basin.

At the recent hearing the agricultural claimants adduced only the testimony of witnesses on behalf of the swamp land claimants, theretofore given in cases involving specific tracts, which testimony it is claimed so conflicts with that given at the recent hearing as wholly to discredit it. Examination shows that the discrepancies are rather as to the terms used than as to the facts stated. At the recent hearing the witnesses called that a swamp or marsh which they generally at the former hearings called "Warner Lake" or "a lake," but they usually added at such former hearings the words "or swamp," "or marsh," or described it as covered with tules, flags, canes, and water grasses, showing its character. In their former testimony the witnesses describing the land in 1866 to 1876 used such expressions as that: "It was then a lake or swamp covered with swamp grass, tule, and water weeds;" "It then had the appearance of a tule marsh;" "The water which overflowed this land was part of Warner Lake or Marsh;" "It had the appearance of a marsh or lake;" "It was tule lake or swamp;" "It was a tule marsh and water interspersed;" "I considered it a marsh;" "It was all covered with water and a growth of tule swamp grass growing on it." The general tendency and substance of their testimony is not that the valley was occupied by the waters of a lake continuous throughout the year and over the whole basin, but that it was flooded "when the streams were full;" that the land was covered by a rank growth of swamp vegetation; that the water was lower in the fall and the vegetation so dense that the water could not be seen in the fall and winter except in low places; and that such conditions were permanent from year to year of ordinary rain or snow-fall.

The swamp land claimants offered parts of Fremont's journal of his expedition through this valley, wherein he says, commencing December 25, 1842:

We encamped on the valley bottom, where there was some cream-like water in ponds, colored by a clay soil and frozen over. . . . December 26. Our general course was again south. The country consists of larger or smaller basins, into which

the mountain waters run down forming small lakes; they present a perfect level from which the mountains rise immediately and abruptly. Between the successive basins the dividing grounds are usually very slight; and it is probable that, in the seasons of high water, many of these basins are in communication. At such times there is evidently an abundance of water, though now we find scarcely more than dry beds.

There are also referred to a series of maps, twenty-nine in number, including the region of this valley: (1) One prepared in 1838 by Colonel J. J. Abert, U. S. Engineers, from information furnished by Hudson Bay explorers and traders, and one in 1844 by M. Mofras, attache of the French Legation to Mexico, compiled probably from similar sources of information. These maps concur in showing a chain of four distinct lakes in this locality lying in a northeast and southwest direction, called by Mofras "Lacs des plants," lakes of plants or vegetable growth, and, according to Abert, connected by "Plants river." Upon Mofras's map is shown a train called "Route des wagons des Utats Unis au Ouallamet" [the United States wagon road to the Willamette], crossing the valley between the second and third of the "Lacs des plants." (2) Maps of 1844 by Colonel Abert (Sen. Ex. Doc. 166, 28th Cong., 2nd Sess.), and 1848 by Charles Preuss, an assistant to Fremont, show the chain of four lakes, the second from the north being named "Christmas Lake," with two unnamed farther south, and show Fremont's trail. (3) In 1849 a sketch map by Lieutenant Williamson, one of Captain Warner's exploring party, was made, showing his route through this valley, and is still preserved in the War Department, and one in 1855, a map by Lieutenants Williamson and Abbott showed Fremont's and Warner's trails through the Warner valleys—the first of these showing six small lakes and the latter five, by which the northernmost one is named "Christmas" lake, lying in the region bounded by 42° and $42^{\circ} 30'$ and by meridians $119^{\circ} 30'$ and 120° . On the latter map are also two more lakes lying in the same chain north of $42^{\circ} 30'$ making a chain of seven. These constitute three general classes independent in origin. In 1851, Mitchell's New Atlas; in 1853, Disturnell's "New Map of California, Oregon, and Washington;" and in 1856, Black's Atlas of North America (Edinburg) were published, apparently compiled from the foregoing as authorities, not from original sources. (4) In 1854 to 1857 a map was prepared by Lieutenant G. K. Warren, topographical engineer, U. S. army, "from authorities, explorations, and other reliable data," under orders of the Secretary of War, of the region from the Mississippi to the Pacific Ocean, to accompany the report on explorations for a railroad route, showing "Christmas" lake and four other lakes southerly from it, one being very small. In 1859 the Bureau of Topographical Engineers by order of the Secretary of War prepared a map of Oregon and Washington, for military purposes, showing in the same region a like chain of lakes. (5) In 1857 "Stanford's Map of the United States" (Rogers &

Johnson, English, publishers,) was prepared "from State Documents and unpublished materials" by Prof. Rogers, of Boston, and Keith Johnson, F. R. S. E., geographer to the Queen, showing in this region a chain of four lakes, the two southerly being small, the third named "Christmas," and the northernmost being considerably larger. (6) In 1860, 1861, 1863, and 1866, the several surveyors-general of Oregon prepared diagram maps connected with reports of the surveys of public lands. See Sen. Ex. Doc. No. 1, 2d Sess., 36 Cong.; H. R. Ex. Doc. No. 1, 37 Cong., 3d Sess.; H. R. Ex. Doc. No. 1, 38 Cong., 1st Sess.; G. L. O. map of Oregon, 1866. The former three of these maps show a chain of four separate lakes in the valley, and the latter seven, of which three are very small. In the maps of 1863 and 1866 the name "Christmas Lakes" first appears as given to the whole chain.

This brings the cartographic publications relating to the region down to the period covered by the oral testimony, and further mention of subsequent maps of the region is unnecessary, except to notice that in 1875 the "Commercial Atlas of the United States," containing "Cram's Railroad and Township Map of Oregon," is the first that shows a continuous body of water, or lake, extending through the valley called Christmas Lake, which is substantially followed by the General Land Office maps of 1876 and 1879, while other maps show a chain of separate lakes, instead of a connected body of water.

Several facts conclusively show that the cartography of 1875, 1876, and 1879, of this region, was erroneous. The valley has a slope of eighteen feet from the mouth, or forks, of Deep Creek, in Sec. 28, T. 39 S., R. 24 E., to the "Stone bridge," near the north line of Sec. 24, T. 37 N., R. 24 E., a distance of about 14 miles on a straight line, and nearly thirty-three feet from the same lower point to the head of the marsh, near the southwest corner of Sec. 19, T. 40 S., R. 24 E., a distance of about 19 miles on a straight line. For a permanent body of water, or lake, to exist extending from either of the above fixed points to the stone bridge, the water there must have had a depth of eighteen or thirty-three feet. No evidence of such fact exists. On the contrary, the French map of 1844 showed that the valley could be crossed by wagons at or near the point now known as the "Stone bridge." Fremont crossed it, lower down, in 1843, above the lower lakes, or the many official maps of his route and explorations are all false. The Oregon Central Military Wagon Road, in 1865, crossed it at or near the place indicated by the old French map, and Colonel Drew, at the same place, about August 1, 1864, he having a company of fifty men, two heavy wagons, an ambulance, and company forge.

The "Stone bridge," as it is termed in the testimony, is a ford, at the narrows of the marsh, where the bed of the morass has been covered with stones, bundles of tules and flags, so as to admit of its passage. Another similar ford, about a mile south of this, was known as

Little Stone Bridge. The witness Peterson crossed the stone bridge in 1867. Judge Hale crossed the marsh on foot nearly opposite the mouth of Deep Creek in the fall of 1875. In the fall of 1868 the water was only two to two and a half feet deep at the stone bridge and had a current of two to three miles per hour when General Crook was there. The surveying party of the Oregon Central Military Wagon Road Company crossed the stone bridge in August or September, 1865. In June, 1890, the water at the stone bridge was too deep to permit passage without swimming, and had a current of fifty feet per minute. Such facts, independently of proof of fall by levels, show that no continuous lake existed throughout the extent of the morass.

Had there been a permanent lake, in length thirty miles and several miles in width, the action of the waters upon the shore must have left beaches or shore lines upon the sides of the valley at elevations that the waters for any considerable period maintained. The evidence fails to show any such beaches except an ancient one mentioned by Professor Russell in his "Geographical Reconnaissance in Southern Oregon in 1881, 1882," page 459, "at an elevation of 225 feet above the level of the surface of the present Playa lakes;" also another beach or water line mentioned by some of the witnesses as containing fragments of tules and swamp grasses observed by them at a flood period, when the water was up among the sage brush about the upper end of the marsh. As sage grows only on arid land, the fact that the waters were then at a height covering land where sage was growing shows that this elevation of the waters was a stage of temporary and unusual flood—not that of a permanent lake.

The agricultural claimants contend that the swamp land grant was confined to lands inundated by overflow of large rivers and does not extend to such valley lands as these. The act of September 28, 1850, is not in terms confined to lands subject to overflow of large streams. The third section of the act provides that the Secretary of the Interior shall include in the lists "all legal subdivisions the greater part of which is 'wet and unfit for cultivation.'" The draft of the bill as first presented to the Senate might give color to such contention, as it contained a provision that the State should adopt means "for the protection of said lands from overflow." But in its course through Congress its scope was so enlarged as to include "*the whole* of those swamp and overflowed lands, made thereby unfit for cultivation, which shall remain unsold at the passage of this act."

This clearly makes the condition of the land, from whatever cause, not its liability alone to inundation from the overflow of a large river, the criterion, and the act has always been given such interpretation. *Michigan Land and Lumber Co. v. Rust* (168 U. S., 589, 596-7); *Texas and Pacific R. R. Co. v. Smith* (159 U. S., 66, 72).

It is also insisted that the act of the surveyor in meandering these

lands as a lake when approved by the proper authorities of the land department established their character as a lake and excluded them from the grant. The view of the Department upon this subject is well expressed in the decision of the Supreme Court of Iowa, in *Carr v. Moore* (93 N. W., 52, 54), where the court said:

But the action of the surveyor in meandering the shore line of the supposed lake cannot make it a lake unless it is one. We have held that if, by evident mistake on the part of the surveyor, a meander line is run where there is no body of water proper to be meandered, the title of the owners of lots or fractional subdivisions on the meander line does not extend beyond. *Schlosser v. Cruickshank*, 96 Iowa, 414, 65 N. W., 344; *Schlosser v. Hemphill*, 90 N. W., 842. As to whether the land within meander lines is swamp land or not is not conclusively settled by the act of the surveyor. *Rood v. Wallace*, 109 Iowa, 5, 79 N. W., 449. And in general, to the effect that the running of the meander line does not conclusively establish the character of the area beyond the meander line, as to whether it is river, lake, marsh, or unsurveyed land, see *Niles v. Cedar Point Club*, 175 U. S., 300, 20 Sup. Ct. 124, 44 L. Ed., 171; *State v. Portsmouth Sav. Bank*, 106 Ind., 435, 7 N. E., 379; *Kean v. Roby*, 145 Ind., 221, 42 N. E., 1011.

This view also has support in *French-Glenn Live Stock Co. v. Springer* (185 U. S., 47, 53).

The agricultural claimants further contend that the selection of school lands in lieu of lands claimed to have been lost in place as within "Warner Lake" estops the State from claiming the land in controversy as swamp land. An estoppel can be no broader than the representation made, upon which it arises. In selecting indemnity land the only facts necessary to exist as right therefor were that the sections assigned as base for the selection were wanting, or did not pass to the State. What might be the fact as to the remainder of the township surveyed as land was immaterial. An immaterial, however false or mistaken, representation never gives rise to an estoppel. While, therefore, the State, by selection of indemnity land, is precluded to claim the particular land assigned as base for such indemnity selections, and can not claim the indemnity and also the lands in place (*Rogers's Locomotive Machine Works v. American Emigrant Co.*, 164 U. S., 559, 574), no estoppel arose against a claim by the State for any other lands in the township as swamp lands, and no part of the sections so assigned as base for indemnity school land selections is included in the swamp land lists. But a sufficient answer to this claim of estoppel lies in the fact, shown by the records of your office, that the State asserted claim under the swamp land grant to substantially all the land embraced in this meander line promptly after its survey in 1887, and has heretofore obtained under that grant patents for such lands of an acreage of more than twice that here in controversy, and that the tracts so patented and those here sought by the State are interspersed or distributed throughout the so-called lake.

The evidence establishes that the lands in controversy at the date of

the grant were not the bed of a lake or apparently permanent body of water, but were swamp lands, subject at times to be entirely overflowed, and at all seasons were thereby rendered unfit for cultivation. While these lands would for considerable periods of any year of ordinary rain- or snow-fall present the appearance of a shallow lake, a careful examination would then, or any time, have disclosed from its vegetation and soil that it was a swamp upon which the waters coming in time of flood were retained by the spongy soil, dense and fallen vegetation, and lack of drainage channels, and that it was not a lake or permanent body of water retained by continuing banks or shores.

The act of March 12, 1860, *supra*, extending to Oregon the grant of September 28, 1850, *supra*, provided that:

the grant hereby made shall not include any lands which the government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of the title to be made under the provisions of said act.

It is thereunder contended that lands to which a right by settlement or filing under the pre-emption law of September 4, 1841, had attached before issuance of patent under the swamp land grant, are excepted from that grant. Neither settlement nor filing under the pre-emption law, nor both such settlement and filing, constitute a sale or disposal of the land by the United States such as excludes it from this grant. Yosemite Valley case (15 Wall., 77); *Ham v. Missouri* (18 How., 126); *Cooper v. Roberts* (Id., 173); *State of Utah* (29 L. D., 418).

The pre-emption claim of the heirs of Amos Boyd is for a portion of these lands. Boyd's pre-emption filing was canceled July 25, 1892, in the contest of the State against the same, but that decision was set aside December 19, 1893 (17 L. D., 571), and July 16, 1895, upon the submission of proof and payment of the purchase price, Boyd's heirs were allowed to make pre-emption cash entry and patent certificate was issued to them. This perfection of the entry constitutes a sale and disposal of the lands embraced therein (*Carroll v. Safford*, 3 How., 441, 461; *Stark v. Starrs*, 6 Wall., 402, 418; *Aspen Consolidated Mining Co. v. Williams*, 27 L. D., 1, 16), and being made under a law (acts September 4, 1841, 5 Stat., 453, and July 17, 1854, 10 Stat., 305), enacted prior to March 12, 1860, and also made prior to the confirmation of title in the State under the swamp land act (*State of Minnesota*, 27 L. D., 418, 419), the lands embraced in such entry are excluded from that grant and the entry should be passed to patent if it be otherwise regular. If any other pre-emption entries shall be regularly perfected prior to the issuance of patent to the State, the lands covered by such entries will likewise be excluded from the grant to the State. The homestead, desert land and timber culture laws under which some individual claims are asserted were all enacted after

March 12, 1860, and therefore constitute no basis for the exclusion of lands from the swamp land grant.

For the reasons herein given, your office decision of March 2, 1901, rejecting the claim of the State, is reversed, and all of the claims adverse to the State, excepting that of the heirs of Amos Boyd, and any other existing pre-emption claim which has been or may be perfected before this decision is carried into effect, are hereby rejected.

Your office will prepare and submit for approval a new swamp land list, embracing such of the lands in controversy as properly pass to the State under this decision.

SWAMP GRANT—FIELD NOTES OF SURVEY.

STATE OF MINNESOTA.

In the adjustment of the swamp land grant to the State of Minnesota all existing contests and controversies between the State and an actual and *bona fide* homestead or pre-emption settler, whether the settlement was made before or after the survey, will be disposed of under the rule announced in the Lachance decision, that being the rule under which the settlement was effected and the contest or controversy begun.

All existing contests or controversies in which there is no claim of actual and *bona fide* homestead or pre-emption settlement will be disposed of under the original plan of following the field notes, there being nothing in such contests or controversies which would equitably entitle the claimants adverse to the State to have the contest disposed of under the rule announced in the Lachance decision.

All contests or controversies hereafter begun respecting the swampy or non-swampy character of lands in Minnesota, whether heretofore or hereafter surveyed, must be determined by the field notes of the survey.

No contest or controversy which has heretofore been carried to a hearing and decision will be in any manner disturbed or affected by these directions.

Where there are two or more surveys of the same lands, that survey which has been finally approved and which is recognized as the existing or subsisting official survey is the one to the field notes of which alone attention will be given hereunder; and, swamp land being generally the exception and not the rule throughout the public land States having a swamp land grant, and it being the practice in public surveys to make special notation of the swamp lands rather than of the dry or non-swampy lands, the silence of the field notes and surveyor's return respecting the character of the land will be treated as equivalent to a statement that the land is dry or not swampy.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 16, 1903.* (G. B. G.)

Upon consideration of a protest by the State of Minnesota the Department, by letter of January 14, 1902, directed your office to suspend all proceedings looking to the determination of the character of certain lands, claimed by the State under the swamp land grant (12 Stat., 3), otherwise than by an examination of the field notes of sur-

vey, until the Department had considered and given final determination to questions involved in the further adjustment of the swamp land grant to that State. Time was allowed all parties in interest within which to show cause why the grant should not be adjusted upon the field notes of survey alone, and your office was directed to transmit to the Department such showings and briefs as might be filed within the time allowed.

With your letter of March 20, 1902, were transmitted briefs on behalf of the State and also other briefs on behalf of Morris Thomas and several other persons who appear to have contests now pending in the local office at Duluth against the State's claim to some of these lands.

The act of March 12, 1860, *supra*, was a present grant, and operated to transfer, as of that date, to the State of Minnesota, all of the swamp and overflowed lands² in the State rendered thereby unfit for cultivation, it only being left to identify the lands granted. There were some exceptions in the grant, but they are not here material. The State and the United States were equally interested in the matter of identification. Your office, on May 21, 1860, acting under the direction of the Secretary of the Interior, addressed a communication to the Governor of Minnesota, that portion which is pertinent to this inquiry being as follows:

Preliminary to the adjustment of the business with the several States affected by the general grant two propositions were submitted designed to obtain a plan or basis which should be adhered to, and be conclusive in the settlement of the great interests involved as follows:

1st. Whether the States would be willing to abide by the field notes of the surveys as designating the lands, or

2nd. Whether in the event of their non-acceptance of these notes as the basis the States should furnish evidence that any lands are of the character embraced by the grant.

The privilege of accepting one or the other of these propositions having been accorded to those States the same is extended to Minnesota.

Having experience in the adjustment of the grant with those States it is respectfully suggested by this office that by the adoption of the first proposition the State will receive all the lands to which she is justly entitled, as the field notes of the survey are very full in characterizing or giving description to the soil; and an important reason for doing so is that she will incur no expense in selecting or designating the lands.

July 14, 1860, the then Governor of the State addressed a letter to the Commissioner of the General Land Office, containing, among others, the following inquiry:

If the State of Minnesota should elect to be governed in the selection of the lands allotted to her by the notes and plats of survey in the land office, would the general government also be concluded by this selection? Would a patent issued to the State preclude individuals thereafter taking any of these lands, upon showing that in fact they were not swamp lands?

To this inquiry the Commissioner of the General Land Office, on October 8, 1860, responded as follows:

In reply to your letter of the 14th ulto., relative to the lands granted to the State of Minnesota as swamp, . . . I have to state, by whichever of the two modes submitted the lands may be selected, the general government reserves to itself the right to supervise the selecting, and holds them subject to its control until they shall have been approved and patented to the State.

Following this correspondence, the State legislature provided, by section 48 of an act of March 10, 1862 (General Laws of Minnesota for 1862, chapter 62), that—

The surveys on file in the Surveyor-General's office are hereby adopted as the basis upon which will be accepted the swamp lands granted to the State by act of Congress of March 12th, 1860.

Communicating this action by the State legislature to the Department, the Governor of the State said:

I have therefore to inform you, that the State of Minnesota will, under the act of Congress of March 12, 1860, . . . abide by the field notes of the Government surveys, designating the lands, etc., and I have therefore to ask that you will direct immediate steps to be taken to confirm in Minnesota the title to these lands.

December 4, 1877, the Secretary of the Interior, in a letter to your office (see Copp's Public Land Laws, vol. 2, page 1081, *et seq.*), said:

The action of the legislature of Minnesota, approved by the chief executive of the state, was, as far as the power existed in the grantee, a selection by her of the lands granted. All that remained to be done in the premises, where the lands had been surveyed prior to March 12, 1860, was merely the clerical duty of preparing the lists of lands thus enuring to the State, and the issuing of a patent for the same—duties that in the ordinary course of the administration of the laws pertaining to our land system would take much time. . . .

This Department invited the state to adopt a certain method of ascertaining what lands enure to her under a grant. The State having complied with the suggestion, exhausted her power to act in the premises, and the Department is barred from asserting that, because of its laches and delay in identifying the lands, the selection has not been made within the prescribed time. The government is not in a position to raise that question.

* * * * *

The principles announced in this letter should govern in the adjustment of the swamp grant to the State of Minnesota.

In the case of the Northern Pacific Railroad Company *v.* State of Minnesota, decided April 19, 1884 (11 Copp's Land Owner, 75), the land involved was claimed by the company under its grant of July 2, 1864, and the Joint Resolution of May 31, 1870, and apparently belonged to the company, if it did not pass to the State under its swamp land grant. The field-notes of the government survey of the land on file in your office recited that the lands were swamp. The company denied that it was in fact swamp, and asked that a hearing be ordered to determine its character. The Department, referring to

part of the correspondence hereinbefore set out, said that the practice had been to abide by the field notes of the Government survey in determining the State's title to the land, and that: "The subsequent grant to said company must be held subject to the adjustment of the swamp grant to the State in the manner provided as aforesaid." This method of adjustment was adhered to from the time of its adoption until after April 7, 1886, when the Department, in the case of *Lachance v. The State of Minnesota* (4 L. D., 479), reversing the action of your office in following the field notes in that instance, said:

As I understand the matter, the acceptance of the field notes as the basis of settlement simply makes them *prima facie* evidence of the condition of any given tract; it is not tantamount to an assertion that the field notes shall govern always and absolutely, irrespective of demonstrated fraud or falsity, but it places the burden of proof of such fraud or falsity on the party alleging it. The grant in question was a grant of swamp land; and if it can be proven affirmatively that any given tract was not swamp land at the date of the grant, then such tract did not pass by the grant.

Under the prevailing practice since that decision either a settler, an applicant to enter land under the public land laws, or the United States, may question the return of the United States surveyor as to the character of lands in this State, and especially in the Duluth district. On the other hand, there does not seem to have been any regulation promulgated or procedure adopted whereby the State may question the surveyor's returns. So that the practical operation of the scheme of adjustment now in force has been to deny to the State title to some lands which were returned by the surveyor as swamp, and at the same time permit the United States to retain all lands returned by the surveyor as not swamp land, without regard to the fact whether they were swamp or not. The State has always protested, and is still protesting, against this scheme of adjustment as manifestly inequitable. It insists, and always has insisted, that its swamp grant should be adjudicated upon the field-notes of survey alone.

Under the swamp land grant, as indicated in repeated judicial and departmental decisions, the duty of identifying, that is, determining what lands were at the date of the grant swampy or overflowed in character, and therefore granted to the State, rests upon the Secretary of the Interior and the subordinate officers of the land department, acting under his direction. It is impossible to select any method of ascertaining what lands pass under this grant which will not be attended with some difficulty in its execution. The usual differences of opinion on the part of those who have had observation of the land; the difference in the condition of the lands at different seasons of the year; the uninhabited condition of the country at the date of the grant; the changes which have occurred by reason of the settlement and improvement of the country; the reduction of the timber areas; the improvement in drainage,—all tend to make an absolutely perfect

identification of the lands which were swamp in 1860 impossible, and to so far burden with expense the matter of their identification as to render impracticable, if not to preclude, resort to some methods of identification. In evident anticipation of this, and with a view to the selection of the best and most practicable plan, but not to obligate himself or his successors by any agreement partaking of the nature of a contract, the Secretary of the Interior, through the Commissioner of the General Land Office, submitted to the several States two methods of identifying the swamp lands, and suggested as the more practicable method that of identifying them by the field notes of the public surveys. The lands had to be surveyed, and observations and notes of their character in this respect could then be made with but little difficulty and with no additional expense. This method was a fair one for the United States, because the surveyors were to be selected and paid under the direction of the Secretary of the Interior. Their work was to be done under his direction and to the satisfaction of the Commissioner of the General Land Office. The State of Minnesota assented to this plan of identification or adjustment, not by way of contract, but because the Secretary of the Interior, the Commissioner of the General Land Office, the Governor of the State and the legislature of the State concurred in the opinion that it was the best and most suitable method. They agreed upon it in the sense that they all concurred in the view that it was the best thing to do. It was uniformly followed for a quarter of a century, and during that time operated quite generally to the satisfaction of the United States and the State.

This method was then departed from, as shown in the Lachance case, not because its original selection had proved to be unwise, or because it had been found by experience to operate injuriously, but because the United States had become lax in its methods of obtaining surveys of its public lands and notations of their character. These surveys are wholly within the control of the Secretary of the Interior and his subordinates, but instead of relying upon his power and ability to prevent the miscarriage and injury which would result from lax surveying methods, by exacting of the surveying officers a faithful performance of their duties, and withholding approval of their surveys and payment therefor until the work was competently and faithfully performed, the Secretary of the Interior, without the concurrence of the State, and against its objection, adopted for the time being the plan of identifying swamp lands by examination by agents in the field and by contests and hearings in the land department. This he could unquestionably do, under the conviction that the new method was a better one than the one originally adopted. Sixteen years of practice under the new rule has shown it to be cumbersome, expensive, slow, litigious and generally unsatisfactory. It is indispensable to the

orderly and early adjustment of the swamp land grant to this State that this new method be discarded. The actual operation of the two methods has demonstrated the superiority of the plan first tried.

Upon full consideration, it is therefore directed, with respect to the adjustment of the swamp land grant to Minnesota:

(1) That all existing contests and controversies between the State and an actual and *bona fide* homestead or pre-emption settler, whether the settlement was made before or after the survey, be disposed of under the rule announced in the Lachance decision, that being the rule under which the settlement was effected and the contest or controversy begun.

(2) All existing contests or controversies in which there is no claim of actual and *bona fide* homestead or pre-emption settlement, will be disposed of under the original plan of following the field notes, there being nothing in such contests or controversies which would equitably entitle the claimants adverse to the State to have the contest disposed of under the rule announced in the Lachance decision.

(3) In all future surveys of public lands in Minnesota, care must be taken by your office and by the surveyor-general's office to put the surveys in the hands of capable and honest surveyors, and to exact from them a faithful and efficient performance of their duty, including a faithful and accurate notation of the swampy or non-swampy character of the lands surveyed. After such surveys have been completed in the field, and at the earliest suitable time, especial care must be taken to have them carefully inspected with reference to the accuracy of the surveyor's notation respecting the character of the land, with a view to having such surveys and notations perfected and corrected, where deficient or inaccurate.

(4) All contests or controversies hereafter begun respecting the swampy or non-swampy character of lands in Minnesota, whether heretofore or hereafter surveyed, must be determined by the field notes of the survey.

(5) No contest or controversy which has heretofore been carried to a hearing and decision will be in any manner disturbed or affected by these directions.

(6) Where there are two or more surveys of the same lands, that survey which has been finally approved and which is recognized as the existing or subsisting official survey is the one to the field notes of which alone attention will be given hereunder; and, swamp land being generally the exception and not the rule throughout the public land States having a swamp land grant, and it being the practice in public surveys to make special notation of the swamp lands rather than of the dry or non-swampy lands, the silence of the field notes and surveyor's return respecting the character of the land will be treated as equivalent to a statement that the land is dry or not swampy.

(7) The best energies of the proper divisions of your office should be devoted to obtaining such accurate surveys and notations of the character of the lands which may be hereafter surveyed in this State as will obviate the existing cause of contest and controversy, and such energies should further be devoted to the early and correct disposition of all such pending contests or controversies, and to the prompt and careful prosecution of the adjustment of this grant, so far as the lands in the State have been surveyed.

OKLAHOMA LAND—HOMESTEAD—CONTEST.

MINTON *v.* BYERS.

The unauthorized and illegal occupancy for townsite purposes of public lands, subject to homestead entry only under the President's proclamation of July 4, 1901, constitutes no bar to such entry thereof by one who asserts a right by virtue of compliance in good faith with the law and regulations relating to the entry of such lands.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 21, 1903.* (A. S. T.)

Andrew Byers has appealed to this Department from your office decision of November 4, 1902, affirming the decision of the local officers and holding for cancellation his homestead entry for the NE. $\frac{1}{4}$ of Sec. 22, T. 7 N., R. 16 W., El Reno land district, Oklahoma.

The land in question became subject to entry on August 6, 1901, under the President's proclamation of July 4, 1901.

At the drawing for rights to make entries for said lands, provided by said proclamation, and held at El Reno on July 29, 1901, Andrew Byers drew No. 70, entitling him to make a homestead entry in said land district, and on the day of the opening, August 6, 1901, he made homestead entry for the land in question.

On September 11, 1901, James P. Minton filed an affidavit of contest against said entry, alleging:

That said Andrew Byers did not make the aforesaid entry in good faith and for the purpose of actual settlement and cultivation and to make a home for himself, but that he made said entry in bad faith and for the purposes of speculation. That it was not the intention of the said Andrew Byers when he made said entry to settle and make a home for himself upon the above described tract of land, but that he made said entry with the intent and for the purpose of transferring the title he might acquire from the United States to a certain townsite company, to wit, the Southwestern Mutual Townsite Company. That at the time of making said entry he had entered into a contract with said townsite company by the terms of which he agrees for a large consideration, to wit, \$8000, to transfer his right, title, and interest in said tract of land to said company as soon as he can obtain title to the same, and that he has stated his intention to perform said contract since making said entry. That before making his aforesaid entry the said townsite company were occupying the said tract of land, had laid the same off into blocks, streets, etc., and had erected buildings thereon.

Said affidavit was forwarded by the local officers to your office pursuant to departmental regulations of August 14, 1901 (31 L. D., 67), and by your office forwarded to this Department, with the recommendation that a hearing be had thereon, and this Department on October 3, 1901, ordered a hearing upon said affidavit. A hearing was accordingly directed and set for January 18, 1902, and on that day the contestant filed an amended affidavit charging:

That the entry was not made in good faith for the purpose of a home, but for speculation that said contestee has not exercised control over or prevented the occupation of said land for townsite purposes, but on the contrary has acquiesced in said occupancy, that the whole of said tract of land is now occupied for townsite purposes; that there are now at the present time situated on said tract of land buildings to the value of at least one hundred thousand dollars, the same being occupied for the purpose of trade and business and as residences by the people doing business on said townsite.

The case was thereupon continued till March 7, 1902, when the parties appeared with their attorneys and witnesses, and a hearing was had, both parties offering testimony, whereupon the local officers recommended the cancellation of the entry, from which action Byers appealed to your office, where on November 4, 1902, a decision was rendered affirming the action of the local officers and holding the entry for cancellation, and from that decision Byers has appealed to this Department.

At the hearing the defendant objected to the introduction of testimony pertaining to the charges made in the amended affidavit of contest, and it is insisted that such testimony should not have been admitted because no hearing had been ordered on such affidavit, and he had not been served with notice thereof. The substance of the charge made in said affidavit was that the defendant had acquiesced in the use and occupancy of the land in question for townsite purposes, and evidence bearing on this charge would have been admissible under the original affidavit since such acquiescence on his part might be considered in connection with other evidence in determining whether or not he made the entry pursuant to the alleged contract with said townsite company.

The proof shows that about January 1, 1901, a number of men formed themselves into an association called the Southwestern Mutual Townsite Company, for the purpose of organizing a town at some point within a few miles of Mountain View, Oklahoma. They proceeded to sell lots in their proposed townsite, issuing to each purchaser of a lot a certificate for each lot purchased. These certificates were sold at five dollars each by a member of the townsite company who seems to have been designated for that purpose and who received as compensation one dollar for each certificate sold by him, and it is shown that about two thousand of said certificates were sold.

This company had secured no land for its proposed townsite, but represented to purchasers of certificates that their townsite would be located within a certain distance of Mountain View. About April 1, 1901, Byers was induced to purchase six of said certificates, paying five dollars each for the same.

Some time in July, 1901, said townsite company applied to segregate a half section of land for townsite purposes, at a point some distance from the land in question. The local officers recommended that said application be rejected; the applicants appealed to your office, and the matter was pending before the Department till shortly before the opening of the lands to entry, when said application was denied and rejected by this Department.

Those who had purchased said certificates from said townsite company were notified to meet at Mountain View on August 5, 1901, the day before the opening of the lands to entry, preparatory to the establishment of said town on August 6, but up to this time no definite location of a townsite had been made by said company. Said departmental decision rejecting their said application not having been made known to them at that time, they still hoped to locate said townsite on the land applied for. Several hundred of the persons who had purchased said certificates met at Mountain View on August 5, expecting that the distribution of town lots would occur on the next day, and the directors of said townsite company were in session there that day arranging for said distribution. At 11:30 o'clock P. M., on August 5, 1901, a telegram was received notifying them that their said application had been rejected, and thereupon said directors determined to locate their townsite on the land in question and the NW. $\frac{1}{4}$ of the same section, and to that end they caused the plats and diagrams of the proposed townsite, which had been prepared with the view of using the land that had been applied for, to be changed so as to answer the same purpose on the land in question, and about 4 o'clock A. M., on August 6, they started to the land in question, followed by several hundred of the persons who had purchased said certificates; they reached the land about 9 o'clock A. M., and immediately put surveyors to work laying off lots, blocks, and streets for the proposed town on the land in question. In the meantime, Byers, who did not attend said meeting at Mountain View, went to the land office at El Reno, and about 2 o'clock P. M., on August 6, filed his homestead application for the land in question, not knowing that said tract had been selected by said company for a townsite; having made his entry he started to the land, reaching there about dusk on August 7th, when he found several hundred people on the land with tents and temporary buildings in which they were engaged in business of different kinds, there having been a distribution of lots made by said company on the afternoon of August 6. He remained there that night, and on the

next morning, upon learning that the surveyors were staking off lots on the land, he ordered them to desist, informed them that he had filed on the land for a homestead and did not want lots laid off and stakes driven in it. He also prepared a written notice to said townsite company to leave the land and desist from further operations thereon, but for some reason it was not served at that time, and he left on the train and did not return for several days. Meantime, said company and those who had purchased said certificates continued the work of laying off the town, erecting buildings, etc. When Byers returned he proceeded to notify those who were thus engaged that he had filed on the land for a homestead, and he ordered them to cease their operations and leave the place; he gave written notices to this effect to several, if not all, of those who were building houses on the land; he also posted notices in various places on the land notifying the public of his claim and demanding that they stay off his land, but they continued to erect houses and make other improvements on the land. Byers, seeing that the people were determined to establish a town there, filed in the local office an application to commute his entry, but his application, not being in proper form, was rejected. He consulted attorneys with a view to instituting legal proceedings to oust said parties from the land, but did not institute such proceedings owing to the great expense incident thereto. He built a house on the land, established his residence there, and began to build a fence around the land, and enclosed about sixty-five acres on three sides. About this time he received several anonymous letters threatening him with violence if he persisted in fencing the land, and on March 15, 1902, an injunction was issued by the probate judge of Kiowa county, Oklahoma, at the suit of one of said townsite directors, inhibiting and enjoining Byers from enclosing said land by a fence or plowing the same.

At the hearing before the local officers the contestant testified that he had no knowledge of any such contract, agreement, or understanding as alleged in his contest affidavit, and the proof utterly fails to show that Byers ever at any time entered into any such contract with said company, or with anybody else.

It is scarcely reasonable to suppose that the company would have offered him \$8,000, or any other sum, to file on said tract for their benefit while they were expecting to locate their proposed town upon another tract of land, and when it was not known that the land in question would not be taken by some one who held an earlier number than the one drawn by Byers, and before he could be allowed to make an entry. But it is unnecessary to discuss this point further. Byers expressly denies that he ever at any time made such a contract; the proof fails to show that he did so; the local officers so found; and it is not now contended that he ever made such a contract, although this

Department ordered the hearing upon an affidavit made by the contestant alleging positively that he had done so.

Your said decision, while not finding that Byers made such a contract as alleged in the affidavit of contest, states that he "was in collusion with other persons at and before the date of his entry, and that he made the entry for speculative purposes while the land was appropriated by more than four hundred persons with valuable improvements." It would seem therefore that your office considered the presence of these persons on the land as a circumstance seriously affecting the right of the defendant to make his entry. The land in question was subject to homestead entry, and to no other method of disposal; the defendant was entitled to make a homestead entry; the people who were on the land at that time had no authority whatever for being there, they had made no entries, had no valid claims to the land, and were there in violation of the President's proclamation, and it is difficult to see how their presence on the land could impair the defendant's right to make entry for it. See *Calvert v. Wood* (31 L. D., 83).

The record fails to show that the defendant, at and before the entry, was in collusion with other persons for the purpose of committing any fraud. A railroad had been built across the land and a station had been established there, and the defendant testified that he selected this tract because he had inspected the soil and believed that it would make a good wheat farm, and because he thought the land might become valuable for other purposes. It can not be said that the entry was made for speculative purposes merely because owing to the proximity of the land to the railroad station the defendant thought that it might become valuable for other than agricultural purposes.

Your said decision also states "that a large number of people in that vicinity, and especially this defendant, had been instrumental in the formation of organizations by becoming stockholders and holding positions of trust therein for speculation and business interests, and that they had this land in view for such purpose can not be denied."

This Department is unable to find any evidence in the record showing that the defendant ever had anything whatever to do with the formation of such an organization, or that he ever held any position of trust or otherwise in such an organization, or was in any manner connected therewith, except that long before this land was opened to entry he was induced to purchase six of the two thousand certificates that were sold by said townsite company. It is not shown that he ever attended a meeting of the company, or in any manner participated in its affairs.

Some time after making his entry, the defendant instituted legal proceedings against a woman who was on the land and who had purchased a number of said certificates, and the matter was compromised, and in your said decision it is stated that a certain witness testified

that "the defendant [Byers] became possessed of her stock [certificates] and the affair was disposed of." This circumstance was referred to as showing that the defendant recognized the claims of the holders of said certificates to the land in question. The testimony of said witness fails to show that the defendant ever became possessed of said certificates, or that he ever offered to do so; on the contrary, it shows that the certificates were said to be in Lawton, and that he (the witness) had never seen them; that by way of compromising said matter he had suggested to the defendant that the certificates would or might be given to him, but he did not testify that the defendant accepted them, or ever agreed to do so.

As before stated, the proof utterly fails to show that the defendant ever at any time entered into such a contract as alleged in the affidavit of contest. But the amended affidavit (which, by the way, is not mentioned in your said decision) alleges that the defendant consented to and acquiesced in the use of the land by the townsite claimants after he made his entry (and there is some evidence in the record tending to establish this charge).

The contestant's witnesses were all, or nearly all, persons who were interested in the proposed townsite, either as officers and directors of the company, or persons who had purchased said certificates, and several of them testified that they had spoken to the defendant in regard to making improvements on the land, and that he had replied, in substance, that his hands were tied, his mouth was closed, etc.—meaning that he could not tell them that a contract or agreement had been entered into by him whereby they would get the land, but insinuating that such was the case, and that they were thus encouraged to make improvements on the land. The defendant denies this *in toto*, and testifies that he gave them repeated warnings that he had filed on the land for a homestead and wanted it for that purpose, and requested them to leave it. They do not deny receiving these notices and warnings, but they testify that the defendant gave them to understand that they were not intended to be taken seriously, but were only to prevent a contest against his entry, but the defendant denies this also. But it is clear that they all knew that the defendant had made a homestead entry for the land, and no one pretends to have any knowledge of any contract or agreement entered into by the defendant, either before or after making his entry, whereby he agreed to relinquish it or to convey the land to any other person or persons.

The defendant probably believed when he made his entry that the land, or at least a portion of it, would at some future time be in demand for townsite purposes, and this belief may have had some influence in making the selection, but he can not be charged with bad faith on that account. When he reached the land after making his entry and found a large number of people there engaged in laying off

a town, and when these people persisted in their work on the land notwithstanding his notices, warnings, and efforts to get them to desist, he determined to commute his entry to a townsite entry, and allow the town to be built on the land, and whatever he said and did in the way of consenting to or encouraging the occupancy of the land for townsite purposes was probably said and done with that view, and not pursuant to any contract, agreement, or understanding with said townsite company or anybody else.

The evidence fails to sustain the charges made by the contestant, and your said decision is therefore reversed and said contest is dismissed.

It appears that on March 25, 1902, the claimant filed an application to commute his entry to a townsite entry, which application seems to have been in some way lost or mislaid, and on December 8, 1902, he filed another and similar application praying that it be treated as if filed on March 25, 1902, the date of his former application. No action has been taken by your office upon said application, but the same was transmitted with the record to this Department. Said application is herewith returned to your office for appropriate action.

RAILROAD LAND—SECTION 5. ACT OF MARCH 3, 1887.

CLOGSTON *v.* PALMER.

Where lands otherwise coming within the provisions of section 5 of the act of March 3, 1887, and not known to be mineral in character at the time of their purchase from the railroad company, are subsequently found to be mineral, they are not for that reason excepted from the right to purchase granted by said section.

The provisions of section 24 of the act of March 3, 1891, were not intended by Congress to authorize the President, in establishing a forest reserve, to extinguish an existing right to purchase granted by section 5 of said act of March 3, 1887.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 16, 1903.* (A. C. C.)

December 1, 1898, Jane O. D. Palmer filed, under section 5 of the act of March 3, 1887 (24 Stat., 556, 557), her application to purchase section 15, T. 1 N., R. 8 W., S. B. M., Los Angeles, California, land district. Said section is within the primary limits of the grant to the Southern Pacific Railroad Company (branch line), made by the act of March 3, 1871 (16 Stat., 573), and within the indemnity limits of the grant to the Atlantic and Pacific Railroad Company made by the act of July 27, 1866 (14 Stat., 292). As to the last-named grant, the tract, among others, was forfeited to the government by act of July 6, 1886 (24 Stat., 123).

December 20, 1892, the tract was included within the boundaries of the San Gabriel timber-land reserve by proclamation of the President

(27 Stat., 1049). At the date of this proclamation the Southern Pacific Railroad Company claimed the tract as a part of its grant under said act of March 3, 1871, but, December 18, 1897, it was declared by the Supreme Court of the United States (*Southern Pacific Railroad Co. v. United States*, 168 U. S., 1) to be public land and to have been excepted from the grant to the Southern Pacific Railroad Company by reason of the prior grant to the Atlantic and Pacific Railroad Company.

March 20, 1901, after due publication, applicant submitted proofs in support of her application to purchase, and at the same time Andrew J. Clogston filed his duly corroborated protest, in which he alleged that the south half of the section was mineral in character.

March 27, 1901, the local officers dismissed the protest, accepted applicant's proofs, and, upon payment by her of the purchase price, entry was allowed.

June 21, 1901, upon appeal by the protestant, the action of the local officers in dismissing the protest was affirmed by your office.

Protestant has appealed to the Department. Attached to and filed with the appeal are several affidavits, made early in May, 1901, by persons claiming to be familiar with said section, which affidavits state, in effect, that all of said tract is mineral in character.

The record shows that on October 11, 1889, one P. H. O'Neill entered into a written contract with the Southern Pacific Railroad Company for the purchase of said tract from said company, and that on October 1, 1895, by due *mesne* conveyances, applicant succeeded to all of O'Neill's rights and privileges under said contract.

Section 5 of the act of March 3, 1887, *supra*, under which applicant claims the right to purchase from the government, is as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue 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.

The proof is in conformity with the rule of the Department providing the method of procedure to obtain patent under said section,

and, among other things, shows (1) that the land applied for was of the numbered sections prescribed in the grant; (2) that it was coterminous with the constructed parts of said road; (3) that it was sold by the company, as part of its grant, to one under whom applicant claims; (4) that it is excepted from the operation of the grant by reason of the prior grant to the Atlantic and Pacific Railroad Company; (5) that, at the date of the sale, it was not in the *bona fide* occupancy of adverse claimants under the pre-emption or homestead laws, whose claims and occupancy have not since been voluntarily abandoned; (6) that it has not been settled upon subsequently to the first day of December, 1882, by any person or persons claiming the right to enter the same under the settlement laws; (7) that the applicant is a citizen of the United States; and (8) that she is a *bona fide* purchaser by assignment of the Southern Pacific Railroad Company's contract, and also by deed.

It is settled law in the Department that the right of purchase from the government, under said section, is not limited to the immediate purchaser from the company, but may be exercised by any *bona fide* purchaser who has the requisite qualification as to citizenship, and that it is immaterial what the qualifications of his immediate grantor or of any intervening purchaser may have been; also, that the operation of the section extends to *bona fide* purchases made since the date of the act. (11 L. D., 229, 230; *Union Colony v. Fulmele et al.*, 16 Id., 273, 276; *Sethman v. Clise*, 17 Id., 307, 310-11; *Ray et al. v. Gross*, 27 Id., 707, 710.) The construction thus placed upon said section has been approved by the Supreme Court of the United States, in the case of *United States v. Southern Pacific Railroad Company* (184 U. S., 49).

The Department has further held that the sale by the company need not be a fully consummated and completed one in order to extend to the purchaser the privilege conferred by said section. (*Schneider v. Linkswiller et al.*, 26 L. D., 407, 409; *John H. Barton et al.*, 26 Id., 489.) This ruling has been approved by the United States Circuit Court for the Southern District of California, in *United States v. Southern Pacific Railroad Company* (88 Fed., 832, 839), and by the United States Circuit Court of Appeals for the Ninth Circuit, in the same case, on appeal (98 Fed., 45, 47).

The applicant is now entitled to a patent for the whole of said tract, unless the protest and affidavits, one or all, allege sufficient to justify an inquiry to determine the character of the land; or unless the President's proclamation establishing the San Gabriel forest reserve deprives her of the right to purchase.

The protest alleges, in effect, that the south half of said section was known to be mineral in character on the date of the allowance of Palmer's entry. The affidavits allege that the tract was of known min-

eral character at the date when the affidavits were made, which was subsequent to the entry. There is no allegation that at the time of O'Neill's purchase, or at the time of Palmer's purchase, the land was of known mineral character. In this connection it should be stated that in the public survey of the land, made prior to these purchases, it was returned as non-mineral.

The grant to the Southern Pacific Railroad Company in terms excepted therefrom all mineral lands save those containing iron or coal. This exception is not repeated in the act of March 3, 1887, section five of which extends to lands which "are for *any reason* excepted from the operation of the grant" to the railroad company.

The question presented by the protest and affidavits and to be determined here, is a legal one, viz: Where lands, otherwise coming within the provisions of said section, and not known to be mineral in character at the time of their purchase from the railroad company, are subsequently found to be mineral, are they for that reason excepted from the provisions of said section?

The solution of this question depends, of course, upon the construction of the act of 1887 as a whole, as well as the construction of its fifth section. "The entire act," says the Supreme Court, in *United States v. Southern Pacific Railroad Company, supra*, "is remedial and is to be construed liberally, and so as to effectuate the purpose of Congress and secure the relief which was designed." Being a remedial statute, the whole, and every part thereof, should be so construed as most effectually to meet the beneficial end in view and to prevent a failure of the remedy. (Potter's *Dwarris on Statutes*, p. 231). What, then, was the purpose which Congress had in view, and what was the relief designed by it in enacting the fifth section? To carry out the intention of the law maker is the cardinal aim with reference to the construction of all statutes. In ascertaining this intention we may look to the condition of the country to be affected, at the time the act was passed, as well as to the situation and surroundings of the persons to whom the act was meant to apply.

It was common knowledge, at the time of the passage of this act, that the land grant companies, in order to dispose of the lands claimed by them under their respective grants, as well as to settle and improve the country along the lines of their roads, had, by way of long time contracts, small annual or semi-annual payments, and a low rate of interest, held out inducements to homeseekers and others to purchase these lands; that under the policy thus pursued numerous tracts of land within the limits of these grants had been sold to actual settlers and other *bona fide* purchasers for value; that at great expense of labor and money valuable and permanent improvements had been erected upon these lands by the purchasers, through whose industry and thrift prosperous communities had been established and built up

along the lines of such railroads (*Schneider v. Linkswiller, supra*; *United States v. Southern Pacific Railroad Co.*, 88 Fed., 839); and that lands in the numbered sections prescribed in the grants and coterminous with constructed road, and thus apparently passing under the grant, were after their sale to *bona fide* purchasers, found, not infrequently, to be for some reason excepted from the operation of the grant and therefore to be lands to which the railroad company could give no title. In the instances therefore where it was ultimately ascertained that the railroad company was without right or title to the lands sold, the purchasers who had thus expended their money and labor in the betterment of the lands were in a situation which, in justice, entitled them to recognition (Attorney General Garland, 6 L. D., 275), which could only be given by Congress. To protect them from loss was evidently the purpose in enacting the section under consideration, by which it was designed to give them the privilege of obtaining the government title upon payment of the ordinary government price for like lands. That this privilege might not be abused, Congress declared that only those who are *bona fide* purchasers of the lands so sold by the land-grant claimants shall be entitled to this protection.

Within the contemplation of said section, who, then, are *bona fide* purchasers? What is the controlling consideration in determining their rights? When does their right of purchase from the government arise, and what lands may they so purchase?

The term "*bona fide* purchasers," as used in said section, has been construed by the Department of Justice and also by the courts. Attorney-General Garland, in an opinion given to the Secretary of the Interior on November 17, 1887 (6 L. D., 272, 275), says:

It is not required that the sale by the railroad shall have been made on its part in good faith, but only that the purchaser shall have bought in good faith.

In the case of the *United States v. Southern Pacific Railroad Company* (88 Fed., 832, 839) the Circuit Court of the United States for the Southern District of California says that the term "*bona fide* purchaser" includes every one, having the necessary qualifications in respect to citizenship—

who bought for value, and in the honest belief that he would thereby acquire, through the grantee company, the government title to the land so purchased.

In the case of *United States v. Winona, etc., Railroad Company* (165 U. S., 463, 481), it is said:

It is true the term used here is "*bona fide* purchaser," but it is a *bona fide* purchaser from the company, and the description given of the lands, as not conveyed and "for any reason excepted from the operation of the grant" indicates that the fact of notice of defect of title was not to be considered fatal to the right. Congress attempted to protect an honest transaction between a purchaser and a railroad company.

The United States Circuit Court of Appeals for the Ninth Circuit, in *United States v. Southern Railroad Company et al.* (98 Fed. Rep., 45, 48), states:

The policy pursued by all the land-grant railroad companies contemplated the settlement of the country by immigrants as the roads were being constructed; and, to carry out this policy, it was necessary for the railroad companies in many instances to furnish settlers seeking to purchase lands supposed to be railroad lands with some evidence of a right to title in a contract of sale, in advance of the transfer of the title by the United States to the railroad companies by patent. . . . When, therefore, congress passed the act of March 3, 1887, providing for the adjustment of land grants made by congress to aid in the construction of railroads, it had this condition of affairs in view, and dealt with it on the broad principle that the good faith of the parties in making such contracts should be controlling considerations in determining all questions in controversy.

Such being the intention of Congress, as shown by judicial decisions and executive rulings, it follows, as a logical consequence, that the *bona fides* of the purchase is to be determined by the conditions prevailing at the time of the purchase and in view of which it was made. The known character of the land at the date of the purchase from the company is therefore the determining factor in any controversy involving the character of the land applied for under the provisions of said section. To except lands from purchase under its provisions for the reason that they contain minerals, it must appear that the lands were of known mineral character at the date of the sale by the land-grant company, and therefore were such that the purchaser should have known at the time of his purchase that they were excepted from the grant to the railroad company, and that he could obtain no title thereto from the company.

The remaining question is whether the President's proclamation establishing the San Gabriel timber-land reserve extinguished applicant's right to purchase the tract involved.

The boundaries of said reservation, as defined by the proclamation, embrace said tract. Certain lands within the boundaries, as defined, are excepted from the force and effect of the proclamation. The tract applied for, however, is not included within such exception. It is clear, therefore, that the intention was to make said tract a part of the reservation, to the extent at least that no claim thereto could thereafter be acquired under the general land laws.

Section 24 of the act of March 3, 1891 (26 Stat., 109 , 1103), under which authority exists to create reserves, such as the San Gabriel, is as follows:

That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public lands bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

The right to purchase conferred by said section five of the act of March 3, 1887, is not a vested right. It may be modified or entirely extinguished by Congress while it is in an inchoate condition. At the time, however, of the enactment of section twenty-four of the act of March 3, 1891, the right conferred by section five of the act of March 3, 1887, was an existing right, hence the provisions of section twenty-four should not be construed to affect injuriously or take away such right unless the intention so to do is clearly expressed (Sutherland, Stat. Const., Sec. 481). There is nothing in the section from which it may be inferred that Congress did intend that the right previously conferred by said section five should be disturbed.

The Department is of opinion, and so holds, that the provisions of section twenty-four of the act of March 3, 1891, *supra*, were not intended by Congress to authorize the President to extinguish an existing right to purchase conferred by section five of the act of March 3, 1887, *supra*, and that the proclamation of the President establishing the San Gabriel timber-land reserve does not affect the applicant's right to purchase the land here involved.

For the reasons stated, your office decision dismissing the protest is affirmed.

RAILROAD GRANT—SMALL HOLDING CLAIM.

LUCERO *v.* ATLANTIC AND PACIFIC R. R. CO.

A mere squatter upon a portion of an odd-numbered section within the primary limits of the grant to the Atlantic and Pacific railroad, made by the third section of the act of July 27, 1866, at the date of the attachment of said grant, without recognition or protection by law or treaty, who applies to make entry of such land as a "small holding claim," under the provisions of section 17 of the act of March 3, 1891, as amended by the act of February 21, 1893, has no such claim or right as will except the land from the operation of said grant.

Secretary Hitchcock to the Commissioner of the General Land Office;
(S. V. P.) *March 30, 1903.* (F. W. C.)

Pablo Lucero has appealed from your office decision of January 2, 1901, affirming the action of the local officers of Santa Fe, New Mexico, in rejecting his application to make entry of portions of sections 9 and 17, T. 10 N., R. 7 W., as "a small holding claim," under the provisions of the seventeenth section of the act of March 3, 1891 (26 Stat., 854, 861), as amended by the act of February 21, 1893 (27 Stat., 470).

Said section 17, as amended, grants a right of entry to "all persons who, or whose ancestors, grantors or their legal successors in title or possession, became citizens of the United States by reason of the treaty of Guadalupe Hidalgo, or the terms of the Gadsden purchase,

and who have been in the actual continuous possession of tracts, not to exceed one hundred and sixty acres, for twenty years next preceding such survey" (referring to the government survey of the township).

The land in question is within the primary limits of the grant made by the act of July 27, 1866 (14 Stat., 292), in aid of the construction of the Atlantic and Pacific railroad, and is opposite the portion thereof definitely located March 12, 1872. By the third section of the act of 1866, there was granted said company—

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

The subdivisive surveys of the township in question were made between September 17 and 21, 1883, and the claim in question was surveyed between April 26, and May 16, 1895, and the plat thereof, numbered 325, was filed in the surveyor-general's office at Santa Fe, New Mexico, February 3, 1897.

It is claimed in the appeal that this tract was excepted from the operation of the railroad grant by that portion of the excepting clause found in the section above quoted which excepts from the grant all lands covered by preemption or other claims or rights at the date of the definite location of the road. That a title vested in the Atlantic and Pacific Railroad Company to all lands of the character granted immediately upon the definite location of the line of road opposite thereto, is clearly settled by a long line of decisions, and the decision in this case must rest upon the construction of said excepting clause, for it seems to be clear that neither the act of 1891 nor that of 1893, relating to these small holding claims, evidences any intention on the part of Congress, if, indeed, it had the power to do so, to grant a right of entry in lands which had been previously disposed of.

These small holding claimants seem to have been merely squatters without recognition or protection by law or treaty prior to the passage of the act of 1891, and it can not be said therefore that the land settled upon was included within any preemption or other claim or right, within the meaning of those terms as employed in the act of 1866, making the railroad land-grant, at the date of the attachment of rights under that grant. It must therefore be held that the title to said land

passed to the company, and your office decision, rejecting Lucero's application to make entry of the land here in question, is accordingly affirmed.

MINING CLAIM—PLACER—DEVELOPMENT AND EXPENDITURE.

ELMER F. CASSEL.

An excavation made upon one of a group of placer mining claims containing a deposit or formation of marble so near the surface as to be most advantageously removed by means of quarries, and which manifestly does not tend to facilitate the extraction of the marble from the other claims of the group, or to promote their development, is not such an improvement as may be accepted in satisfaction of the statute requiring an expenditure of \$500 in labor or improvements upon or for the benefit of each of the claims constituting the group as a condition to obtaining patent thereto.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 3, 1903.* (F. H. B.)

January 2, 1901, Elmer F. Cassel filed application for patent to the Kosciusko group of placer mining claims, Nos. 1, 2, 3, 4, and 5 (bearing marble), survey No. 541, Sitka, Alaska. Notice of the application was published and posted for the statutory period of sixty days, and no adverse claim was filed. April 2, 1901, Cassel made entry for the claims. May 15, 1901, he filed certificate of the surveyor-general for Alaska, that the "improvements consist of surface excavations 300 feet long, 300 feet wide, average depth of 8 feet. \$2500.00."

January 7, 1902, your office found from the record that the improvements certified and relied upon had been made wholly upon claim No. 4 of the group; that it is not alleged that such improvements tend to the development of any of the other claims; and that there is no evidence that the several locations were ever relocated as a single placer: and it was thereupon held that the entryman would be allowed sixty days (subsequently extended) from receipt of notice within which to show that the statutory expenditure had been made upon each location, or for the benefit thereof, prior to the expiration of the period of publication, in default of which showing, or of appeal, his entry would be canceled without further notice.

In response to the above-mentioned requirement there was filed the affidavit of the deputy mineral surveyor who surveyed the claims, dated February 24, 1902, in which it is alleged—

that said expenditure and improvements were made prior to the expiration of the period of publication, and are manifestly for the general development of each and every location embraced within the said application, and that said improvements show good faith in the highest degree.

The affidavit was accompanied by the certificate of the surveyor-general, in which it is stated that no portion of the labor or improvements

(which are again certified) has been included in the estimate of expenditures upon any other claim; that said improvements were made prior to the expiration of the period of publication; and that they appear from the accompanying affidavit of the deputy mineral surveyor, to be for the benefit of each location embraced in the survey.

June 17, 1902, your office held the additional showing to be insufficient, for the stated reason that it is not therein made to appear in what manner the excavation upon claim No. 4 would tend to develop or benefit the other claims of the group, and thereupon held the entry for cancellation, except as to claim No. 4.

The entryman has appealed. It is urged by him, among other things, that your office ignored the specific statements made in the affidavits of Samuel F. Crabbe and Albert W. Beals, under date of January 17, 1902. The record contains no such affidavits, but, upon informal inquiry at your office, it appears that the affidavits referred to were filed in support of the entry (now pending in your office) made by this claimant for the neighboring Marble Creek group of placer claims, ten in number. However, as the relative situations and mineral character of the claims of each group and the conditions with respect to improvements are substantially alike, the affidavits will, in view of counsel's reliance upon them and of the *ex parte* character of the case, be considered in this connection.

Crabbe, as a civil engineer, and Beals, as a quarry expert, in substance allege that, in the interest of Cassel, they made careful examinations of the claims comprising the Marble Creek group, and considered the matter of opening and developing them; that the claims rise more or less abruptly from the shore of Shakan Bay toward the interior, a corner of one of the claims being upon a high hill; that most of the claims which lie along the shore are more or less broken at the water's edge; that all the claims are covered with dense timber, and the surface of the rocks have little or no dirt thereon; that at the foot of the standing trees the claims are covered with dense masses of brush and fallen trees and timber, and the rocks are overlaid with moss and dead brush to a depth averaging from two to five feet, which makes it extremely difficult and expensive to open up any roadways, trails, or paths across the claims; that there is but one point along the shore where a wharf for shipping marble from the group can be constructed, at which point there is deep water and a good harbor; that, after mutual consultation, they advised the superintendent in charge of the work that the proper method to develop the property was to open a quarry at a point where the marble from the several claims could be stored and from which it could be shipped, and that roadways should be constructed, to radiate from the point selected, by the most feasible routes, over and across the several claims of the group, in order to bring the marble therefrom to the wharf for shipment: and affiants

allege that, of their own knowledge, the work done is for the benefit, and tends to the development, of each and all of the claims of the group.

The record contains a further affidavit by the deputy mineral surveyor, dated July 11, 1902, filed in support of the Kosciusko entry. In this affidavit (which does not appear to have been called for or considered by your office) much the same showing is made with respect to the physical conditions of the Kosciusko group that is made in the affidavits of Crabbe and Beals with respect to the Marble Creek; but affiant does not, however, therein indicate the consequential development of the remaining claims by the work done upon No. 4.

Section 2324 of the Revised Statutes prescribes that upon each mining claim located subsequent to May 10, 1872, and until patent issues, there must annually be expended \$100 in labor or improvements, and further provides that where a number of "such claims are held in common, such expenditure may be made upon any one claim." In the case of Copper Glance Lode (29 L. D., 542, 548), and many earlier cases, the latter provision was recognized as equally applicable to the requirement (Sec. 2325, R. S.) that \$500 worth of labor be expended or improvements made upon each claim as a condition precedent to obtaining patent.

It is now well settled that improvements made upon one or wholly outside of several claims held in common are acceptable in satisfaction of the statutory requirements only where the claims are contiguous and where such improvements tend to facilitate the extraction of the minerals contained in the claims. The situation disclosed in most of the decided cases is that of a shaft sunk upon or tunnel driven from one of the claims, or without the group, to reach the veins or ledges of each at a depth which would render the cost of separate shafts or drifts excessive and sometimes prohibitive; or of the construction of a flume and the introduction of water, for the purpose of washing placer minerals from each claim. But, whether lode or placer, it must appear that the entire group will integrally profit by the work done upon one or more (or wholly outside) of such claims. The labor or improvements so performed or made must be of such character as to *promote the development* of each claim. (See *Smelting Co. v. Kemp*, 104 U. S., 636, 655; *Jackson v. Roby*, 109 U. S., 440, 445.)

It is manifest that the surface excavation or open cut made upon claim No. 4 of the Kosciusko group does not bring the remaining claims any nearer development than they were prior thereto. The deposit of marble is shown to be superficial—covered by at most but a few feet of soil—and plainly susceptible of removal only by means of quarries. In the very nature of such a form of deposit actual work upon the surface of such a claim is indispensable to the extraction of the mineral which composes the deposit. Neither by shafts, tunnels

flumes, nor any of the methods usual in the development of a group of lode or ordinary placer claims can such superficial formation be practically mined. The quarry opened upon claim No. 4 has no tendency to *facilitate* the extraction of the mineral of its companion claims, but obviously tends to the development of that claim alone; and, as said in *Jackson v. Roby, supra*,—

The law does not apply to cases where several claims are held in common, and all the expenditures made are for the development of one of them without reference to the development of the others.

After careful consideration of the case, the Department is convinced that the conditions which obtain with respect to this placer group are not such as to bring the several claims within the class contemplated in section 2324, Revised Statutes, and that the work done upon claim No. 4 does not, therefore, suffice to satisfy, with respect to the remaining claims, the requirements of the law.

The decision of your office is affirmed.

ADJUSTMENT OF SWAMP-LAND GRANT TO STATE OF MINNESOTA.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 4, 1903.

REGISTERS AND RECEIVERS OF UNITED STATES LAND OFFICES,
State of Minnesota.

SIRS: There is appended hereto [page 65] a copy of departmental order of March 16, 1903, giving specific instructions relative to the adjustment of the swamp-land claim of the State of Minnesota, and for the disposition of existing contests or controversies involving the claim of the State under the grant.

You will observe that this latest departmental order, in effect, abrogates the circular of December 13, 1886 (5 L. D., 279), in so far as the State of Minnesota is concerned, and you will note that by direction No. 5 all contests or controversies which had been carried to a hearing—and by this is meant where testimony had been submitted and where decision had been rendered by you prior to March 16, 1903—are to be disposed of as though the direction contained in said departmental order had not been made, viz, under the decision in case of *Lachance v. State of Minnesota* (4 L. D., 479), and the circular of December 13, 1886 (5 L. D., 279).

All other contests or controversies will be disposed of under directions Nos. 1 and 2, and where dismissed under direction No. 2, the departmental order should be cited as authority for the action taken.

You should strictly observe the requirements of the appended departmental order, and use due diligence in disposing of all swamp-land controversies now pending before your office.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

E. A. HITCHCOCK,
Secretary.

REGULATIONS UNDER THE ACT OF MARCH 3, 1903, FOR THE RELIEF
OF CERTAIN HOMESTEAD SETTLERS IN THE STATE OF ALABAMA.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April 7, 1903.*

The act of March 3, 1903 [32 Stat., 1222], reads as follows:

That whenever any person, association, or corporation that has recovered, in any court of competent jurisdiction, the title to any land which is included in any homestead entry made on lands granted by the Congress of the United States to the State of Alabama to aid in the construction of the Mobile and Girard railroad, or the Tennessee and Coosa railroad, which recovery of said land was made or had by virtue of the title asserted and claimed by either of said railroad companies or its vendee, or successor in interest, shall execute a deed conveying all his or their interest in, or claim to, the land included in such homestead entry to the United States, and file the same with the Secretary of the Interior, such person, association, or corporation shall be entitled to receive from the Secretary of the Interior a certificate authorizing them or their assigns to enter, within one year from the issuance of such certificate, of the public lands of the United States in the State of Alabama, subject to homestead entry, an area equal to that contained in the tract so deeded and relinquished, and all certificates which have not been presented as a basis for the entry of a specific tract within one year of their issuance, as above, shall be void, and each and every certificate issued shall have plainly printed across the face thereof the date of its expiration.

SEC. 2. That the Secretary of the Interior shall prescribe all necessary rules and regulations for the administration of this act.

The purpose of this act is to induce the Mobile and Girard and the Tennessee and Coosa railroad companies, their vendees or successors in interest, to release to the United States for the relief of the homestead claimants any lands within the limits of the grants to aid in the construction of said railroads, which either of said companies, their vendees or successors, have recovered in any court of competent jurisdiction from the homestead claimants who have been allowed to enter them, whether patented or not, under the rulings of the General Land Office or the Secretary of the Interior, and it provides that upon the execution of

a deed by the proper claimants under the grants to either of said companies, conveying his or their interest in the land to the United States, such claimants shall be entitled to receive from the Secretary of the Interior a certificate authorizing them or their assigns to enter, within one year from its date, a quantity of public land situated within the State of Alabama and subject to homestead entry, equal in area to that reconveyed as aforesaid.

Therefore, upon the presentation by the rightful claimants under either of said railroad grants of satisfactory evidence that he or they have recovered from the homestead entryman in the manner prescribed, the land embraced in his entry or patent, accompanied by a proper reconveyance of such lands to the United States, there shall be issued to such claimants the certificate of location prescribed in the act for the entry of other lands in lieu thereof, and the proper steps will be taken to secure to the homestead entryman the title to the land covered by his entry.

Very respectfully,

Approved:

E. A. HITCHCOCK,
Secretary of the Interior.

W. A. RICHARDS,
Commissioner.

HOMESTEAD ENTRIES IN ALASKA—ACT OF MARCH 3, 1903.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 8, 1903.

Register and Receiver, Juneau, Alaska.

GENTLEMEN: Your attention is called to the provisions of the act of Congress approved March 3, 1903 (32 Stat., 1028), entitled, "An act to amend section one of the act of Congress approved May fourteenth, eighteen hundred and ninety-eight, entitled, 'An act extending the homestead laws and providing for a right of way for railroads in the district of Alaska,'" a copy of which is hereto attached.

The act provides that—

no indemnity, deficiency, or lieu land selections pertaining to any land grant outside of the district of Alaska, shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district, except as now provided by law; and provided further, that no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right.

There is no existing law whereby indemnity, deficiency, or lieu land selections pertaining to any land grant, or scrip or warrants, may be

located upon any lands in Alaska. No such locations will, therefore, be allowed by you.

Full instructions with reference to the general homestead law will be found in the general circular of July 11, 1899, as well as special instructions under the act of May 14, 1898 (30 Stat., 409), concerning homesteads, etc., in Alaska, and will, so far as applicable, govern the making of entries and proofs under this act, except as modified herein.

The act of 1898, *supra*, is amended so as to provide that no entry shall be allowed extending more than 160 rods along the shore of any navigable water, and to provide that no homestead entry shall be allowed for more than 320 acres.

In executing surveys for homestead applications the instructions now prevailing will be followed and the limit of 160 rods as to frontage will be measured along the meandered line of said frontage.

The form of the tract sought to be entered, if upon *unsurveyed* land, is prescribed in the act as follows:

If any of the land . . . is unsurveyed, then the land . . . must be located in a rectangular form, not more than a mile in length and located by north and south lines run according to the true meridian.

The above is construed to mean that the boundary lines of each entry must be run in cardinal directions, *i. e.*, true north and south and east and west lines by reference to a true meridian (not magnetic), with the exception of the meander lines on meanderable streams and navigable waters forming a part of the boundary lines of the entry. Thus a frontage meander line, and other meander lines which form part of the boundary of a claim, will be run according to the directions in the Manual, but *other* boundary lines will be run in true east and west and north and south directions, thus forming rectangles except at intersections with meander lines.

The limit of one mile in length for each entry is held to be 80 chains in aggregate easting or westing, or 80 chains in aggregate northing or southing.

In other respects the rules previously adopted to govern surveys of claims under the act of May 14, 1898, will continue to be followed by you, of course taking into consideration the limitations as to area of claims.

Every person who is qualified under existing laws to make a homestead entry of the public lands of the United States, who has heretofore settled upon any of the unsurveyed public lands of the United States in the district of Alaska, with the intention of taking the same under the homestead law, shall, within ninety days from date hereof, or prior to the intervention of an adverse claim, file the record of his location for record in the recording district in which the land is situated, as provided by sections 13 to 16. of the act of June 6, 1900 (31 Stat., 321, 326 to 328).

Every such person who hereafter settles upon any of the said unsurveyed land, shall, within ninety days from the date of settlement, or prior to the intervention of an adverse claim, file the record of his location for record in the recording district in which the land is situated, in the manner above stated. Said record shall contain the name of the settler, the date of settlement, and such a description of the land settled upon, by reference to some natural object or permanent monument, as will identify the same.

If at the expiration of the time required under sections 2291 and 2292, R. S., and as modified by section 2305, R. S., or at such date as the settler desires to cummute under section 2301, R. S., the public surveys have not been extended over the land located, the locator may secure patent for the land located, by procuring, at his own expense, a survey of the land, which must be made by a deputy surveyor who has been duly appointed by the surveyor-general, in accordance with section 10 of the act of May 14, 1898 (30 Stat., 409).

When the survey is approved by the surveyor-general under authority of this office, the same rules should be followed as in soldiers' additional certified rights, in addition to which the settler must furnish the required proof of residence and cultivation.

You will use the regular homestead and final proof blanks (forms 4-007, 4-063, 4-062 and 4-369), and continue the series of original and final numbers as now used in soldiers' additional cases, except in commutation you will continue the regular cash series of numbers, instead of the final homestead series.

When a settler desires to commute, the survey and homestead application must cover his entire claim, but only 160 acres, or less, thereof may be commuted, in which event the entry will stand intact as to the portion not commuted, subject to future compliance with the requirements of law within the statutory period of seven years.

You will require entrymen who commute to pay, in addition to the price of \$1.25 per acre, the same fees and commissions as in final homesteads.

Report the entries hereunder at the close of each month in the usual way, and if you have not on hand the regular blanks for allowing entries and for your reports, you should at once make requisition on this office therefor.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

MINING CLAIM—CO-OWNER—SECTION 2324, R. S.

SURPRISE FRACTION AND OTHER LODE CLAIMS.

The interest of a co-owner in a mining claim, which may be acquired under the forfeiture provision of section 2324, Revised Statutes, is the share or interest of such co-owner in the purely possessory rights under the mining location, and not in any rights arising under an application for patent.

A co-owner who has been omitted from an application for patent to a mining claim can not, by subsequent recourse to forfeiture proceedings against the applicant co-owner, acquire any right in himself to make entry under the application.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 9, 1903.* (F. H. B.)

February 7, 1899, A. F. Corbin, claiming as sole transferee by sundry mesne conveyances, filed application for patent to the Surprise Fraction, Last Shot Fraction, Ida, and Spokane (among other) lode mining claims, survey No. 427, Spokane, Washington. Notice of the application was published and posted for sixty days, commencing February 11, 1899, and no adverse claim was filed.

October 19, 1900, J. S. Herrington, claiming as co-owner of said claims, commenced, pursuant to the provision of the mining laws, publication of notice of forfeiture against said Corbin, in which it was stated that Herrington had made the required annual expenditure of \$100 upon each of the claims in question for the year 1899. August 7, 1901, Herrington filed in the local office proof of continuous publication of the notice for ninety days, accompanied by certified abstract of title and by his affidavit, in which affidavit it is alleged that Corbin had wholly failed to contribute his proportionate share of said annual expenditures, as demanded in the forfeiture notice, within ninety days after completion of publication thereof, or at any other time. August 17, 1901, Herrington made entry for the claim, based upon Corbin's application for patent.

October 23, 1902, your office, in passing upon the entry, stated and held that, inasmuch as it is shown by the abstract of title that at the date of the application for patent Corbin and Herrington owned joint interests in each of the entered claims, patent would be issued in the names of both.

Herrington has appealed to the Department. The appeal presents the question whether patent may, in view of the forfeiture proceedings instituted by Herrington against his alleged co-owner, now issue in the name of the former.

The provision of the mining laws with respect to the forfeiture of the interest in a mining claim of one co-owner to another is contained in section 2324 of the Revised Statutes, and is as follows:

Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or

made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.

The "required expenditures" to which the above provision refers, and the penalty in case of default, are prescribed by a preceding portion of the same section, as follows:

On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year; . . . and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

The interest of a co-owner to which the forfeiture provision of the section obviously relates, and which may be acquired under and in accordance with that provision, is such co-owner's share or interest in the purely possessory rights which subsist under a mining location, and not in any rights acquired under an application for patent.

In this case the annual expenditures which constitute the basis of the forfeiture proceedings are alleged, in the published notice, to have been made for the year in which Corbin's application for patent to the claims in question was filed. The period of publication of notice of the application ended April 12, 1899. Thereafter, so far as disclosed by the record, no bar to entry during the then calendar year interposed. The patent proceedings were not so carried to completion, and after the expiration of that year Herrington, appearing in the character of a co-owner who had made the required annual expenditures upon the claims in question, invoked the forfeiture provision of section 2324 to defeat the possessory rights of Corbin. He stands, therefore, in such an attitude of hostility to the latter as to occupy the position of a protestant who alleges a material default upon the part of the applicant for patent. In this situation the case falls within the rule applied in *The Marburg Lode Mining Claim* (30 L. D., 202), *Cleveland et al. v. Eureka No. 1 Gold Mining and Milling Co.* (31 L. D., 69), and earlier cases, and Corbin must be held to have waived and lost whatever rights he may have acquired under the proceedings upon his application for patent.

Herrington attempts, at one and the same time, to base a right in himself to entry upon Corbin's application for patent and also upon the defeat of the latter's possessory title by the forfeiture proceedings. Herrington was not a party to the patent proceedings, which were

instituted intentionally to his exclusion, and could, therefore, under no circumstances claim anything by virtue of them. By reason of the delay which followed with respect thereto, those patent proceedings, upon whosoever rights now claimed to have been founded, have, as held above, lapsed. Or, if Corbin and Herrington were in fact co-owners, as claimed by the latter, and the forfeiture proceedings were in all respects regular (matters as to which the Department expresses no opinion), the former's possessory interest, upon which the application for patent was predicated, was defeated and determined and the application fell. In any view, the entry by Herrington was improperly allowed.

For the foregoing reasons, the entry will be canceled, without prejudice to the right of the parties, or either of them, to institute patent proceedings anew, should they so desire.

The decision of your office is reversed.

OKLAHOMA LANDS—SCHOOL SECTIONS—MINING LAWS.

INSTRUCTIONS.

Of the lands ceded to the United States by the Wichita and affiliated bands of Indians under agreement ratified by the act of March 2, 1895, sections 16 and 36, 13 and 33, reserved for school purposes, are by the provisions of said act made subject to the operation of the mining laws; but the like numbered sections reserved for school purposes of the lands ceded by the Comanche, Kiowa and Apache Indians under agreement ratified by the act of June 6, 1900, are not subject to the operation of such laws.

Any lands ceded by either of said agreements, which have been heretofore set aside and reserved by the Secretary of the Interior for county-seat town sites, under the act of March 3, 1901, or which have been reserved and appropriated, by authority of law, for any other specific purpose, are not subject to the operation of the mining laws.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 9, 1903.* (A. B. P.)

The Department is in receipt of your communication wherein you state, in substance, that numerous inquiries have been received by your office as to whether sections 16 and 36, 13 and 33, in each township of the lands opened to settlement by proclamation of the President July 4, 1901 (31 L. D., 1), are subject to the operation of the mining laws of the United States, and request to be instructed as to the status of such sections with respect to said laws.

The proclamation referred to embraces the lands in the Territory of Oklahoma which were ceded to the United States by the Wichita and affiliated bands of Indians, under an agreement ratified by act of Congress, of March 2, 1895 (28 Stat., 876, 894-9), and by the Comanche,

Kiowa, and Apache tribes of Indians, under an agreement ratified by act of Congress of June 6, 1900 (31 Stat., 672, 676-80).

The act ratifying the Wichita agreement, after providing for allotments of land to the Indians as required by the agreement, among other things, further provides:

That whenever any of the lands acquired by this agreement shall, by operation of law or proclamation of the President of the United States, be open to settlement, they shall be disposed of under the general provisions of the homestead and town-site laws of the United States:

That sections sixteen and thirty-six, thirteen and thirty-three, of the lands hereby acquired, in each township, shall not be subject to entry, but shall be reserved, sections sixteen and thirty-six for the use of the common schools, and sections thirteen and thirty-three for university, agricultural college, normal schools, and public buildings of the Territory and future State of Oklahoma; and in case either of said sections or parts thereof is lost to said Territory by reason of allotment under this act or otherwise the governor thereof is hereby authorized to locate other lands not occupied in quantity equal to the loss: *Provided*, That the United States shall pay the Indians for said reserved sections the same price as is paid for the lands not reserved.

* * * * *

That the laws relating to the mineral lands of the United States are hereby extended over the lands ceded by the foregoing agreement.

In the Comanche, Kiowa, and Apache agreement it is provided that in addition to the allotment of lands to the Indians, as in that agreement required, the Secretary of the Interior shall set aside for the use in common of said Comanche, Kiowa, and Apache tribes of Indians, four hundred and eighty thousand acres of grazing lands. The act ratifying this last-mentioned agreement, among other things, provides:

That the lands acquired by this agreement shall be opened to settlement by proclamation of the President within six months after allotments are made and be disposed of under the general provisions of the homestead and town-site laws of the United States:

That sections sixteen and thirty-six, thirteen and thirty-three, of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved, sections sixteen and thirty-six for the use of the common schools, and sections thirteen and thirty-three for university, agricultural colleges, normal schools, and public buildings of the Territory and future State of Oklahoma; and in case either of said sections, or parts thereof, is lost to said Territory by reason of allotment under this act or otherwise, the governor thereof is hereby authorized to locate other lands not occupied in quantity equal to the loss.

* * * * *

That should any of said lands allotted to said Indians, or opened to settlement under this act, contain valuable mineral deposits, such mineral deposits shall be open to location and entry, under the existing mining laws of the United States, upon the passage of this act, and the mineral laws of the United States are hereby extended over said lands.

By the act ratifying the Wichita agreement the mining laws of the United States were expressly extended over *the lands ceded* by that

agreement. There would seem to be no room for serious question, therefore, that by that act sections 16 and 36, 13 and 33, reserved therein for school and other purposes, were made subject to the operation of the mining laws in the same manner and with like effect as are sections of lands similarly reserved elsewhere, and not yet granted, as to which the mining laws are applicable.

With respect to the act ratifying the Comanche, Kiowa, and Apache agreement the situation is different. By that act only the lands which were to be allotted to the Indians or to be opened to settlement thereunder (Acme Cement & Plaster Co., 31 L. D., 125; Instructions, id., 154) were made subject to the mining laws and to mineral exploration and entry. The act did not extend the mining laws generally to the lands ceded by that agreement, as was done by the earlier act with respect to the lands ceded by the Wichita agreement, but only to the lands which were to be allotted to the Indians or to be opened to settlement under the act. Sections 16 and 36, 13 and 33, reserved for school and other purposes for the benefit of the Territory and future State of Oklahoma, were not lands to be allotted to Indians or to be opened to settlement any more than were the four hundred and eighty thousand acres set aside for the common use of the Indians as grazing lands.

The Department is of the opinion that sections 16 and 36, 13 and 33, of the lands ceded by the Wichita agreement are subject to the operation of the mining laws, and that the like numbered sections of the lands ceded by the Comanche, Kiowa, and Apache agreement are not subject to the operation of such laws.

It is to be understood, however, that lands in said Territory, ceded by either of said agreements, which have been heretofore set aside and reserved by the Secretary of the Interior for county seat townsites, under the act of March 3, 1901 (31 Stat., 1093), are not subject to the mining laws. Such lands, having been appropriated and set apart for specific purposes under the law, are withdrawn from the operation of the mining and other public land laws. This is true of any and all lands which have been reserved and appropriated, by authority of law, for specific purposes.

It is not intended to hold or to intimate that the Territory of Oklahoma is entitled, or that said Territory or the future State of Oklahoma may in any event be entitled, to minerals, if any, now known to exist in sections 16 and 36, 13 and 33, of the lands ceded by the last-mentioned agreement, or which may be hereafter found to exist in said sections, prior to the time when the same shall be granted to such Territory or State. It is simply held, as to said sections, that under existing legislation the lands therein are not subject to the operation of the mining laws.

ALASKAN LAND—RAILROAD GRANT—SEC. 2, ACT OF MAY 14, 1898.

ALASKA COAL AND COKE COMPANY.

The right of way granted by section 2 of the act of May 14, 1898, is "to any railroad company, duly organized under the laws of any State or Territory or by the Congress of the United States," and an organization seeking the benefits conferred by said section which is not a railroad company under the laws of the State wherein it was created, is not a railroad company within the meaning of that term as employed in said section.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 21, 1903.* (F. W. C.)

The Department has considered the appeal by the Alaska Coal and Coke Company from your refusal on January 21, last, to submit for filing under the act of May 14, 1898 (30 Stat., 409), its articles of incorporation and due proofs of organization.

It seems that on December 30, last, there was filed in this Department by Elmer W. Armfield, the secretary of the Alaska Coal and Coke Company, a corporation created under the laws of the State of California, copies of the articles of incorporation and due proofs of organization of said company, together with a map and field notes, intended as an application for right of way under the act of 1898, there being delineated on the map a terminal on the south bank of the Yukon river, at a point known as Royles Landing, which terminal is described as embracing 40 acres, a located line of road along and toward the source of Washington Creek, for a distance of 10.08 miles, and a second terminal also described as embracing 40 acres, it being alleged in the showing filed in connection with said application that said company owns, by location and purchase, valuable mines of coal on and near Washington Creek in the Territory of Alaska, and that the purpose of the proposed road is to furnish a means of transporting the coal, when mined, to a convenient point of shipment on the Yukon river. The claimed right of way on account of said line of road, as shown by the papers, is 200 feet, namely, 100 feet on each side of the proposed road.

In refusing to submit the articles of incorporation and due proofs of organization filed by this company, your office letter of January 21, last, addressed to the secretary of said company, states:

The articles of incorporation fail to show that the company was incorporated for the purpose of constructing and operating a railroad line, and as it therefore does not appear that it is authorized to construct the line for which the map has been filed, I must refuse to consider the application under the provisions of the act of May 14, 1898 (30 Stat., 409). The same is accordingly hereby rejected, subject to the usual right of appeal.

In its appeal the company refers to the last clause of the second

sub-division found in its articles of incorporation, which contains the following language:

To own, buy, sell, charter, control and operate steam and other water-craft, and therewith to conduct a general forwarding business for the transportation of freight and passengers, as common carriers; and *generally to do and perform all acts and things, though not specifically mentioned herein, which are consistent with the general purposes of this corporation—*

which it claims is sufficient to authorize the company to construct and operate a railroad the use of which is said to be absolutely necessary for the transporting of the coal from the mines to the Yukon river where it can be shipped to market.

By the second section of the act of May 14, 1898, *supra*, being an act extending the homestead laws and providing for right of way for railroads in the district of Alaska, it is provided:

That the right of way through the lands of the United States in the District of Alaska is hereby granted to any railroad company, duly organized under the laws of any State or Territory or by the Congress of the United States, which may hereafter file for record with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the center line of said road; also the right to take from the lands of the United States adjacent to the line of said road, material, earth, stone, and timber, necessary for the construction of said railroad; also the right to take for railroad uses, subject to the reservation of all minerals and coal therein, public lands adjacent to said right of way for station buildings, depots, machine shops, side tracks, turn-outs, water stations, and terminals, and other legitimate railroad purposes, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road, excepting at terminals and junction points, which may include additional forty acres.

It will be noted that this right of way is granted "to any railroad company duly organized under the laws of any State or Territory or by the Congress of the United States." An examination of the articles of incorporation of the Alaska Coal and Coke Company fails to show that said company, aside from whether it might build a railroad or a tramway for the purpose of conveniently carting its products to market, is a railroad company under the laws of the State of California, wherein it was created (see Secs. 291 to 295, Deering's Annotated Code and Statutes of California), and, consequently, is not a railroad company within the meaning of that term as employed in the second section of the act of 1898, and, for that reason, the Department approves of the action taken by your office refusing to accept for filing under the provisions of said act, the articles of incorporation and due proofs of organization filed by this company, and they are herewith, together with the map and field notes accompanying the same, returned.

In the appeal some reference is made to the provisions of section 6 of the act of 1898, which authorizes the Secretary of the Interior to issue a permit by instrument in writing, to any responsible person,

company or corporation, for a right of way over the public domain in the district of Alaska, not to exceed 100 feet in width, together with necessary grounds for station and other purposes, to construct wagon roads, and wire, rope, aerial and other tramways, but a consideration thereof in connection with the present application is unnecessary as it does not appear that said company has ever applied for the issue of a permit under said section.

FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

WILLIAM G. GOSSLIN.

The legal title created by the issue of a patent for public land relates back to the inception of the equitable title arising from payment therefor; and where after the acquisition of equitable title and prior to issue of patent the land is transferred, the legal title, upon issue of the patent, inures to the benefit of the grantee. No right to make selection under the act of June 4, 1897, can arise until legal title exists in the person assuming to convey it to the United States and claiming the right to make selection.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 21, 1903.* (J. R. W.)

William G. Gosslin appealed from your office decision of December 2, 1902, requiring him to obtain additional deeds from the patentees of certain tracts of land conveyed by him to the United States, situate in a forest reservation, and assigned as part of the base for his application under the act of June 4, 1897 (30 Stat., 36), number 1782 your office series, to select the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, lots 1, 2, 3, Sec. 30, and all of Sec. 32, T. 9 S., R. 7 W., W. M., Oregon City, Oregon.

August 16, 1887, Daniel C. McLaughlin, Henry L. Nudd, and Jonathan C. Shepard, respectively, made entries under the act of June 3, 1878 (20 Stat., 89), and obtained final certificates. Patents were issued on all these entries April 16, 1890. Prior thereto, at sundry times between August 24, and 30, inclusive, 1887, the entrymen, by their several deeds reciting valuable money considerations, "remised, released, and forever quitclaimed," their respective tracts to the Madera Flume and Trading Company, with—

all the estate, right, title, interest, in the above described property, possession, claim and demand whatsoever as well in law as in equity of the said party of the first part of, in or to the said premises, unto the said party of the second part, and to its heirs and assigns forever.

Gosslin's title is deraigned through mesne conveyances from the Madera Flume and Trading Company. The land is in Fresno county, California.

Your office, citing F. A. Hyde (28 L. D., 284, 290), held that:

additional deeds will be required in each of the above described instances, dated on or subsequent to the date of patent in question, therein respectively shown, which

deeds shall show the said patentees conveyed to his respective vendee the legal as well as the equitable title, and the procedure as to recording and certification by the recorder of Madera County will be also followed as prescribed in the ruling above referred to.

The legal title created by the issue of a patent for public land relates back to the inception of the equitable title arising from payment therefor. *Hussman v. Durham* (165 U. S., 144, 148); *Witherspoon v. Duncan* (4 Wall., 210, 220); *Stark v. Starrs* (6 Wall., 402, 418, 450); *Def-feedback v. Hawke* (115 U. S., 392, 405). Patents having in fact issued upon the entries, they have the same legal effect, and must be regarded, with reference to all acts and conveyances of the patentees and those in privity with them, as having issued August 16, 1887, when the entries were made upon which the patents issued. The deeds of the entrymen, though quitclaims in form, recited substantial and adequate money considerations paid, and conveyed the grantors' entire estate and right, legal and equitable, and the equitable right to receive the legal title thereby passed. When the patent issued, the legal title inured to the benefit of the grantee.

This doctrine is established in California by statutory provisions and judicial construction. The Civil Code of California (Deering's Annotated Codes and Statutes, Secs. 1105, 1106) provides that:

SEC. 1105. A fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended.

SEC. 1106. Where a person purports by proper instrument to grant real property in fee-simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors.

Under these sections the Supreme Court of California holds that a quitclaim deed operates to transfer to the grantee the legal title of the grantor subsequently acquired by the issue to him of title papers, made for the purpose of confirming and perfecting the equitable title then in him. *Crane v. Salmon* (41 Cal., 63); *Thompson v. Spencer* (50 Cal., 532); *Graff et al. v. Middleton et al.* (43 Cal., 341); *Wholey v. Cavanaugh* (88 Cal., 132); *Stanway v. Rubio* (51 Cal., 41); *Frey v. Clifford* (44 Cal., 335). The legal title by operation of law having thus vested was reconveyed by Gosslin's deed to the United States prior to his application under the act of 1897 to select land in lieu thereof.

In the case of *F. A. Hyde* (28 L. D., 284), cited in your office decision, it was otherwise. Belden made his purchase from the State of California, December 16, 1897, and December 24, 1897, the application was made by Hyde before any patent had been issued by the State upon Belden's purchase, nor was any issued until January 23, 1899 (28 L. D., 290), so that legal title was to that time vested in the State and no right of selection existed at the date of the application by Hyde, or yet on June 13, 1898, when Belden's application was presented (28 L. D., 285). In that case Belden's deed of relinquishment to the United States could not operate by relation, or by operation of law be given

the effect, to vest title in the United States until the patent by the State, January 23, 1899. Had any equity against conveyance by the State existed, such equity might have been asserted by the State and patent refused.

The obvious objection to, and insufficiency of, a title in such condition is well illustrated by the case of *Hussman v. Durham*, *supra*, wherein an equity existed against issue of patent upon an entry, in form perfectly regular, made in 1858, but for which no consideration actually passed to the government until 1888. No right to make a selection under the act of 1897 can arise until legal title actually exists in the person assuming to convey it to the United States and claiming right to make selection. Such was not the fact in *Hyde's case*, *supra*, and therein it is plainly distinguished from the case at bar.

The additional deeds from the above named patentees are therefore not necessary and will not be required.

There were also other defects in the abstract of title, required by your office decision to be cured, and to which requirements Gosslin makes no objection or argument. As to them your office decision is not hereby affected, and as above modified the same is affirmed.

JUDGMENT OF CANCELLATION—WHEN OPERATIVE—APPLICATION.

YOUNG v. PECK.

So far as the rights of the entryman are concerned, a final judgment of cancellation by the land department is operative and effective from the moment of its rendition; but no application will be received nor any rights recognized as initiated by the tender of an application for the land embraced in such entry until the cancellation of the entry has been noted on the records of the local office.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 23, 1903.* (C. J. G.)

A motion has been filed by defendant in the case of George L. Young v. Sarah F. Peck, for review of departmental decision of January 10, 1903 (not reported), rejecting her application to make desert-land entry for the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, and lots 7, 9, 12, 15, and 16, Sec. 14, T. 8 S., R. 88 W., Glenwood Springs, Colorado, and holding intact, subject to compliance with law, plaintiff's desert-land entry embracing the same tract.

The facts of the case are very fully set forth in the decision complained of, as well as in the decision of your office of May 21, 1902, in said case. It is sufficient to say here that by departmental decision of November 2, 1901, a desert-land entry of said Sarah F. Peck, assignee of Joseph F. Peck, covering the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, and lots 7, 9, 12, 15 and 16,

Sec. 14, T. 8 S., R. 88 W., was held for cancellation based on proceedings instituted by George L. Young; and January 31, 1902, a motion for review of said decision was denied.

Notice of this final decision of the Department was received in the local office February 25, 1902, but prior thereto and subsequent to the date of said decision, to wit, February 11, 1902, Joseph F. Peck and Sarah F. Peck, his assignee, filed a relinquishment, which was accompanied by an application of the latter to make desert-land entry for the same tract in her own name. The relinquishment and application were held in the local office to await notice of the action of the Department on the motion for review.

Prior to initiating contest against the Peck entry, George L. Young had made application to enter the land embraced therein under the desert-land law, which was rejected for conflict with said entry, and from which action he appealed. When notice of the denial by the Department of Sarah F. Peck's motion for review was received in the local office, Young again applied to make desert-land entry for the land involved, together with other land. The local officers on March 3, 1902, concluding that Young had secured a preference right by reason of the proceedings he had instituted, allowed him to enter the land, at the same time rejecting Sarah F. Peck's application. The latter appealed March 24, 1902.

In the decision of your office of May 21, 1902, it was held that Young had not secured a preference right. His entry was accordingly held for cancellation as to the land in question and it was directed that the application of Sarah F. Peck, as modified by a relinquishment filed by her March 29, 1902, be accepted. Young appealed to the Department, where, after fully stating the facts of the case, it was held:

After a careful examination of the entire record, the Department is unable to sustain the conclusion reached in the decision of your office. All rights under the former desert-land entry, assigned to Mrs. Peck, were extinguished by the final decision of this Department on January 31, 1902. Under the practice in such cases, no application to enter the land formerly embraced in that entry could be accepted until notice of this decision had been received and the entry formally canceled upon the records of the local land office. *Stewart v. Peterson* (28 L. D., 515). At the time of the presentation of the relinquishment by Mrs. Peck, to wit, on February 11, 1902, she had nothing to relinquish, and her act in filing said paper did not hasten the time when, under the practice, the land covered by her former entry would become subject to disposition. The new application in her name, which accompanied said relinquishment, was prematurely filed, and no right was secured by this action. The entry was not canceled upon the records of the local office until more than a week thereafter.

The application presented by Young on February 25, 1902, was the first legal application tendered for this land, and this fact was sufficient to warrant the local officers in accepting said application, without consideration of any question as to whether Young secured a preference right by his contest of the former entry covering this land.

It will be seen that the conclusion of the Department adverse to Sarah F. Peck was reached "without consideration of any question as to whether Young secured a preference right by his contest of the former entry covering this land," although it appears to be conceded that he had no such right. In the motion for review certain familiar principles are contended for as being applicable to and controlling the claim of Sarah F. Peck, namely, that so long as an entry remains of record it constitutes a segregation of the land; and furthermore, that a relinquishment takes effect upon the date of its filing thereby immediately releasing the land. The instructions issued to local officers by your office in accordance with the decision in the case of *Stewart v. Peterson*, *supra*, are in part as follows (29 L. D., 29):

No application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local office.

These instructions were not formulated with the idea of modifying or overruling any well-established principles governing such matters. They grew out of what was deemed a wise, expedient and necessary administrative policy. Valid entries of record remain just as potent, judgments of cancellation become operative upon their rendition, and relinquishments are effective upon their filing, as before. The only change or innovation is one of practice, and for the sake of good practice it is deemed well that the cancellation of an entry, so far as releasing the land is concerned, shall take effect from the time the same is noted on the records of the local office. The cancellation is operative and effective, so far as any validity of and vitality in the entry itself or any claim or right left in the entryman, are concerned, from the moment of the rendition of the final and adverse judgment. As to the initiation of other claims or rights, the Department has said that they must await the notation of the cancellation of the prior entry on the records of the local office, thus changing in that respect and to that extent only the former practice.

It may be that the language in the instructions, "until said entry has been canceled upon the records of the local office," is susceptible of misconstruction. It may be that to have said, *until the cancellation of the entry has been noted on the records of the local office*, would have more aptly and clearly expressed what was intended in said instructions. The latter is undoubtedly what was meant, as no reasonable contention could be made that it was the purpose in said instructions to delegate the actual and final cancellation of an entry to the local officers. The said instructions conclude with this direction:

Cancellation of entries should be promptly noted upon your records upon receipt of instructions by this office to that effect.

In the case under consideration there had been a final judgment against Sarah F. Peck, and her entry was in effect canceled, at the

time she filed her relinquishment. The only thing remaining was the purely ministerial act of noting such cancellation on the records of the local office. Until this was done the Department deemed it good policy not to allow other claims to attach. Sarah F. Peck literally had nothing to relinquish after the final judgment of the Department overruling her motion for review. The instrument she presented as a relinquishment had nothing to operate upon and was wholly ineffective to change the status of the land.

The Department finds no valid reason in the motion now filed for disturbing its decision of January 10, 1903, and none appearing otherwise, said decision is adhered to and the motion for review is denied.

SCHOOL LANDS—MINERAL CHARACTER—INDEMNITY.

STATE OF OREGON.

The title to school lands returned as non-mineral at the time of survey, and for which no claim was asserted under the mining or other public land laws at the date when, if at all, the right of the State would attach, presumptively passed to the State, and the State will not be permitted to make indemnity selection in lieu of such lands, on the ground that they are mineral in character, except upon a clear and satisfactory showing that the base land was known to be chiefly valuable for mineral at the date when the State's right thereto would have attached, if at all.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, April 25, 1903.* (F. W. C.)

With your office letter of the 9th instant was transmitted what is denominated as clear list No. 19, covering 720 acres within the Roseburg land district, Oregon, selected by the State in lieu of an equal amount of land, being portions of Secs. 16 and 36 in place, which are claimed to have been lost to the State because mineral in character.

In your said office letter is set forth the proceedings initiated by the State and the summary of the testimony offered, tending to establish the mineral character of the base lands; from which it appears that hearings were held in 1894, under a practice then pursued permitting an inquiry as to the character of the base lands before selection had been made of lieu lands; that these hearings were *ex parte*, no one having been detailed to represent the government, and in each instance two witnesses were introduced on behalf of the State, their testimony being largely speculative as to the value of the lands for mining purposes, no actual development of valuable mineral deposits being shown.

Upon these records both your office and the local officers adjudged these base lands to be mineral, and in 1899 and 1900 the lieu selections in question were made.

The base lands were surveyed between the years 1881 and 1885, and in each instance were returned as non-mineral by the deputy mineral surveyor, and your office letter of the 9th instant reports that there are no mining or other claims of record covering any portion or these base lands.

The following are taken from the circular of March 6, last (32 L. D., 39), prescribing rules and regulations to be observed in the adjustment of the grants to the several States and Territories, made in aid of the support of the common schools, namely:

RULE 1. When a school section is identified by the government survey and no claim is at the date when the right of the State would attach, if at all, asserted thereto under the mining or other public land laws, the presumption arises that the title to the land has passed to the State, but this presumption may be overcome by the submission of a satisfactory showing to the contrary. Applications presented under the mining laws covering parts of a school section will be disposed of in the same manner as other contest cases.

RULE 2. The State will not be permitted to make selection in lieu of land within a school section alleged to be mineral in character and for that reason excepted from its grant, whether returned by the surveyor-general as mineral or otherwise, in the absence of satisfactory proof that the base land was known to be chiefly valuable for mineral at the date when the State's right thereto would have attached, if at all. The proof must show the kind of mineral discovered upon the land and the extent thereof, when and by whom the discoveries were made, as far as practicable, whether any claim to the land was asserted under the mining laws at the date when the State's right thereto attached, if at all, and if so by whom, the nature and extent of the mining improvements placed upon the land by the mineral claimant, and what efforts have been and are being made to develop the land in good faith for mineral purposes. If, in any case, the proof does not clearly show that the base land was known to contain valuable mineral deposits, and to be chiefly valuable on account of such deposits at the date the State's right would have attached thereto, a selection in lieu thereof will not be permitted. A certificate of the proper authorities that the base lands have not been sold, encumbered or otherwise disposed of must also be furnished.

The list submitted for approval and now under consideration is the result of the proceedings originally instituted by the State to establish the character of the base lands, and is the first consideration thereof by the Secretary of the Interior.

The proof offered by the State for the purpose of establishing the mineral character of the lands made bases for the selections in question, falls far short of showing such lands were of known mineral character at the date of survey or at all, and does not overcome the presumption that the title thereto passed to the State upon their identification by survey. There were at that time no adverse claims asserted to any portion of these lands under the mining or other public land laws. The Department therefore returns the list in question without approval.

UNION PACIFIC RAILROAD CO.

Request of the Union Pacific Railroad Company that the departmental decision of March 16, 1903, 32 L. D., 48, be so modified as to permit the issuance of patents to said company, without further delay, for lands within its grant situate in ranges 115 and 116 west, Evanston land district, Wyoming, denied by Acting Secretary Ryan April 25, 1903.

STATE SELECTION—PREFERENCE RIGHT—ACT OF MARCH 3, 1893.

McFARLAND *v.* STATE OF IDAHO.

The preference right over any person or corporation, for the period of sixty days from the filing of the township plat of survey, accorded to certain States by the act of March 3, 1893, within which to select lands under grants made by the act of February 22, 1889, applies to the State of Idaho as much as to the other States named in said act of 1893, notwithstanding said State was not included among those to which grants were made by the act of 1889.

Failure on the part of the State to publish notice of an application for the survey of lands within thirty days from the date of such application, as provided by the act of August 18, 1894, does not affect its preference right to select such lands, for the period of sixty days from the filing of the township plat of survey, conferred by the act of March 3, 1893.

The fact that land sought to be selected by the State for university purposes was returned and classified as mineral is no bar to such selection, if there is not within the limits of such tract any known valuable mineral deposit; and any question as to the tract lying within six miles of a known mining claim is wholly between the State and the United States.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *May 1, 1903.* (G. B. G.)

This is the appeal of Robert E. McFarland from your office decision of September 13, 1902, denying his timber and stone application for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 5, T. 38 N., R. 4 E., Lewiston land district, Idaho.

This township was surveyed upon the application of the governor of the State of Idaho under the act of August 18, 1894 (28 Stat., 372, 394-395), and the lands therein were withdrawn from settlement and entry in accordance with an order of your office of March 29, 1899. The plat of survey was filed in the local land office April 17, 1902, and on that day the said application of McFarland was filed, but was suspended by the local officers pending the sixty days' preference right period to select said tract accorded to the State under the act of March 3, 1893 (27 Stat., 572, 592-593).

June 6, 1902, which was prior to the expiration of the sixty days' period from the filing of the township plat of survey, the State selected said land for university purposes, per list No. 4, whereupon the local

officers rejected McFarland's application, and he appealed, contending before your office and still insisting that the State, having failed to publish a notice of its application for survey within thirty days from the date of such application, as provided by the act of August 18, 1894, *supra*, was not entitled to a preference right of selection under that act.

The action of your office herein is put upon the ground that the State had a general preference right of selection under said act of March 3, 1893, for sixty days after the filing of the township plat of survey, that during such time the land was not subject to McFarland's application, and that the State having regularly selected the land during the preference right period given by said last named act, the application of McFarland must be denied.

The act of March 3, 1893, *supra*, making appropriation for surveys and resurveys of public lands, provides:

That the States of North Dakota, South Dakota, Montana, Idaho, and Washington shall have a preference right over any person or corporation to select land subject to entry by said States granted to said States by the act of Congress approved February twenty-second, eighteen hundred and eighty-nine [25 Stat., 681], for a period of sixty days after lands have been surveyed and duly declared to be subject to selection and entry under the general land laws of the United States.

A peculiarity of the act of March 3, 1893, not noted in the decision of your office and not referred to by the appellant, is, that while it provides in terms that the State of Idaho shall have a preference right over any person or corporation to select land subject to selection by said State under the grants of land made by the act of February 22, 1889, the act of 1889 referred to does not make a grant of lands to the State of Idaho, and, therefore, strictly speaking, there are no lands subject to selection by said State under that act.

The State of Idaho takes its grant of lands for university purposes by section 8 of the act of July 3, 1890, entitled, "An act to provide for the admission of the State of Idaho into the Union," and it may be argued with some force that inasmuch as the preference right of selection accorded by the act of 1893 is only of lands granted by the act of 1889, such right does not extend to the State of Idaho in view of the fact that the privilege conferred is in derogation of the rights of claimants under the public land laws, and ordinarily should be construed strictly. This argument is, however, in some respects weak. It would result, if adopted, in the conclusion that Congress did not intend by the act of 1893 to confer any benefit whatsoever upon the State of Idaho, and yet the State of Idaho is mentioned in the same connection as the other States, and apparently the intention with reference to this State is the same as with reference to the other States so named; and to say that Congress did not intend to confer the same benefit on the State of Idaho as upon the other States is to say

either that the mention of this State was inadvertent or that the statute itself is absurd. It is a familiar rule that a statute should be so construed, if possible, that the whole of it may stand. This may be done in the present instance. It is believed that it was the intention of Congress to confer upon the States named a preference right to select lands confirmed to them by the acts respectively admitting them into the Union. This view meets the difficulties of construction and is in keeping with the manifest policy of Congress. In answer to the suggestion that the statute should be construed strictly, it should be said that if there were doubt as to the extent of the benefit conferred nothing could be taken for granted, but as to this there is no doubt, the doubt arising upon the question as to what States are included within the benefit. There is no apparent reason why the State of Idaho should not have the same privilege in respect to a preference right of selection as the other States named.

The principal difference between the acts of 1893 and 1894 is that, under the act of 1893 lands are reserved for the benefit of the State for a period of sixty days from the filing of the township plat of survey, whereas, under the act of 1894, lands are reserved from the date of the filing of the application for survey, if the publication required by that act is made. There would seem to be no good reason why the State may not apply for a survey of these lands under the act of 1894 and waive its right to have them withdrawn from the date of the application by failing to publish the necessary notice, inasmuch as it had a right to rely, and did rely, upon the terms of the act of 1893 for a preference right for sixty days from the filing of the township plat of survey. It is not believed that the State lost any right which it otherwise had under the act of 1893 by failing to comply with some of the requirements of the act of 1894.

But it is urged that the lands in controversy were, at the time of the application for survey, as well as at the date of selection, situated within six miles of a known mining claim then being operated, and were returned and classified as mineral bearing lands. This, if true, is without force in support of this timber and stone application. If the land is known to be chiefly valuable for the mineral it contains, it is no more subject to a timber and stone application than to the State selection; and if there is not within the limits of such tract any valuable mineral deposit, as is stated in an affidavit filed in support of said application, it was subject to the State selection. The question of its lying within six miles of a mining claim is one wholly between the State and the United States, subject to the regulations in such cases.

The decision appealed from is affirmed.

MELDER *v.* WHITE.

Departmental decision herein of August 31, 1898 (not reported), on appeal, of May 22, 1899 (28 L. D., 412), on motion for review, and of September 2, 1899 (not reported), on petition for rehearing, which were withdrawn by departmental decision of December 20, 1901 (not reported), pending supplemental hearing, reinstated, and White's entry relieved from suspension, by decision of Acting Secretary Ryan of May 1, 1903.

FOREST RESERVE—DISPOSAL OF DEAD AND FALLEN TIMBER.

OPINION.

When actual possession of land held in private right in a forest reserve is abandoned by the owner, and conditions exist by reason of fallen or dead timber which make it a menace to the safety of the forest growth on the reservation, it is within the power of the Secretary of the Interior to take proper measures for the abatement of such conditions.

Assistant Attorney-General Campbell to the Secretary of the Interior,
May 4, 1903. (J. R. W.)

I have considered the reference to me April 21, 1903, of the letter of the Commissioner of the General Land Office of March 28, 1903, for opinion on the question presented. The Commissioner's letter states—

that the question has been presented by the forest supervisors as to whether or not they may, pending acceptance of the reconveyance of these lands, consider applications for this material; as it is from these lands that parties so often desire to take firewood, posts and poles, thereby affording an opportunity, which should be improved, if possible, for clearing the lands of what constitutes a source of fire danger.

While realizing that it is quite as necessary a protective measure to clear lands, in this situation, of the dead and dry timber, as to clear the adjoining public lands of the same kind of fire menace, and accepting the general proposition that lands which are base for lieu selections eventually become the property of the United States, this office hesitates to advise the forest officers on the subject in view of Department letter of December 22, 1902, in the White Pine Lumber Company case, and of January 5, 1903, in the Lindsley Bros. Company case, directing that action in those cases be suspended until final action should be had on the relinquishments to the United States of the lands involved.

The prime object of the act of March 3, 1891 (26 Stat., 1095, 1103), was to promote and conserve for public use the forest growth of the tracts so reserved, and it was held (15 L. D., 284, 285)—

that these lands remain under the control of this Department, and that there is authority to make all rules and regulations proper and necessary to carry into execution the provisions of the law authorizing the withdrawal of such lands and to the realization of the objects of that legislation.

By the act of June 4, 1897 (30 Stats., 11, 35), for the protection of the forests in the reservations so created, it was expressly provided that:

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States.

Another provision of this act (ib., 36) was that intended to secure complete title by the government to all land held in private right by inviting its relinquishment by the owner in exchange for other land. It is significant of the extent of control over the lands within the forest reservations that while the act (ib. 36) saved rights of ingress and egress of actual settlers, residents, miners, and prospectors, such right was accorded only with the proviso: "that such persons comply with the rules and regulations covering such forest reservations."

When one having private right to land in a forest reservation accepts the provisions of the act of June 4, 1897, by relinquishing to the government the title or right he has, or by attempting to do so, he thereby abandons its control and submits the land to the control of the government. If such land by reason of fallen and dead timber, or other inflammable material, is a menace to the forest growth upon the surrounding lands the authority of the Department extends to the abatement of such dangerous conditions. Pending the consideration by the Department of an offered exchange, the control of the lands abandoned by the owner must for safety of the reservation be lodged somewhere, and as no other authority exists authorized to control it but that of the owner and the Secretary of the Interior, when actual possession of such land is abandoned by the owner, the right of control and police for safety of that and the surrounding lands immediately devolves upon the Secretary of the Interior as a necessity arising from the conditions and the duty to regulate, control, and protect the reservation.

I am therefore of opinion that when actual possession of land held in private right in a forest reservation is abandoned by the owner, and conditions exist by reason of fallen or dead timber which make it a menace to the safety of the forest growth on the reservation, it is within the powers of the Secretary to take any proper measures for the abatement of such conditions, either by authorizing the removal of such inflammable material by parties desiring to make use of it with or without sale of it, or, if necessary, by clearing, burning, and destroy-

ing the dangerous material as a protective measure by persons employed for that purpose.

If a profit results, the fund so received should be kept account of until final action upon the relinquishment, to be paid to the owner if the title he tenders is not finally accepted, the right of control so existing and exercised being regarded as a conserving one simply for safety of the property and its surroundings.

Approved, May 4, 1903.

THOS. RYAN, *Acting Secretary*.

CALIFORNIA—EXTRATERRITORIAL EXECUTION OF DEEDS.

FRANK H. HEREFORD.

A duly appointed commissioner of deeds for the State of California is an officer of that State, and deeds executed outside of the State before such commissioner are not, in contemplation of law, extraterritorially executed, but have the same force and effect as if executed within said State before any officer authorized by law to take acknowledgments.

Acting Secretary Ryan to Frank H. Hereford, Tucson, Arizona, May 4, 1903.
(F. L. C.) (J. R. W.)

I am in receipt of your letter of April 18, 1903, making reference to departmental decisions of November 26, and December 31, 1902, in Frank H. Hereford (32 L. D., 31), respecting proof of acknowledgment of deeds, extraterritorially executed, required by section 1189, Civil Code of California, as amended by the act of February 26, 1897 (acts 1897, page 45, California), and requesting a further explanation as to its application to deeds acknowledged outside of California before a commissioner of deeds appointed by the governor of that State.

A commissioner of deeds appointed by the governor under section 811, Political Code of California, is an officer of that State, the record of whose appointment and whose signature is evidenced by the records in the office of the Secretary of State of California (sections 817 and 814 Political Code, California), and section 813 of such code provides that:

acknowledgments and proofs certified by commissioners of deeds, have the same force and effect, to all intents and purposes, as if done and certified in this State by any officer authorized by law to perform such acts.

Such deeds are not, in contemplation of law, extraterritorially executed; nor are they within the letter or spirit of section 1189 as amended, or of the departmental decision construing the same.

RAILROAD GRANT—PURCHASER—SECTION 5, ACT OF MARCH 3, 1887.

WILLIAMS ET AL. *v.* ELLIOTT.

Lands having been certified under the act of June 3, 1856, on account of the Wills Valley grant, in excess of the amount granted, and suit having been instituted to recover such excess, no further certifications of lands will be made under said grant, even though they are of the prescribed number within the place limits and free from adverse claims or rights at the date of the definite location of said road. Where such lands have been sold, however, as a part of the grant and before the ascertainment of such excess, it must be held that the equity of the purchaser is superior to the right of the United States to retain said lands on account of the excess in certifications; and by way of assurance to the purchaser's title under the railroad grant, his purchase of the lands under the provisions of section 5 of the act of March 3, 1887, may be permitted to stand.

Adverse claims asserted to these lands under the homestead and pre-emption laws denied, for the reasons (1) that although the Department has found that an excess exists in approvals made on account of the Wills Valley grant, the question is pending in the courts, and the granted sections within the place limits not certified on account of the grant have never been restored to entry; (2) that the settlements alleged to have been made in 1882 were not because of any decision of this Department holding the lands in question excepted from the grant and subject to settlement; (3) that upon the facts shown it would seem that the United States is without jurisdiction to entertain claims thereto under the settlement laws; and (4) that even should these lands be held excepted from the Wills Valley grant and subject to the provisions of the act of 1887, the showing made in support of claims asserted thereto under the settlement laws is not sufficient to defeat the right of purchase under the fifth section of the act.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *May 5, 1903.* (F. W. C.)

The Department has considered the appeals of Allen Williams *et al.* from your office decision of August 7, 1902, sustaining the purchase made by James M. Elliott, junior, under the provisions of Sec. 5 of the act of March 3, 1887 (24 Stat., 556), of an undivided moiety of the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, N. $\frac{1}{2}$ of SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of Sec. 1, T. 12 S., R. 5 E., Huntsville land district, Alabama.

These lands are within the primary limits common to two grants made by the act of June 3, 1856 (11 Stat., 17), to the State of Alabama; one to aid in the construction of a railroad from Gadsden to connect with the Georgia and Tennessee line of railroads through Chatoga, Wills and Lookout valleys, which grant was conferred by the State upon the Wills Valley Railroad Company, and the other to aid in the construction of a railroad from Tennessee river at or near Gunter's Landing to Gadsden on the Coosa river, which grant was conferred by the State upon the Tennessee and Coosa Railroad Company.

In accordance with an act of the State legislature the Wills Valley Railroad Company was consolidated with the Northeast and South

western Railroad Company, the claimant through the State to another grant made by the act of 1856, the name of the new corporation being known as the Alabama and Chattanooga Railroad Company, and said road was duly constructed as early as May, 1871. The portion of the Tennessee and Coosa railroad opposite to which the lands in question lie, was also constructed prior to September 29, 1890. A full section of the Tennessee and Coosa railroad, as provided for in the act of 1856, was never constructed, and because of this fact it was held in departmental decision of January 30, 1891 (12 L. D., 254), that no portion of that grant had been earned and that the entire grant was forfeited by the general forfeiture act of September 29, 1890 (26 Stat., 496). This decision was in error (see case of the United States *v.* Tennessee and Coosa Railroad Company, 176 U. S., 242). May 13, 1885, the Alabama and Chattanooga Railroad Company listed the lands in question as a part of its grant, and because of the erroneous holding by this Department that the grant for the Tennessee and Coosa railroad opposite constructed road had been forfeited by the act of September 29, 1890, and because it was shown that there had been certified on account of the Wills Valley grant more than an amount equal to a moiety of the lands within the conflict between the grant for that road and the Tennessee and Coosa railroad, departmental decision of May 13, 1893 (16 L. D., 442), affirmed your office decision of January 26, 1892, holding said listing for cancellation, and on January 1, 1894, Elliott was permitted to make purchase of these lands, with the exception of the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, under the provisions of section three of said act of 1890. The reason he did not include the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ in his purchase was that the act of 1890 limited a purchase to 320 acres.

It should be here stated that after the consolidation of the Wills Valley Railroad Company with the Northeast and Southwestern Railroad Company these two grants were in their administration by the land department treated as an entirety instead of as separate grants, with the result that because there was a large deficit in the grant for the Northeast and Southwestern portion of the grant, an excess was created in approvals made along the Wills Valley portion. It was not, however, until 1887 that the adjustment of the two roads as an entirety was held to be erroneous and that steps were taken to identify and recover the excess opposite the Wills Valley portion. See United States *v.* Alabama State Land Company (14 L. D., 129). The suit instituted to recover this claimed excess is still pending in the courts and, so far as this Department is informed, has never been brought to a hearing.

In the papers on file in your office relating to the Alabama and Chattanooga railroad, it is alleged that in order to secure the construction of that road the legislature of the State, by acts of February 9, 1867, and September 22, 1868, authorized the governor to endorse

the bonds of said road, and that by reason of such endorsements the State became liable for the sum of \$7,200,000; that to secure the State against loss on account of said endorsements the company executed to the State mortgages, dated December 19, 1868, and March 2, 1870, upon all the properties of the railroad company including the lands granted in aid of the construction thereof by the act of June 3, 1856; that the railroad company made default in the payment of interest due on the bonds and that the State, after paying about \$40,000 interest, foreclosed the mortgages, and, in making settlement with the bondholders under the act of February 23, 1876, commonly known as the Debt Settlement Act, the State on February 8, 1877, conveyed all the lands granted by the act of 1856 to aid in the construction of the Alabama and Chattanooga railroad, to John Swann and John A. Billups, as trustees; that on or about December 8, 1886, said trustees, at the request of the beneficiaries in the trust deed, for a valuable and adequate consideration, conveyed all the undisposed of lands to the Alabama State Land Company, a corporation under the laws of Alabama, which company is the present claimant under the grant of 1856, on account of the Wills Valley and the Northeast and Southwestern railroads.

In the record made in this case it is shown that the Alabama State Land Company, on April 7, 1890, conveyed the lands here in question to one Obal Christopher, who, in the following year, transferred them to Elliott.

Williams and others, with the exception of Samuel T. Fowler, lay claim to the land in question by reason of settlements made thereon during the year 1882 and since maintained. Fowler's claim rests alone on a homestead application proffered March 25, 1892.

The controversy between these several claimants has been twice before considered by the Department. See departmental decisions of October 31, 1900 (30 L. D., 319), and December 26, 1901 (not reported). In the decision of October 31, 1900, it was held that the forfeiture act of September 29, 1890, had no application to the lands in question because both roads had been constructed opposite these lands prior to the date of the passage of that act, and it was further held in said decision, because of the decision of the Supreme Court in the case of *United States v. Tennessee and Coosa Railroad Company*, *supra*, that Elliott, who also claimed an interest in this land through purchase from that company, was duly protected through such purchase in a moiety of the lands. As it had been before shown that there had been certified to the State of Alabama on account of the Wills Valley road, a large quantity of land in excess of the amount granted, it was said in said departmental decision that no further claim to land on account of that grant would be entertained, citing *Sioux City and St. Paul R. R. Co. v. United States* (159 U. S., 349), and for that reason, treating the lands as excepted from that grant, it was said that Elliott might also be protected in the remaining moiety of the lands under the provisions of

section five of the act of March 3, 1887 (24 Stat., 556), through his purchase from the Alabama State Land Company. It was under the proceedings thereafter instituted by Elliott, because of said suggestion and with a view of establishing his right under the act of 1887 to a moiety of the lands purchased of the Alabama State Land Company, that the matter is again before this Department, your decision sustaining the claimed right of purchase.

From a more careful consideration of the matter it is the opinion of this Department that the equity of the United States would prevail as against the railroad company were the company the claimant to this land, in the event that the pending suit be decided in favor of the United States, for the railroad company would not be heard to claim more lands when it had already been shown to have received an excess, but, as the title to a moiety of this land was fully earned by the construction of the road, being part of an odd-numbered section and within the place limits, and having been sold to a *bona fide* purchaser who made purchase while the grant was treated as a part of the Northeast and Southwestern railroad, the two being adjusted as one, that the equity of such purchaser is superior to that of the United States and that the decision in the case of the Sioux City and St. Paul Railroad Company *v.* United States, *supra*, can have no application. In this view it results that the United States is without jurisdiction to make other disposition of this land than under or through the grant, and as no harm can result by permitting Elliott, who claims under the grant, to make purchase of the land under the act of 1887, which by way of assurance will quiet his title, his purchase made thereunder will be permitted to stand.

In disposing of the claims asserted under the settlement laws it is sufficient to say (1) that although it has been determined by this Department that an excess exists in approvals made on account of the Wills Valley grant, the question is pending in the courts by reason of the suit to recover such excess, and the granted sections within the place or primary limits not certified or approved on account of the grant have never been restored to entry; (2) that the settlements made in 1882 were not based upon any decision by this Department holding these lands excepted from the grant and subject to settlement, for until 1887 the two grants were treated as one and when so considered there is no excess; (3) that the views herein expressed assume that the United States has already made disposal of these lands and is without jurisdiction to entertain claims thereto under the settlement laws, and (4) even if held to be excepted from the Wills Valley grant and subject to the provisions of the act of 1887 that your office decision rightly holds that the claims asserted by Williams *et al.* would not defeat the right of purchase as applied for under the fifth section of that act.

For the reasons herein given your office decision is affirmed.

SCHOOL LAND—MINERAL CHARACTER—SURVEYOR'S RETURN.

STATE OF UTAH.

A grant of lands to a State for school purposes does not carry lands known to be chiefly valuable for mineral at the time when the State's right would attach, if at all.

A mineral return by the surveyor-general does not have the effect to establish the character of lands as chiefly valuable for mineral, and can not of itself operate to take lands out of the grant to the State, as mineral lands; this can only be done by proof clearly showing that the lands were, at the time when the right of the State would have attached, known to contain valuable deposits of mineral, and to be chiefly valuable on account of such deposits.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *May 5, 1903.* (A. B. P.)

This is an appeal by the State of Utah from your office decision of July 10, 1902, whereby the petition filed by said State, March 25, 1902, asking that a hearing be ordered to determine whether the lands embraced in Sec. 2, T. 14 S., R. 6 E., and Sec. 36, T. 12 S., R. 6 E., passed to the State under its school grant made by section 6 of the act of July 16, 1894 (28 Stat., 107-109), or were excepted from said grant because known to contain valuable mineral deposits at the date when the State's right must have attached thereto, if at all, was dismissed.

Utah was admitted into the Union as a State by proclamation of the President, January 4, 1896 (29 Stat., 876). The lands in question were surveyed prior to that time, and were returned by the surveyor-general as mineral (coal) lands.

The petition avers, in substance, that the lands have never been known to contain valuable deposits of coal or other mineral, and that the same was at the date of the State's admission into the Union (the time when its rights thereto must have attached, if at all) of the class and character of lands intended by Congress to pass under its said grant.

The request for a hearing is predicated upon the theory that, in view of the surveyor-general's return, the lands can not be regarded or dealt with as having passed to the State so long as such return remains subsisting. The contention by the appeal is upon the same theory.

It is settled law that a grant of school lands to a State does not carry lands known to be chiefly valuable for mineral at the time when the State's right would attach, if at all. A mere mineral return by the surveyor-general, however, does not have the effect to establish the character of lands as chiefly valuable for mineral, and can not, therefore, in and of itself, operate to take lands out of the grant to the State, as mineral lands. This could only be done by proof clearly showing that the lands were, at the time when the right of the State would have attached, known to contain valuable deposits of mineral, and to be chiefly valuable on account of such deposits.

By the circular of instructions issued by your office, with the approval of this Department, March 6, 1903 (32 L. D., 39), it is declared, among other things, as follows:

RULE 1. When a school section is identified by the government survey and no claim is at the date when the right of the State would attach, if at all, asserted thereto under the mining or other public land laws, the presumption arises that the title to the land has passed to the State, but this presumption may be overcome by the submission of a satisfactory showing to the contrary. Applications presented under the mining laws covering parts of a school section will be disposed of in the same manner as other contest cases.

RULE 2. The State will not be permitted to make selection in lieu of land within a school section alleged to be mineral in character and for that reason excepted from its grant, whether returned by the surveyor-general as mineral or otherwise, in the absence of satisfactory proof that the base land was known to be chiefly valuable for mineral at the date when the State's right thereto would have attached, if at all. The proof must show the kind of mineral discovered upon the land and the extent thereof, when and by whom the discoveries were made, as far as practicable, whether any claim to the land was asserted under the mining laws at the date when the State's right thereto attached, if at all, and if so by whom, the nature and extent of the mining improvements placed upon the land by the mineral claimant, and what efforts have been and are being made to develop the land in good faith for mineral purposes. If, in any case, the proof does not clearly show that the base land was known to contain valuable mineral deposits, and to be chiefly valuable on account of such deposits, at the date the State's right would have attached thereto, a selection in lieu thereof will not be permitted. A certificate of the proper authorities that the base lands have not been sold, encumbered or otherwise disposed of must also be furnished.

There is nothing in the record to show that any claim under the mining laws was asserted to the lands here in question, or to any portion thereof, at the time when the right of the State must have attached thereto, if at all (which was the date the State was admitted into the Union), and it is therefore to be presumed that they passed to the State under its said grant. In view of this presumption, which subsists until overcome by satisfactory proof to the contrary as provided in said circular, the land department would not be justified to order a hearing as asked by the State in its petition. The lands being presumably the property of the State under its said grant, notwithstanding the mineral return of the surveyor-general, no useful purpose could be accomplished by such a proceeding.

It is stated in the record that a large number of coal filings have been made for portions of the lands in said section 2, township 14 south, range 6 east. Such filings should not have been allowed in the absence of a determination (upon notice to all parties interested, as in other contest cases), that the lands were known to be chiefly valuable for coal deposits at the date the State was admitted into the Union. You will therefore direct the local officers to notify the coal claimants that their filings will be canceled unless within a reasonable time, to be fixed by your office, they shall, after proper notice to the State,

and other interested parties, if any, submit evidence to satisfactorily show that the lands covered by such filings were known to be chiefly valuable for coal at the date the State was admitted into the Union. If evidence shall be submitted for the purpose and in the manner required, the case will be considered and adjudicated as are other contest cases; otherwise, the coal filings will be canceled.

The decision of your office is modified to conform to the views herein expressed.

FOREST RESERVE—INDIAN LANDS—ACT OF JUNE 4, 1897.

HIRAM M. HAMILTON.

Lands which are to be disposed of for the benefit of a tribe of Indians, and only under laws which require a cash payment, are not subject to selection under the act of June 4, 1897.

Acting Secretary Ryan to the Commissioner of the General Land Office, May 5, 1903. (F. L. C.) (W. C. P.)

Hiram M. Hamilton by his attorney-in-fact Robert E. Sloan, has appealed from your office decision of November 30, 1902, rejecting his application of April 6, 1901 (4018 your office series), under the act of June 4, 1897 (30 Stat., 36), to select the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 4, SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 8, SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 17, T. 34 N., R. 3 W., N. M. M., Durango, Colorado, in lieu of lands relinquished to the United States in the Lake Tahoe forest reserve, California.

Your office rejected the selection upon the theory that the lands applied for are "located in what was formerly the Ute Indian reservation, ceded to the United States under an agreement with the Ute Indians which was accepted and ratified by the act of Congress approved June 15, 1880 (21 Stat., 199)," and that the provisions of said act require that the lands so ceded shall be disposed of by cash entry only.

It is insisted, upon appeal, that these tracts are not a part of the lands ceded by the agreement ratified by said act of June 15, 1880, and that they are located in what was formerly the Southern Ute Indian reservation, opened to settlement and entry under the act of February 20, 1895 (28 Stat., 677).

The tracts in question are within the territory included in the Ute Indian reservation established by the treaty of March 2, 1868 (15 Stat., 619), and within the reservation, established in pursuance of the provisions of the agreement with said Indians, approved by the act of June 15, 1880, *supra*, for the Southern Utes. They never came under the operation of the provisions of said act of 1880 in respect of the disposal of the lands ceded by the agreement thereby ratified. An

agreement was negotiated by commissioners on the part of the United States with the Southern Utes, November 13, 1888, but was never ratified by Congress, and by the act of February 20, 1895, *supra*, it was enacted that said agreement "be and the same is hereby annulled and the treaty made with said Indians June 15, 1880, be carried out as herein provided, and as further provided by the general laws for settling Indians in severalty." It was then provided in said act that the Secretary of the Interior should cause allotments of land in severalty to be made to such of the Southern Ute Indians as might be considered by him qualified to take the same, such allotments to be made in accordance with the provisions of the act of June 15, 1880; that a certain portion of said reservation be set apart for the sole and exclusive use of such of said Indians as did not elect or were not deemed qualified to take allotments in severalty, and that the lands embraced within said reservation, except such as might be allotted or reserved, should be by proclamation of the President declared opened to occupancy and settlement, "and thereupon said lands shall be and become a part of the public domain of the United States and shall be subject to entry under the desert, homestead, and townsite laws and the laws governing the disposition of coal, mineral, stone and timber lands; but no homestead settler shall receive a title to any portion of such lands at less than one dollar and twenty-five cents per acre." It was further provided that the moneys realized from the sale of said lands should be paid to, or expended for the benefit of, the Southern Ute Indians.

By Executive proclamation of April 13, 1899 (31 Stat., 1947), the lands were opened to settlement and entry May 4, 1899, instructions to govern the disposition thereof being issued April 15, 1899 (28 L. D., 271).

While the modes of entry provided for these lands are somewhat extended the situation is in all essentials like that presented in the case of William C. Quinlan (30 L. D., 268), and this case is governed by the rule announced there. The rule that where Congress has declared that lands shall be disposed of under specific laws this Department has no authority to dispose of them in a different manner, has been recognized and applied in various decisions of the Department. (State of Utah, 30 L. D., 301; Joseph S. White, 30 L. D., 536, and authorities there cited.) Lands which are to be disposed of for the benefit of a tribe of Indians, and only under laws which require a cash payment, are not subject to selection under the act of June 4, 1897. This application can not be allowed, and the action of your office denying the same is, for the reasons given herein, affirmed.

FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

RICARD L. POWELL.

Under the exchange provisions of the act of June 4, 1897, title to fractional parts of a government subdivision may be accepted by the government where the owner relinquishes all the land in the subdivision to which he has title.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, May 5, 1903.* (J. R. W.)

Ricard L. Powell appealed from your office decisions of October 4, 1902, and January 9, 1903, rejecting his applications, numbers 1278, 1279, and 1280, your office series, under the act of June 4, 1897 (30 Stat., 36), to select certain lands at Las Cruces, New Mexico, in lieu of land relinquished to the United States in the Pikes Peak forest reserve, Colorado.

The applications were rejected by your office because the abstract of title showed that former owners of the subdivisions embracing the land involved had conveyed to the Colorado Midland Railroad Company for right of way a strip of land extending diagonally across each subdivision assigned as base for the selections. Your office assigned as authority for such decision the departmental decisions in F. A. Hyde *et al.* (28 L. D., 284), Edgar A. Coffin (30 L. D., 15), and Frederick W. Kehl, September 19, 1902 (not reported), wherein your office states that: "It was held that this office could not accept land thus encumbered by an easement in exchange for public lands."

Examination of the abstract of title shows that Dilley French, by special warranty deed (No. 2 of abstract), July 27, 1886, for a consideration of \$500, purported to convey to the Colorado Midland Railway Company "a strip of land one hundred feet wide through the south half of the southwest quarter of the northwest quarter of the southwest quarter of section 25, town. 13 S., R. 68 W., for right of way." This conveyance may be ignored, as the abstract shows that title out of the United States originated by a cash entry of Cephas T. R. McClelland, August 18, 1888, so that in 1886 the United States was owner of the land, and nothing could pass by French's deed, except such possessory right or improvements as he may have had.

McClelland conveyed to Norman C. Jones, who June 13, 1893, by warranty deed, for \$275, conveyed to the same railroad company "a strip 100 feet wide, being 50 feet on each side of center line of road across the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 25, T. 13 N., R. 68 W." The abstract indicates that through mesne conveyances the title came to George W. Walker, who, September 10, 1895, by quitclaim deed (No. 13 of abstract), for \$75 conveyed to the same company "a strip of land one hundred feet wide through the northwest quarter of the southwest quarter and the south half of the southwest quarter of said

section 25, for right of way." In subsequent deeds of Scattergood to Moses, of Moses to Powell, and of Powell to the United States, the land embraced in the former grants of right of way is excepted, so that they never took title to that part of the several government subdivisions traversed by the railroad, but to only so much of those subdivisions as had not been conveyed to the railroad company. No easement existed on the land to which Powell got title and which he conveyed to the United States. All the land to which Powell got title, all of which he conveyed to the United States, was and is, if the abstract is accurate, free of any easement or servitude. He obtained title to and relinquished to the United States only detached portions of government subdivisions, severed into irregular tracts by the strip formerly conveyed to and occupied by the railroad company. It follows that the cases cited as basis for your office decision are irrelevant and inapplicable to the facts.

The question presented by this case is not whether title subject to a servitude can be accepted under the act of June 4, 1897, but whether title can be accepted to fractional parts of government subdivisions where the owner relinquishes all the land in the subdivision to which he has title.

While the government disposes of its lands only by entire subdivisions, it is of constant occurrence that private owners subdivide government subdivisions and dispose of their holdings in irregular parcels. The object of the act of June 4, 1897, was to extinguish private title to all lands within the forest reserves, so as to secure a more effective control. An irregular fractional tract held in private right serves as a base for the operations of depredators, or habitat of disorderly or objectionable persons. For this reason the land department in administration of the act has refused to accept relinquishment of part only of a subdivision when the abstract showed that the relinquisher was owner of all of it or of more of it than his deed conveyed to the government. The same reason of policy that impels to the rejection of a relinquishment of the fraction of a subdivision in cases where the owner holds the remainder or another fraction of it prompts to the acceptance of the relinquishment of such fraction in cases where the owner conveys to the government the entire tract that he holds. All the existing private title is thereby extinguished and the object of the act is thereby promoted. Such fractional tracts, if title is otherwise unobjectionable, should be accepted as base for selections under the act.

Two objections lie to the abstract as presented. Neither the deeds to the railway company, nor the subsequent conveyances of the subdivisions excepting the strip so conveyed, definitely describe the location or area of the strip. Reference is made to the road as constructed. The road being a visible object, ascertainable upon the

ground, such reference is sufficient to protect the rights of the railroad company, but is insufficient to enable your office to ascertain the area of the excepted strip or to determine what area of land was conveyed to the United States. A blue print plat, purporting to have been made by the chief engineer of the railroad company, is filed by the selector, which shows the route of the road only through section 26, no subdivisions of which are here involved, but not through the subdivisions of section 25 here in question. Attached to this plat is a statement and computation, signed by the engineer, as to the area of the right of way strip in the several subdivisions of section 25 in question. This is not sworn to and should not be accepted by your office without a verified plat of the road through the subdivisions of section 25, by which your office could verify the computations of the engineer and satisfactorily determine the area of the fragmentary subdivisions relinquished to the United States.

Another defect in the abstract of title is that it indicates, but does not show, that George W. Walker, owning the land in question, died at some time between September 10, 1895, when he executed deed No. 13 of the abstract, and July 19, 1899, when "Cora E. Sanford, formerly Cora E. Walker, widow and residuary legatee of George W. Walker, deceased," executed deed 16, purporting to convey the premises to George J. Scattergood. There is no evidence of Walker's death, no entry, memorandum, or notation of his will or of its probate, and no evidence that his estate is settled or the claims of his creditors paid or barred. Reference to the serious complications that arose in the similar case of E. S. Howe, of April 18, 1903 (unreported), wherein creditors of a decedent sought to subject to payment of the decedent's debts land of the United States for which your office had accepted conveyance from one taking title by mesne conveyances under the legatee, and had issued a patent for the land selected, is sufficient to show the necessity for greater caution in such cases. Title to lands derived from a decedent's estate should never be accepted until it is shown that the estate is finally settled or that the claims of creditors upon the decedent's lands have been in some manner discharged or barred.

For the error first mentioned your office decision herein is vacated, and the case is remanded to your office for further proceedings appropriate thereto.

MORROW ET AL. *v.* STATE OF OREGON ET AL.

Motion for review of departmental decision of March 16, 1903, 32 L. D., 54, denied by Acting Secretary Ryan May 5, 1903.

SWAMP LANDS—MINNESOTA—CHARACTER OF LANDS.

MARY E. COFFIN.

A tract of land having been found by the land department to be "swamp by field notes," its character will not be again inquired into except upon a clear and direct averment of the insufficiency of the evidence in the field notes to support the finding.

A homestead entry of land subject to selection by a State under its grant of swamp and overflowed lands, made subsequent to the grant to the State, does not exclude the land embraced therein from the operation of the grant.

The swamp-land grant to the State of Minnesota being a grant *in presenti* of all land of specific character in place, and the field notes having been accepted by both the State and the government as the evidence by which their rights shall be adjusted, a third party will not be allowed to question an adjustment satisfactory to the parties themselves.

An application by the State to select lands under its swamp grant while pending segregates the land from other location, entry, or disposal.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, May 7, 1903.* (J. R. W.)

Mary E. Coffin filed a motion for review of departmental decision of October 26, 1902 (unreported), canceling her application for selection under the act of June 4, 1897 (30 Stat., 36), as to the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 17, T. 58 N., R. 20 W., 4th P. M., Duluth, Minnesota.

Mrs. Coffin appealed from your office decision of June 9, 1902, in so far as it required her to comply with the requirements of the circular of December 13, 1886 (5 L. D., 279), by filing a corroborated affidavit that the land in its natural state was not swamp and overflowed and thereby rendered unfit for cultivation. It was claimed by Mrs. Coffin upon her appeal that the governor of Minnesota, December 1, 1883, had relinquished the swamp land claim of the State, but upon examination of the records of your office the Department found that such relinquishment was qualified and limited to the benefit of the homestead entry of Henry J. Willis, made December 15, 1875, finally canceled by your office August 15, 1893, and that the State's swamp land selection was still pending. Thereupon it was held that such selection segregated the land, and that it was not subject to selection by Mrs. Coffin, and her selection was canceled. The motion assigns errors in the departmental decision, that it exceeded the proper limits of appellate jurisdiction in that (1) it deprived her of right to contest the swamp character of the land, and if no right to contest existed (2) it deprived her of being heard upon what the field-notes do actually show, and the departmental decision should have been limited to a review of that from which appeal was taken; (3) that at the date of presentation of the State's swamp land list, the land was covered by Willis's existing entry of record, and was not subject to the State's

selection; (4) that the governor's relinquishment should be given a general effect and not be limited to the benefit of Willis's entry only.

The first contention is disposed of, since the motion was filed, by the decision in State of Minnesota (32 L. D., 65, 70), that all existing contests or controversies in which there is no claim of actual and *bona fide* settlement will be disposed of under the original plan of following the field-notes.

As to the second contention, it must be noted that Mrs. Coffin's brief upon appeal states that your office, February 3, 1878, "found said land to be 'swamp by field notes.'" It is not now alleged but that the field-notes show the land to be of the character that passed by the grant. That question having been decided favorably to the State in 1878, long prior to any attempt by Mrs. Coffin to acquire any interest in the land, ought not to be reopened to the State's prejudice, except upon a clear and direct averment of the insufficiency of the evidence in the field-notes to support the finding.

The third contention proceeds upon a misconception of the nature of the State's claim. It was not the location of a general right to select or locate a quantity of public land, but was a claim of prior grant of this specific land, so that Willis's entry did not exclude the tract from listing by the State as previously granted. The State might waive its grant or might insist upon it. Willis's entry, made after the grant, would not exclude the land from its operation, or from listing by the State as part of its prior grant.

Nor can the fourth contention be sustained. The State's grant being *in presenti* of all land of specific character in place, and the field-notes being now accepted by both the State and the government as the evidence by which their rights shall be adjusted, a third party will not be allowed to question an adjustment satisfactory to the parties themselves. As against a later claimant the State's application while pending segregates the land from other location, entry, or disposal. "In the administration of the swamp land grant, lands formally claimed thereunder must of necessity, during the pendency of such claim, be reserved from any other disposition." St. Louis, Iron Mountain and Southern Railway Company (11 L. D., 157, 160); Chicago, Milwaukee and St. Paul Railway Company (15 L. D., 121, 123). It is not compatible with good administration to permit the filings of applications for entry or selection to be held unacted upon until land segregated by former pending applications may be restored to the public domain.

The State has not waived its right fixed by the decision of your office, February 3, 1878, nor authorized its governor to do so, except under the act of February 24, 1881 (Gen. Laws Minn. 1881, p. 205-7), as to lands "claimed by the State as swamp lands now occupied or held by actual settlers, their heirs or assigns, or claimants who hold the same by virtue of homestead, pre-emption, or timber culture

entry." The statute gave only a limited power to the governor. By no fair construction of the act could it be held that he had power to make a general waiver of the right of the State under its grant. It is also clear that he did not assume to do so or to exceed the limit of the power granted.

The motion therefore presents no reason to vacate, modify, or recall said departmental decision, and none appearing otherwise, the same is adhered to and the motion is denied.

RAILROAD GRANT—CONFIRMATION—ACT OF MARCH 2, 1889.

WEBB v. LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON CO.

The act of March 2, 1889, forfeited lands granted to the State of Michigan by the act of June 3, 1856, in aid of the construction of certain railroads, and the third section of that act confirmed certain disposals made of the forfeited land by proper officers of the United States, with a proviso "that nothing herein contained shall be construed to confirm any sales or entries of lands, or any tract in such State selection upon which there were *bona fide* pre-emption or homestead claims on the first day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed." *Held*: That such proviso is a saving clause in favor of such claimants who may entitle themselves to patents, and not an excepting clause which would prevent the confirmation becoming effective as to such lands upon abandonment of the claims thereto.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, May 7, 1903.* (E. J. H.)

The land involved herein is the undivided one-half interest in the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 15, T. 43 N., R. 35 W., Marquette, Michigan, land district, and the case is before the Department upon the appeal of the plaintiff, Thomas Webb, from your office decision of November 10, 1902, rejecting his application for confirmation of his right thereto under the third section of the forfeiture act of March 2, 1889 (25 Stat., 1008).

The above-described tract is within the overlapping limits of the grants for the Marquette and State Line and the Ontonagon State Line railroads, by the act of June 3, 1856 (11 Stat., 21), and was certified to the State on account of said grants. Subsequently, upon a change of the line of the Marquette road said tract was, on May 1, 1868, relinquished to the United States. On May 21, 1871, it was certified to the State for the benefit of the defendant company under the act of July 3, 1866 (14 Stat., 81), granting lands to the State of Michigan to aid in the construction of a ship canal.

The act of March 2, 1889, *supra*, declared the lands granted by the act of 1856 to aid in the construction of the Ontonagon and State Line road, opposite the unconstructed portion of that road, forfeited, with

a provision therein confirming the title to all of said lands that had theretofore been disposed of by the proper officers of the United States, or under State selection, subject to the prior right of "*bona fide* preemption or homestead claims on the first day of May, 1888."

In the case of *Donahue v. Lake Superior Ship Canal, Railway and Iron Company* (155 U. S., 386), it was held that the lands within the place limits of both the Marquette and Ontonagon railroads passed in undivided moieties to each company, and following the decision in the Cunningham case (*ibid.*, 354), it was also held that the relinquishment by the State of Michigan to the United States of such lands was invalid as to the undivided moiety of the Ontonagon company. The grant, therefore, to the Marquette company, having been lawfully surrendered to the United States prior to the selection of the tract in controversy by the canal company, the undivided half thereof passed to said company under its grant.

The other undivided one-half of said tract, being the land in controversy herein, is claimed by the canal company under the confirmatory provisions of the third section of said forfeiture act. The plaintiff, Webb, also claims said undivided half interest by virtue of the confirmatory provisions of said act, and initiated these proceedings therefor by filing, on January 24, 1895, an affidavit alleging that on May 1, 1888, one O'Dell was in the actual occupation of said tract, and that he (Webb) as the assignee of O'Dell is entitled thereto.

April 5, 1895, a hearing was had in the case at which both parties appeared and submitted testimony. The local officers found that O'Dell had an actual residence upon the tract during the spring, summer and fall of 1888, and recommended that a patent be issued to Webb therefor, as transferee of O'Dell; from which the canal company appealed.

November 10, 1902, your office decision found that the testimony elicited at the hearing, regarding O'Dell's occupancy and improvements on the tract, was conflicting and that it was fatally defective in not showing that he was qualified as to citizenship, and the other statutory requirements, to make entry thereof. The decision of the local officers was reversed, the claim of Webb rejected, and the title to the land was held to have been confirmed in the canal company by the act of 1889; from which Webb has appealed to the Department.

The last paragraph of the third section of the forfeiture act of March 2, 1889, under which Webb claims the undivided one-half interest in the land in controversy, is as follows:

That nothing herein contained shall be construed to confirm any sales or entries of lands, or any tract in such State selection upon which there were *bona fide* preemption or homestead claims on the first day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed.

O'Dell was not produced as a witness at the hearing, he having moved away from that vicinity, and the evidence submitted fails to show satisfactorily that he was a settler on the land on May 1, 1888. Nothing was shown regarding his qualifications to make entry, except that he claimed to be a "Yankee" and looked like one.

Moreover, Webb makes no claim of settlement or occupancy of the land until long after May 1, 1888, but claims the same through an assignment or quit-claim deed bearing date January 28, 1895, from O'Dell, who had abandoned the land in 1889.

The proviso to the third section of the act of 1889, excepting from the confirmation therein declared all lands included in *bona fide* pre-emption or homestead claims on May 1, 1888, fairly considered, is a saving clause in favor of such claimants who may entitle themselves to patents, rather than an excepting clause, and when thus considered the confirmation of the canal selection must be held to have become effective upon the abandonment of O'Dell's claim, even were such claim shown to have been a valid one on May 1, 1888, which, as before stated, is not established by the record made in this case.

Your office decision rejecting the claim of Webb and holding the title to the land to have been confirmed in the canal company by the act of 1889, is affirmed.

LYNN ET AL. v. MILES.

Motion for review of departmental decision of February 14, 1903, 32 L. D., 11, denied by Acting Secretary Ryan, May 11, 1903.

MINING CLAIM—MILL SITE—ALASKA.

ALASKA COPPER COMPANY.

Section 2337, R. S., does not contemplate the location of a separate mill site for each of a group of contiguous lode claims held and worked under a common ownership. N. 1111

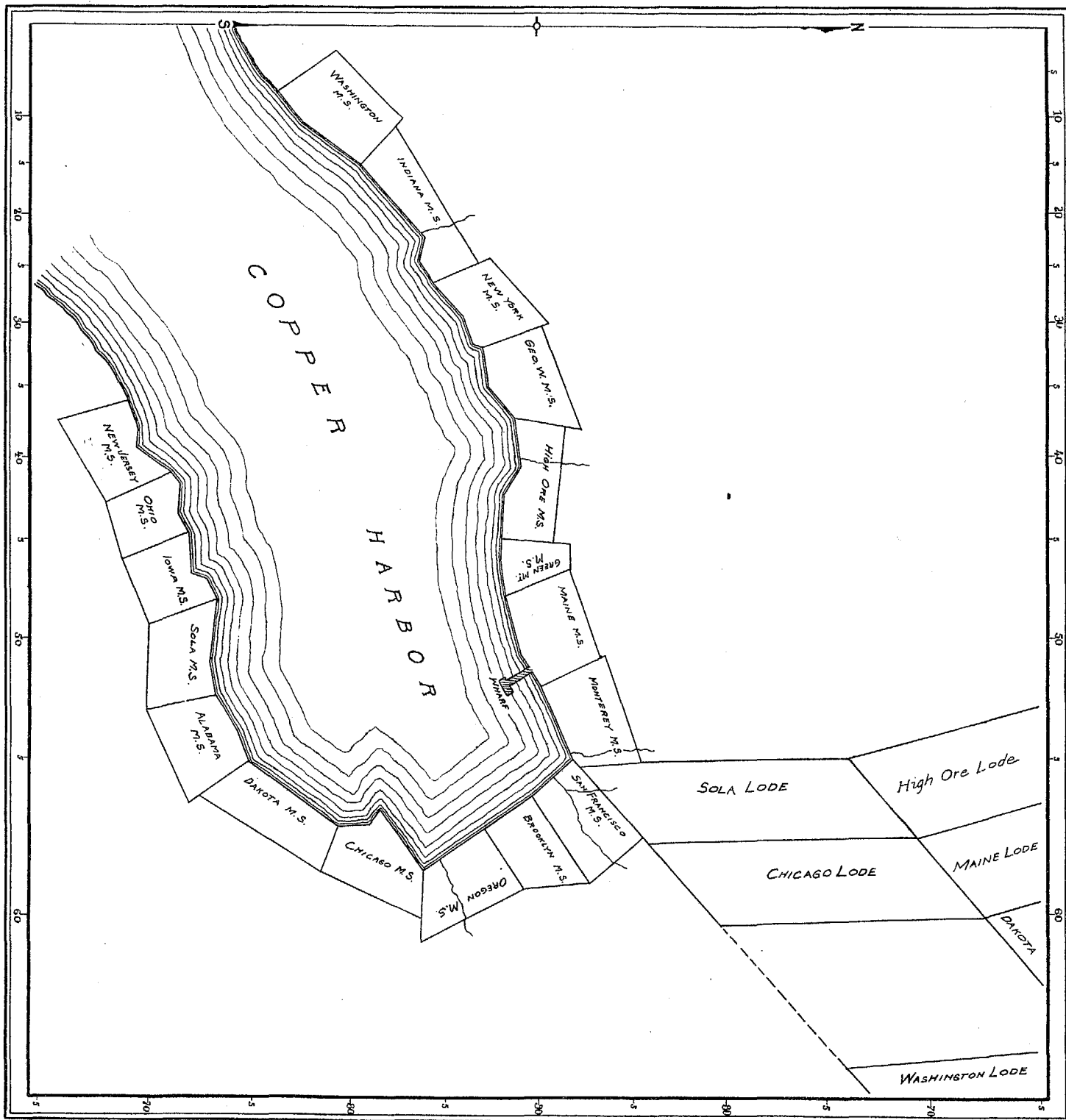
The statute requires that a mill site be used or occupied by the proprietor of the vein or lode for *mining* or *milling* purposes; and some step in or directly connected with the process of mining or some feature of milling must be performed upon, or some recognized agency of operative mining or milling must occupy, the mill site at the time patent is applied for to come within the purview of the statute.

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Kreg 10/16 The statute in terms permits only "non-mineral land, *not contiguous* to the vein or lode," to be appropriated for mill-site purposes.

In Alaska, the boundary lines of a mill-site location can not lawfully be laid within sixty feet of the shore line of navigable streams, inlets, gulfs, bays, or the sea.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, May 12, 1903.* (F. H. B.)

August 30, 1901, the Alaska Copper Company made entry, No. 84, for the Copper Mountain group of lode mining claims and mill sites, survey No. 419 A & B, Sitka, Alaska. The group comprises eighteen



lode and an equal number of mill-site claims, bearing corresponding names.

July 11, 1902, your office found, among other things, in substance and effect, that there is no apparent present use or occupancy of the mill-site claims in connection with the operation of the lode claims, but that they appear to be held for prospective use and occupancy; and that certain specified improvements relied upon to indicate actual use and occupancy are located wholly upon one of the mill-site claims; and it was held that claimant be allowed sixty days within which to show use and occupancy of each mill-site claim in connection with the particular lode with which it is claimed, upon pain of cancellation of the entry, to the extent of the mill-site claims, in the event of default.

The company has appealed to the Department.

The lode claims are shown by the official plat to form a compact group, the southern extremity of which (the southwest corner of the Sola claim—an acute angle) approaches very near to the shore line of Copper Harbor, an arm or inlet of the North Pacific Ocean. From this point the exterior boundaries of the group bear rapidly away from the shore line.

By the diagram which accompanies this opinion, prepared from the official plat, it is to be observed that the mill-site claims form an unbroken chain in the shape of a horseshoe and surround the north-eastern extremity of Copper Harbor, along the water's edge, so as to occupy an uninterrupted stretch of the water front, nearly two miles in length. Two of the mill-site claims, the Monterey and San Francisco (near the center of the chain or horseshoe), are contiguous to and adjoin the Sola lode claim on its westerly side line and southerly end line, respectively. The two arms of the horseshoe bear from this point away from the mining claims, so that the most remote of the mill-site claims lie more than half a mile in an air line from the nearest point of the group of lode claims and nearly two miles from the most northerly of those claims.

Provision for the acquisition of title to a mill-site is made by section 2337 of the Revised Statutes, 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 first clause of the section is applicable here. Its manifest purpose is to permit the proprietor of a lode mining claim to acquire

a small tract of non-contiguous, non-mineral land as directly auxiliary to the prosecution of active mining operations upon his lode claim, or for the erection of quartz-mills or reduction works for the treatment of the ore produced by such operations. The area of such additional tract is by the terms of the statute restricted to five acres, as obviously ample for either purpose. The logical inference is that the mill-site provision is intended solely to subserve a recognized practical necessity, contemplating an accession for specified purposes to acquired mining rights, and is not a provision for the acquisition of merely additional superficies in connection with each lode location under section 2320. Whilst no fixed rule can well be established, it seems plain that ordinarily one mill site affords abundant facility for the promotion of mining operations upon a single body of lode claims. It is not to be supposed that Congress intended a grant of an equal number of such tracts as rightfully incident to all the lode claims of a compact group held and worked under a common ownership. Every provision for the disposal of the public domain is intended to subserve some substantial, useful purpose. There is nothing in the language or reason of the statute to permit a mill site to be taken and acquired in connection with each mining claim of such a group as that in question here. A separate mill site can not, therefore, be regarded or allowed as complementary to each of these lode locations.

In any event, the relative positions of the mill-site claims of the group, coupled with the fact that but one of them (the Maine) is used or occupied at all, indicates that the others are included in common with it in the application for patent upon the mistaken theory that the same principle is applicable with respect to them as with respect to a number of mining claims held in common; and the location of the greatest possible number of mill-site claims, following and conforming to the shore line of Copper Harbor, so as to surround and occupy its extremity, leads to the conviction that the real and ultimate purpose of the applicant is, not in good faith to secure title to ground actually needed and used "for mining or milling purposes," but to secure control of and title to extensive and valuable water front. This is manifestly not in the contemplation of the statute.

The structures upon the Maine mill-site claim are certified by the surveyor-general to consist of "a boarding-house, store, sawmill, and wharf." These are relied upon as evidencing use and occupation of that claim in satisfaction of the requirements of section 2337. That they accomplish this end the Department is unable to agree. The language of the section is, "used or occupied" for "*mining or milling purposes.*" It contains in terms no requirement of an expenditure in labor or improvements, as under sections 2324 and 2325, but the nature of the use or occupation of the ground is prescribed, and the character of the utilities requisite for either of such specified purposes

is by necessary implication made manifest. A mill site is required to be used or occupied distinctly and explicitly for *mining* or *milling* purposes in connection with the lode claim with which it is associated. This express requirement plainly contemplates a function or utility intimately associated with the removal, handling, or treatment of the ore from the vein or lode. Some step in or directly connected with the process of *mining* or some feature of *milling* must be performed upon, or some recognized agency of operative *mining* or *milling* must occupy, the mill site at the time patent thereto is applied for to come within the purview of the statute. None of the works or structures upon the Maine mill-site claim and here relied upon is such a mining or milling appliance or agency as the statute contemplates, and must be held to fall short of the requirement thereunder.

A further and equally fatal objection to the entry, with respect to the mill-site claims, lies in the fact that these claims are contiguous, as a group, to the group of lode claims with which they are claimed. The statute in terms permits only "non-mineral land, *not contiguous* to the vein or lode," to be appropriated for mill-site purposes, and only "such *non-adjacent* surface ground" to be embraced and included in an application for patent for the lode claim, and limits the area of "such *non-adjacent* land" to five acres. These terms are too plain to invite discussion. In this case the lode and mill-site claims form one continuous, uninterrupted group, in manifest contravention of the plain terms of the statute.

All other considerations aside, the mill-site claims in question should not have been allowed to pass to entry in the positions in which they are located. By the 10th section of the act of May 14, 1898 (30 Stat., 409, 413), it is provided that "a roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway" along all navigable streams, inlets, gulfs, bays, and the seashore in Alaska. Evidence of the navigability of Copper Harbor, sufficient for the purposes of this case, is found in the certification on the company's behalf of the wharf extending from the Maine mill-site claim into the waters of the harbor. Being non-mineral lands, these mill-site claims do not fall within the exception of mineral lands from such reservation, provided by section 26 of the act of June 6, 1900 (31 Stat., 321, 330), and therefore their shoreward boundaries could not lawfully be laid within sixty feet of the water's edge.

In view of the foregoing considerations the entry, as to all the mill-site claims, must be canceled, and it is so ordered. The decision of your office is modified accordingly.

COMPULSORY ATTENDANCE OF WITNESSES—ACT OF JANUARY 31, 1903.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 20, 1903.

Registers and Receivers, United States Land Offices.

GENTLEMEN: Your attention is directed to the provisions of the act of Congress approved January 31, 1903 (32 Stat., 790), entitled "An act providing for the compulsory attendance of witnesses before registers and receivers of the land office."

The act reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That registers and receivers of the land office, or either of them, in all matters requiring a hearing before them, are authorized and empowered to issue subpoenas directing the attendance of witnesses, which subpoenas may be served by any person by delivering a true copy thereof to such witness, and when served, witnesses shall be required to attend in obedience thereto: *Provided,* That if any subpoena be served under the provisions of this act by any person other than an officer authorized by the laws of the United States, or of the State or Territory in which the depositions are taken, the service thereof shall be proved by the affidavit of the person serving the same: *Provided further,* That said subpoenas shall be served within the county in which attendance is required, and at least five days before attendance is required.

SEC. 2. That witnesses shall have the right to receive their fee for one day's attendance and mileage in advance. The fees and mileage of witnesses shall be the same as that provided by law in the district courts of the United States in the district in which such land offices are situated; and the witness shall be entitled to receive his fee for attendance in advance from day to day during the hearing.

SEC. 3. That any person wilfully neglecting or refusing obedience to such subpoena, or neglecting or refusing to appear and testify when subpoenaed, his fees having been paid if demanded, shall be deemed guilty of a misdemeanor, for which he shall be punished by indictment in the district court of the United States or in the district courts of the Territories exercising the jurisdiction of circuit or district courts of the United States. The punishment for such offense, upon conviction, shall be a fine of not more than two hundred dollars, or imprisonment not to exceed ninety days, or both, at the discretion of the court: *Provided,* That if such witness has been prevented from obeying such subpoena without fault upon his part he shall not be punished under the provisions of this act.

SEC. 4. That whenever the witness resides outside the county in which the hearing occurs any party to the proceeding may take the testimony of such witness in the county of such witness's residence in the form of depositions by giving ten days' written notice of the time and place of taking such depositions to the opposite party or parties. The depositions may be taken before any United States commissioner, notary public, judge or clerk of a court of record. Subpoenas for witnesses before the officer taking depositions may issue from the office of the register or receiver, or may be issued by the officer taking the depositions, and disobedience thereof, as defined in this act, shall also be punished; and the witness shall receive the same fees and mileage and be subject to the same penalties in all respects as in case of violation of a subpoena to appear before the register or receiver, and subject to the same limitations. The fees of the officer taking the depositions shall be the same as those allowed in the State or Territorial courts, and shall be paid by the party taking the

deposition, and an itemized account of the fees shall be made by the officer taking the depositions and attached to the depositions.

SEC. 5. That whenever the taking of any depositions taken in pursuance of the foregoing provisions of this act is concluded the opposite party may proceed at once at his own expense to take depositions in his own behalf, at the same time and place and before the same officer: *Provided*, That he shall, before taking of the depositions in the first instance is entered upon, give notice to the opposing party, or any agent or attorney representing him in the taking of said depositions, of his intention to do so.

The first section of the act authorizes and empowers the register and receiver, or either of them, to issue subpoenas directing the attendance of witnesses at hearings to be held before them; and requires such witnesses, when duly served as herein provided, in the county wherein the land office is situated, to attend in obedience to the summons.

Registers and receivers, or either of them, when requested in writing, by either party to a cause pending before them, will issue a subpoena for such witnesses as the applicant may desire to testify in his behalf at such hearing.

The subpoena may be in the following form:

THE UNITED STATES OF AMERICA.

To.....

You are hereby commanded to be and appear before.....
at.....office, in....., in the county of.....,
State (or Territory) of....., at the hour of.....m. on
the.....day of....., 190., to testify in behalf of.....
at a hearing, to be then and there held, wherein.....
is.....and.....is....., and herein fail not at your peril.

Issued this.....day of....., 190....

.....
.....

The service of the subpoena and proof of the same as provided in said section will devolve upon the party in whose behalf the subpoena is issued, and the officer issuing the same shall deliver to such party the original and a copy of the same for each witness named therein. No fee is provided for the register and receiver for issuing such process.

Section 2 of the act fixes the fees and mileage of witnesses attending before registers and receivers at the same as that provided by law in the district courts of the United States for the district in which the land office is situated and gives to the witness the right to receive the fee for one day's attendance and mileage in advance, and also entitles him to receive his fee for attendance in advance from day to day during the hearing. Such payments must be made by the respective parties to the hearing in whose behalf the witness is subpoenaed, except in cases in which the United States is a party. In such cases the receiver will pay the fees and mileage of the witnesses on behalf of the Government, and it will be his duty to make requisition based upon an estimate furnished by the special agent for funds to pay all expenses chargeable to the United States in such hearings.

Section 3 fixes the punishment to which persons are liable who wilfully neglect or refuse obedience to such subpoena, and provides the method of enforcing the same, which shall be by indictment in the district court of the United States or in the district courts of the Territories exercising the jurisdiction of circuit courts of the United States.

Section 4 authorizes any party to the proceedings to take the testimony of any witness, who resides outside of the county in which the hearing occurs, by deposition, which, upon ten days' previous notice, may be taken before any United States commissioner, notary public, judge or clerk of a court of record in the county where the witness resides. In such case the party desiring to take the deposition will be required to file with the register or receiver an affidavit setting forth the name and the address of the witness; that he resides outside the county in which the land office is situated, and that for such reason he desires to take the testimony of the witness named, in the form of a deposition. Whereupon it shall be the duty of the register or receiver, or either of them, to enter an order designating the time and place at which such deposition will be taken, and to issue a commission to some officer designated by this act to take the same. In such case either the register or receiver or the officer before whom the deposition is to be taken is authorized to issue subpoena for the witness, using substantially the form hereinbefore prescribed, and disobedience thereof as defined in the act is punishable as in case of violation of a subpoena to appear before the register or receiver. Witnesses attending before such officers are entitled to the same fees and mileage and payable in the same manner, as if they appeared before the register and receiver at the district land office, and the fees of the officer taking such deposition will be the same as those allowed to such officers respectively for taking depositions to be used in the State or Territorial courts. Such fees are to be paid by the party taking the deposition, and the officer taking the same is required to attach thereto an itemized account of the fees charged and collected.

It will be the duty of the register and receiver to see that this requirement is observed.

Section 5 extends to the opposite party the right to take depositions before the same officer, at once upon the conclusion of the first depositions; and he is entitled to have his witnesses summoned in like manner and subject to the same conditions as his antagonist: Provided that notice of the intention to take such testimony is given to the opposite party, his agent or attorney, "before taking of the depositions in the first instance is entered upon."

To aid in enforcing the punitive provisions of this act, in issuing a commission to take testimony you will instruct the commissioner to make special return to you of the names of any witness who, after

service has failed, under the provisions of section 3, to respond to the subpœna, and you will make prompt report to the United States district attorney of the proper district, of the names of such party or parties as well as of those who having been duly summoned have failed to appear before you, to the end that he may take such action in the premises as the law requires.

The object and purpose of this act is to afford to litigants the means of enforcing the attendance of witnesses when hearings are ordered. It is not exclusive in its operation to the extent of abolishing the existing methods, under the rules, by which the attendance of witnesses may be secured or their testimony taken by deposition; and parties may elect to use either method of procedure. But should they think proper to proceed under the existing rules of practice and fail to secure the attendance of their witnesses, they will not be entitled to a continuance as heretofore.

Very respectfully,

W. A. RICHARDS, *Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

HOMESTEAD—ACTS OF MARCH 2, 1889, AND MAY 22, 1902.

THOMAS L. BOWDON.

The act of May 22, 1902, does not enlarge the scope of the act of March 2, 1889, so as to allow an additional entry under that act for a greater amount of land than therein specified, but gives a new and independent right to make a homestead entry, for not exceeding one hundred and sixty acres, to such persons as would have been entitled to the benefit of the "free homestead act" had they not made final entry prior to the passage thereof.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *May 15, 1903.* (A. S. T.)

On July 30, 1895, Thomas L. Bowdon made homestead entry for lots 1 and 2, Sec. 6, T. 21 N., R. 1 E., C. M., Alva land district, Oklahoma, containing 81.20 acres. On March 10, 1900, he made final proof in support of said entry and paid the Indian price for the land, and on March 14, 1900, final certificate issued to him for the same, and a patent issued to him on October 4, 1900.

On March 29, 1900, Bowdon made entry for the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 5, T. 22 N., R. 15 W., I. M., same land district, containing 80 acres, as an addition to his said former entry, under section 6 of the act of March 2, 1889 (25 Stat., 854).

On January 9, 1902, Bowdon applied to amend his last-named entry, so as to include, besides the land therein described, the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 5, T. 22 N., and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 32, T.

23 N., R. 15 W., I. M., same land district. He stated in his last-named application "that, under the present law of June 6, 1890 [evidently meaning June 5, 1900], he believes himself entitled to an additional 80 acres."

On February 19, 1903, your office rendered a decision rejecting said application, on the ground that the applicant is not entitled to make a second homestead entry under the act of June 5, 1900, for the reason that he did not commute his former entry; and from that decision he has appealed to this Department.

It is insisted on behalf of the applicant, that, while he may not be entitled to make the entry applied for under the act of June 5, 1900, he is entitled to the same under the act of May 22, 1902 (32 Stat., 203). Section 2 of that act provides:

That any person who, prior to the passage of an act entitled "An act providing for free homesteads on the public lands for actual and *bona fide* settlers, and reserving the public lands for that purpose," approved May seventeenth, nineteen hundred, having made a homestead entry and perfected the same and acquired title to the land by final entry by having paid the price provided in the law opening the land to settlement, and who would have been entitled to the provisions of the act before cited had final entry not been made prior to the passage of said act, may make another homestead entry of not exceeding one hundred and sixty acres of any of the public lands in any State or Territory subject to homestead entry: *Provided*, That any person desiring to make another entry under this act will be required to make affidavit to be transmitted with the other filing papers now required by law giving the description of the tract formerly entered, date and number of entry, and name of the land office where made, or other sufficient data to admit of readily identifying it on the official records: *And provided further*, That said person has all the other proper qualifications of a homestead entryman.

It appears that Bowdon made the first named entry, perfected the same, and received final certificate thereon prior to May 17, 1900, and is therefore entitled to the benefit of the above quoted statute. He has made entry for a tract of eighty acres as an additional entry under the act of March 2, 1889 (25 Stat., 854), and it is that entry which he now seeks to amend by including therein another tract of eighty acres, which would make his additional entry embrace one hundred and sixty acres. The act of March 2, 1889, *supra*, only allows an additional entry for an amount of land which, together with the original entry, shall not exceed one hundred and sixty acres. Inasmuch, therefore, as the amendment applied for would make the additional entry, together with the original entry, embrace 241.20 acres, the application to amend the additional entry, as such, must be rejected.

The act of May 22, 1902, *supra*, did not enlarge the scope of the act of March 2, 1889, so as to allow an additional entry under that act for a greater amount of land than therein specified: but it did give a new and independent right to make a homestead entry for not exceeding one hundred and sixty acres to the class of persons therein specified, and Bowdon appears to be clearly included therein. Therefore, while he

can not take the present land applied for as an amendment to his additional entry, there seems to be no reason why he should not be permitted to relinquish his additional entry and make a new entry under the act of May 22, 1902, for the land embraced therein, together with the tract now applied for.

You are therefore directed to cause Bowdon to be notified that he will be allowed thirty days from notice hereof in which to make such entry in accordance with the above conditions.

Your said decision is modified accordingly.

MINTON *v.* BYERS.

Motion for review of departmental decision of March 21, 1903, 32 L. D., 71, denied by Acting Secretary Ryan, May 16, 1903.

NEW MEXICO—LEASING OF SCHOOL LANDS.

KLASNER *v.* LUMBLEY.

The question of leasing school lands in the Territory of New Mexico under territorial laws is one exclusively for the consideration of the Board of Public Lands of said Territory.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *May 28, 1903.* (G. B. G.)

This is a petition filed on behalf of Mrs. Lillie C. Klasner, asking that you be instructed to forward the papers on file in your office in the matter of her proffered appeal to the Department, from the action of the Board of Public Lands of the Territory of New Mexico, awarding a lease of Sec. 16, T. 11 S., R. 18 E., in said Territory, to one William H. Lumbley.

It appears from the petition that this land was first leased to Lumbley by the Board of Public Lands, October 23, 1899, and that this lease was approved by the Secretary of the Interior, January 12, 1900. In the meantime, however, the Board had leased the same land to Mrs. Klasner, which lease, together with a recommendation by the Board that the lease to Lumbley be canceled, was forwarded for consideration under section 10 of the act of June 21, 1898 (30 Stat., 484). Before the lease to Mrs. Klasner had been submitted to the Secretary of the Interior for his action, your office addressed a communication to the Department calling attention to an act of the territorial legislature of New Mexico, of March 16, 1899, which provided that all lands to be leased in that Territory should "first be appraised by the board," and to a subsequent act of said legislative assembly, approved March 20,

1901, repealing so much of the act of March 16, 1899, as provided for appraisal.

In response to the request of your office for a ruling upon the question of the effect of these statutes, the Department January 3, 1902 (31 L. D., 188, 190), referring to an opinion rendered by the Assistant Attorney-General for this Department, June 5, 1900 (15 Assistant Attorneys-General's Opinions, 234), held that the appraisal of the lands to be leased was, under the act of March 16, 1899, *supra*, a necessary prerequisite to such leasing and to the approval of the lease by the Secretary of the Interior, and that, "if these lands were not appraised before the leases were executed, then the leases were invalid from the beginning, and the repeal of the law in force at the date of the execution of the leases would not make them valid."

It results that both the lease to Lumbley and Mrs. Klasner, above referred to, were invalid. It further appears, however, that these parties had filed affidavits before the Board in support of their respective claims to lease the tract under certain provisions of the territorial laws, and that the Board, acting on this showing, and presumably upon a report made to it in the matter by the Commissioner of Public Lands who had been instructed to make a personal investigation in regard to the conflicting claims of the parties, awarded the tract to Lumbley and reinstated his lease. It is from this action that Mrs. Klasner attempted to appeal, and this appeal which your office, upon the authority of a decision of this Department in the case of the Lyons and Campbell Ranch and Cattle Co. *v.* Stockton (31 L. D., 341), refused to forward. In that case a lease had been made to one Thomas Lyons and approved by the Secretary of the Interior. It afterwards appearing, however, to the satisfaction of the Board of Public Lands that the lease had been obtained by fraudulent representations on the part of Lyons, the Board, after due notice to him, canceled the lease and executed a lease of the same land to Stockton. The cattle company protested against this action, and in considering the matter upon this protest it was held that the sufficiency of the evidence upon which the action of the Board was taken was not a question for review by this Department.

The Department is of opinion that the question of leasing these lands under territorial laws is one exclusively for the consideration of the Board of Public Lands of the Territory. Should any action which they might take conflict with a federal statute, it would be the duty of the Secretary of the Interior, in the exercise of the authority conferred upon him by the 10th section of the act of 1898, to withhold his approval. But the law does not contemplate that the Secretary of the Interior shall interfere in controversies between citizens of the Territory before the Board of Public Lands, respecting the leasing of lands under territorial laws.

The jurisdiction of the duly constituted Board for the leasing of these lands over questions of this character is exclusive. Any question of irregularity in the execution of the lease to Lumbley will be considered upon its submission for my approval.

The petition is denied.

HOMESTEAD—RELINQUISHMENT—SECTION 2290, REVISED STATUTES.

STUBENDORDT *v.* CARPENTER.

A contract to sell the relinquishment of a homestead entry is not in violation of the oath required of a homestead applicant by section 2290 of the Revised Statutes as amended by the act of March 3, 1891, and is no ground for cancellation of the entry if good faith on the part of the entryman at the time of making his entry is apparent.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *May 28, 1903.* (A. S. T.)

On February 20, 1899, Ira B. Carpenter made homestead entry for lots 3 and 4 and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 30, T. 21 N., R. 1 E., Guthrie land district, Oklahoma.

On August 3, 1900, M. Stubendordt filed an affidavit of contest against said entry, charging failure to reside on the land as required by law. Notice issued fixing September 20, 1900, as the day for a hearing before the local officers. The notice was served on the defendant on August 3, 1900.

On October 8, 1900, the contestant filed an amended affidavit charging "that the said entry was not made honestly and in good faith for the purpose of actual settlement and cultivation, and was not made for the purpose of obtaining a home, by the said entryman, but that the said entry was made by the said Carpenter for the purpose of speculation and for the purpose of selling his relinquishment of said entry."

The case was continued from time to time by stipulation of the parties, till November 19, 1901, when the hearing was commenced before the local officers, both parties being present. A large volume of testimony was taken, and the hearing closed in April, 1902. The principal portion of the testimony relates to the question of the defendant's residence on the land, but there is also evidence showing that the defendant, after making the entry, entered into a contract whereby he agreed to sell all his interest in the land to B. F. Lathrop for two thousand dollars, one hundred dollars of which was paid to him and the remainder was to be paid on or before November 1, 1900.

The local officers rendered dissenting opinions—the register finding in favor of the defendant both on the question of residence on the land and as to the speculative character of the entry, while the receiver found in favor of the contestant on both questions. Both parties appealed to your office, where on February 18, 1902, a decision was

rendered wherein it was found that the charge of failure to reside on the land was not sustained by the proof, but it was also found that the defendant had made the contract to sell the land above referred to, and for that reason his entry was held for cancellation, and from that decision he has appealed to this Department.

It is insisted in behalf of the defendant that inasmuch as the contestant has not appealed from your said decision, which was adverse to him on the question of the defendant's residence on the land, your decision on that question has become final, and that therefore the only question to be determined by this Department is, whether or not the defendant by making the contract referred to above forfeited his entry.

The defendant's appeal from your office decision brings the whole case before this Department for consideration upon the entire record, involving both questions, and the record has been carefully examined, and it is found that your said decision on the question of the defendant's residence on the land is fully sustained by the proof, the material portions of which are correctly stated in your decision and need not be recited here, and your said decision on that question is affirmed.

The charge in the amended affidavit of contest is, that the entry was not made in good faith for the purpose of acquiring a home for the defendant, but for speculative purposes, and for the purpose of selling his relinquishment thereof. It is not charged in the affidavit that the defendant had contracted to sell his relinquishment, but evidence of such contract was properly admitted as bearing upon the charge that the entry was made for speculative purposes.

The proof shows that the defendant, on February 20, 1899, purchased the improvements and relinquishment of a former entryman for eight hundred dollars, and on the same day made entry for the land. In June, 1899, he erected a small house on the land and established his residence therein, with his family, and immediately began the erection of a much larger and more commodious house, which was completed in about two months; this was a frame house, made of the best quality of material he could obtain; it was painted, and when it was finished he placed in it about four hundred and fifty dollars worth of first-class furniture, and moved into it; the floors were carpeted and the house was neatly and comfortably furnished.

One of contestant's witnesses testified that the defendant said to him, about the time he was building the house, that it would make the place sell better, and that "he defendant said he would not give a snap only for speculation; never made anything only in speculation; talking about land he bought back in the east, and that he made more speculating on lands than anything else." While this testimony may be construed as tending to show his purpose in making the entry, it is offset by the testimony of other witnesses, who say that in selecting his materials for the house the defendant said he wanted the best he

could get, because he was building the house for a home; it is also offset by the amount and quality of furniture he placed in the house, which tend to show that his purpose was to make his home there.

Several letters written by the defendant to B. F. Lathrop, from January 12, 1900, to July 26, 1900, were filed as evidence by the contestant. These letters were evidently written with the view of inducing Lathrop to purchase the land, or whatever interest the defendant had in it, and although the defendant claims that a portion of the letters refers to a different tract of land, it is believed from all the circumstances that they all refer to the land in controversy. The defendant admits that he wrote the letters, and he also admits that they contain misrepresentations as to the crops grown on the land, and that he purposely misrepresented the facts in order to induce Lathrop to buy the land.

It seems that at some time prior to July 6, 1900, or on that day, they reached an agreement whereby the defendant sold to Lathrop all his interest in the land. This is evidenced by the following instrument, a copy of which is in the record, and which is admitted by the defendant to be correct:

PERRY, *Oklahoma, July 6.*

This is to certify that I have this day contracted to sell to B. F. Lathrop all my interest, right and title to the following described land . . . [describing the tract in question]; the said B. F. Lathrop to pay to the said Ira Carpenter \$2000; the receipt of \$100 is hereby acknowledged; the remaining \$1900 is to be paid on or before November 1, 1900; and the said Ira Carpenter reserves the crops on said farm, except the hay.

IRA CARPENTER.

The contestant calls this instrument a contract, while the defendant insists that it is not a contract, but merely a receipt for \$100.

While the instrument is not, strictly speaking, a contract, because it is only signed by one of the parties, it is nevertheless an admission by the defendant, who did sign it, that such a contract as described therein had been made.

It is insisted in behalf of the contestant that the defendant by entering into the contract described in said instrument forfeited his entry, and that view seems to have been adopted by your office, for it was not found that the entry was made for speculative purposes, but your office held that, "the entryman by making the contract hereinbefore quoted has violated his contract made with the government when he made the entry," and hence you held his entry for cancellation.

Section 2290 of the Revised Statutes, as amended by the act of March 3, 1891 (26 Stat., 1098), requires the applicant for a homestead entry to make and file an affidavit which shall state, among other things—

that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself or herself, and that he, or she, has not directly or indirectly made, and will not make, any agreement or contract in any

way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which he or she might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself or herself.

Your said decision seems to be based on the theory that Carpenter, by making the contract above described, violated the oath required by said statute and taken by him when he made the entry, and thereby forfeited his right to the land. A violation of the oath required by the statute as a prerequisite to the allowance of a homestead entry would constitute sufficient grounds for the cancellation of the entry. It is not the intention of the law, by requiring the applicant to state in his affidavit that he will not make any contract whereby the title which he may acquire from the government shall inure to the benefit of any other person, to thereby prohibit or prevent the entryman from selling the land after he shall have acquired title to it, but the purpose of the law is to prevent the allowance of entries where such contracts have been previously made, and to prevent the making of such contracts after entries are made and before final proof is submitted, the object being to prevent the acquisition of the public lands under the homestead law by persons not having the requisite qualifications to make homestead entries, and who, but for said statute, might employ others to make entries for their benefit. [There is nothing in the law to prevent an entryman from relinquishing his entry, whether he does it for a consideration or not; his right to relinquish his entry is recognized by the law, which provides for the cancellation of the entry and the restoration of the land to the public domain upon the filing of a relinquishment. No fraud is perpetrated upon the government by the execution and filing of a relinquishment; the land is thereby restored to the public domain and the title remains in the government, and if a person who has purchased the relinquishment applies to make entry for the land, he is required to comply with the requirements of the law the same as he would have been if the former entry had never been made.] It is quite different with one who, by contract, procures another to make an entry for his benefit, or to acquire title to land already entered and convey the same to him. He may not be one of the class of persons allowed to acquire lands under the homestead laws; he may be an alien or he may own thousands of acres of land, or for various other reasons not entitled to the benefit of the homestead laws; yet, if he be permitted to procure other persons, who are qualified, to make homestead entries for his benefit, he might thereby acquire title to an unlimited quantity of the public lands. It is thus seen that a wide distinction exists between a contract to sell a relinquishment of a homestead entry, and a contract to convey to another the title that may be acquired under such an entry, the latter being, for good and sufficient reasons, prohibited by the law, while the former

is not prohibited. *Bailey v. Olson* (2 L. D., 40); *Chatten v. Walker* (16 L. D., 6); *Lewis v. Barnard* (22 L. D., 150); *Cummins v. Crabtree* (27 L. D., 711).

The contract made by the defendant in this case was clearly an intended sale of his relinquishment and his improvements. The instrument of writing signed by him says that it was a sale of all his right, title, and interest in the land, and not that he had contracted to convey to Lathrop the title which he might subsequently acquire from the government. He had no title at the time he made the contract; all the right and interest he had in the land, in addition to the improvements on it, was the right to acquire title to it by complying with the requirements of the law as to residence, cultivation, and improvement, and it was this that he sold to Lathrop; in other words, he agreed for \$2,000 to surrender and relinquish this right in order that Lathrop might acquire a similar right to the land by making entry for it, and this he undoubtedly had a right to do.

It clearly appears that it was Carpenter's intention to surrender possession of the land to Lathrop as soon as he might arrive to take possession. This is shown by various circumstances, but especially by one of the letters filed by the contestant. This letter was written by Carpenter to one Abrams, in September, 1900, and in it he said:

Tell Frank Lathrop that I want them to come as soon as they possibly can, as some of us have to go and stay at the homestead every night, and still we are liable to have a contest at any time. . . . The men who are putting up hay for them are not doing any good, and I tried to get some one else.

It thus appears that it was not his intention to remain on the land till he should earn title under his entry and then convey it to Lathrop, but merely to sell his improvements and possessory right, so that Lathrop might make entry for the land.

When Lathrop reached the vicinity of the land, and before the deal was fully consummated, he learned that a contest had been initiated against the entry, and this is doubtless the reason why the relinquishment was not executed and filed as agreed upon, though the defendant claims that it was because Lathrop was not able to pay the money he had contracted to pay.

The defendant denies that he understood at the time he made the contract that he was doing an unlawful thing, but it is shown by the proof that he advised Lathrop to say nothing about it, because it might give them trouble if it should become known. This tends to show that he then understood that it was unlawful to sell a relinquishment of his entry, and if such was his understanding, then his intention was fraudulent, though his act was lawful, and he did not forfeit his entry by doing a lawful thing, though he may have thought at the time that he was violating the law.

Although the sale of a relinquishment is not prohibited by the law,

yet good faith on the part of the entryman at the time of making his entry is required; but the proof in this case fails to show that the entry in question was made for a speculative purpose.

Your said decision is therefore reversed, said contest is dismissed, and said entry will remain intact.

RIGHT OF WAY—ACTS OF MAY 14, 1896, AND FEBRUARY 15, 1901.

KINGS RIVER POWER CO. *v.* KNIGHT.

In passing upon applications for rights of way over the public domain under the acts of May 14, 1896, and February 15, 1901, the Department will require a *prima facie* showing of right on the part of the applicant to appropriate water; but it is not the province of the Department to determine the validity of such appropriation.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, May 29, 1903.* (G. B. G.)

This is the appeal of the Kings River Power Company from your office decision of August 29, 1902, dismissing its protest against the application of George A. Knight under the acts of May 14, 1896 (29 Stat., 120), and February 15, 1901 (31 Stat., 790), for permission to use a right of way in the Sierra Forest Reserve, California, over which it is proposed to build certain flumes and tunnel lines for the purpose of diverting and conveying water for the generation and distribution of electrical power.

There are two lines indicated on the map—one, a line having its initial point in the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 35, T. 12 S., R. 28 E., running thence in a westerly direction along or near the north bank of Kings River to a point in the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 30, T. 12 S., R. 27 E.; the other, beginning at a point in the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 3, T. 12 S., R. 27 E., on the south bank of the north fork of Kings River, and running thence in a southerly direction, connecting with the Kings River line at a point in the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 22, same township.

The right of way applied for includes a power-house site No. 1, in the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 16; a power-house site No. 2, in the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 22; and a power-house site No. 3, near the center of Sec. 30—all in T. 12 S., R. 27 E., and each containing 4.591 acres.

In support of the application there was filed, among other things, a certified copy of a notice of water appropriation, dated November 5, 1901, in the name of one Sidney Sprout, which notice did not in terms meet some of the requirements of section 1415 of the Civil Code of California, but it was duly admitted to record November 12, 1901.

The water right acquired by this notice of appropriation was on

November 14, 1901, conveyed to the applicant Knight. After the conveyance, to wit, on February 14, 1902, the said Sprout gave a notice of amended location, which conformed to the requirements of the Code, but there does not seem to have been any other or further conveyance from Sprout to Knight.

The protest of the Kings River Power Company is put upon one ground only. It recites, in substance, that said company have a prior right to take and divert water, to the extent of 30,000 miners' inches, for power purposes from Kings River, immediately below the south and middle forks of said river, by reason of a notice of water appropriation posted November 15, 1901, by one Sumpter F. Zombro, all rights under which have vested in said company; that the water so appropriated is to be diverted by said company at the junction of the middle and south forks of Kings River and used at a power-house to be located in Sec. 30, T. 12 S., R. 27 E., a distance of about ten miles below said junction; and that since the posting of said notice all work of construction required by the laws of California to hold said water has been done, but that for lack of time the company has not been able to complete its surveys and file a map for right of way, as contemplated.

It is contended, in substance, that the notice of water appropriation by Sprout, November 5, 1901, was and is void, in that it purports to be a notice under the laws of the United States, instead of under the laws of California, and in that it fails to state the means of diverting the water and the place of intended use; that the amended notice initiated no right as against the protestants, because of the alleged fact that it names a different point of appropriation from that specified in the original notice, and because even if valid, the applicant Knight has no right, title, or interest therein.

It is not the province of this Department to pass upon the sufficiency of a water appropriation. Inasmuch as the Sprout notice of November 5, 1901, was posted upon the public lands of the United States within a forest reserve, it is not surprising that it recited that the appropriation was made "in compliance with the laws of the United States." If it had recited that it was made by permission of the laws of the United States and in compliance with the laws of California, it would have been unobjectionable, and this was evidently what was intended. In any event, it is not shown or alleged that the protestant or any one else was misled by it. Section 1415 of the Civil Code of California provides, among other things, that a notice of water appropriation must state the purpose for which the appropriator claims the water, the place of its intended use, and the means by which he intends to divert it. The notice of November 5, 1901, does not state these things, but the Department will not undertake to say that it is not a *prima facie* valid notice of appropriation. "No particular form of notice

is required: all that is necessary is that it should be sufficient to put a prudent man on inquiry." See note to section 1415 of the Civil Code of California, and cases cited. Nor will the Department undertake to say that the defects in the original notice, even if material, were not cured by the amended notice. It purports to cure these defects, was evidently filed for that purpose, and the question whether Knight is entitled to the benefits accruing therefrom is one between him and the appropriator, Sprout. It is undoubtedly true that the amended notice was posted at the same point as the original one, and that the point of appropriation was not intended to be and was not changed. The misunderstanding in regard to this matter would seem to be explainable on the ground of defects in the public surveys.

But aside from this, even if this Department were the proper tribunal to pass upon the validity of water locations and questions of priority of water rights, the protestant has made no sufficient showing of priority of appropriation, assuming even that Sprout's first location was invalid. Neither of the parties to this controversy has appropriated the water as yet to a beneficial use, and this under the laws of California determines the question of prior appropriation.

"The title to water does not arise . . . from the manifestation of a purpose to take, but from the effectual prosecution of that purpose." *Kimball v. Gearhart* (12 Cal., 28, 50). Of course, if both parties prosecute the work of actual appropriation diligently, the one first in time will be first in right, but, in this case, because the protestant contemplates the making of certain surveys and the filing of certain maps for the consideration of this Department, it is urged that its rights as a prior appropriator be recognized.

The acts of May 14, 1896, and February 15, 1901, *supra*, were intended to encourage industrial activity, and it is therefore the duty of this Department to see to it that the public domain is not incumbered with mere paper rights of way, designed by promoters as a basis of speculation. But while this is so, the Department can not try close questions of water rights arising under State laws. It has always insisted on a *prima facie* showing of such rights, and without attempting to say generally of what this showing should consist, it is enough to say that the showing is sufficient in the present instance. It should be remembered always that the Department is in no sense passing upon the validity of the appropriation, and this question is not directly involved in the approval of maps for the use of rights of way under said acts. This is ultimately a question for the courts.

The protest is dismissed, and, your office reporting that the applicant has complied with all the regulations of the Department governing such matters, the map is herewith returned with the approval of the Department noted thereon.

RESERVATION IN PATENT—RIGHT OF WAY—ACT OF AUGUST 30, 1890.

INSTRUCTIONS.

The provision in the act of August 30, 1890, 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," applies only to entries under the public or general land laws.

Secretary Hitchcock to the Director of the Geological Survey, June 4, 1903. (S. V. P.)

By your letter of March 28th last you call attention to the act of August 30, 1890 (26 Stat., 391), wherein it is 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—

and request the opinion of the Department whether in certain cases stated or in similar cases the act in question would have the effect of reserving the right of way for the construction of canals or ditches by the Reclamation Service. Then follow five stated cases, wherein you inquire as to the effect of said act of 1890.

I enclose herewith a report from the Commissioner of the General Land Office, dated April 9, 1903, stating that his office has never construed the act aforesaid as applicable to any cases other than entries under the public or general land laws.

Since the passage of the act no occasion has arisen in the Department rendering it necessary to pass specifically upon the proposition as to whether the provisions of said act were intended to apply to cases other than those recognized in the practice of the general land office, as stated in the report above referred to; but upon due consideration of the question, having in view the peculiar language employed by said act, to wit: "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," and the recognized significance in the land department of the terms "taken up under any of the land laws," "entries or claims," as well as the character and class of claims validated by said act, I am constrained to believe that the general land office has placed the proper construction upon the provisions of this act, and you are so advised.

RESERVOIR LAND—HOMESTEAD ENTRY—ACT OF JANUARY 13, 1897.

WILSON v. PARKER.

The second section of the act of January 13, 1897, relating to the construction of reservoirs upon unoccupied public lands for the watering of livestock, vests in the Secretary of the Interior a discretion as to the amount of land that may be reserved for any such reservoir, limiting the amount to not more than one hundred and sixty acres; and the regulations issued under said section do not contemplate that there shall be reserved necessarily one hundred and sixty acres because the reservoir has a capacity which authorizes such reservation, but it was only intended that such reservation should be made as is necessary for the use and maintenance of the reservoir.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) June 4, 1903. (G. B. G.)

This case involves the SE. $\frac{1}{4}$ of Sec. 18, T. 1 N., R. 51 W., Akron land district, Colorado, and is before the Department upon the appeal of James Wilson from your office decision of August 7, 1902, holding for cancellation his homestead entry for said tract.

It appears that on July 21, 1899, the defendant, James L. Parker, filed a declaratory statement, No. 181, for the purpose of having this land reserved as a reservoir site under the act of January 13, 1897 (29 Stat., 484), and that on March 15, 1901, the said Wilson was permitted under the regulations or practice of your office to make homestead entry therefor, subject to said declaratory statement.

June 25, 1901, Wilson filed an affidavit of contest, alleging, in substance, that the reservoir filing of Parker was and is fraudulent, because (1) said tract of land had and has a living stream of water flowing through and across the same, and because there were springs and water-holes of living water thereon; (2) that Parker, contrary to law and the regulations of the Interior Department, fenced off from the herds of range stock that portion of the land on which said springs and water-holes were located; (3) that he failed to file a statement or affidavit in January, 1901, as provided by law, that the reservoir on said land was kept in repair, or that water had been kept therein during the preceding year; and (4) that at the time Parker filed said declaratory statement he did not intend to construct said reservoir on said land or on any part thereof, but on the contrary that he intended by his said false representations to segregate said land so as to prevent legally qualified applicants from entering it under the homestead law until his son, Mack Parker, should become twenty-one years of age and qualified to enter said land as a homestead.

A hearing was duly ordered and had on this affidavit of contest. It was shown at the hearing that the land in controversy is not in any correct sense watered land, or that it had a living stream of water running over it. It is traversed by what is known as a sand creek,

but no water is visible on the surface of this creek, except at rare intervals and for a few hours after heavy rains. The bed of this creek was a natural subterranean reservoir, and during the dry seasons of the year the only way water could be gotten for stock was by sinking barrels, etc., in the sand so that water might rise in them, or by pumping. There is some evidence that during such seasons horses could reach water by pawing in the sand. Parker's reservoir was constructed by throwing a sort of earth dam across the bed of this creek and by excavating, both in the bed of the creek and on one of the banks, down to a bed of clay, or some other hard substance, which seems to be impervious to water, and which conserves it for the use of the stock in the neighborhood. There is testimony to the effect (in fact it is admitted by Parker) that he had the waters of this reservoir fenced by a one-string wire fence for a short time to prevent range horses from injuring the herds of calves that watered there. The evidence does not show that this was done with any intention of appropriating the water to his private use, or that it interfered with the approach of any stock to the water, except range horses. Moreover, it seems that the wire was down most of the time, and that at the date of the hearing it had been entirely removed. There is no evidence to sustain the allegation that this reservoir declaratory statement was made for the purpose of having the land reserved until Parker's son became of age so that he might enter it under the homestead law. Upon the third proposition it will be enough to state that the affidavits required by paragraph 41 of the regulations approved July 8, 1898 (27 L. D., 200, 212), have been furnished.

Section one of the act of January 13, 1897, *supra*, provides that any person engaged in breeding, grazing, driving, or transporting livestock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such livestock, and shall have control of said reservoir under regulations prescribed by the Secretary of the Interior, "and the lands upon which the same is constructed, not exceeding one hundred and sixty acres, so long as such reservoir is maintained and water kept therein for such purpose: *Provided*, That such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind."

The departmental regulations of June 23, 1899 (28 L. D., 552, 553), provide that for a reservoir of more than 1,500,000 gallons capacity 160 acres may be reserved. It is shown that the capacity of this reservoir is in excess of 1,500,000 gallons, but it is not shown that anything like this amount of water has ever been in the reservoir, or that it is at all probable such amount of water may be developed, or that if it could be developed the interests of the neighborhood demand it. Said act vests in the Secretary of the Interior a discretion as to the amount

of land that may be reserved, being limited to one hundred and sixty acres. The regulations referred to do not contemplate that there shall be reserved necessarily one hundred and sixty acres because the reservoir has a capacity which authorizes such reservation. It was only intended that such reservation should be made as is necessary for the use and maintenance of a reservoir.

Upon the whole case the Department is satisfied that eighty acres will be a sufficient reservation on account of this reservoir, and the applicant's map will be approved only as to the N. $\frac{1}{2}$ of said quarter section upon which the reservoir itself lies.

The protest is dismissed, and Parker's map is herewith returned, with the approval of the Department noted thereon as to the said N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 18, and said tract will be reserved from sale so long as the reservoir is kept in repair and water kept therein. If the homestead entryman should elect, his entry may stand as to the S. $\frac{1}{2}$ of the said quarter section, which is hereby relieved from reservation, or it may be canceled as to the whole of it without prejudice to his homestead rights. With these modifications, the decision of your office is affirmed.

INDIAN LANDS—SIOUX HALF BREED SCRIP.

JULIA ROI LAFRAMBOISE.

Lands formerly a part of the Mille Lac Indian reservation, and subject to disposal under the joint resolution of May 27, 1898, to qualified settlers only, are not subject to location with Sioux Half Breed scrip.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *June 4, 1903.* (E. F. B.)

By decision of March 6, 1903, you held for cancellation location of Sioux Half Breed scrip made by Francis G. Burke, attorney in fact for Julia Roi Laframboise, on lot 7, Sec. 18, T. 43 N., R. 27 W., 4th P. M., St. Cloud, Minnesota, being a part of the former Mille Lac Indian reservation, subject to disposal under the joint resolution of May 27, 1898 (30 Stat., 745). From said decision an appeal has been filed by the locator.

The only question involved in this appeal is whether the land is subject to location with Sioux Half Breed scrip.

The act of July 17, 1854 (10 Stat., 304), under which this scrip was issued, provides that it may be located on any "unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by the government upon which they [the scrippees] have respectively made improvements."

At the time of the passage of said act, the general laws in force providing for the disposal of the public lands were the laws relating to

public and private cash sales, and the pre-emption law, so that the practical operation of the act was to make the scrip locatable on any lands subject to disposal under the general land laws.

It may be conceded, for the sake of argument, that the tract in question had at one time been subject to location with said scrip, but that did not prevent Congress from taking it from under the operation of the act of July 17, 1854, and providing specially for its disposition. Such was the effect of the joint resolution of May 27, 1898, *supra*, which provided that the lands formerly within the Mille Lac Indian reservation "are hereby declared to be subject to entry by any *bona fide* qualified settler under the public land laws of the United States," thus expressly limiting the disposal of said lands to "qualified settlers." The mere fact that the act provided that all pre-emption filings made prior to the repeal of the pre-emption law "shall be received and treated in all respects as if made upon any of the public lands of the United States subject to pre-emption or homestead entry," was not intended to enlarge the scope of the act as to the qualification of the entryman and the class of entry, but merely to preserve, as to these lands, that provision of the pre-emption law saving and protecting the rights of *bona fide* pre-emption claimants who had lawfully initiated their claim to land before the repeal of the law.

Your decision is affirmed.

FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

A. B. HAMMOND.

The abstract of title accompanying the relinquishment of lands within a forest reserve as a basis for the selection of lands in lieu thereof under the provisions of the act of June 4, 1897, must be accompanied by a certificate from the officer having custody of the tax roll and charged with the collection of taxes that no taxes levied upon the property, or lien thereon, remain unpaid.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) June 10, 1903. (J. R. W.)

A. B. Hammond appealed from your office decision of February 25, 1903, ruling him to complete his abstract of title to Sec. 23, T. 58 N., R. 4 W., B. M., in the Priest River Forest Reserve, Kootenai county, Idaho, relinquished to the United States and assigned as base for his application under the act of June 4, 1897 (30 Stat., 36). No. 2981, your office series, for selection of lands at Helena, Montana.

March 28, 1900, there was recorded the deed of the Northern Pacific Railway Company, dated February 27, 1900, conveying the land to Hammond, with full covenants of warranty "except taxes and assessments." May 9, 1900, he filed for record in the office of the recorder

of deeds for Kootenai County, Idaho, his deed relinquishing the land to the United States. May 18, 1900, and October 2, 1902, he filed for record other deeds conveying the same land to the United States, for the purpose of removing objections taken by your office to the form of execution of the original deed. July 16, 1900, he filed in the local office his application to select unsurveyed lands under the act of June 4, 1897, *supra*, in lieu of those so relinquished. After sundry objections to the abstract and rulings by your office, not necessary here to notice, the matter came for final decision February 25, 1903, at which time the abstract was closed by authenticating certificates as to taxes:

(1) May 26, 1902, by the compiler, the "Panhandle Abstract Co., Ltd.," "Remarks concerning taxes: Not assessed. No taxes." This, however, was under the reservation that:

If land is marked "Not Assessed," and is actually assessed to parties other than grantees herein, or is erroneously assessed, we will not be held for delinquent taxes or tax sales.

(2) June 21, 1902, by "H. J. Borthwick, assessor":

that there are no taxes due and unpaid upon the lands described in the within abstract, and that there are no tax sales of said land unredeemed, and that no tax deeds have been given thereon, except as stated below. . . .

REMARKS CONCERNING TAXES.

Never been assessed. No Taxes.

Your office decision held that the land was subject to taxation for the year 1900; that the law of Idaho provided the machinery by which lands were to be assessed and taxes collected; that a perpetual lien exists for the tax; that a liability exists for the tax such as to preclude the United States from accepting what is but a clouded title, and rejected the application.

The appellant contends that it was error of your office to hold that any lien exists for taxes, as the abstract shows that no assessment was made.

By section 1414 of the Revised Statutes of Idaho, 1887, the lien for taxes is created as of the second Monday of April in each year "against the property assessed." The statute does not profess of itself to create a lien, or to levy an annual tax, but fixes the date from which the lien exists when proceedings are had for valuation of the property and levy of a tax. By the revenue statute of Idaho, Title 10, Revised Statutes, 1887 (Secs. 1451-1453), a listing and valuation of property by the assessor is necessary. The county commissioners must on the second Monday of September, annually, ascertain and levy the necessary rate for state and local purposes (Sec. 1411, Rev. Stat., Idaho, amended February 16, 1899, Sessions Laws, Id., 1899, p. 455). Without an assessment and levy no tax, or lien therefor, exists. In *Heine v. Levee Commissioners* (19 Wall., 655, 659), the court held that:

it is too clear for argument that taxes not assessed are no liens, and that the obligation to assess taxes is not a lien on the property on which they ought to be assessed. This was one of the points urged and overruled in the case of *Rees v. Watertown 19 Wall.*, 107.

To the same effect is held in *Lyon v. Alley* (130 U. S., 177, 188). This doctrine is recognized by the court of Idaho in *Quivey v. Lawrence* (1 Id., 313, 316), which held that:

By the provisions of the act above referred to there can be no lien for taxes on the land, except the land be assessed. There can be no levy upon the lands, unless they are described in the assessment roll. The delinquent list is taken from the assessment roll, and no property can be sold except it be found in the delinquent list; hence the basis of the whole proceedings is the assessment roll. . . .

In no case can lands be sold for taxes unless they be assessed.

It follows that if the abstract of title shows that no assessment for taxes has been made, then no tax and no lien therefor exists. The land was clearly subject to taxation and should have been assessed. Presumably an assessment was made and a tax was levied. The burden rests upon the selector who tenders title to the United States to show that the title tendered is good and free of tax or other liens. That the present abstract fails to do.

The certificate of the abstract company above set out is without value. The abstract company is not custodian of the county assessment rolls and tax lists. All the value of that certificate is the ability of the abstract company to respond in damages in case its certificate is untrue. The certificate itself is qualified and limited to a perfectly regular assessment of the land in the true name of its then record owner. It disclaims liability, though the land may be "actually assessed to parties other than grantees herein." The certificate is worthless though the abstract company may be abundantly responsible, as it is a general principle that a tax is not invalidated by the error of the assessor in listing the land in the name of some one else than the true owner. The Statutes of Idaho provide that omissions, errors, and defects in form may be corrected at any time, and do not invalidate the assessment or tax (Rev. Stat., Id., Secs. 1700-1704).

To negative the existence of a tax lien the certificate should be complete and unqualified and be made by the person having at the time official custody of the tax roll. Looking to the statutes of Idaho for that purpose, it will be seen that the assessor must complete the assessment roll on or before July first in each year (Rev. Stat., Idaho, 1887, amended February 16, 1899, acts 1899, p. 260). The roll then is delivered by him to the clerk of the Board of Commissioners (Rev. Stat., Idaho, Sec. 1454), and he thereafter has no custody of it. His certificate of what the rolls show, or of what does, or in this case of what does not, thereon appear, is not the official certificate of the custodian of the record, but is a mere voluntary unofficial statement

as to his past defaults, without evidential value. When that statement amounts in substance, as it does in this case, to a confession of default in official duty, it certainly adds no authenticity to the abstract, whatever force it might have as evidence against him in an action brought by the county under sections 1457-1459 of the Revised Statutes of Idaho for revenue lost by his default.

The abstract is therefore not so authenticated as to show that no assessment of the land was made for the year 1900. On the other hand the abstract does not show the existence of a tax lien, and is incomplete. Instead of rejecting the selection for defect of title to the land tendered as base therefor, your office should have ruled the applicant within a reasonable time to complete his abstract by obtaining from the officer having custody of the tax roll and charged with collection of taxes evidence of their payment or a certificate made from examination of the records in his charge that no taxes levied upon the property, or a lien thereon, remain unpaid.

Your office decision is vacated, and the case is remanded for further proceedings appropriate thereto.

WAGON ROAD GRANT—INDEMNITY—ACTS OF JULY 2, 1864, AND
DECEMBER 26, 1866.

CALIFORNIA AND OREGON LAND CO.

The act of December 26, 1866, amending the act of July 2, 1864, making a grant to the State of Oregon in aid of a wagon road from Eugene City to the eastern boundary of said State, did not make an additional grant of lands in place, but made a grant of indemnity lands only, under which no rights attach until selection.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) June 12, 1903. (G. B. G.)

This is the appeal of the California and Oregon Land Company from your office decision of December 23, 1902, rejecting the company's application, as the successor in interest to the Oregon Central Military Road Company, to select the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 31, T. 21 S., R. 3 E., Roseburg land district, Oregon.

By the act of July 2, 1864 (13 Stat., 355), a grant was made to the State of Oregon in aid of a wagon road to be constructed from Eugene City to the eastern boundary of the State. The grant was of odd sections for three miles in width on each side of the proposed road, and contained no indemnity provision. This act was amended by the act of December 26, 1866 (14 Stat., 374), as follows:

That there be, and is hereby, granted to said state for the purposes aforesaid, such odd sections, or parts of odd sections, not reserved or otherwise legally appropriated,

within six miles on each side of said road, to be selected by the surveyor-general of said state, as shall be sufficient to supply any deficiency in the quantity of said grant as described, occasioned by any lands sold or reserved, or to which the rights of preemption or homestead have attached, or which for any reason were not subject to said grant within the limits designated in said act.

By appropriate legislation and mesne conveyances the California and Oregon Land Company succeeded to all the interests of the State under this grant, and its application to select the land above described was presented October 25, 1902. In the meantime, however, said land was included within the boundaries of the Cascade Forest Reserve, established by the President's proclamation of September 28, 1893 (28 Stat., 1240), which proclamation excepted from the force and effect thereof "all lands . . . embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and all mining claims duly located and held according to the laws of the United States and rules and regulations not in conflict therewith."

It is contended that the act of December 26, 1866, *supra*, made an additional grant of lands in place, and that said wagon road having been completed long before the proclamation establishing said forest reserve, the company's right to said land attached absolutely, thus putting it beyond the power of the President to reserve it for any other purpose.

The Department can not accept this view. The act of 1866 clearly made a grant of indemnity lands only. The grant is of lands "to supply any deficiency in the quantity of" the grant made by the act of July 2, 1864, "occasioned by any lands sold or reserved, or to which the rights of preemption or homestead have attached, or which for any reason were not subject to said grant [of July 2, 1864] within the limits designated in said act."

This was clearly a grant of indemnity lands, and under the well settled rulings of this Department and the courts no rights attach under such a grant until selection. At the date of the President's proclamation aforesaid no selection had been made or proffered by the company, it was then of the character of land which the President was authorized to "set apart and reserve" by virtue of the authority conferred by section 24 of the act of March 3, 1891 (26 Stat., 1095, 1103), and was not covered by the excepting clause of said proclamation.

• The decision appealed from is affirmed.

CIRCULAR RELATING TO MANNER OF ACQUIRING TITLE TO TOWN SITES ON PUBLIC LANDS.

(NOT APPLICABLE TO ALASKA.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 12, 1903.

Registers and Receivers, United States Land Offices.

GENTLEMEN: There are three methods by which title may be acquired to public lands for town-site purposes, one provided for in sections 2380 and 2381, another in sections 2382, 2383, 2384, 2385, and 2386, and the third in sections 2387, 2388, and 2389, United States Revised Statutes.

I. Section 2380 authorizes the President to reserve public lands for town-site purposes on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population. Section 2381 provides for the survey of such reservations into urban or suburban lots, the appraisalment of the same, and the sale thereof at public outcry; the lots remaining unsold are thereafter to be disposed of at public sale or private entry, at not less than the appraised value thereof.

II. Sections 2382, 2383, 2384, 2385, and 2386, Revised Statutes, limit the extent of the area of the city or town which may be entered under said acts to 640 acres, to be laid off in lots, which, after filing in this office the statement, transcripts, and testimony required by section 2383 are to be offered at public sale to the highest bidder at a minimum of \$10 for each lot.

An actual settler upon any one lot may preempt that lot and any additional lot on which he may have substantial improvements at said minimum at any time before the day of sale. Such person must furnish preemption proof showing residence and improvement upon the original lot and improvement upon the additional lot after publication of the usual notice.

Lots not disposed of at time of public sale are thereafter subject to private entry at such minimum, or at such reasonable price as the Secretary of the Interior may order from time to time, after at least three months' notice, as the municipal property may increase or decrease in value.

The preliminaries required by this method are:

1. Parties having founded or who desire to found a city or town on the public lands under the provisions of sections 2382, 2383, 2384, 2385, and 2386 must file with the recorder of the county in which the land is situate a plat thereof describing the exterior boundaries of the land according to the lines of public surveys where such surveys have been made.

2. Such plat must state the name of the city or town, exhibit the streets, squares, blocks, lots, and alleys, and specify the size of the same, with measurements and area of each municipal subdivision, the lots in which shall not exceed 4,200 square feet, with a statement of the extent and general character of the improvements.

3. The plat and statement must be verified by the oath of the party acting for and in behalf of the occupants and inhabitants of the town or city.

4. Within one month after filing the plat with the recorder of the county a verified copy of said plat and statement must be sent to the General Land Office, accompanied by the testimony of two witnesses that such town or city has been established in good faith.

5. Where the city or town is within the limits of an organized land district a similar map and statement must be filed with the register and receiver. The exterior boundary lines of the town, if upon the land over which Government surveys have not been extended, may, when such surveys are so extended, be adjusted according to those lines, where it can be done without impairing vested rights.

6. In case the parties interested shall fail or refuse, within twelve months after founding a city or town, to file in the General Land Office a transcript map, with the statement and testimony called for by section 2382, the Secretary of the Interior may cause a survey and plat to be made of said city or town, and thereafter the lots will be sold at an increase of 50 per cent on the minimum price of \$10 per lot.

7. When lots vary in size from the limitation fixed in section 2382 (4,200 square feet), and the lots, buildings, and improvements cover an area greater than 640 acres, such variance as to size of lots or excess in area will prove no bar to entry, but the price of the lots may be increased to such reasonable amount as the Secretary may by rule establish.

8. Title to be acquired to town lots embracing mineral entries is subject to recognized possession and necessary use for mining purposes, as provided in section 2386.

III. Lands actually settled upon and occupied as a town site, and therefore not subject to entry under the agricultural preemption laws, may be entered as a town site, in accordance with the provisions of sections 2387, 2388, and 2389, United States Revised Statutes.

1. If the town is incorporated the entry may be made by the corporate authorities thereof through the mayor or other principal officer duly authorized so to do.

2. If the town is not incorporated the entry may be made by the judge of the county court for the county in which said town is situated.

3. In either case the entry must be made in trust for the use and benefit of the occupants thereof, according to their respective interests.

4. The execution of such trust as to the disposal of lots and the pro-

ceeds of sales is to be conducted under regulations prescribed by State or Territorial laws. Acts of trustees not in accordance with such regulations are void.

5. Private individuals or organizations are not authorized to enter town sites under this act, nor can entries under this act be made of prospective town sites. The town must be actually established, and the entry must be for the benefit of the actual inhabitants and occupants thereof.

6. The officer authorized to enter a town site may make entry at once, or he may initiate an entry by filing a declaratory statement of the purpose of the inhabitants to make a town-site entry of the land described.

7. The entry or declaratory statement shall include only such land as is actually occupied by the town, and the title to which is in the United States, and, if upon surveyed lands, its exterior limits must conform to the legal subdivisions of the public lands.

8. The amount of land that may be entered under this act is proportionate to the number of inhabitants. One hundred and less than two hundred inhabitants may enter not to exceed 320 acres; two hundred and less than one thousand inhabitants may enter not to exceed 640 acres; and where the inhabitants number one thousand and over an amount not to exceed 1,280 acres may be entered; and for each additional one thousand inhabitants, not to exceed five thousand in all, a further amount of 320 acres may be allowed.

9. When the number of inhabitants of a town is less than one hundred the town site shall be restricted to the land actually occupied for town purposes, by legal subdivisions.

10. Where an entry is made of less than the maximum quantity of land allowed for town-site purposes, additional entries may be made of contiguous tracts occupied for town purposes, which, when added to the previous entry or entries, will not exceed 2,560 acres; but no additional entry can be allowed which will make the total area exceed the area to which the town may be entitled by virtue of its population at date of additional entry.

11. The land must be paid for at the Government price per acre, and proof must be furnished relating—

First. To municipal occupation of the land;

Second. Number of inhabitants;

Third. Extent and value of town improvements;

Fourth. Date when land was first used for town-site purposes;

Fifth. Official character and authority of officer making entry; and

Sixth. If an incorporated town, proof of incorporation, which should be a certified copy of the act of incorporation.

12. Thirty days' publication of notice of making proof must be made and proof of publication furnished.

13. Title can not be acquired under this act to mines of gold, silver, cinnabar, or copper, nor to any valid mining claim or possession. A nonmineral affidavit is required in all States and Territories except Florida, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, and Wisconsin.

14. A greater quantity of land than 2,560 acres is not excluded from preemption or homestead entry because of town-site reservations unless the excess in area is actually settled upon, inhabited, improved, and used for business and municipal purposes.

15. Section 6069, Oklahoma Statutes, 1893, makes it the duty of the corporate authorities of a town situated on public land, if incorporated, and if not incorporated then for the judge of the probate court of the county in which such town may be situated, "whenever requested by a majority of the occupants or owners of the lots within the limits of the town," to enter the land so settled upon and occupied. No entry will therefore be allowed by local officers in Oklahoma or in any other State or Territory where the provisions of the State or Territorial law in that respect are similar to those of Oklahoma, until they are satisfied that a majority of the occupants or owners of the lots within the town desire that such action be taken. The laws of each State and Territory with respect thereto should be observed. (16 L. D., 82.)

TOWN SITES IN ALASKA.

1. All town-site entries in said Territory are to be made by trustees, to be appointed by the Secretary of the Interior, according to the spirit and intent of section 2387, United States Revised Statutes, which section provides that the entries of land for such purposes are to be made in trust for the several use and benefit of the occupants thereof, according to their respective interests, and at the minimum price, which in these cases shall be construed to mean \$1.25 per acre. When the inhabitants of a place and their occupations and requirements constitute more than a mere trading post, but are less than one hundred in number, the town-site entry shall be restricted to 160 acres; but where the inhabitants are in number one hundred and less than two hundred, the town-site entry may embrace any area not exceeding 320 acres; and in cases where the inhabitants number more than two hundred, the town-site entry may embrace any area not exceeding 640 acres. It will be observed that no more than 640 acres shall be embraced in one town-site entry in said Territory.

2. The "system of public land surveys" was extended to Alaska by act of March 3, 1899 (30 Stat., 1074, 1097-1098), making a general appropriation for the survey of "lands adapted to agriculture and lines of reservations." The costs of surveys of the exterior lines of town sites on public lands, over which the township surveys have not

been extended, are "payable out of the general appropriations for the survey of 'lands adapted to agricultural and lines of reservations.'" (18 Copp's Landowner, 117, 119.) Where, therefore, the land on which a town site is situated in said territory is not within a surveyed township, it becomes necessary for the occupants thereof, as a prerequisite to the entry of the land as a town site, to secure a special survey of the land by application to the surveyor-general.

3. The fee-simple title to certain real estate in Alaska was conferred under Russian rule upon certain individuals and the Greek Oriental Church, and confirmed by treaty concluded March 30, 1867, between the United States and the Emperor of Russia (15 Stat. L., 539); the act of March 3, 1891 (26 Stat., 1095), in section 14, has expressly excepted from entry for town sites and trading and manufacturing sites all tracts of land in Alaska, not exceeding 640 acres in any one tract, occupied as missionary stations at the date of the passage of same; while other real property is now held and occupied by the United States in several of the Alaska towns for school and other public purposes, and it is perhaps desirable that still other lots or blocks in those towns that take advantage of the provisions of said act should be reserved to meet the future requirements for school purposes or as sites for Government buildings. Therefore such employee or employees of the Government as shall be designated or detailed for that purpose shall constitute a board whose duty it shall be, as soon as notified by the United States surveyor-general of Alaska that an application for a special survey of the exterior lines of any such town site has been received by him, to go upon the land applied for and to determine and designate what lands should be eliminated from the town-site survey, as above indicated.

Such board shall inquire into the title to the several private claims and church claims held in such town site under Russian conveyances, as originally granted and claimed at the date of the acquisition of Alaska by this Government, and into the claims for land therein, not exceeding 640 acres in one tract, occupied as missionary stations on March 3, 1891, and shall fix and determine the proper metes and bounds of said church, missionary, and private claims, after due notice having been given to the present owners of same, both of their right to submit testimony and documents, either in person or by attorney, in support of same, and of their right, within thirty days from receipt of notice of the conclusions of said board, to file an appeal therefrom with said board, for transmission to this office. Should any one of such parties be dissatisfied with the decision of this office in such a case, he may still further prosecute an appeal to the Secretary of the Interior upon such terms as shall be prescribed in each individual case. Proper evidence of notice should be taken by said board in all cases, and a record of all testimony submitted to them should be kept. If an appeal is taken, the

same, together with the decision of the board and all papers and evidence affecting the claims of the appellant, should be forwarded direct to this office. Should no appeal be taken, the report of the board should be filed with the United States surveyor-general for his use and guidance as hereinafter directed.

It shall also be the official duty of said board to approximately fix and determine the metes and bounds of all lots and blocks in any such town site now occupied by the Government for school or other public purposes, and of all unclaimed lots or blocks which, in their judgment, should be reserved for school or any other purpose, and to make report of such investigations to the surveyor-general for his use and guidance, as also hereinafter directed, should no appeal be filed therefrom.

4. Should an appeal from the action or decision of such board be filed in any case, no further action will be taken by the surveyor-general until the matter has been finally decided by this office or the Department. But should no appeal be filed, the surveyor-general will proceed to direct the survey of the outboundaries of the town site to be made, the same in all respects as above directed in the survey of land for trade and manufacturing purposes, except that no deposit for survey will be required and that he will accept the report and recommendations made by said board and exclude and except, by metes and bounds, from the land so surveyed, all the lots and blocks for any purpose recommended to be excepted by said board. The execution of the survey of the lots and blocks thus excepted shall be made a part of the duties of the surveyor who is deputized to survey the exterior lines of the town site; the survey of such lots or blocks shall be connected by course and distance with a corner of the town-site survey, and also fully described in the field notes of said survey and protracted upon the plat of said town site; and the limits of such lots or blocks will be permanently marked upon the ground in such manner as the surveyor-general shall direct. In forwarding the plat and field notes of the survey of any town site for the approval of this office, the surveyor-general will also forward any report that said board may have filed with him for approval in like manner.

5. Under section 31 of the act of June 6, 1900 (31 Stat., 321, 332), the district court of Alaska is authorized, by its order, to set aside unappropriated public land in said Territory for jail and court-house sites, a certified copy of which order, when duly made and filed in this office, operates as a reservation of the lands therein properly set aside under said section. Where any certified copies of such orders have been filed in this office prior to the survey of the exterior lines of any such town site, affecting the lands therein, this office will, on being informed of an application for such survey, furnish the surveyor-general with a copy thereof, and he will proceed to exclude from such

survey the land in such orders reserved in the manner above provided for the reservations made by such board.

6. When the plat and field notes of the survey of the outboundaries of any town site shall have been approved, the Secretary of the Interior will appoint one trustee to make entry of the tract so surveyed, in trust for the occupants thereof, as provided by said act. The trustee, having received his appointment and qualified himself for duty by taking and subscribing the usual oath of office and executing the bond hereinafter required, will call upon the occupants of said town site for the requisite amount of money necessary to pay the Government for the land as surveyed, and other expenses incident to the entry thereof, keeping an accurate account thereof and giving his receipt therefor. And when realized from assessment and allotment, he will refund the same, taking evidence thereof, to be filed with his report in the manner hereinafter directed. He will then file with the proper local land office a written notice, in due form, reciting the name of the party who will make the entry, the name and geographical location of the town site, the place and date of making proof, and the names of four witnesses by whom it is proposed to establish the right of entry. The register will cause such notice to be published once a week for six consecutive weeks, at the applicant's expense, in a newspaper published in the town for which the entry is to be made, or nearest to the land applied for. Copies of said notice must also be posted in the office of the register and in a conspicuous place upon the land applied for, for thirty days next preceding the date of making proof. The required proof shall consist of the affidavits of the applicant and two of the published witnesses, and shall show (1) the actual occupancy of the land for municipal purposes; (2) the number of inhabitants; (3) the character, extent, and value of town improvements; (4) the nonmineral character of the town site; (5) that said town site does not contain any land occupied by the United States for school or other public purposes, nor any land to which the title in fee was conferred under Russian rule and confirmed by the treaty of transfer to the United States, nor any land for which patents have been issued by the United States; and (6) proof of the publication and posting of notices for the required time, consisting of the affidavit of the publisher to that effect, accompanied by a copy of the published notice, together with the certificate of the register as to the posting of the notice in his office and the affidavit of the party who posted the notice upon the land applied for, reciting the fact and date of posting said notices and that the same so remained for the specified time hereinbefore required. The proof being accepted and the certificate of entry issued by the register of the land office, the purchase price of the land should be paid to and receipted for by the receiver of the land office, after which all the papers will be forwarded to this office, and, if found to be complete and made in accordance

with these instructions, patent will issue without delay. Cash certificate of entry (No. 4-189) will be used by the register in allowing all entries authorized by the law and these regulations, and said entries will be numbered consecutively, beginning with No. 1.

7. A protest against the allowance of a town-site entry will be heard, and the same permitted to be carried into a contest in the same manner and under the same conditions as provided in the matter of contests before local land officers.

8. Trustees of the several town sites entered in said Territory shall levy assessments upon the property either occupied or possessed by any native Alaskan the same as if he were a white man, and shall apportion and convey the same to him according to his respective interest, without regard to the question of citizenship. But in case of white settlers or associations or corporations the trustees shall require the same evidence of citizenship or the right to hold real estate, as the case may be, as is required of purchasers of land for purposes of trade or manufactures.

9. The entry having been made and forwarded to this office, the trustee will cause an actual survey of the lots, blocks, streets, and alleys of the town site to be made, conforming as near as in his judgment it is deemed advisable to the original plan or survey of such town, making triplicate plats of said survey and designating upon each of said plats the lots occupied, together with the value of the same and the name of the owner or owners thereof; and in like manner he will designate thereon the lots occupied by any corporation, religious organization, or private or sectarian school. When the plats are finally completed they will be certified to by him as follows:

I, the undersigned, trustee of the town site of ———, Alaska Territory, hereby certify that I have examined the survey of said town site and approved the foregoing plat thereof as strictly conformable to said survey made in accordance with the act of Congress approved March 3, 1891, and my official instructions.

One of said plats shall be filed in the land office in the district where the town site is located, one in the office of the Commissioner of the General Land Office, and one retained for his own use. The designation of an owner on such plats shall be temporary until final decision of record in relation thereto, and shall in no case be taken or held as in any sense or to any degree a conclusion or judgment by the trustee as to the true ownership in any contested case coming before him.

10. As soon as said plats are completed, the trustee will then cause to be posted in three conspicuous places in the town a notice to the effect that such survey and platting have been completed, and notifying all persons concerned or interested in such town site that on a designated day he will proceed to set off to the persons entitled to the same, according to their respective interests, the lots, blocks, or grounds to which each occupant thereof shall be entitled under the provisions of

said act. Such notices shall be posted at least fifteen days prior to the day set apart by the trustee for making such division and allotment. Proof of such notification shall be evidenced by the affidavit of the trustee, accompanied by a copy of such notice.

11. After such notice shall have been duly given, the trustee will proceed on the designated day, except in contest cases, which shall be disposed of in the manner hereinafter provided, to set apart to the persons entitled to receive the same the lots, blocks, and grounds to which each person, company, or association of persons shall be entitled, according to their respective interests, including in the portion or portions set apart to each person, corporation, or association of persons the improvements belonging thereto, and in so doing he will observe and follow as strictly as the platting of the town site will permit the rights of all parties to the property claimed by them as shown and defined by the records of the clerk of the district court of Alaska, who is ex officio recorder of deeds and mortgages and other contracts relating to real estate in said Territory.

12. After setting apart such lots, blocks, or parcels, and upon a valuation of the same as hereinbefore provided for, the trustee will proceed to determine and assess upon such lots and blocks according to their value, such rate and sum as will be necessary to pay all expenses incident to the town-site entry. In those cases in which there appears more than one claimant for any lot or block the trustee will require each claimant to pay the assessment, and upon the final determination of the contest, as hereinbefore provided for, the unsuccessful claimant or claimants will be reimbursed in a sum equal to the assessment paid by them, such reimbursements to be properly accounted for by the trustee. In making the assessments the trustee will take into consideration—

First. The reimbursement of the parties who advanced such money as was necessary to pay the purchase price of the land.

Second. The money expended in advertising and making proof and entry of the town site.

Third. The compensation of himself as trustee.

Fourth. The expenses incident to making the conveyances.

Fifth. All necessary traveling expenses and all other legitimate expenses incident to the expeditious execution of his trust.

More than one assessment may be made, if necessary, to effect the purposes of said act of Congress and these instructions. Upon receipt of the assessments the trustee will issue deeds for the uncontested lots, blank forms of conveyance being furnished by this office for that purpose.

13. His work having been completed to this point, the trustee will then, and not before, in cases where he finds two or more inhabitants claiming the same lot, block, or parcel of land, proceed to hear and

determine the controversy, fixing a time and place for the hearing of the respective claims of the interested parties, giving each ten days' notice thereof, and a fair opportunity to present their interests in accordance with the principles of law and equity applicable to the case, observing as far as practicable the rules prescribed for contests before registers and receivers of the local offices; he will administer oaths to the witnesses, observe the rules of evidence as near as may be in making his investigations, and at the close of the case, or as soon thereafter as his duties will permit, render a decision in writing. If the notice herein provided for can not be personally served upon the party therein named within three days from its date, such service may be made by a printed notice published for ten days in a newspaper in the town in which the lot to be affected thereby is situated; or, if there is none published in such town, then said notice may be printed in any newspaper published in the Territory. Copies of such notice should also be posted upon the lot in controversy and in at least three other conspicuous places in the town wherein the lot is situated. The proof of such publication and posting of notices, to be filed with the record, may be made as provided in these rules and regulations in other cases. The proceedings in these contests should be abbreviated in time and words, or the work may not be completed within the limit of any reasonable period of time or expense.

14. Before proceeding to dispose of the contested cases the trustee will require each claimant to deposit with him each morning a sum sufficient to cover and pay all costs and expenses on such proceedings for that day. At the close of the contest, on appeal or otherwise, the sum deposited by the successful party shall be returned to him, but that deposited by the losing party shall be retained and accounted for by said trustee.

15. Any person feeling aggrieved by the decision of the trustee may, within thirty days after notice thereof, appeal to the Commissioner of the General Land Office, under the rules as provided for appeals from the opinions of registers and receivers, and if either party is dissatisfied with the conclusions of said Commissioner in the case, he may still further prosecute an appeal, within sixty days from notice thereof, to the Secretary of the Interior, upon like terms and conditions and under the same rules that appeals are now regulated by and taken in adversary proceedings from the Commissioner to the Secretary. All costs in such proceedings will be governed by the rules now applicable to contests before the local land offices.

16. The trustee shall receive and pay out all money provided for in these instructions, subject to the supervision of this office, and he shall keep a correct record of his proceedings and an accurate account of all money received and disbursed by him, taking and filing proper vouchers therefor, in the manner hereinafter provided; and before

entering upon duty he shall, in addition to taking the official oath, also enter into a bond to the United States in the penal sum of \$5,000, for the faithful discharge of his duties, both as now prescribed and furnished by the Department of the Interior.

17. All lots remaining unoccupied and unclaimed when the trustee shall have made his allotments and assessments will be sold at public outcry, for cash, to the highest bidder. The proceeds of such sales, together with any balance remaining in the hands of the trustee to the credit of the town-site occupants, to be expended, under the direction of the Secretary of the Interior, for the benefit of the town.

18. All payments by the occupants of any town site for any of the purposes above named shall be in cash, and made only to the trustee thereof, who shall make duplicate receipts for all money paid him, one to be given the party making the payment and the other to be forwarded to this office with the trustee's papers and accounts. Said trustee shall also take receipts for all money disbursed by him, and be held strictly accountable by this office, under his bond, for the proper handling of the trust funds in his possession.

19. The trustee of any town site in said Territory will be allowed compensation at the rate of \$5 per day for each day actually engaged and employed in the performance of his duties as such trustee, and his necessary traveling expenses.

20. The trustee's duties herein prescribed having been completed, the account of all his expenses and expenditures, together with a record of his proceedings and a list of the lots to be sold at public sale, as hereinbefore provided, with all papers in his possession and all evidence of his official acts, shall be transmitted to this office to become a part of the records hereof, excepting from such papers, however, the subdivisional plat of the town site, which he shall deliver to the clerk of the district court, to be made of record and placed on file in his office as ex officio recorder of deeds, mortgages, and other contracts relating to real estate in the Territory of Alaska.

COMMUTATION OF HOMESTEAD ENTRIES FOR TOWN-SITE PURPOSES IN OKLAHOMA.

All applications to commute homestead entries, or portions thereof, to cash entries, at the rate of \$10 per acre, for the purpose named in the twenty-second section of the act of May 2, 1890 (26 Stat. L., 81), will be made through the district land office, addressed to the honorable Secretary of the Interior and transmitted to the Commissioner of the General Land Office, in accordance with the following regulations:

1. Entries under said section must be made according to the legal subdivision 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.

2. An entryman desiring to commute his homestead entry, in whole or in part, for town-site purposes shall present his application (Form 4—001) 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, the register and receiver will permit him to make publication of notice of his intention to submit commutation town-site proof in accordance with the law herein referred to. The notice of intention to make proof as above provided shall be the same in all respects as that required of a claimant in making final homestead proof, with the addition that it shall state that said proof will be made under section 22 of the act of May 2, 1890.

3. Proof in accordance with the published notice, consisting of the testimony of the claimant and two of the advertised witnesses, must be furnished relating—

First. To evidence that the tract sought to be purchased is required for town-site purposes.

Second. To the observance by the entryman of the provisions of the law and of the President's proclamation under which settlement on the land sought to be purchased became permissible.

Third. To the claimant's citizenship and qualifications in all other respects, as a homesteader, the same as in making final homestead or commutation proof.

Fourth. To due compliance with all the requirements of the homestead law by the claimant up to the date of submitting proof.

Proof of publication of notice must also be furnished as in ordinary cases.

4. At the time of submitting proof, as provided in the preceding paragraph, the entryman shall file therewith triplicate plats of the survey of the land applied for, duly verified by the oaths of himself and the surveyor. Such plats shall be made on tracing linen and on a scale of 100 feet to 1 inch; they shall be provided with a margin sufficient to contain the oaths of the entryman and the surveyor and the approval of the Secretary of the Interior; they 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 10 nor more than 20 acres."

5. It is of the utmost importance that all plats of town sites should

be correct. The size of each lot should be stated, and if the lot is irregular in shape the width at each end should be indicated; the width of each street and alley should be marked, and the dimensions, together with the area of the reservations and parks, indicated.

Whenever an entry is made adjacent to a town already in existence the streets must conform to the streets already established; and this must be stated in the affidavit of the surveyor. The affidavit of the surveyor shall also contain a statement of what tract of land is surveyed as the town site and that the tracts reserved for public purposes contain the requisite amount of land.

The affidavit of the party applying to make the entry shall embrace the statement that the application to enter the described tract of land as the town site of — is made under the provisions of the second proviso to section 22 of the act of May 2, 1890, entitled "An act to provide a temporary government for the Territory of Oklahoma," etc., that all streets, alleys, parks, and reservations are dedicated to public use and benefit, and that the plat is correct according to the survey made by the proper surveyor.

6. At the time of submitting proof and filing the triplicate plats the claimant shall tender to the receiver the purchase price of the land applied for, exclusive of the portions reserved for parks, schools, and other public purposes (which are to be patented as a donation to the town when organized as a municipality, for the specific purposes for which they were reserved), payment to be made by draft on New York made payable to the order of the Secretary of the Interior, at the rate of \$10 per acre for that portion of the land actually entered.

The register and receiver will thereupon transmit the proof and triplicate plats to this office for examination and the approval of the Secretary of the Interior, together with the application to make entry and their joint report as to the status of the land applied for, and at the same time they will transmit to the Secretary of the Interior the draft tendered in payment for the land, making references in each letter to the other.

7. When the proof and triplicate plats are received by this office, if found to be regular and in accordance with these regulations, they will be forwarded to the Secretary of the Interior with recommendation that the plats be approved.

Should the triplicate plats be approved and receipt of the purchase price of the land be acknowledged by the Secretary, one of said approved plats will be retained in this office and the other two will be returned to the district land office with directions to the register to issue final certificate for the land embraced in said approved plats (exclusive of the lands to be donated and maintained for public purposes as heretofore provided). Receipt of the purchase money having been acknowledged by the Secretary of the Interior, no final receipt

will be issued by the receiver. One of the approved plats returned to the register and receiver will be retained in their office and the other they will deliver to the applicant, to be by him filed and made of record in the office of the recorder of deeds of the county in which the town is situated.

8. Upon the issuance of final certificate the register and receiver will note on their records the commutation of the applicant's homestead entry, in whole or in part, as the case may be. When patent is ready for delivery the entryman will be required to surrender his duplicate homestead receipt for transmittal to this office if the entire homestead entry is commuted, or to deliver the same to the register and receiver to have the commuted town-site entry noted thereon and returned to the entryman if the homestead entry is commuted in part only, before said patent will be delivered.

9. The foregoing regulations will be observed in all cases in which the entry and claimant's application to commute for town-site purposes are free from protest, contest, or other adverse proceedings. But in all cases in which, at the time of submitting proof, or prior thereto, a protest or an affidavit of contest is filed, the register and receiver will take appropriate action on such protest or contest in accordance with the prevailing practice in ordinary homestead, commutation, or final-proof cases before transmitting the papers to this office, and should such action be adverse to the application to commute, or favorable thereto, and an appeal be filed by the contestant, they will not require tender of the purchase price of the land sought to be purchased for town-site purposes until they are advised of the final determination of such protest or contest proceedings by this office or the Department favorable to the application to purchase. When so advised they will require the applicant to make immediate tender of the purchase money, which they will transmit to the Secretary of the Interior and advise this office thereof, as hereinbefore provided.

Protest or contest affidavits filed in the district land office after the transmittal of the proof and triplicate plats to this office will not be considered by the register and receiver, but must be promptly transmitted to this office for appropriate action. After the approval of the triplicate plats by the Secretary of the Interior no protest or contest relating thereto will be entertained by the district land office or this office, but should one be filed with the register and receiver it will be forwarded to this office, to be transmitted to the Secretary of the Interior for appropriate action.

10. In all contested cases the contestant will be required to file in the district land office 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 deter-

mination; and if the allegations therein contained are considered sufficient to warrant the ordering of a hearing, the same will be ordered upon compliance by the contestant with the condition that he shall deposit a sufficient sum to cover the cost thereof.

Notice of actions or decisions in all matters affecting an entry, or an application to commute for town-site purposes, under the foregoing instructions, and the proof thereof, shall be the same as in ordinary cases; and any person feeling aggrieved by the judgment of the register and receiver in such matters may, within thirty days from notice thereof, appeal to this office. Within the time allowed 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 decisions of this office lie to the Secretary of the Interior the same as in other matters of like character, such appeal and service thereof to be filed within sixty days from notice of the decision of this office from which appeal is taken, in accordance with the Rules of Practice.

Motions for review of the decisions of the district land office shall be filed and served within the time allowed for appeal, and motions for review of the decisions of this office and of the Secretary of the Interior shall be filed and served within thirty days from notice thereof.

11. The act under consideration provides that the sums received by the Secretary of the Interior for commuted town-site entries shall be paid over to the proper authorities of the municipalities when organized, to be used by them for school purposes only.

Before the money can be paid over there must be satisfactory evidence that the municipality has been organized as required by the laws of Oklahoma.

In support of an application by the proper municipal officers for payment of the money deposited with the Secretary of the Interior for a particular commuted town-site entry the following evidence shall be furnished:

First. A duly certified copy, under seal of the order of the board of county commissioners, declaring that the specified territory shall, with the assent of the qualified voters, be an incorporated town; also the notice for a meeting of the electors, as required by paragraph 5 of article 1, chapter 16, of the statutes of Oklahoma.

Second. A like certified copy of the statement of the inspectors filed with the board of county commissioners, also a like certified copy of the order of said board, declaring that the town has been incorporated, as provided by paragraph 9 of said article 1.

Third. A like certified copy of the statement of the inspectors, filed with the county clerk, declaring who were elected to the office of trustees, clerk, marshal, assessor, treasurer, and justice of the peace, as provided by paragraph 16 of said article 1.

Fourth. A like certified copy, by the town clerk, of the proceedings of the board of trustees electing one of their number president: also a copy of the qualifications to act, by each of the officers mentioned, as provided by paragraph 19 of said article 1.

Fifth. A certified copy, by the town clerk, of the proceedings of the board of trustees, designating some officer of the municipality to make application for and to receive the money to be paid by the Secretary of the Interior.

Sixth. A proper application for the money by said designated officer.

Said application shall be addressed to the Secretary of the Interior and may either be filed in the district land office for transmittal to this office or forwarded by the municipal authorities direct to this office. When the same is received by this office, if the application and accompanying evidence are in accordance with the requirements herein mentioned, it will be transmitted to the Secretary of the Interior and when approved by him the money will be paid over to the designated officer to be used by the municipality for school purposes only as required.

12. When the towns herein provided for are organized as municipalities, applications, accompanied by proof of municipal organization similar to that provided in the preceding paragraph, shall be made for patents for the reservations which the act under consideration provides shall be made for parks, schools, and other public purposes, and which are to be donated to the municipalities when duly organized as such.

The application for patent shall be made by the mayor or other proper municipal authority; shall be addressed to the Secretary of the Interior, and shall particularly describe the reservations to be patented according to the approved plats of said town site. Said application shall be filed in the district land office, and if the register and receiver find the accompanying evidence of municipal organization and authority to make application to be in accordance with these regulations, the register will issue certificate thereon as follows:

LAND OFFICE AT _____,
_____ 19—.

No. —.

It is hereby certified that, pursuant to the provisions of section 22 of the act of May 2, 1890 (26 Stat., 81), and the regulations thereunder _____, (mayor or trustee) of the town (or city) of _____, in _____ County, Okla., has made application for patent to said town (or city) for _____ in the town site of _____, Oklahoma, reserved for said public purposes in accordance with the approved plats of said town site, said application being accompanied by satisfactory proof of the organization of said municipality, and of said _____ (mayor's or trustee's) authority to make application for patent for said reservations.

Now, therefore be it known that on presentation of this certificate to the Commissioner of the General Land Office the said town (or city) of _____ shall be entitled to a patent for the tract (or tracts) of land above described, to be maintained for said public purposes as provided in the act herein mentioned.

_____, Register.

You will give to certificates of this character a separate series of numbers, giving to each certificate its consecutive number in the series, and when issued you will transmit the same to this office, together with the application for patent and accompanying evidence by special letter.

ENTRIES OF PUBLIC LAND FOR PARK AND CEMETERY PURPOSES.

Pursuant to the act of Congress entitled "An act to authorize entry of public lands by incorporated cities and towns for cemetery and park purposes," approved September 30, 1890 (26 Stat., 502), the following rules and regulations will be observed:

1. The right of entry under said act is restricted to *incorporated* cities and towns, and such cities and towns shall be allowed to make but one entry of contiguous tracts of unreserved and unappropriated public land, not exceeding a quarter section in area, all of which must lie within 3 miles of the corporate limits of the city or town for which the entry is made.

2. If the public surveys have not been extended over the land sought by any city or town under the provisions of said act, it shall first be necessary for the proper corporate authority to apply to the surveyor-general of the district in which the tract in question is located, for a special survey of the outboundaries of such tract. The application should describe the character of the land sought to be surveyed and, as accurately as possible, its area and geographical location. Tracts covered by such special surveys must be as nearly as practicable in square form, and entries of the same will not be allowed until after the surveys shall have been approved by the surveyor-general and accepted by the Commissioner of the General Land Office. The current appropriation for "surveying the public lands" being applicable to the survey of "lines of reservations," as well as to the extension of the ordinary lines of the system of public-land surveys, the cost of the surveys of all unsurveyed lands selected under the provisions of said act of September 30, 1890, will be paid for out of said appropriation, the same as the special surveys of the outboundaries of town sites and for like reasons (see case of Fort Pierre, 18 C. L. O., 117), and the deputies employed by the surveyor-general to execute such special surveys will report whether the land is either mineral in character or within an organized mining district.

3. An application for the purposes indicated herein can only be made by the municipal authorities of an incorporated city or town; and in all cases the entries will be made and patents issued to the municipality in its corporate name, for the specific purpose or purposes mentioned in said act.

4. The land must be paid for at the Government price per acre, after proof has been furnished satisfactorily showing—

First. Six weeks' publication of notice of intention to make entry, in the same manner as in homestead and other cases.

Second. The official character and authority of the officer or officers making the entry.

Third. A certificate of the officer having custody of the record of incorporation, setting forth the fact and date of incorporation of the city or town by which entry is to be made, and the extent and location of its corporate limits.

Fourth. The testimony of the applicant and two published witnesses to the effect that the land applied for is vacant and unappropriated by any other party, and as to whether the same is either mineral in character or located within an organized mining district.

Fifth. In case the land applied for is described by metes and bounds, as established by a special survey of the same, that the applicant and two of the published witnesses have testified from personal knowledge obtained by observation and measurements that the land to be entered is wholly within 3 miles of the corporate limits of the city or town for which entry is to be made.

5. Entries under this act will receive the current number of the cash series of entries, and in all cases, the cash certificate (Form No. 4—189) should contain the corporate name of the city or town, and the last clause thereof should be modified so as to guarantee to the city or town a patent in this wise:

Now, therefore, be it known, that on presentation of this certificate to the Commissioner of the General Land Office, the said city (or town) of ———, shall be entitled to receive a patent for the tract above described, for park and cemetery purposes (or either purpose as the case may be), as authorized by the act entitled "An act to authorize entry of public lands by incorporated cities and towns for cemetery and park purposes," approved September 30, 1890 (26 Stat., 502).

6. If any land covered by a cash certificate issued under the foregoing provisions, is either mineral in character or within an organized mining district, the above-indicated modification of the last clause of such certificate shall be enlarged by adding to the close thereof the following exception, to wit:

Provided, That no title shall be hereby acquired to any mineral deposits within the limits of the above-described tract of land, all such deposits therein being reserved as the property of the United States.

Very respectfully,

W. A. RICHARDS, *Commissioner*.

Approved, June 12, 1903.

E. A. HITCHCOCK, *Secretary*.

FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

MARY E. COFFIN.

Where in making selection of unsurveyed lands under the exchange provisions of the act of June 4, 1897, a third party is employed to protract the lines of survey over the land desired, and selection is made according to the description furnished by such party, and it afterwards develops that mistake was made in the description so furnished, the Department can not recognize any such mistake as a sufficient ground for amendment of the selection.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *June 16, 1903.* (J. R. W.)

Mary E. Coffin appealed from your office decision of March 17, 1903, rejecting her application to amend her selection under the act of June 4, 1897 (30 Stat., 36), No. 1978½, your office series, to be for the SE. ¼ NE. ¼, Sec. 15, T. 69 N., R. 22 W., Duluth, Minnesota, instead of the SE. ¼ NW. ¼, Sec. 13, T. 67 N., R. 24 W., as originally described, in lieu of a like area of land relinquished to the United States in the Black Hills Forest Reserve, Pennington County, South Dakota.

February 7, 1900, the selector filed the original application in the local office, for unsurveyed land, and September 26, 1900, filed a relinquishment thereof and an "amended application" to select the land in question (unsurveyed), with affidavits of John Coats and John B. Jacquemont, Coats stating that he is the person who purchased from Mary E. Coffin the land that he now learns will be when surveyed the SE. ¼ NE. ¼, Sec. 15, T. 69 N., R. 22 W.; that by mistake of the locator, who gave him and the selector the description, it was described as the SE. ¼ NW. ¼, Sec. 13, T. 67 N., R. 24 W., but affiant and the selector believed the description last given was that of the tract selected, which when surveyed will be the SE. ¼ NE. ¼, Sec. 15, T. 69 N., R. 22 W.; that he offers a deed (attached to his affidavit) to the United States for the land, which is in its natural state, without removal of timber or other thing therefrom.

Jacquemont's affidavit is that he is the locator referred to, and that he intended to and believed he did describe the land as in the amended application, but now learns that it is erroneously described as in the original one, and is unable to say how the error occurred, but believes it resulted from his having some descriptions of land in township 67 north, one of which was by mistake substituted for the correct one; that he furnished the description to Coats and Coffin, who both relied upon it.

December 1, 1902, your office refused the application for want of any allegation by Mrs. Coffin that she was misled or that the land originally selected was not that intended, and because section 2372 of the Revised Statutes confined changes of entry to applications by the

original party, his heirs or legal representatives, those "not being assignees or transferees."

February 24, 1903, Mrs. Coffin moved for a review, filing her affidavit that she is the person who made the application for change of entry; that she was advised of the application, and failure to file her affidavit therewith was due to oversight or to deeming it immaterial, the facts being so fully set out in the affidavits filed; that she made the original application for Coats, who furnished the description, and never having examined the land she was not aware of the mistake until advised by Coats; that her intent was to select the land he desired.

Your office denied the motion, on the ground that it was without authority to allow the change of entry by reason of the inhibition in section 2372 of the Revised Statutes as to transferees.

The appellant alleges error of your office in basing its action upon section 2372 of the Revised Statutes, which, it is claimed, has reference only to entries wherein equitable title vests by action of the local office and wherein the local office issues at the time of the entry a final certificate or other written evidence of right to a patent. It is urged that the language of the section and the date of the statute from which it is derived, May 24, 1824 (4 Stat., 31), when forms of merely initiate appropriation of public land were unknown, make the section inapplicable to cases where no decision is made by the local office upon the applicant's right to a legal title, and upon which no written evidence of such right is issued.

Without discussing the question thus raised, it is sufficient to say that this case presents no meritorious ground for the requested change of description. It is not claimed the description written in the application was not that intended to be written, nor that Coffin, or any one acting for her, had seen and chosen a particular tract of land which was fixed upon and intended to be selected, but by some error in protracting the lines of survey that land after the survey proved to have a different description than the protraction of the lines, before survey, seemed to give it. Such claim could not reasonably be proven, as the two tracts lie in different townships and ranges more than fifteen miles apart. The description intended at the time to be written was written, and that tract of land was thereby segregated and withheld from appropriation by others for about seven months. The selector herself had no tract other than the one described in the original application in mind. The mistake, if any, was made in a transaction between the selector and a third party. This Department can not take cognizance of such transactions and can not recognize any mistake arising in them as sufficient ground for an amendment of a selection.

The action of your office denying the application for amendment is affirmed.

HOMESTEAD ENTRY—AMENDMENT.

CHARLES CARSON.

A homestead entryman who by reason of misinformation, and with no intent to waive any part of his homestead right, enters less than the one hundred and sixty acres allowed by law, will be permitted, where his entry has not yet been carried to completion and no adverse rights have intervened, to amend his entry so as to include a quantity of adjacent unoccupied public land, subject to such entry, which added to the land already entered will not exceed one hundred and sixty acres.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *June 19, 1903.* (J. R. W.)

Charles Carson appealed from your office decision of March 28, 1903, rejecting his application to amend his homestead entry so as to embrace, with the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 20, also the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 29, T. 49 N., R. 3 W., B. M., Coeur d'Alene, Idaho.

September 5, 1901, Carson made entry for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 20. December 30, 1901, he filed an affidavit, corroborated by one witness, that:

At the time of examination, Sept. 2nd, 1901, of the above described land, by him preparatory to making a filing on the same under the H. D. laws, he was informed by different ones living in that section that this was all the land that was vacant in that particular place, so that under those circumstances it was an impossibility for him to get the total amount of land allowed him under the H. D. laws, namely one hundred and sixty acres; he further states that at the time of his making his filing he was fully prepared to take the total amount allowed him and expected to do so, but that he was misinformed and therefore only filed upon eighty acres, and he further states that after his commencing to make improvements and to make the same his home, which he did on Sept. 6th, 1901, that he saw no signs of improvements and no sign that the adjoining land that he was informed was taken, was in any way occupied, that he then waited sixty days to see if any claimant appeared, and that at the end of the said time he made a second trip to the land office and was there informed that said piece of land was vacant and subject to entry under the H. D. laws. He further states that he has made the following improvements on the land, filed on by him Sept. 5th, 1901: A two room house, size 12 x 22 ft., log, about an acre and a-half of clearing, all of which is fenced, have built about one mile and a half of road. And further he states that he has in no way disposed or tried to dispose of any of the land described in his application, made Sept. 5th, 1901. Therefore he prays that he be allowed to amend his H. D. entry so that he may have the full benefit of the H. D. law. And that his entry be amended so that it will call for the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 29, T. 49 N., R. 3 West of B. M., in addition to the above first described entry.

Your office decision held that:

An examination of the papers in this case shows that the homestead affidavits were executed before the register, from which it will be seen that the applicant while there had an opportunity (if he had so desired) to examine the records of your office and know of his own knowledge whether the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 29, was vacant or not.

The application to amend is corroborated by only one witness, Gust Johnson, who fails to state specifically, as does the applicant, who informed the homesteader as alleged, that there was but 80 acres in that neighborhood vacant and subject to entry.

For these reasons, I am of the opinion that the applicant should not be allowed to amend his entry as desired. His application is, therefore, rejected subject to the right of appeal.

The application does not seek to change the entry so as to abandon land entered and held from other appropriation, but merely to fill the right which the entryman had and failed to exercise because of erroneous information as to the condition of the land he now seeks to appropriate. No one has been or could have been prejudiced by the alleged mistake, except the entryman himself. The policy of the homestead law is to allow a qualified entryman to take one hundred and sixty acres, or one quarter section, of the public domain. Where one deliberately takes less than his right he is regarded to have waived so much of it as was not then exercised, especially where the first entry has been consummated and closed upon the record. Michael Dermody (10 L. D., 419-420).

Where, however, the presumptive waiver of right was induced by misinformation as to the condition of the land, the intention to waive the right to the extent not exercised is rebutted. It was held in Josiah Cox (27 L. D., 389, 390) that:

the rule permitting amendment of entries has been very liberally construed by this Department, particularly where parties have been misled through ignorance or misinformation as to their rights, where no adverse rights have intervened.

In that case the applicant was misled by the advice of his attorney. The essential ground for relief from the consequence of mistake is the equitable one that owing to an erroneous impression, due to incorrect information of existing facts, the one seeking relief was induced to act differently from what he otherwise would have done, by doing or forbearing to do something whereby his rights are prejudiced. In such cases the act done is properly not his deliberate act, and he is equitably entitled to be relieved of the consequences so far as is compatible with the rights of innocent third parties.

In the present case no third parties are affected. While the original entry was made at the local office and the mistake of the entryman might have been corrected at the time had he inquired as to the condition of the land now applied for, the essential fact remains that he did not intentionally waive his right to take eighty of the one hundred and sixty acres of land to which he was by law entitled. He not having deliberately and intelligently waived his right, the fact that he did not make inquiry when he might have done so does not estop him when no innocent third party has been misled to his prejudice. The entry being still *in fieri*, not carried to completion, is amendable.

Your office decision is reversed.

RIGHT OF WAY—RESERVOIR SITE—ACTS OF MARCH 3, 1891, AND MAY
14, 1896.

IRRIGATORS OF AZUSA, DUARTE AND COVINA *v.* ELECTRIC WATER COM-
PANY AND ELECTRIC POWER COMPANY.

The act of March 3, 1891, granting rights of way through the public lands and reservations for canals, ditches and reservoirs, to be used for irrigation purposes, and the act of May 14, 1896, granting similar rights of way for the purpose of generating, manufacturing and distributing electric power, necessarily contemplate such destruction of timber along the line of any such right of way as results from the use and maintenance of the right.

Section 18 of said act of March 3, 1891, does not limit the size of the reservoirs therein provided for, but authorizes the approval of a right of way "to the extent of the ground occupied by the water of the reservoir," "and fifty feet on each side of the marginal limits thereof."

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *June 19, 1903.* (G. B. G.)

Your office decision of February 18, 1902, denied the respective applications of the Electric Power Company under the act of May 14, 1896 (29 Stat., 120), and the Electric Water Company under sections 18 to 21 of the act of March 3, 1891 (26 Stat., 1095, 1101-1102), for a right of way through the San Gabriel Forest Reserve, in the State of California.

The applications of each are for substantially the same right of way, and their interests as they relate to these proceedings are identical, the enterprise being a joint one for the purposes of irrigation and the generation and distribution of electrical power. It is proposed to divert the waters of the upper tributaries of the San Gabriel river, and by means of an extended system of canals, conduits, and pipe lines convey these waters to the points of intended use for the purposes mentioned. The right of way applied for includes two power house sites of about twenty acres each, one being upon section 21, the other upon section 29, and a reservoir site situated in sections 14, 15, 22, and 23, covering 67.60 acres—all in township 2 north, range 9 west, S. B. M.

April 13, 1898, there was filed in your office a protest, signed by a large number of settlers and land owners in the communities of the Azusa, Covina and Duarte, against the granting of these applications, alleging that all the water claimed by the applicants had long since been appropriated by protestants; that there was no surplus water in the San Gabriel river subject to appropriation; that the carrying out of the project would destroy the water sources of the river, the forest, and the forest reserve; that the applicants' maps were forced and unreliable, and that the granting of the right of way applied for would cloud protestants' title, and impose upon them the cost of litigation.

A hearing was ordered by your office, and the case was heard at the local land office from September 4, to December 13, 1900.

The San Gabriel water shed, through which this right of way is asked, covers an area of two hundred and twenty-three square miles. It is drained by numerous small streams, which unite on the eastern side to form the east branch and on the western side to form the west branch of the San Gabriel river, and these two branches unite in one stream some distance above the intake of an electric plant, operated by the "San Gabriel Electric Company," situated on the SE. $\frac{1}{4}$ of Sec. 31, T. 2 N., R. 9 W., where the water is diverted by said company and taken over a right of way, heretofore approved by the Department, used for the purpose of generating electrical power, and then returned to the bed of the San Gabriel river six or seven miles down the canyon, where it is taken into the ditch line of the protestants and distributed over a large area of country below the mouth of the canyon, for the purpose of irrigating the lands in that vicinity.

It is admitted that the protestants are the prior appropriators, and are entitled to all of the waters flowing in the San Gabriel river at the intake of their canal, not exceeding 5000 miners' inches. There is at all times during the irrigating season, except following an occasionally heavy rain in the mountains, a very much less quantity of water flowing in the San Gabriel river than is conceded to belong to the protestants. On the other hand, the applicants, while making this concession, claim that there is more water during the irrigating seasons of the year flowing at their proposed points of diversion in the tributaries of the river than flows at the intake of the protestants' ditch line; that they can divert this water, transfer it through ditches, conduits, and pipe lines; use it for the purpose of generating electrical power, and return it to the irrigators undiminished in quantity and unimpaired in quality, and besides that by the construction of the reservoir, as contemplated by the applicants, they will be able to impound the storm waters of the San Gabriel water shed, and store these waters for use during the irrigating season of the year, and thereby be enabled to irrigate a large area of country which is now a barren waste.

The main question in this case is, whether the diversion of the waters from the tributaries of the San Gabriel river, as proposed by the applicants, will result in depriving the protestants of any water which they are now entitled to by reason of their prior appropriation, or whether such diversion will result in injury to the San Gabriel water shed by the destruction of forest growth which it is now thought protects the sources of water supply. An injury to the protestants may be worked in either of these two ways.

Much testimony was adduced and many expert witnesses have testified in this record upon these questions. Scientific measurements of water flowing at both the upper and lower points of diversion have been made, and while the witnesses who took these measurements do not always agree as to the methods used in measuring the water, or as

to the results obtained from such measurements, the conclusion is justified from the whole record that there is more surface water flowing at the points of diversion as proposed by the applicants than flows under the same conditions of time and temperature at the intake of the protestants' ditch line. The question of the loss of water between these points is, however, very much complicated by what has been generally designated in the record as the underground flow. The San Gabriel basin contains a large area of gravel beds and sand, which constitutes an immense subterranean reservoir, and it is a moot question whether the diversion of water from the upper streams which feed this reservoir will not stop the surface flow of the San Gabriel river altogether below these points during the dry or irrigating seasons of the year.

The theory of the protestants has been that by the diversion of these upper waters the water running into the canyon below these points from small streams and gulches would not be sufficient to charge the gravel beds; that the plane of saturation will be very much lowered, and that as a consequence the surface stream will disappear entirely; that this will result not only in diminishing the supply of the sub-surface water, which they are now collecting and utilizing by means of a sub-surface dam, but it will inevitably result in the destruction of all the timber in the canyon which now subsists upon the normal water supply, and that the destruction of this timber will operate to cause the waters of this canyon to flow more rapidly than they now do, thereby causing the water shed to distribute its waters much more rapidly upon the plain below, with dangerous consequences to their property during storm floods. They also contend that the natural beauty of the canyon will be very much impaired by the destruction of this timber, and that its value as a summer resort will be entirely destroyed.

On the other hand, the applicants contend that none of these results will follow. They admit that the surface stream will be very much diminished, but claim that there will still be enough water to protect any timber of real value found in the canyon, and that the destruction of certain classes of undergrowth, if such destruction results, will be a benefit rather than an injury to both the beauty and utility of the canyon; that these gravel beds will be charged from year to year during periods of heavy rain-fall and flood, and that inasmuch as it has been scientifically demonstrated that sub-surface waters in sand and gravel beds of the character here found do not flow faster than three to ten miles per annum, the sub-surface flow at the mouth of the canyon will not be diminished by reason of the diversion from the upper stream; that before there could be any perceptible diminution of the sub-surface flow at the mouth of the canyon, the gravel beds would again be fully charged from storm waters.

It is believed that the weight of the testimony is to the effect that the diversion of these surface waters on the upper stream will not effect a material diminution of the sub-surface flow at the mouth of the canyon; that there will be some less water at the lower point is probable, but the difference will not be sufficient to affect the conclusion hereinbefore reached, that there is more water flowing at the upper points of diversion than at the intake of the protestants' ditch line. Moreover, this conclusion does not take into consideration the possibility of the applicants putting in sub-surface dams at their several points of diversion, thus utilizing the sub-surface flow at these points, which would undoubtedly effect a large saving of water, and would have very little, if any, effect on the sub-surface flow at the mouth of the canyon. The loss of water between the applicants' points of diversion and the intake of protestants' ditch line is due to two causes—first, evaporation, and, second, consumption of water by plant life. The vegetation which subsists on the surface flow in the San Gabriel canyon is composed almost exclusively of alders, water moties, and willows. These growths have little, if any, commercial value, and according to the testimony are the greatest known consumers of waters in the vegetable kingdom. Besides, there is a comparatively small area that would be affected by the diversion of waters from the canyon, probably less than fifty acres in all. There is a considerable growth of live-oaks and sycamores in the canyon, but these do not depend for life upon surface waters, and there is no reason to believe that there would not be sufficient moisture in the ground to protect this class of timber. The proposed diversions can in no wise affect the forest growth lying above the points of diversion, nor can they have any effect upon the forest growth in the numerous small streams and canyons lying below the points of diversion. Only the timber in the main canyon will be affected, and only such timber as subsists upon surface waters. That the destruction of this growth of alders, water moties, and willows will cause a more rapid precipitation of waters in the canyon is reasonably certain, but it is not at all clear that this would not be a benefit rather than a hindrance, or that it would not operate to protect the irrigators from flood waters rather than increase the dangers from that source. This is true, because the rapid precipitation in the lower canyon would clear the canyon for the waters that are flowing in the upper tributaries, and in this way there would not be nearly so much danger of floods as if the thick vegetable growth referred to was still in the canyon and beds of the stream, retarding the flow of the waters. That the timber growth on the head of the stream in the mountains is very valuable in this respect can not be doubted, because it operates to retard the flow of the waters and lets the storm waters run off gradually, thus obviating a condition which would produce floods if the water all ran off at once, but there is noth-

ing in the record which shows or tends to show that the valuable timber on the reservation will be injured, or that the beneficial conditions which exist in this reservation will be in any wise interfered with. There will be some destruction of timber along the line of the proposed right of way on the hillsides, but the act which permits rights of way through forest reservations necessarily contemplates such destruction as results from the use and maintenance of the right of way.

In addition to these main grounds of protest, the protestants assert that so much of the proposed scheme as includes the building of a reservoir is impracticable, and there is some testimony of engineers to this effect. On the other hand, the engineers who surveyed these rights of way and who surveyed the reservoir site testify that the scheme is altogether practicable, both as an engineering and as a financial proposition. Whatever may be the fact as to this, time and effect alone can satisfactorily demonstrate. The record justifies the conclusion that the applicants in good faith believe it is practicable to construct the proposed reservoir, and there is nothing before the Department to authorize a finding that this is not so. If it should develop that the applicants are not acting in good faith, or that the reservoir scheme is impracticable, the nature of the permit asked for is such, if allowed, that the Department may at any time revoke it in so far as it depends upon the act of May 14, 1896, *supra*, and if the protestants are injured, both the Department and the courts will be open to them for such relief as they may be entitled to. Nor is there any force in protestants' contention that the law does not authorize the granting of the right to construct this reservoir because of its extensive area. Section 18 of said act of March 3, 1891, authorizes the approval of a right of way "to the extent of the ground occupied by the water of the reservoir," "and fifty feet on each side of the marginal limits thereof." The size of the reservoir is not limited.

It is also urged that because some of the claimed water rights of the applicants rest on locations made at a time when no law authorized the appropriation of water within a reservation of the United States, the application should be denied. While there might be some doubt as to whether water locations under the laws of California could be legally made within the boundaries of a government reservation prior to the passage of the act of June 4, 1897 (30 Stat., 36), such locations were authorized by that act, and inasmuch as no person is asserting in this record a better claim to these waters, the question is not of sufficient importance to warrant discussion.

The decision of your office is reversed. The protest is dismissed, but inasmuch as your office has not examined the case with reference to the sufficiency and regularity of applicants' maps under the laws and regulations of the Department, the case is herewith returned for such examination. If found in all respects regular, your office will return the maps for the approval of the Department.

SCHOOL LAND—INDEMNITY—FRACTIONAL TOWNSHIPS.

STATE OF OREGON.

In determining the amount of indemnity school land granted the several States on account of losses occurring in fractional townships, under the adjustment provided for in section 2276 of the Revised Statutes, the acreage of land returned by the government survey will be taken as the basis for the calculation.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *June 22, 1903.* (F. W. C.)

The State of Oregon has appealed from your office decision of October 23, last, wherein its school indemnity list No. 436 was held for cancellation for insufficient bases.

By said list the State selected the N. $\frac{1}{2}$, Sec. 24, containing 320 acres, in lieu of a like deficiency alleged to exist in township 3 N., R. 1 W.

Your said office decision states that—

Tp. 3 N., R. 1 W., is fractional with area of 12071.64 acres, which under the provisions of Sec. No. 2276, U. S. Revised Statutes, entitled the State to 960 acres of school land. Sec. 16 has 429.95 acres in place as shown by the township plat on file in this office, and the State made selections amounting to 530.07 acres, approved in clear list 2, upon the basis of the entire deficiency in said township, which leaves the above described selection without base and invalid.

In its appeal the State contends that your office erred—

Third. In not holding that the State of Oregon was entitled to select 1280 acres of school indemnity selections, less 429.95 acres in place in Sec. 16, of said T. 3 N., R. 1 W., said township having an area of more than 27 sections, or three-fourths of a township.

No argument has been filed in support of the appeal and it is assumed that the basis of the State's claim is that the subdivisinal survey of the township shows more than 27 sections to have been identified, that is, that land is returned in more than 27 sections as usually surveyed.

An examination of the township in question shows that the Columbia river, the boundary between Oregon and Washington, runs nearly due north and south through the eastern part thereof, the land to the west of the river being in the State of Oregon. Further, that due to the presence of lakes and ponds the area of land in each section, excepting section 6, is less than 640 acres, some of the sections being almost entirely covered by water.

In determining the amount of indemnity land granted the several States for fractional townships, under the adjustment provided for in section 2276 of the Revised Statutes, which was compiled from the acts of May 20, 1826 (4 Stat., 179), and February 26, 1859 (11 Stat., 385), the acreage of land returned by the government survey has been taken as the basis for the calculation. The following is taken from

the circular of August 30, 1826 (Vol. 2, Laws, Instructions & Opinions, page 466):

For each township or fractional township containing a greater quantity of land than *three-quarters of an entire township*, (that is to say, more than 17,280 acres) *one section* is to be reserved.

For each fractional township containing a greater quantity of land than *one-half* and not more than *three-quarters of a township*, (that is to say, more than 11,520 acres, and less than 17,280 acres) *three-quarters of a section* are to be reserved.

For each fractional township containing a greater quantity of land than *one-quarter*, and not more than *one-half* of a township, (that is to say, more than 5760 acres, and not more than 11,520 acres) *a half section* is to be reserved.

For each fractional township containing a greater quantity of land than *one entire section*, and not more than *one-quarter of a township*, (that is to say, more than 640 acres, and not more than 5,760 acres) *one-quarter section* is to be reserved.

Upon inquiry at your office it is learned that this method of calculation has been uniformly followed and after careful consideration of the matter is adhered to.

Applied to the case in hand, the adjustment made by your office was correct and the decision appealed from is affirmed.

SURVEY—NOTICE—CIRCULAR OF OCTOBER 21, 1885.

ALLEN F. FERRIS.

The instructions of October 21, 1885, requiring that notice shall be given of the receipt and filing in the local office of approved plats of the survey of any township before applications for entry of lands included in the survey will be received, are applicable in the matter of the filing of the plat of survey of an island, or other fragmentary tract of public land, made after the regular survey of the township in which such tract is situated, the same as in the case of the survey of an entire township.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *July 2, 1903.* (C. J. G.)

March 18, 1903, your office directed the local officers at St. Cloud, Minnesota, to withdraw from the files of their office the plat of survey of an island in Fish Trap Lake, in Sec. 18, T. 135 N., R. 28 W., and Sec. 13, T. 135 N., R. 29 W., pending notice of the filing of said plat in pursuance of the regulations contained in the instructions of October 21, 1885 (4 L. D., 202).

March 24, 1903, your office returned to the local officers at St. Cloud, an application of Allen F. Ferris, assignee of Elizabeth Case, widow of John Case, to enter under section 2306 of the Revised Statutes, lot 9, Sec. 18, T. 135 N., R. 28 W., and lot 5, Sec. 13, T. 135 N., R. 29 W., situated on said island in Fish Trap Lake, for the reason that the application was prematurely received, and with instructions that Ferris might renew the same upon the refiling of the plat of sur-

vey and after the requirements of your office of March 18, 1903, were complied with.

An appeal has been filed by Ferris from the said decision of your office, it being alleged, among other things, that the instructions of October 21, 1885, *supra*, require that notice shall be given only when the plat of the survey of any *township* is filed in the local office, and that the prevailing practice in the local offices in Minnesota has been to allow entries of islands immediately upon the filing of the plats of survey thereof, when they are situated in townships that have been surveyed.

It appears that the survey of the island in question was made upon the application of one Louis M. Osborn, dated February 14, 1902. The survey was approved by your office January 19, 1903, and the plat thereof filed in the local office January 30, 1903. The application of Ferris to make soldier's additional homestead entry was received in the local office January 31, 1903, and transmitted to your office February 5, 1903. It appearing that the local officers had failed to give any notice of the filing of the plat of survey of said island, the action hereinbefore referred to was taken by your office.

The instructions of October 21, 1885, *supra*, require that notice shall be given of the receipt and filing in local offices of approved plats of the survey of any townships, and it is specifically stated therein how publicity shall be given, by posting notices and otherwise, that said plat will be filed on a day named, "which shall not be less than thirty days from the date of such notice." Until this is done the plats are not to be regarded as officially received. And it is only after such notice has been given that local officers are authorized to receive applications for the entry of lands included in the survey. The object of such notice is undoubtedly to give all persons who may have claims to or desire to enter the lands an equal chance to present their claims. All the reasons for the regulations contained in said instructions are equally as potent and applicable in the matter of the filing the plat of survey of an island, or other fragmentary tract of public land, made after the regular township survey has been made. Whatever may have been the practice heretofore in local offices, it is clearly in keeping with good administration to require that before entry is allowed in this case, or in similar cases, proper publicity should be given of the filing of the plat of survey, as contemplated by the instructions referred to.

The decisions of your office appealed from are hereby affirmed.

TOWNSHIP SURVEY—NOTICE—CIRCULAR OF OCTOBER 21, 1885.

INSTRUCTIONS.

The circular of October 21, 1885, requiring notice to be given of the receipt and filing in the local office of approved plats of survey of townships before applications for entry of lands included in such survey will be received, embraces all public land surveys of a township, whether made in whole or in part, and the same notice will be required of the survey of fragmentary portions of a township made after the regular township survey as in the case of original township surveys.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *July 2, 1903.* (E. F. B.)

The Department is in receipt of your letter of June 16, 1903, transmitting a proposed amendment to the circular of October 21, 1885 (4 L. D., 202), relative to the filing in the local office of plats of public land surveys.

It is understood that the amendment (which is to the effect that said circular applies to the plats of surveys of islands, or other fragmentary portions of the townships, as well as to other township surveys) was proposed because it has been brought to your notice that the prevailing practice in the local offices in Minnesota has been to allow entries of islands immediately upon the filing of the plats of survey thereof, when they are situate in townships that have been surveyed.

The Department sees no necessity for the proposed amendment. The circular as it now stands embraces all public land surveys of a township, whether made in whole or in part, and the reason for giving the notice prescribed by the circular is equally as important in the filing of plats of fragmentary portions of the township as in the case of original township surveys: to-wit, in order that notice may be given to the public that the lands are open to entry, so that all persons may have equal opportunity to file applications therefor. See case of Allen F. Ferris (32 L. D., 184).

It is sufficient that the local officers receive instructions from your office of the scope and purpose of the circular; and in order that a failure to comply therewith may not occur in the future, it is suggested that when plats of survey of fragmentary portions of a township are sent to the local officers their attention should be called to the requirements of said circular, which must in all cases be complied with preliminary to the filing of the plat of survey in the local office.

RIGHT OF WAY—INDIAN LANDS—SEC. 1, ACT OF MARCH 2, 1899.

ST. PAUL, MINNEAPOLIS AND MANITOBA R. R. CO. *v.* MINNEAPOLIS,
ST. PAUL AND SAULT SAINTE MARIE R. R. CO.

The proviso to section 1 of the act of March 2, 1899, which act provides for acquiring rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, that no right of way shall be granted under said section for a proposed road parallel to and within ten miles of a constructed road or one in actual course of construction, applies only where a road has been constructed or is in the actual course of construction across the Indian lands, and has no application in a case where a right of way has been granted or is applied for upon the mere survey and platting of the proposed line of road.

Acting Secretary Ryan to the Commissioner of Indian Affairs, July 8, 1903. (S. V. P.) (F. W. C.)

The Department has considered the applications by the Minneapolis, St. Paul and Sault Ste. Marie Railroad Company and the St. Paul, Minneapolis and Manitoba Railroad Company, for rights of way under the provisions of the act of March 2, 1899 (30 Stat., 990), through the White Earth Indian reservation in the State of Minnesota. Each company has filed maps of location through this reservation for approval under said act, and in forwarding these applications your office letters of May 13, last, recommend that both applications be approved.

The application of the "Soo" company is on account of a projected branch line from Glenwood, a point on its actually constructed and operated line in the State of Minnesota, running in a northerly and northwesterly direction to the south boundary of the White Earth Indian reservation and then almost due north through the western part of said reserve. So far as shown by the record before the Department in connection with these applications no portion of said projected branch line has been constructed or is in actual course of construction further than the surveying of the proposed line of road.

Proceeding under the act of 1899 this company applied for permission to survey the line of road through the White Earth Indian reservation, which survey was authorized by this Department February 25, 1903. From the maps now submitted it appears that the survey was made between April 10 and 17, last, and as surveyed the line was adopted by the Board of Directors April 27, last.

The application of the Manitoba company is on account of a projected branch line from Fergus Falls, a point on its actually constructed and operated line in the State of Minnesota, running in an almost direct line, nearly due north, through the White Earth Indian reservation to McIntosh, a point of connection on another portion of its actually constructed and operated lines in the State of Minnesota. A portion of this projected branch line, namely, about twenty miles extending northerly from Fergus Falls to Pelican Rapids, is an actually con-

structed line. The Manitoba company never applied to this Department for permission to survey the line of its road through this reserve but from the maps filed with its application for right of way it appears that the line of the proposed road through this reservation was surveyed between April 16 and 24, last, and that the line of road as surveyed was adopted by the company April 27, last.

These two projected lines converge and are only a short distance apart at the point of crossing the south boundary of said reserve and running through the reserve are very close together actually crossing at a point about four miles south of the northern boundary of said reserve. The proposed lines of road are therefore parallel and within ten miles of each other (in fact much less than a mile) through the entire reserve.

The "Soo" company first filed for approval its maps of location through this reservation and thereafter protested against the granting of the right of way as applied for by the Manitoba company upon the ground that it was entitled to precedence and that the proviso to the first section of the act of March 2, 1899, which reads as follows—

That where a railroad has heretofore been constructed, or is in the actual course of construction, no parallel right of way within ten miles on either side shall be granted by the Secretary of the Interior unless, in his opinion, public interest would be promoted thereby—

barred the granting of the application by the Manitoba company.

The Manitoba company also protested against the claim of the "Soo" company to precedence in this matter, urging that at the time of the survey and of the filing of the maps of location by the Manitoba company through this reserve, the "Soo" company had not entitled itself under the State laws to construct its proposed Glenwood branch line, and that until the "Soo" company had fully complied with the State laws no rights were conferred by reason of any prior survey and location, referring in support thereof to the decision of the Supreme Court in the case of *Washington and Idaho Railway Company v. Coeur d'Alene Railway Company* (160 U. S., 77). In this connection the Manitoba company submitted a certified copy of the act of the State legislature approved April 10, 1901, as follows:

SEC. 1. That chapter thirty-one (31) of the General Laws of the State of Minnesota for the year 1881, being section 2749 of the General Statutes of 1894, be amended to read as follows:

Any railroad corporation may, under the provisions of this chapter, extend its railroad from any point named in its charter or articles of incorporation, or may build branch railroads either from any point on its line of railroad or from any point on the line of any other railroad connecting or to be connected with its road, the use of which other road between such points and the connection with its own road such corporation shall have secured by lease or agreement for a term of not less than ten years from its date. Before making such extensions, or building such branch road, such corporation shall, by resolution of its board of directors, to be entered in the record of its proceedings, designate the route of such extension or branch, a

copy of which, and a plat or map thereof, duly certified by such corporation under the seal thereof, signed and verified by the president and secretary of such company, and file the same in the office of the secretary of state of this state, who shall record the same in the book to be provided for that purpose. Whereupon such corporation shall have and exercise, with respect to such extension or branch, all the rights, powers, franchises and privileges possessed by such corporation pertaining to its main or other line of railroad, but no right of way over any private property or any street or highway in this state shall be acquired in any other manner than as provided in this chapter; and all the provisions of this chapter shall apply thereto. And may receive municipal and other aid in the construction of such branch or extension as now or hereafter authorized by the general laws of this state; provided, that the provisions of this act shall not apply to street railroads or street-railroad companies.

SEC. 2. This act shall take effect and be in force from and after its passage.

In disposing of the protest by the Manitoba company it is only necessary to say that until survey had been made of the proposed line of road the State law could not have been complied with; that under the act of 1899 permission from the Secretary of the Interior was necessary before the survey of a line of road into or through the reserve should have been permitted; that the "Soo" company having proceeded in obedience to this law, and having complied with the State law within a reasonable time after survey and before approval of its maps of location, is entitled to whatever precedence was gained by a prior survey, and that the decision of the supreme court in the case referred to has no application to the state of facts herein presented.

It but remains, therefore, to determine whether the proviso to the first section of the act of 1899 against granting a right of way for a proposed road parallel to and within ten miles of a constructed road or one in actual course of construction, has any application to the case under consideration.

The bill that became the law of 1899 granting rights of way through Indian lands was introduced in the House and as passed by that body did not contain a provision against granting rights of way for parallel lines of road. It was amended by the Senate and as it passed that body it contained the following proviso: "That when a right of way has been heretofore or shall hereafter be granted, no parallel right of way within ten miles on either side shall be granted by the Secretary of the Interior unless, in his opinion, the public interest will be promoted thereby." In conference, however, the Senate amendment was stricken out and the proviso hereinbefore first quoted inserted. It seems, therefore, that in providing against the granting of rights of way for parallel lines of road, Congress intended to give recognition only to those lines of road which had been constructed or were in actual course of construction, and this as contradistinguished from a mere proposed line of road toward the construction of which nothing had been done beyond a mere survey and platting of the proposed line of road upon which a right of way might be granted.

In disposing of the applications under consideration the proposed branch lines must be considered as new roads, separate and apart from the existing lines operated by the "Soo" and the Manitoba railway companies. When thus considered the Manitoba railway company has the best claim to an advantage because of a constructed road or one in actual course of construction, for, as before shown, a portion of its proposed branch line is actually constructed and operated; but in the opinion of this Department neither is a constructed road or one in actual course of construction within the meaning of the proviso referred to, because neither has been constructed or is shown to be in actual course of construction within the reserve, and it follows that the proviso has no application to the case under consideration.

It might be further added, as claimed by counsel for the Manitoba company, that the building of its proposed branch line will open a direct connection by the Great Northern railway, of which the Manitoba company is a part (nearly six thousand miles), which goes far towards showing that public interests will be promoted thereby.

The entire matter considered, the Department approves of the recommendation made by your office and returns herewith, approved, the maps of location filed by both companies. Your further recommendation that the United States Indian agent of the White Earth agency be designated to act for and on behalf of the Indian allottees in the matter of negotiating an amicable settlement with the railway companies, is also approved.

OKLAHOMA LAND—SETTLEMENT—ACT OF JUNE 6, 1900.

KINMAN *v.* APPLEBY.

Settlements on public land while it is reserved from entry confer no rights as against the government, but the question of priority between such settlements may be considered in determining the rights of adverse claimants in case the land is subsequently opened to entry.

Settlement and residence under the homestead laws can not be established by an agent nor maintained by an agent or tenant after having been established.

The provision in the act of June 6, 1900, providing for the opening of certain lands in Oklahoma to settlement and entry, "that the settlers who located on that part of said lands called and known as the 'Neutral Strip' shall have preference right for thirty days on the land upon which they have located and improved," applies only to such persons as had made settlements and improvements on said lands and were maintaining the same at the date of the passage of said act.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *July 14, 1903.* (A. S. T.)

On August 6, 1901, James M. Appleby made homestead entry for the NE. $\frac{1}{4}$ of Sec. 4, T. 7 N., R. 14 W., El Reno land district, Oklahoma, and on the same day William Kinman filed an affidavit of con-

test against said entry, alleging that he "was a settler on said tract prior to the issuance of the President's proclamation of July 4, 1901, and was entitled to exercise the preference right of entry for such land as provided in such proclamation: that this affiant has the superior right to said tract of land for the reason that this affiant settled on said land prior to any settlement by the said entryman."

On August 29, 1901, this Department directed that a hearing be had upon said affidavit, which was accordingly done, both parties appearing and offering testimony. The local officers found in favor of the defendant and recommended the dismissal of the contest. The contestant appealed to your office, where on March 19, 1903, a decision was rendered affirming the action of the local officers, and from that decision the contestant has appealed to this Department.

The land in question is a portion of what is known as the "Neutral Strip," and was opened to entry by the President's proclamation of July 4, 1901 (31 L. D., 1), under the act of June 6, 1900 (31 Stat., 672), which provides: "That the settlers who located on that part of said lands called and known as the 'Neutral Strip' shall have preference right for thirty days on the land upon which they have located and improved."

The proof shows that the contestant and his wife settled on the land in August, 1897. It had been previously occupied by a man named Roberts, who had cleared and cultivated a few acres of it.

The defendant built a dugout, and cleared, fenced, and cultivated a portion of the land, but it does not very clearly appear what amount of the land was cleared by him. He testified that he cleared, plowed, and cultivated about four or five acres in 1898; that there were about forty acres of the land cultivated in 1898; and that in all he cleared and put in cultivation under the plow fifty or sixty acres, including what was partially cleared before he went there. He says there was none actually cleared; that Roberts had "an old deadening" on the place which he had tried to plow, but had never taken the timber off.

Kinman resided on the place about seventeen months, and evidently made considerable improvements there in the way of clearing, fencing, and preparing the land for cultivation, and his wife testified that she assisted him in this work. He left the land in January, 1899, having leased it for twelve months to two brothers named Easterwood, and moved to a place several miles from the land in question. While at this place his wife was appointed postmaster, and he was appointed deputy or assistant postmaster. They subsequently moved their residence and the post office to a place called Hardin, about twenty-five miles from the land. While Kinman occupied the land in question he was arrested and imprisoned for cutting timber on government land (the land in controversy), and after he left the place he was arrested and imprisoned for introducing whiskey into an Indian reservation,

but it does not appear that he was ever tried or convicted for either of these offenses. When the Easterwood lease expired, the contestant did not resume possession of the land, and the Easterwood brothers continued in possession. He (contestant) testified that he was prevented from resuming possession of the land by threats of violence made by the Easterwoods against him, and one of his witnesses testified that Henry Easterwood told him that if contestant attempted to come back to the land he would "winchester him in a holy minute," and that Kinman knew better than to come back, and the witness says he communicated this threat to Kinman, but Easterwood denies that he made any threat against Kinman, but admits that when the lease expired he set up a squatter's claim to the land and would have objected to Kinman taking possession of it.

The proof shows that in February, 1900, which was shortly after the expiration of the lease, Mrs. Kinman attempted to go upon the land and was met at the gate by the two Easterwood brothers, who prevented her from entering the premises. She testified that they were armed, one with a large knife and the other with a club; that T. J. Easterwood told her that if she attempted to enter the premises they would hurt her, and that they would hold the land or kill Kinman. H. J. Easterwood, who testified for the defendant, admitted that they met her at the gate, and forbade her entering the premises, but denied that they were armed or that they made threats against her or Kinman.

In the fall of 1900, the Easterwoods sold the improvements on the place and their possessory right to one Sandifer, who then moved onto the land. He remained there till August, 1901, and made considerable improvements. He testified that he did not know till about July 1, 1901, that Kinman claimed the land. About May 1, 1901, Sandifer sold out to Appleby, who then moved onto the place, but Sandifer continued to reside there till August, 1901.

Kinman, in his contract with the Easterwoods, reserved the right to go upon the land at his pleasure, and when he moved away from it he left a portion of his personal property there, consisting of tools and some articles of household furniture, which he has never moved away. He testified that owing to threats made against him by the Easterwoods he was afraid to move back to the land after the expiration of the lease, but that he sent his wife, with their household property, thinking that her sex would protect her from violence. She procured a wagon, team, and a driver to convey their household goods to the land, and about midnight on July 3, 1901, she reached the place, entered, and proceeded to a place in the timber where she purposed erecting a tent in which to live. While she and the driver, one Ewing, were unloading the goods from the wagon, Sandifer and Appleby appeared on the scene, armed with shotguns, and demanded to know

who they were and what they were doing there. She told them who she was and that she had come there to take possession of the place. They ordered her to take her property and leave. She refused to do it, and continued to unload the things from the wagon. Sandifer began to reload the things into the wagon, and she threw them out as fast as he put them in. He took up the reins to drive the team out, and she also took hold of the reins and tried to stop the team, but he jerked them from her and drove the team out into the road, leaving her alone with the things she had succeeded in getting out of the wagon. Ewing took the remainder of the things back to the point from which they started. She testified, and was corroborated by Ewing, to the effect that Sandifer cursed her and threatened to kill her and tried to tie the lines around her arms when she took hold to prevent him from driving the team out; that he tried to throw her under the mules, and threatened to tie her and throw her in the river if he found her there the next morning; and that Appleby had a shotgun presented at her and Ewing. She remained there till daylight, and then crawled into a briar patch, and laid down beside a log, where she remained all that day and the next night, and on the morning of July 5, 1901, she got away. Sandifer gathered up what things she had unloaded from the wagon and hauled them to Mountain City. She testified that while she was hiding by the log in the briar thicket she heard what she took to be Sandifer and his wife searching for her.

Sandifer and Appleby admit that they ordered her to leave, and that they drove the team out. They also admit that they were armed with shotguns, but they deny that they attempted or threatened to do her any violence.

It is not shown that Appleby, when he bought out Sandifer, had any knowledge of Kinman's claim. It is contended in behalf of Appleby that Kinman did not settle on the land with the intention of making it his home, but that his purpose was to appropriate the timber growing thereon; and the proof shows that he had sold a considerable amount of timber from the place, but it was necessary to cut the timber in clearing and preparing the land for cultivation, and the amount of land put in cultivation shows that the appropriation of the timber was not his sole object. Moreover, it is shown that in 1897 he applied to enter the land, and letters from your office in response to his application are in the record.

The only question to be determined in this case is, whether or not Kinman was a settler on the land at and prior to the passage of the act of June 6, 1900, *supra*. Though a settlement on public land while it is reserved from entry confers no rights as against the government, the question of priority between such settlements may be considered in determining the rights of adverse claimants in case the land is subsequently opened to entry; and hence, if Kinman and Appleby had

both been settlers on the land at the time of the passage of the act of June 6, 1900, the question of priority of settlement as between them would have been material; but it is admitted that Appleby did not settle on the land till May, 1901, nearly a year after the passage of the act, and he bases his claim of right to make entry for it on the ground that he is the remote vendee of Easterwood, who was in possession of it at the time of the passage of the act, but inasmuch as the contestant must succeed herein, if at all, by virtue of his own right as a settler, the qualifications of Appleby are not a material issue.

Kinman evidently intended, when he leased the land to Easterwood, to resume possession of it at the expiration of the lease. This is shown by the fact that he left a portion of his property there, and Easterwood testified that he at that time expected him to do so. Kinman testified that he was prevented from doing it by threats of violence and intimidation on the part of Easterwood, and considering the treatment received by Mrs. Kinman at the hands of the Easterwoods and their vendees Sandifer and Appleby, when she attempted to go upon the land, Kinman's fears seem to have been well founded, and, if Kinman's previous settlement on the land had been such as to give him any rights as against the government, and he had been prevented from maintaining it by such threats and intimidation, he would not thereby have lost the right acquired by his settlement. But he voluntarily left the place in January, 1899, intending to reside elsewhere for the next twelve months, and was not an actual settler on the land for more than a year next before the passage of the act of June 6, 1900. It was not his intention to abandon his claim to the land, and he doubtless believed that the possession and occupancy of the land by his tenants would protect his claim as effectually as if he himself had remained in possession; but in this he was mistaken. One can not make settlement and establish residence by an agent so as to acquire rights under the homestead laws, nor can he by an agent or tenant maintain a settlement or residence after it has been established. While the act of June 6, 1900, *supra*, does not expressly require that the settlement and improvement therein contemplated shall have been maintained up to the time of its passage, it was evidently the intention of Congress to give preference rights of entry to those persons who had made settlements and improvements on said lands and who still maintained the same, and not to those who may have settled on and improved the lands at some past time, and who had abandoned and left the land either because of a sale of their improvements or for any other reason, and therefore, inasmuch as Easterwood's possession could not inure to the benefit of Kinman, and Kinman was not a settler on the land at the time of the passage of the act, his previous settlement can not avail to give him a preference right of entry for the land.

In the case of *Fleming v. Thompson* (17 L. D., 561), which was in many respects remarkably similar to the case at bar, it was held (syllabus):

Residence on land not subject to settlement is ineffective, if abandoned or discontinued before the land becomes subject to settlement, and not resumed until after the intervention of an adverse right. Settlement rights can not be maintained through the occupancy of a tenant.

It must be held therefore that Kinman was not a settler on the land at the time of the passage of the act of June 6, 1900, and therefore that he was not entitled to the preference right of entry accorded to such settlers by the act.

The result is that your said decision is affirmed and said contest is dismissed.

OKLAHOMA LANDS—GREER COUNTY—ACT OF JANUARY 18, 1897.

INSTRUCTIONS.

The purpose of the words "excepting for school purposes," employed in section 5 of the act of January 18, 1897, providing for the entry of lands in Greer county, Oklahoma, is to except from the obligation to make payment imposed by said section, all lands patented thereunder by reason of being occupied for school purposes.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *July 14, 1903.* (E. F. B.)

By letter of January 27, 1903, you call attention to the instructions of February 25, 1897 (24 L. D., 184), to carry into effect the act of January 18, 1897 (29 Stat., 490), providing for the entry of lands in Greer county, Oklahoma, with special reference to the instructions relating to section 5 of the act, which provides:

That all lands which on March sixteenth, eighteen hundred and ninety-six, are occupied for church, cemetery, school, or other charitable or voluntary purposes, not for profit, not exceeding two acres in each case, shall be patented to the proper authorities in charge thereof, under such rules and regulations as the Secretary of the Interior shall establish, upon payment of the government price therefor, excepting for school purposes.

The instructions under this section to which reference is made in your letter are as follows:

Under section 5, the right of entry to land within said county which on March 16, 1896, was occupied for church, cemetery, school, or other charitable or voluntary purposes, not for profit, is given to the proper authorities in charge thereof.

In each case the maximum area to be so entered is two acres. Sections numbered 16 and 36, within each township, are reserved by section 4 of this law for school purposes, and are exempted from the operations of this section.

By section 4 of the act, "sections numbered sixteen and thirty-six are reserved for school purposes," and sections thirteen and thirty-

three are reserved "for such purpose as the legislature of the future State of Oklahoma may prescribe." Said section also provides that whenever any of the lands reserved for school *or other* purposes under the act or under the laws of Congress relating to Oklahoma shall be found to have been occupied by "actual settlers or for townsite purposes or homesteads," prior to March 16, 1896, an equal quantity of indemnity lands may be selected as provided by law.

You express the opinion that occupancy of lands for the uses mentioned in section 5 is occupancy "by actual settlers," and that if such view is correct, sections sixteen and thirty-six are not excepted from the operation of section 5; and that, in view of the general indemnity provision, there is no reason why sections thirteen and thirty-three should be subject to the operation of section 5, and sections sixteen and thirty-six should not.

In the instructions of February 25, 1897, the words, "excepting for school purposes," in section 5 of the act, were construed as having reference to lands *reserved* for school purposes, and not to the character of the occupancy of the land. If that is a correct interpretation of the act, sections sixteen and thirty-six are expressly excepted from its operation, and that is a sufficient reason why the instructions should declare that sections thirteen and thirty-three are subject to the operation of section 5 of the act, and sections sixteen and thirty-six are not, although occupancy for the uses mentioned in the act may be considered as occupancy by actual settlers, and notwithstanding the general indemnity provisions applicable to all of said sections. Section 5 of the act extends to all lands except such as are expressly excepted from its operation. The only question is, are any lands excepted.

Upon a further consideration of the question, it does not seem clear that said words, "excepting for school purposes," have been given their proper interpretation in the instructions of February 25, 1897. The sentence above quoted is so involved as to make its meaning obscure and indefinite and to render its proper construction difficult. Do the words, "excepting for school purposes," refer to "lands" occupied March 16, 1896, or to "payment of the government price therefor?" They must be transposed to indicate clearly their application to lands reserved for school purposes. When the general scope and purpose of the act is considered, it seems clear that it was not the intent of Congress to except any lands from the operation of the section, but rather that the intent was to except lands occupied for school purposes from the obligation to make payment. The general purpose of the act was to protect occupancy for charitable or voluntary purposes upon all lands in said county, whether reserved for territorial uses or subject to entry under the provisions of the act.

The occupancy of a part of a school section for school purposes is, to the extent of such occupancy, an appropriation of the land for the

purpose contemplated by the reservation. The probability of such condition existing may have induced legislation favorable to such uses, although it is not apparent why Congress should have protected occupancy of other lands for school purposes without the condition of payment, while imposing such condition upon occupancy for other charitable or voluntary purposes. However that may be, the words, "excepting for school purposes," must be given some intent and purpose, and the most reasonable construction is that the purpose of the exception was to secure to the proper authorities a patent for the lands occupied for such purposes, not exceeding two acres in any case, without payment therefor.

You will therefore prepare for approval by the Department an amendment to said instructions of February 25, 1897, in accordance with the views herein expressed.

SWAMP LAND—INDEMNITY—ACT OF MARCH 2, 1855.

STATE OF OREGON.

Swamp land indemnity locations under the act of March 2, 1855, can only be made upon "public lands subject to entry at one dollar and a quarter per acre, or less." Lands within the primary limits of the grant of May 12, 1864, in aid of the construction of the McGregor and Missouri River railroad, which were erroneously included within the meander lines of a lake, are not for that reason excepted from the provisions of said act increasing in price the alternate sections along the line of road therein provided for.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *July 16, 1903.* (F. W. C.)

The Department has considered the appeal filed by Henry C. Evans, as agent of the State of Iowa, from your office decisions of October 9 and 25, last, holding for cancellation a selection or location made by said agent as swamp land indemnity under the provisions of the act of March 2, 1855 (10 Stat., 634), of lot 3, Sec. 2, T. 96 N., R. 35 W., lot 7, Sec. 26, and lot 9, Sec. 36, T. 97 N., R. 35 W., and lots 12 and 13, Sec. 30, T. 97 N., R. 34 W., all within the Des Moines land district, State of Iowa.

Your said office decisions held the selection or location in question for cancellation upon the ground that the lands located or selected are portions of the alternate sections within the primary limits of the grant of May 12, 1864 (13 Stat., 72), in aid of the construction of the McGregor and Missouri River railroad and were by said act enhanced in price to \$2.50 per acre.

The act of 1855, under which the location or selection in question was made, provides that where swamp lands have been located by warrant or scrip the State "shall be authorized to locate a quantity of

like amount, upon any of the public lands subject to entry at one dollar and a quarter per acre, or less, and patents shall issue therefor upon the terms and conditions enumerated in the act aforesaid."

A question was sought to be raised before your office as to whether the lands located or selected were properly rated at \$2.50 per acre, it being claimed that until recently they were within the meander lines of a lake and were therefore not affected by the act of 1864. There can be no question but that your office properly disposed of this matter in holding that the mere erroneous inclusion of the lands within the meander lines of the lake did not place them without the provisions of the act of 1864 increasing in price the alternate sections along the line of the road, therein provided for.

By the plain terms of the act of 1855 the State is limited in its selection of swamp indemnity lands to "the public lands subject to entry at one dollar and a quarter per acre or less." As the lands in question were at the date of the attempted location and selection by the State subject to entry only at the enhanced or double minimum price, namely, \$2.50 per acre, they were clearly not subject to location or selection under said act, and your office decisions are therefore affirmed and the location or selection of the tracts in question will be canceled.

MINING CLAIM—PLACER—FORM OF LOCATION.

WOOD PLACER MINING COMPANY.

A placer mining claim upon unsurveyed public land to be valid must be located upon the ground in such shape and position as to conform, as nearly as practicable, to the "United States system of public-land surveys, and the rectangular subdivisions of such surveys."

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) July 16, 1903. (F. H. B.)

The Department has before it the appeal of the Wood Placer Mining Company from your office decision of November 29, 1902, in which its entry, No. 94, for the Discovery and Annex placer mining claims, surveys Nos. 5885 and 6000, respectively, Missoula, Montana, was held for cancellation, to the extent of the latter claim, because the improvements placed upon the former claim for the alleged benefit of both were not shown to tend to the development of the latter, upon which the improvements actually made fall far short of the required amount (Sec. 2325, R. S.).

The placer claims in question are situated upon unsurveyed land, in what is supposed will be T. 2 S., R. 21 W., M. M., in the aforesaid land district. By the official plat a situation is disclosed, which is not referred to in your office decision, and which is not warranted by the mining laws.

The Discovery claim, which is somewhat irregular in shape and defined by a number of courses, is nearly 9,000 feet in length and averages about 500 feet in width. It lies longitudinally in a northeasterly and southwesterly direction. Hughes creek enters the claim at its northeasterly end, flows thence substantially through the center, except at one point, for the entire distance, and passes out at the southwesterly end. The exception occurs near the northeasterly end, where the creek flows south and passes without for a little distance the southerly or southeasterly side of the claim, but soon re-enters and courses thence throughout the remaining length thereof, as above described. At the point where the creek makes this fugitive departure from the confines of the Discovery claim, the Annex placer (which occupies a position 1540.3 feet in length along and coincidental with that side of the Discovery from its northeasterly end, and which is apparently 173 feet wide) is situated. Its location and dimensions are such as to embrace and include that part of Hughes creek which leaves and flows without for a short distance the boundaries of the Discovery claim.

In the case of Miller Placer Claim (30 L. D., 225, 227), which involved a similar state of facts, the Department, citing and quoting sections 2329, 2330, and 2331 of the Revised Statutes, held as follows:

Under the last section of the Revised Statutes above cited, *all placer mining claims*, located after the tenth day of May, 1872, must "conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys;" and this would appear to be the case whether the locations are upon surveyed or unsurveyed lands. In the matter of shape, the claim in question not only fails to approximate conformity "with the United States system of public land surveys," but appears to be totally at variance with such system, which affords no warrant for cutting the public lands into lengthy strips of such narrow width as is three miles in length of the claim here in question. Nothing is found in the showing made in response to your office decisions requiring further proof, or in the affidavits filed in the Department since your office decision of November 9, 1899, was rendered, which can justify the approval of the entry in its present shape, and for the reasons above given it must be canceled.

Your attention is directed, in this connection, to paragraph 30 of the mining regulations (31 L. D., 474, 478-9), which reads as follows:

The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on record, must be observed in the case of placer locations so far as the same are applicable, the law requiring, however, that all placer mining claims located after May 10, 1872, shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, whether the locations are upon surveyed or unsurveyed lands.

It is clear from the provisions of the mining laws and the above-quoted authority and regulation, that a placer claim upon unsurveyed public land to be valid must be located upon the ground in such shape and position as to conform, as nearly as practicable, to the "United States *system* of public-land surveys, and the rectangular subdivisions

of such surveys." The locations here in question (comprising a long and narrow strip, throughout its length following and embracing Hughes creek, in the manner shown by the official plat) do not even approach conformity with the *system* of public-land surveys. The entry, therefore, will be canceled as to both claims.

In view of the foregoing it is unnecessary to consider the question of improvements upon the claims.

Your office decision is modified accordingly.

MINING CLAIM—PATENT PROCEEDINGS—RELOCATION.

LUCKY FIND PLACER CLAIM.

Where an applicant for patent to a mining claim, after the expiration of the period of publication of notice of the application, voluntarily defers making entry until after the close of the calendar year in which the period of publication ends, his negligence, in the presence of an alleged relocation of the claim after the termination of that year, is fatal to the entry.

The length of the interval of time between the end of the period of publication, or the finality of pending adverse proceedings in court or protest proceedings in the land department, and the date of entry, is immaterial, so long as entry is made before the close of the then current calendar year; and the principle with respect to the completion of the patent proceedings is the same whether the time remaining to the applicant within which to make entry as aforesaid be only a day or several months.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) July 18, 1903. (F. H. B.)

October 5, 1901, Barney Hokes *et al.* filed application for patent to the Lucky Find placer mining claim, which embraced the NW. $\frac{1}{4}$ of Sec. 13, T. 18 N., R. 16 W., Harrison, Arkansas, land district. Notice of the application was published and posted for sixty days, ending December 13, 1901, and no adverse claim was filed.

January 7, 1902, Hardin Cox *et al.* filed protest against the allowance of mineral entry upon the application for patent, for the reason, as alleged, that the land involved became subject to relocation January 1, 1902, and was so relocated by protestants January 6, 1902. Evidence of such relocation is exhibited by an abstract of title, filed with the protest.

February 11, 1902, applicants for patent filed in the local office the usual proofs in support of their application, and tendered the purchase price for the land. The local officers refused to allow entry to be made, and found and stated, in substance and effect, that inasmuch as the applicants for patent had not carried their patent proceedings to completion, by making payment and entry for the claim in question, within the calendar year in which the period of publication termi-

nated, the case falls within the ruling of the case of Cleveland *et al. v.* Eureka No. 1 Gold Mining and Milling Company (31 L. D., 69), and that the application must, therefore, in the presence of the alleged relocation of the claim, be held for rejection in order that opportunity may be afforded for the determination of the question of the right of possession between the contending parties by a suit in court.

On appeal by the applicants, your office, by decision of September 26, 1902, reversed the action of the local officers, and held that the Cleveland-Eureka case does not bear the construction placed upon it by them (*viz.*, that failure to make entry within the calendar year in which the period of publication ends, in the presence of a protest and allegation of relocation after the end of that year, constitutes a waiver of the rights acquired under the application for patent), but that the reference made by the Department in that case to the failure of the applicant to complete his patent proceedings within the calendar year was merely in passing and only as incidental to the objection, that "the applicant, apparently of his own volition, delayed making entry for a period of more than eight months after the close of the period of publication of notice." It was therefore further held that the applicants in the case at bar had applied to make entry within a reasonable time, and that the entry should have been, and would be, in the absence of other objection, allowed.

The appeal of protestants brings the case before the Department.

The decision of your office evinces a misconception of the decision in the Cleveland-Eureka case. In the earlier cases of Cain *et al. v.* Addenda Mining Company (29 L. D., 62), P. Wolenberg *et al.* (*Id.*, 302), same case on review (*Id.*, 488), Scotia Mining Company (*Id.*, 308), Barklage *et al. v.* Russell (*Id.*, 401), Reins *v.* Montana Copper Company *et al.* (*Id.*, 461), Homestake Mining Company (*Id.*, 689), The Marburg Lode Mining Claim (30 L. D., 202), and Little Annie No. Five Lode Mining Claim (*Id.*, 488), the Department applied the criterion of a "reasonable period" to the completion of proceedings under applications for mineral patent, the necessity not having been apparent in any of the cases for a more definite statement on the subject; but in the Cleveland-Eureka case the principle underlying the former rulings was clearly expressed and applied. It is, that where an applicant for patent to a mining claim, after the expiration of the period of publication of notice of the application, voluntarily defers making entry until after the close of the calendar year in which the period of publication ends, his negligence, in the presence of an alleged relocation of the claim after the termination of that year, is fatal to the entry. This principle was again applied by the Department in the recent case of Surprise Fraction and Other Lode Claims (32 L. D., 93, 94).

The reason of the principle is plain and logical. By section 2324 of

the Revised Statutes it is provided that upon each claim located subsequent to May 10, 1872, not less than \$100 shall annually be expended in labor or improvements until patent issues, upon default of which the claim becomes subject and liable to relocation. By section 2 of the act of January 22, 1880 (21 Stat., 61), these annual periods are made to conform to the calendar years. The annual expenditures (which may be made at any time during the year) serve to preserve and protect the possessory title of the locator, who is only relieved from the possible consequences of default in this respect by making entry for his claim, under proper patent proceedings, and thereby acquiring the equitable title and the complete right to patent. If, then, a claimant who has satisfied the requirements of section 2325, Revised Statutes, applies for patent and carries his patent proceedings to completion by making entry during the calendar year in which the period of publication of notice of the application for patent ends, he acquires the equitable title and thereby obviates the necessity for observing for that year and prospectively the requirement with respect to annual expenditures. If, however, he fails to make entry within the calendar year in which such period of publication ends, his title or interest remains throughout that year purely possessory in character, and—except where entry is prevented by suit in court based upon an adverse claim filed during the period of publication or by pending protest or protests in the land department (The Marburg Lode Mining Claim, *supra*)—dependent for its maintenance and continuance to the succeeding calendar year upon the prescribed annual expenditures, with equal liability to forfeiture by relocation, as though no patent proceedings had been instituted. The length of the interval of time between the end of the period of publication, or the finality of pending adverse proceedings in court or protest proceedings in the land department, and the date of entry, is immaterial, so long as entry is made before the close of the then current calendar year; and the principle with respect to the completion of the patent proceedings is the same whether the time remaining to the applicant within which to make entry as aforesaid be only a day or several months. In the event of default in this respect and an alleged subsequent relocation of the claim, the applicant must be remitted to his original situation, in order that opportunity may be afforded, upon the institution of new patent proceedings, for the determination, by “a court of competent jurisdiction,” of the newly asserted adverse right of possession.

In the case at bar there remained to the applicants for patent between the termination of the period of publication and the end of the then current calendar year eighteen days within which entry might have been made. The record discloses that no barrier thereto interposed during that time; and, in the presence of the alleged relocation of the claim after the end of the calendar year in which publication ended,

applicants' negligence is fatal to their right to now make entry under the patent proceedings already had. This is without prejudice to their right to commence patent proceedings anew.

The decision of your office is reversed.

HOMESTEAD—SOLDIERS' ADDITIONAL—ASSIGNMENT.

WILLIAM C. CARRINGTON.

A *bona fide* assignee of a soldier's additional right of homestead entry may lawfully assign the right in amounts differing from the quantity of land in legal subdivisions according to the public surveys.

Directions given for the preparation of circular instructions regulating the application of the rule of approximation in the matter of additional homestead entries made under sections 2306 and 2307 of the Revised Statutes.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *July 23, 1903.* (A. S. T.)

William C. Carrington has filed a motion for review of departmental decision of March 3, 1903 (not reported), in the case of William C. Carrington, assignee of Daniel Sullivan, *ex parte*.

The record shows that on May 26, 1900, Daniel Sullivan assigned to Lewis C. Black his soldier's additional right of homestead entry under section 2306 of the Revised Statutes, which right was based on his service in the army of the United States during the war of the rebellion, and on homestead entry made by him on May 1, 1869, for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 6, T. 18 N., R. 1 W., Omaha land district, Nebraska, containing 77.64 acres.

On June 9, 1900, Black assigned said right to William E. Moses, describing it as an additional right for 82.46 acres.

On July 28, 1900, Moses assigned to William C. Carrington seventy-six acres of said right, and on September 4, 1900, Carrington applied to make soldier's additional homestead entry for lot 2 of Sec. 7, T. 28 S., R. 56 W., and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 12, T. 28 S., R. 57 W., Pueblo land district, Colorado, containing 74.32 acres, under said additional right so assigned to him.

On August 9, 1902, your office rendered a decision rejecting Carrington's application on the ground that the assignment by Moses to Carrington did not correspond in amount with legal subdivisions of the public lands according to the government surveys, and from that decision Carrington appealed to this Department, where on March 3, 1903, the decision now complained of was rendered.

The question presented for the consideration of the Department was, whether or not a *bona fide* assignee of a soldier's additional right of homestead entry may lawfully assign the right in amounts differing

from the quantity of land in legal subdivisions according to the public surveys.

In the decision complained of that question was answered in the negative, and your said decision was affirmed and Carrington's application rejected, on the ground that the assignment to him by Moses was illegal because the amount of the right assigned did not correspond with the amount of land in legal subdivisions according to the public surveys.

In the case of *Webster v. Luther* (163 U. S., 331), such additional rights were held to be assignable, and it was held that the act conferring upon the soldier such additional right of entry "vested a property right in the donee," and in that case the court said:

There is no reason to suppose it was intended to hamper the gift with conditions that would lessen its value, nor that it was intended to be made in any but the most advantageous form to the donee.

It being a property right in the hands of the donee, he may dispose of it as he chooses, just as he might dispose of any other property owned by him; and not being hampered with conditions that would lessen its value, he is not restricted in his right to dispose of it in such amounts as to him may seem most advantageous.

The public lands are usually divided into sections of 640 acres, half sections of 320 acres, quarter sections of 160 acres, and quarters of quarter sections of 40 acres each, but these do not invariably contain exactly these quantities of land, and it frequently happens that a subdivision contains several acres more or less than the quantity usually embraced in subdivisions of the same denomination. But the public lands are not always subdivided into tracts having these designations; it frequently happens that owing to excess of acreage in a given section, or for other cause, a portion of the section is subdivided into lots of irregular form and dimensions, and containing widely different quantities of land, and such lots are legal subdivisions. Therefore, while legal subdivisions usually contain the amounts of land above stated, they may contain different amounts, and hence the amount of land in a legal subdivision is indefinite and uncertain, and if this Department had authority to prescribe in what amounts such additional rights might be assigned, it would be impracticable to require such assignments to correspond in amount with the amount of land in legal subdivisions because of the want of uniformity in the area of legal subdivisions of land.

While this Department may not adopt regulations to restrict the holders of such additional rights of entry in their right to sell and assign the same in such amounts, at such prices, and to such persons as they may deem proper, it may adopt such regulations with regard to the disposition of the public lands by such additional homestead entries as will tend to carry out the purpose of the act granting the right, and will not conflict with the general laws.

Section 2306 of the Revised Statutes provides that each of the persons therein described:

shall be permitted to enter so much land as, when added to the quantity previously entered, *shall not exceed one hundred and sixty acres.*

This additional right of entry has been held to be a gift, a "mere gratuity," an "unfettered gift." None of the things required by law of an ordinary homestead entryman are required of an entryman under this act, except to prove his qualifications; he is not required to reside upon, cultivate, or improve the land embraced in his additional entry; he may sell his right before making the additional entry, or may sell the land as soon as his entry is recorded. But while Congress intended to donate to each of the persons described in the act a right to enter "so much land as when added to the quantity previously entered shall not exceed one hundred and sixty acres," it was not intended to give him a right to enter any greater quantity of land than that mentioned in the act, and this Department has authority to adopt such regulations with regard to the allowance of additional entries under said statute as will carry out the purpose of the act and at the same time prevent its use as a means of evading other statutes enacted to regulate the manner of disposing of the public lands. Since no restriction can be placed upon the right to sell and assign this gift, but it may be sold in such quantities as may suit the wishes of the donee, he may choose to divide it into small fractions and sell them to a great number of persons, and he has an undoubted right to do so; and the purchasers would be entitled to make entries for the amount of land called for in their respective fractions of the original right, provided tracts of land of equivalent acreage and subject to appropriation are found. Now, if, in making these entries, they are also allowed to adopt the rule of approximation as applied to ordinary homestead and other similar entries, they may, in the aggregate, acquire much more land than the original owner of the right was entitled to enter.

To illustrate: Suppose the soldier's original entry was for forty acres, under the act in question he is entitled to make an additional entry for one hundred and twenty acres; suppose he sells twenty-one acres of his right to each of five persons, that would be one hundred and five acres sold, and he would yet own fifteen acres of the right; now suppose that each of the five persons to whom he sold should apply under the rule of approximation to make entry for forty acres—the smallest usual legal subdivision of land—if such entries should be allowed they would thus acquire two hundred acres, and the soldier would still be entitled to fifteen acres, whereas Congress only intended to give him a right to enter one hundred and twenty acres; and this increase in amount would result from dividing the right into only six parts, whereas it may be divided into an almost unlimited number of

parts, and the amount of land taken increased proportionately. True, the excess in acreage over the amount of the additional right used in each case would, under the rule of approximation, be paid for with cash, but in such cases as the one above stated the allowance of the rule of approximation would virtually defeat the purpose of the act of Congress abolishing private cash entries, and would allow the assignees of soldiers' additional rights to purchase large amounts of public lands with cash.

With reference to the application of the rule of approximation, the case differs materially from other cases where this rule is applied, the difference consisting in the fact that in each of the other cases in which the rule is applied there can be but one entry made, and hence but one application of the rule, while in the case of a soldier's additional right of entry there may be many entries made under a single original right, and the application of the rule to each entry would greatly increase the amount of land taken under the right.

Said decision of March 3, 1903, is hereby recalled and vacated. Your said decision rejecting Carrington's application on account of the illegality of the assignment to him by Moses is reversed, and if there be no other objection said application will be allowed.

And you are directed to prepare, for the approval of this Department, a circular of instructions to registers and receivers announcing that in all future additional homestead entries made under sections 2306 and 2307 of the Revised Statutes the rule of approximation will be applied only when the entire additional right originally due to the soldier, his widow, or orphan children, is offered as a basis for the entry.

HOMESTEAD ENTRY—SOLDIERS' ADDITIONAL—APPROXIMATION.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 7, 1903.

Registers and Receivers, United States Land Offices.

GENTLEMEN: Hereafter, in allowing soldiers' additional homestead entries under sections 2306 and 2307 of the Revised Statutes of the United States, the rule of approximation will be applied only when the entire additional right, originally due to the soldier, his widow or orphan children, is offered as a basis for the entry. If part of the right is located upon a tract of land agreeing in area with such right surrendered or located, then this circular will not prevent the application of the rule of approximation as to the remainder, if offered in its entirety as a basis for the entry.

If the right has been divided, and a part located and entry allowed therefor, before the date of this circular, the rule of approximation may be applied as to the outstanding and unused portion of such right, in the manner and to the extent above directed as to the additional right originally due.

You will be careful to observe this circular in all future entries.

Very respectfully,

J. H. FIMPLE, *Acting Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

DESERT LAND—CULTIVATION—SEC. 5, ACT OF MARCH 3, 1891.

JOHN CUNNINGHAM.

Any effort made in good faith by a desert-land entryman to produce crops of any kind on the land, which demonstrates the fact of reclamation, is cultivation within the meaning of the fifth section of the act of March 3, 1891.

A showing on the part of a desert-land entryman that as a result of irrigation of the land there is a marked increase in the growth of the native grass thereon, sufficient to support stock, is sufficient proof of cultivation.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *July 23, 1903.* (A. S. T.)

On November 21, 1899, John Cunningham made desert land entry for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 21, the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 22, T. 43 N., R. 108 W., Lander land district, Wyoming.

On September 13, 1902, he made final proof in support of said entry, and on October 6, 1902, final certificate was issued to him.

The final proof was duly forwarded to your office, where on April 27, 1903, a decision was rendered holding said final certificate for cancellation on account of insufficiency of the final proof.

It is shown by said proof that as a result of the irrigation of the land in question there is a marked increase in the growth of native grass on the entire tract. In your said decision it is held that "the mere increase in the growth of natural grass is not deemed sufficient when the soil is such that plowing and stirring the same would not be detrimental thereto," and you directed the local officers to notify the entryman and any other known party in interest "that unless one-eighth cultivation as above indicated is shown in 60 days or appeal taken, the final certificate, which is hereby held for cancellation, will be canceled without further notice from this office." The entryman has appealed from said decision to this Department.

No question is made as to the desert character of the land prior to

the entry, nor as to the regularity of the proceedings under which the final proof was made, the only objection being as to the sufficiency of the proof as to cultivation. The proof shows that the entryman has expended three dollars per acre in reclaiming the land from its desert condition, fencing it, etc.; that he owns sufficient water rights to irrigate the entire tract, and has, by means of irrigation ditches, conveyed water onto and over each legal subdivision of the land and irrigated the entire tract, as a result of which there is "a marked increase in the growth of grass;" that it now produces "pasture grass sufficient to support stock on all the land."

It does not appear that any of the land has been plowed, or that any crops have been planted on it, nor does it appear what manner of cultivation has been employed, but the claimant testified in his final proof that he had one hundred and sixty acres under cultivation.

Your decision seems to hold that in order to make proof of an increased growth of grass sufficient proof of cultivation, it must be shown that the land is of such a character that it would be detrimental to it to plow or stir the soil.

The fifth section of the act of March 3, 1891 (26 Stat., 1095), requires that proof be made "of the cultivation of one-eighth of the land," but it does not prescribe the kind of cultivation required. The object of requiring cultivation seems to be to afford proof of the reclamation of the land from its desert condition, and it is believed that any effort made in good faith to produce crops of any kind on the land, which demonstrates the fact of reclamation, is cultivation within the meaning of the statute.

In the case of *George W. Johnson* (7 L. D., 439), it was held that "proof as to cultivation does not necessarily require a showing that a crop has been raised," and in that case this Department said:

While cultivation ultimately includes the planting and raising of crops, there may be cultivation without this, one definition of the word being "improvement for agricultural purposes."

While the proof in this case does not show definitely how the land has been cultivated, the reasonable inference is that it has been by growing crops of native grass, and this cultivation seems to have been successful, for it is shown that as a result of irrigation there is a marked increase in the growth of such grass. It does not appear what amount of grass has been produced, or how it has been used, if at all, nor is it necessary that this should be shown, but the proof shows that grass sufficient to support stock has been produced on all the land.

This Department finds therefore that the proof is sufficient to meet the requirements of the law as to cultivation, and your said decision is therefore reversed and said final certificate will remain in full force.

FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

H. H. GOETJEN.

Where it is disclosed by the abstract of title accompanying a relinquishment of lands within a forest reserve under the act of June 4, 1897, with a view to the selection of other lands in lieu thereof, or in any other manner, that adverse claims exist to the lands relinquished, the land department can not try the question as to which claimant has the better title or right, and such a controversy must in some manner be terminated before a title from either claimant can be accepted as base for selection of public land under the exchange provisions of said act.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *July 29, 1903.* (J. R. W.)

H. H. Goetjen appealed from your office decision of May 14, 1903, rejecting his application, number 5775, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 8, T. 13 N., R. 5 E., M. M., and other lands, in all 640 acres, Boise, Idaho, in lieu of Sec. 23, T. 5 N., R. 16 W., S. B. M., California, in the Pine Mountain and Zaca Lake Forest Reserve, relinquished to the United States.

Your office rejected the selection for the unsatisfactory condition of title to the land assigned as base therefor. The origin of legal title out of the United States as shown upon the abstract was by patent issued October 15, 1901, for all of said section 23 to John T. Houx, in his own right and as assignee in insolvency proceedings of F. C. Garbutt, insolvent, upon an entry made January 10, 1900, under section 5 of the act of March 3, 1887 (24 Stat., 556, 557), under a contract of sale of the land as part of its grant made by the Southern Pacific Railroad Company, November 27, 1888, to F. C. Garbutt and W. W. Jenkins. December 19, 1901, Houx and his wife conveyed by deed to H. H. Goetjen, who, as unmarried, December 21, 1901, conveyed to the United States under the act of June 4, 1897, *supra*, each of which instruments was duly recorded prior to April 4, 1902, when Goetjen presented his application at the local office.

The abstract also showed eight other conveyances of placer mining claims or interests therein named, Hope, Last Chance, Nancy, Paulina, St. Louis Gold Gravel Placer, Sophia, and Wayward, severally involving different parts of section 23, and together including its entirety, which conveyances and a contract alleged in legal proceedings for reformation of one such conveyance bore dates from December 12, 1886, to May 22, 1900, a period of over thirteen years. A consideration of \$300 was paid under one of these conveyances for a one-sixth interest in the northwest quarter of the section.

Your office decision noted that the authenticating certificates of the abstractor and recorder certify that the abstract is—

a full, true and correct abstract of all matters affecting the title to the land "except as to mining locations and water locations." The abstract would, on that account, be unsatisfactory and insufficient. It should show all matters of record affecting the title, and be certified so to do by the recorder.

Referring to the several mineral claim conveyances, above adverted to, your office decision held that:

While the abstract does not disclose the foundation of these various mineral claims and titles, it does clearly show that from dates long prior to the entry by Houx, under which the selector claims title, all the land in Sec. 23, T. 5 N., R. 16 W., S. B. M., was claimed, held, sold and conveyed as mineral land; and, as to a part of the land, such mineral rights or claims were existing at and prior to the date of the contract with the Southern Pacific Railroad Company, by reason of which Houx claimed the right of entry. So far as appears such claims or titles are still subsisting—they certainly are not vested in the selector—and it is by no means certain that they are not superior to the title tendered by the selector. At least the relative value of such titles is an open question, the burden of settling which the government cannot be asked to assume, by accepting the title tendered. Further, if it could be assumed that the title under the patent, tendered by the selector, is the superior title, still the showing of the abstract is something more than a suggestion that the land is in fact mineral land, and, therefore, cannot be accepted as basis for selection under the law.

Under the showing made by this abstract, I think the selector does not tender such a clear, unincumbered title to nonmineral land as can, under the law, be accepted in exchange for other land; that his tender of reconveyance cannot, therefore, be accepted, and that his said selection must be rejected.

It is alleged as error to hold that the abstract of title did not show "such a clear, unincumbered title to nonmineral land as can, under the law, be accepted in exchange for other land," and in failing to hold that the allowance of Houx's entry and issuance of patent thereon was an adjudication that the lands "were of the character and class subject to such entry, and necessarily determined that they were non-mineral public lands, and that there was no adverse claim thereto."

The several conveyances are assertions of right or title to the lands so conveyed. The allowance of Houx's entry determined only the matters before the land department and under consideration. It does not appear that the mineral claimants were made parties to his proceeding or were served with notice. If the land was in fact mineral that character would not be changed by an error of the land department in the *ex parte* proceeding of Houx, due to lack of information that the land was claimed and was being sold and conveyed as mineral land by parties not brought before the land office and not heard; nor would their rights be adjudicated.

In receiving a reconveyance of land so granted the land department acts administratively to accept for the government a title tendered. If it is disclosed by the abstract, or in any other manner, that adverse claims exist, the land department cannot try the question which claimant has

the better title or right. Such a controversy must in some manner be terminated before a title from either claimant can be accepted as base for selection of public land under the exchange provisions of the act. Where, as in this case, an abstract of title discloses a claim adverse to that of the proponent of title, it should further show its origin and its termination. That it failed to show the origin of an adverse title might be excused in a proper case, but that it fails to show its termination must be a fatal objection to its sufficiency.

Your office decision is affirmed.

MINING CLAIM—TOWNSITE PATENT.

LALANDE ET AL. v. TOWNSITE OF SALTESE.

A patent issued under the general townsite laws, for lands embraced in an unincorporated townsite, is inoperative to convey title to any lands known to be valuable for minerals at the date of the townsite entry, or to any valid mining claim or possession held under the mining laws at the date of such entry.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *July 29, 1903.* (A. B. P.)

June 8, 1901, the judge of the district court for the fourth judicial district of Montana filed townsite declaratory statement, under the provisions of the general townsite laws (Chapter 8, Title 32, Sections 2380 to 2394, inclusive, of the Revised Statutes), and Section 5100, Vol. 1, of the Codes of Montana (1895), for the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 14, T. 19 N., R. 31 W., Missoula, Montana, known as the townsite of Saltese (not incorporated), to be entered for the several use and benefit of the occupants of said townsite. Subsequently the declaratory statement was amended so as to exclude the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and to embrace, in lieu thereof, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section.

July 2, 1901, Vincent Lalande, on behalf of himself and others, filed a protest against the allowance of entry and patent upon said declaratory statement. The allegations of the protest, in so far as material to be here stated, are, in substance: (1) That protestants are the owners of five lode mining claims, known as the Schemer, the New York, the Brooklyn, the Argenta, and the Baby, and also of three millsite claims, known as the New York, the Brooklyn, and the Argenta, all located upon lands embraced within the townsite; (2) that all of said lode and millsite claims were located prior to the filing of the townsite declaratory statement; (3) that the lands included within the several lode claims are known mineral lands; and (4) that protestants are in possession of all said lode and millsite claims, and, by reason of full

compliance with the provisions of the mining laws with respect thereto, are entitled to hold such possession: Wherefore they ask that proceedings upon the townsite declaratory statement be stayed and that a hearing be ordered to determine their rights in the premises.

November 26, 1901, proofs were submitted by the townsite claimants, with the view to entry and patent, and on the same day the protestants appeared and submitted testimony on behalf of their protest. Upon the proofs and testimony the local officers found that some of the lands embraced in the townsite declaratory statement had been for years claimed by protestants under the mining laws. They declined, however, to make a finding as to the character of the lands, for the stated reason that "the issuance of patent to the townsite claimants will not bar the mineral claimants from continuing to comply with the law, and to receive a mineral patent also upon proper showing." They thereupon recommended that the protest be dismissed.

Upon appeal, your office, by decision of January 21, 1903; held, in substance, that no rights possessed by the protestants would be lost or prejudiced by the issuance of townsite patent, subject to the limitations of section 2392 of the Revised Statutes, for the full area claimed in the declaratory statement, and, upon that ground, dismissed the protest. The protestants have appealed to this Department.

The general laws providing for the acquisition of title to townsites upon the public lands contain the following provisions relating to mineral lands and mining claims or possessions within the limits of such townsites:

SEC. 2386. Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town-lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States.

SEC. 2392. No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper; or to any valid mining-claim or possession held under existing laws.

By section 16 of the act of March 3, 1891 (26 Stat., 1095, 1101), it is provided:

That town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: *Provided*, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.

In the case of *Hulings v. Ward Townsite* (29 L. D., 21), which arose upon a protest by Hulings against the issuance of patent upon a townsite entry made by the *incorporated* town of Ward, in the State of Colorado, on the ground that the lands embraced in the entry were mineral in character, said section 16 was construed and applied. The Department there held as follows:

Under this statute it is plain that whatever action is taken upon the present protest, the rights of Hulings and others under their mining locations, if such locations in fact existed and possession thereof was recognized as alleged, can not be disturbed for the reason that the act expressly provides for the protection of possessory rights under existing valid mining claims, and also, that entry for the mineral veins so possessed may be made and patent issued therefor, after patent has issued for the townsite.

The issuance of patent on the townsite entry, under the statute referred to, will not determine the rights of the protestant, in the premises, nor will such patent convey title "to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law" within the townsite limits, by the protestant or any other person, at the date of the townsite entry. The statute excludes from the operation of the townsite patent any such existing mineral vein, mining claim, or possession.

The townsite patent when issued will not, therefore, deprive the protestant or any other person, of any rights existing at the date of the townsite entry under any valid mining claim, or possession so recognized as aforesaid, within the patented area. All such rights are protected by the statute in terms. Nor will the townsite patent deprive the Department of jurisdiction to issue patent for any such mining claim upon application therefor supported by proper proofs, for the reason that the statute also provides that patent may be issued to the possessor of any such mining claim after the townsite patent has been issued. All rights of mineral claimants existing at the date of the townsite entry being thus reserved and fully protected by the statute, there would seem to be no necessity for the segregation, prior to the issuance of the townsite patent, for the purpose of excluding the same from the patent, of any mining claims, surveyed or unsurveyed, for which applications had not been filed at the date of the townsite entry. All such claims, if subsisting and valid at the date aforesaid, may be carried to entry and patent, upon proper proofs showing that the mining laws have been complied with and that the claims are within the protection of the statute, notwithstanding the townsite entry and patent, provided only that such mineral entry and patent shall not embrace surface ground "where the owner or occupier of the surface ground shall have had possession of the same before the inception of title of the mineral-vein claimant."

While the provisions of the aforesaid sections 2386 and 2392 of the Revised Statutes, whereby mineral veins and mining claims or possessions are excepted from the operation of titles obtained under the general townsite laws, are substantially the same as the excepting provisions of said section 16 of the act of March 3, 1891, with respect to patents issued under that section, it is to be observed that in the former it is not in terms provided, as it is in the latter, that patent may be obtained by the claimant of the excepted mineral veins, mining claims or possessions, after the townsite patent shall have been issued.

As the townsite declaratory statement or application here in question is not presented on behalf of an incorporated town or city, this

case does not fall within the provisions of said section 16, and is not controlled by the ruling in the case of *Hulings v. Ward Townsite*. It rests upon the general townsite laws, and is to be determined by the provisions of those laws and the decisions of the courts and the Department construing the same.

In the case of *Deffeback v. Hawke* (115 U. S., 392), the question whether title to mineral lands upon the public domain could be acquired under the laws relating to townsites was directly involved. In the course of its opinion, after referring to the laws providing for the disposal of the mineral lands of the United States, and to the laws authorizing the sale of public lands for townsite purposes, including the provisions of sections 2386 and 2392 hereinabove quoted, the Supreme Court said:

It is plain, from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas. We say "land *known* at the time to be *valuable* for its minerals," as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term "mineral" in the sense of the statute is applicable. In the first section of the act of 1866 no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which repealed that section and re-enacted one of broader import, it is "*valuable* mineral deposits" which are declared to be free and open to exploration and purchase. The same term is carried into the Revised Statutes. It is there enacted that "lands *valuable* for minerals" shall be reserved from sale, except as otherwise expressly directed, and that "*valuable* mineral deposits" in lands belonging to the United States shall be free and open to exploration and purchase. We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued.

In the present case there is no dispute as to the mineral character of the land claimed by the plaintiff. It is upon the alleged prior occupation of it for trade and business, the same being within the settlement or town site of Deadwood, that the defendant relies as giving him a better right to the property. But the title to the land being in the United States, its occupation for trade or business did not and could not initiate any right to it, the same being mineral land, nor delay proceedings for the acquisition of the title under the laws providing for the sale of lands of that character. . . .

Whilst we hold that a title to known valuable mineral land cannot be acquired under the town-site laws, and, therefore, could not be acquired to the land in con-

troversy under the entry of the town site of Deadwood by the probate judge of the county in which that town is situated, we do not wish to be understood as expressing any opinion against the validity of the entry, so far as it affected property other than mineral lands, if there were any such at the time of the entry. The acts of Congress relating to town sites recognize the possession of mining claims within their limits; and in *Steel v. Smelting Co.*, 106 U. S., 447, 449, we said that "land embraced within a town site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes; its exemption is only from settlement and sale under the pre-emption laws of the United States. Some of the most valuable mines in the country are within the limits of incorporated cities, which have grown up on what was, at its first settlement, part of the public domain; and many of such mines were located and patented after a regular municipal government had been established. Such is the case with some of the famous mines of Virginia City, in Nevada. Indeed, the discovery of a rich mine in any quarter is usually followed by a large settlement in its immediate neighborhood, and the consequent organization of some form of local government for the protection of its members." It would seem, therefore, that the entry of a town site, even though within its limits mineral lands are found, would be as important to the occupants of other lands as if no mineral lands existed. Nor do we see any injury resulting therefrom, nor any departure from the policy of the government, the entry and the patent being inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation or improvement for residences or business under the town-site title.

In the case of *Davis's Administrator v. Weibbold* (139 U. S., 507, 516-517), the court, speaking on the same subject, said

Chapter eight, Title thirty-two, of the Revised Statutes, contains the law for the reservation and sale of town sites on the public lands. Among other things it provides for the entry, at the local land office, of any portion of the public lands occupied as a town site by its corporate authorities, or, if the town be unincorporated, by the judge of the county court of the county in which the town is situated; the entry to be "in trust for the several use and benefit of the occupants thereof, according to their respective interests;" and the execution of the trust and the disposal of the lots in the town to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the town is situated. It also provides that the entry shall include only such land as is actually occupied by the town, and the title to which is in the United States; and declares 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;" with the reservation, however, that nothing in the section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States. By another section of the chapter, and near its close, it is enacted that "no title shall be acquired" under its provisions "to any mine of gold, silver, cinnabar or copper; or to any valid mining claim or possession held under existing laws." Sec. 2392.

In *Deffeback v. Hawke*, we said of this statement of the legislation of Congress, that it was plain that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar or copper, could be obtained under the pre-emption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands,—except in certain States, not affecting the question before us, commenting particularly upon the terms *known* and *valuable* used in connection with the minerals in public lands, implying that they must be of that character to bring the lands within the exception of mineral lands from sale or grant by the United States

Dower *v.* Richards (151 U. S., 658, 663), was a case which involved the same question. There the court held as follows:

It is established by former decisions of this court, that, under the acts of Congress which govern this case, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect; but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them; and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent. *Deffebach v. Hawke*, 115 U. S., 392; *Davis v. Weibbold*, 139 U. S., 507.

The case of the Pacific Slope Lode *v.* Butte Townsite (25 L. D., 518) was a controversy between claimants of the same land under the townsite and mining laws respectively. The Department there held (syllabus):

A townsite patent that in terms provides that "no title shall be hereby acquired to any mine . . . or to any valid mining claim or possession held under existing laws of Congress," does not divest the Department of jurisdiction to subsequently issue a patent for a lode claim within the limits covered by said townsite patent, if at the date of the townsite entry such lode claim was known to exist.

In the later and similar case of Gregory Lode Claim (26 L. D., 144), it was held (syllabus) that—

The issuance of townsite patent for land known at the date of the townsite entry to contain a valuable lode claim, does not pass title to such claim, but leaves it in the United States, subject to the jurisdiction of the land department.

See, also, *Brady's Mortgagee v. Harris et al.* (29 L. D., 89, 92), and same case on review (*Ib.*, 426, 433).

Applying the principle of the authorities cited to the facts of the case under consideration, it is clear that no injury can result to the mineral protestants by the allowance of entry and patent to the townsite claimants, subject to the limitations and exceptions contained in said sections 2386 and 2392 of the Revised Statutes, provided the proceedings had and proofs submitted upon the townsite declaratory statement are in all other respects regular and in accordance with law. The patent when issued will not operate to convey title to any lands known to be valuable for minerals at the date of the townsite entry. It will not affect any rights, present or prospective, possessory or otherwise, which the protestants may have acquired under the provisions of the mining laws. They may subsequently apply for and obtain patent, upon proper proceedings under the mining laws, to any or all lands claimed by them within the townsite which they may be able to show were known to be valuable for minerals at the date of the entry, the same as though townsite patent had not been issued. The law will preserve to them all rights acquired under the mining laws prior to the townsite entry.

The protestants have instituted no proceedings in the land department looking to the acquisition of the paramount title to the lands

embraced in their alleged mining claims. In the absence of such proceedings, the land department should not undertake to determine their rights as to said lands. The proper time to make such determination, both as to the lands claimed as millsites and as to those alleged to be valuable for minerals, will be when application for patent to the same, or any of them, shall be filed under the mining laws.

It is not intended by this decision to pass upon any question as to the rights of the protestants in any of the lands in controversy. All that is here decided is that such rights, whatever they may be at the date of the townsite entry, will not be injuriously affected by the issuance of patent for the benefit of the townsite claimants, and for this reason alone the decision of your office dismissing the protest is affirmed.

MINING CLAIM—APPLICATION FOR PATENT.

GOLDEN CROWN LODE.

Application for patent to public land claimed and located for valuable mineral deposits may be filed only by a person, association, or corporation (otherwise authorized) who has, or have, *claimed and located* a piece of land for such purposes and complied with the terms of the mining laws in other respects, or by the grantee or grantees of such locator or locators.

Where an application for mineral patent is filed by an association of persons, one of whom is without interest in any one or more of the claims embraced in the application, the proceedings had thereunder are to the extent of such claim or claims without statutory authority, and a nullity.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *August 7, 1903.* (F. H. B.)

November 21, 1901, Thomas B. Hart, on behalf of himself and James Cunningham, made entry, No. 1216, for the Golden Crown, Old Virginia, and Emerald lode mining claims, survey No. 1450, Rapid City, South Dakota.

January 5, 1903, your office, in passing upon the entry, stated that it appears from the abstract of title accompanying the record that Cunningham has never owned any interest in the Golden Crown claim, and it was held that unless an abstract be furnished to show that at the date of the application for patent Cunningham owned an interest in the claim in question the entry must to the extent of the claim be canceled. The local officers were therefore directed to notify claimants that sixty days would be allowed them within which to make such showing, or to appeal, and that upon default the entry would be canceled as stated.

Hart has appealed to the Department, substantially upon the following grounds: That the three claims were applied for and entered as a group; that appellant, being unable to find Cunningham and secure

from him a deed for his (Cunningham's) one-eighth interest in the Old Virginia and Emerald claims, applied for patent to himself and Cunningham for the group; that it is a matter of no concern to the government if appellant is willing, in full protection of Cunningham's interests, that patent should issue in the names of both for the Golden Crown claim, as well as the others, inasmuch as appellant manifestly is the only person to be prejudiced thereby, and the respective rights of the parties in the premises may hereafter be determined between themselves; that the entry, as made, is valid, for the reason that Cunningham will not thereunder acquire title to ground to which he has no claim, inasmuch as he has an interest in the group; and that the insertion of the name of Cunningham in the final certificate of entry and patent will not operate to convey to him any interest in the Golden Crown claim, but merely an interest in the group, to be determined between the parties elsewhere than in the land department.

The Golden Crown, Old Virginia, and Emerald claims, as the official plat discloses, are contiguous upon their side lines in the order named, and form a compact body or group approximately oblong in shape. The Golden Crown is fractional.

By section 2325 of the Revised Statutes it is in part provided as follows:

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of an application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent.

For the guidance of claimants in the presentation of applications for patent and of the officers of the land department in the administration of the law with respect to proceedings of that character, it is provided

by paragraph 41 of the mining regulations (31 L. D., 474, 481) as follows:

Accompanying the field notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining district, State, or Territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent.

Except as provided by section 2326 of the Revised Statutes, whereby judgment claimants in suits upon adverse claims may, "without giving further notice," file with the registers of the land offices certified copies of the judgment rolls as bases for mineral patents, section 2325 makes the only provision for the prosecution in the land department of proceedings for the acquisition of the legal title to mining claims; and the portion above quoted prescribes, in clear and express terms with respect to some and by necessary implication with respect to the others, those who may avail themselves of the provisions of that section. Application for patent to any land claimed and located for valuable deposits may be filed in the proper land office only by the person, association, or corporation (otherwise authorized) who has, or have, *claimed and located* a piece of land for such purposes and complied with the other terms of the statute, or by the grantee or grantees of the locator or locators. When, therefore, as in the case at bar, mineral patent is sought to be secured under the provisions of the section by an association of two persons, their authority for making application therefor is expressly dependent upon the condition precedent, among others, that *they*, or *their* mediate or immediate grantors, have *claimed and located* the piece of land embraced in the patent proceedings. In other words, the right of possession, whether by location or purchase, must be in *all* the members of an association to authorize them under the law to prosecute proceedings for the acquisition of the legal title. Proceedings instituted to secure mineral patent by one who is without interest in or control over the lands applied for are without statutory authority (South Carolina Lode and Other Claims, 29 L. D., 602). Each member of an association of persons seeking to acquire the legal title to lands under the mining laws must own an interest in the claim, or in each claim of a group, embraced in their joint application for patent. The contention that the government would not be injuriously affected by the inclusion in the entry and patent of the name of a person without interest in the mining claim embraced in the patent proceedings invokes a consideration which can have no part in the equation. The authority conferred by the provision in question to apply for mineral patent is exclusive of all other persons, and the land department is without power or

authority to enlarge or extend that provision or dispense with any of the requirements thereunder.

Appellant's contention that the entry is valid notwithstanding Cunningham owns no interest in the Golden Crown, inasmuch as "he has an interest in the group," contains a false premise and is wholly untenable. Obviously, an "interest in the group," within the purview of the law which permits application for patent to claims in common, means an interest in each claim which composes the group.

Although Hart personally undertook the prosecution of the patent proceedings here in question, he did it on behalf of himself and Cunningham. Both, therefore, appear before the land department as applicants for patent for the three claims involved. Inasmuch as the proceedings instituted to secure mineral patent were, so far as they pertain to the Golden Crown claim, instituted conjointly with one without interest, those proceedings are as to that claim without statutory authority, and a nullity. To the extent of the Golden Crown claim, the entry will be canceled.

The decision of your office is affirmed.

MINING CLAIM—PATENT PROCEEDINGS—PENDING APPLICATION.

STEMMONS ET AL. *v.* HESS.

Application for mineral patent should not be received where the land therein included is embraced in a pending application of another party.

Where, because of an incurable default on the part of the applicants for a mineral patent, entry for one of the several claims in common embraced in the application is refused, the refusal is in effect a rejection of the application to the extent of such claim.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *August 7, 1903.* (F. H. B.)

December 27, 1900, C. H. Stemmons *et al.* filed application for patent to the Consolidated High Peak placer mining claim, which embraced the SE. $\frac{1}{4}$ of Sec. 33, T. 20 N., R. 16 W., Harrison, Arkansas, land district. Notice of the application was published and posted for sixty days, beginning January 12, 1901, and no adverse claim was filed. August 1, 1901, entry was made for the claim, with the exception of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section 33.

February 16, 1901, the ten-acre tract in question was located by one Ida K. Fishburn as the Ten Acres placer mining claim, and certified copy of recorded notice of such location accompanies the record. March 8, 1902, R. W. Hess, claiming as her transferee, filed application for patent to the claim. Publication and posting of notice of the application regularly followed, beginning March 14 and ending May

13, 1902, and no adverse claim was presented. May 12, 1902, however, the Consolidated High Peak claimants filed in the local land office their protest, wherein they urged, in substance and effect, that the proceedings under the last mentioned application for patent be stopped and annulled, for the stated reason, substantially, that the tract involved was then and at the time of the pretended relocation thereof embraced in a valid, subsisting patent application by protestants, which had not been rejected, and was therefore not subject to such relocation and application for patent by protestee; that the portion of the Consolidated High Peak placer claim now in controversy was omitted from protestants' entry by inadvertence and mistake; and that protestants have complied with the mining laws, rules and regulations, and customs of miners in every respect: Wherefore, they applied to pay for and enter the tract under their application for patent to the Consolidated High Peak claim. The local officers refused to allow entry to be made and dismissed the protest, and protestants appealed to your office.

By decision of February 19, 1903, your office sustained the action of the local officers, substantially for the following reasons: That the challenge by protestants of the validity of the Ten Acres location raises as between the parties a question which goes only to their respective claimed rights of possession and could be determined as between the parties only by a suit in court and not in a proceeding before the land department; that the tract in question was excluded from the entry made under protestants' application for patent because the claim applied for by them embraces three separate locations (of which this tract is one) and it was not shown that the requisite expenditure in labor or improvements had been made upon the tract as a condition to obtaining patent, and was not excluded by inadvertence and mistake as alleged; and that this necessary omission of the tract constituted a waiver of all rights obtained under the earlier proceedings, in effect relegated the land to the public domain, and thus rendered it subject to appropriation by the first legal applicant therefor.

Protestants have prosecuted a further appeal, to the Department.

At no time, either during the proceedings in the local office, or before your office, or on appeal here, have protestants disputed the finding that they had not made the requisite expenditure of the value of \$500 (Sec. 2325, R. S.) in labor or improvements upon the tract in controversy, or an aggregate expenditure upon either of the other locations of the group *for the common benefit*, prior to the expiration of the period of publication of notice of their application for patent to the consolidated claim. In fact, it is disclosed by the record that they omitted the tract from their application to make entry, upon their attention being called by the local officers, as stated by the latter, to the default with respect to the required expenditures. Notwith-

standing the default in question is thus conceded, it is persistently contended by protestants that the application for patent by protestee was improperly allowed, for the reason that the tract involved was then embraced in a pending valid application by them.

It is true that it uniformly has been held by the Department that a tract of land included in a pending application for patent to a mining claim can not properly be included in the subsequent application of another party (*Fox v. Mutual Mining and Milling Co.*, 31 L. D., 59, and earlier cases). This ruling, which has ample justification in the provision (Sec. 2326, R. S.) for the assertion of rights by a rival claimant by the presentation of an adverse claim during the period of publication of notice of the application for patent and the timely institution of suit in court for their determination, and has its foundation in the obvious possibility of confusion and error to result from the accumulation of applications, is incorporated into the mining regulations, paragraph 44 (31 L. D., 474, 482), as follows:

Before receiving and filing a mineral application for patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application for patent or entry, or for any lands embraced in a railroad selection, or for which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that a mineral application should not, for these or other reasons, be accepted and filed, they should formally reject the same, giving the reasons therefor, and allow the applicant thirty days for appeal to this office under the Rules of Practice.

The rule is one of administration, whose violation would in itself be in no wise detrimental to the rights of a diligent prior applicant for patent; and it obviously has relation only to cases of prior *pending* applications for patent. Is such situation presented in the case at bar?

The period of publication of notice of the protestants' application for patent extended from January 12 to March 13, 1901. During that period, to wit, February 16, 1901, protestee's grantor made relocation upon the ground of the ten-acre tract embraced in that application and here in controversy. Had the then pending patent proceedings been in all respects regular and seasonably prosecuted to completion by making entry, the possessory rights acquired by the relocation, if any there were, would have been irretrievably lost (*The Marburg Lode Mining Claim*, 30 L. D., 202, 208). But it was found and conceded, at the time entry was attempted to be made for the consolidated claim, that an expenditure of the value of \$500 in labor or improvements had not been made upon or for the benefit of the tract in controversy prior to the expiration of the period of publication, as required by section 2325, Revised Statutes. The requirement of the statute in this respect is mandatory (as has been held and recognized in a number of departmental decisions); and as this indispensable prerequisite to entry and patent admittedly did not then exist, and the failure to comply with the mandate of the statute was incurable so far as the patent proceedings already had were concerned,

there was left no alternative but to refuse entry (which was done) as to the tract in question and allow it, if at all, only upon the prosecution of new patent proceedings. The action of the local officers in refusing to allow entry as aforesaid, because of the admitted default, was, to the extent of the tract involved, in effect a rejection of the application for patent. The patent proceedings theretofore taken having failed, therefore, so far as that tract is concerned, and not having been renewed by protestants, there has been since that time, manifestly, no *pending* application for patent thereto by them. Fox v. Mutual Mining and Milling Co., *supra*, 62.

In the following year the protestee, claiming as transferee of the relocater, filed his application for patent to the tract in controversy, and duly published and posted notice thereof. Protestants, whose rights in the premises were as yet possessory only at most, permitted the period of publication to pass without availing themselves of the provision in such case for the preservation of their claimed rights, by means of adverse claim and suit in court. Upon the termination of that period of publication without appropriate challenge of the application, the assumption arose that no adverse claim existed. The protest raises no question which can now avail protestants anything, and it must be dismissed.

The decision of your office is affirmed.

FOREST RESERVE—CHARACTER OF LAND—ACT OF JUNE 4, 1897.

JEREMIAH COLLINS.

The character of land at the time of its proposed relinquishment, rather than the class of entry under which the United States parted with its title, determines its acceptability under the exchange provisions of the act of June 4, 1897.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *August 7, 1903.* (J. R. W.)

Jeremiah Collins appealed from your office decision of June 1, 1903, ordering a hearing as to the mineral character of the NE. $\frac{1}{4}$; Sec. 7, T. 9 S., R. 77 W., in the South Platte Forest Reserve, Colorado, assigned as base for his application, number 3195, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 8, T. 7 S., R. 14 W., M. M., and other lands, Helena, Montana.

December 31, 1873, the NE. $\frac{1}{4}$ of Sec. 7, T. 9 S., R. 77 W., after offer at public sale, was entered at private cash entry, and patented April 30, 1874, to John Reed. June 21, 1900, Collins recorded his deed, executed June 14, 1900, relinquishing the NE. $\frac{1}{4}$ of Sec. 7 to the United States, and at a date between April 18, and May 11, 1903, not more definitely shown by the record, presented his application to make selection. In the meantime, November 25, 1901, two mineral placer locations were made, together covering all the NE. $\frac{1}{4}$ of Sec. 7, upon

which, March 10, 1902, mineral placer entry of the NE. $\frac{1}{4}$ was made. With the proofs in the mineral entry was filed a certified copy of Collins's deed of relinquishment to the United States, for the purpose of showing that the land though once entered had again become public land of the United States.

Referring to instructions of April 26, 1899 (28 L. D., 328), and of July 7, 1902 (31 L. D., 372), and to departmental decision of February 12, 1903, in the case of the Santa Fe Pacific Railroad Company (unreported), your office held it to be—

necessary to determine whether the tract in question was known to be mineral land on or before June 14, 1900, when the deed of conveyance to the United States was executed, or, if subsequently discovered to be mineral land, then the date of such discovery. In other words, it becomes essential to know the time when, if ever, this tract was first known to be mineral land.

A hearing was ordered to be held at Leadville local office, in which district the land lay. From this order Collins appealed, contending that as the land was patented in 1874 under the laws for disposal of non-mineral land, its character in 1900 is an immaterial question.

Referring to the instructions of April 26, 1899, *supra*, as, in view of counsel, settling the matter, it is conceded that land held under a mineral patent or title is not subject to relinquishment under the exchange provisions of the act of June 4, 1897, *supra*, but it is contended that such rule does not apply where the title to land of mineral character is derived from a patent based upon a non-mineral entry. The question presented is, whether it is the known character of the land at the time of its relinquishment to the United States, or its classification for disposal under the land laws at a former time, based upon its then supposed character, which determines its acceptability by the United States under the exchange provisions of the act of 1897.

The object sought by the exchange provisions of the act was, as far as possible, to acquire exclusive ownership and control of all lands in the forest reserves for the more effective protection of the forests and conservation of waters. F. A. Hyde (28 L. D., 284, 289). It was desired to eliminate as far as possible all land holdings controlled by individual claimants or owners. Instructions of April 26, 1899 (28 L. D., 328, 329). At the same time the development of the mineral resources of the country was so important that the same act offering exchange of land with private owners also provided:

Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

* * * * *

And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

It could in no way advance the object of the act to accept relinquishment of mineral land under the exchange provisions thereof, as such lands would remain subject to re-entry, and the exclusive control and ownership by the government would be in no way assured. Such an interpretation of the act would in fact tend to defeat the act of March 2, 1889 (25 Stat., 854), prohibiting cash sales of public land (except in Missouri) and all acts limiting the amount of land that one person might acquire. As mineral land may be entered, if it might also be relinquished and assigned as base for selection of other public lands, the same tract may be so entered and relinquished repeatedly, and become a mere vehicle or conduit for appropriation of other land without limit. It was therefore clear that the exchange provisions of the act extend only to such lands as are not mineral and are not subject to be again entered and thereby to pass from the control of the government.

It is the character of the land at the time of its proposed relinquishment rather than the class of entry under which the United States parted with its title that must determine its acceptability under the provisions of the act. The quality and completeness of title conveyed by patent from the United States to a private owner is the same whether the entry under which such patent issues was a mineral or non-mineral entry. In either case alike complete ownership and dominion of the tract granted passes to the patentee, who is nowise limited as to the uses he will make of it. The United States as completely parts with its further control of the land in one case as the other. What the government seeks by the exchange provisions of the act of 1897 is to acquire title to land it can permanently hold and control. It is therefore not the class of entry by which it parted with title, but the character of the land to be acquired by the exchange which must be the controlling factor in the transaction. The basis of your office decision is therefore the correct one.

A minor error, however, appears in fixing the point of time to which the proofs of known mineral character of the land must be addressed. The time fixed by your office was June 14, 1900, when Collins executed his deed to the United States, whereas his complete dominion over the land and control of the title thereto remained until June 21, 1900, when he filed his deed for record (Mary E. Coffin, 31 L. D., 252), and that is the proper date with reference to which the character of the land should be determined.

As so modified your office decision is affirmed.

JEREMIAH COLLINS.

Motion for review of departmental decision of August 7, 1903, 32 L. D., 223, denied by Acting Secretary Ryan October 3, 1903.

ABANDONED MILITARY RESERVATION—HOMESTEAD—QUALIFICATION—
ACT OF AUGUST 23, 1894.SMITH *v.* LONGPRE.

The disqualification to make homestead entry, imposed by section 2289 of the Revised Statutes upon a person owning more than one hundred and sixty acres of land, extends to one who holds land under a contract of purchase, though the payments thereunder have not been completed.

The preference right of entry accorded by the act of August 23, 1894, opening lands in abandoned military reservations to settlement and entry, to settlers "who are qualified to enter under the homestead law," extends only to persons who are qualified at the date of the presentation of their applications.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) August 12, 1903. (G. B. G.)

This is a duly entertained motion on behalf of Antoine Longpre for review of departmental decision of January 31, 1903 (unreported), which directed the cancellation of his entry allowed September 17, 1900, for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lots 3 and 4, Sec. 33, T. 13 N., R. 28 W., North Platte land district, Nebraska.

This land was in the former Fort McPherson military reservation. The reservation was relinquished and abandoned January 5, 1887, but the odd-numbered sections therein, of which the land in controversy is a part, were withheld from disposal pending the determination of a claim asserted thereto by the Union Pacific Railway Company. The company's claim was denied October 24, 1899 (29 L. D., 261, 264), and pursuant to instructions of August 3, 1900 (30 L. D., 213), the land was relieved from reservation, to take effect September 17, 1900. On that day Longpre applied, and was permitted, to enter said tract under the act of August 23, 1894 (28 Stat., 491).

May 14, 1901, Eber H. Smith, whose application to enter the land had previously been rejected, filed an affidavit in the nature of a contest against Longpre's entry, alleging, among other things, that he (Longpre) at the date of his entry was the proprietor of more than one hundred and sixty acres of land and therefore disqualified to make an entry under the homestead laws.

The case was submitted upon an agreed statement of facts, which included an admission on the part of Longpre that on August 13, 1896, six years after his settlement on said tract, he purchased from the Union Pacific Railway Company 186.20 acres of land, not described in the stipulation, on a ten year credit contract, that he has since complied with the terms of the contract in the matter of payments as they fell due, and has had the possession and use of such land to this time, and it was upon this admission that the decision complained of directed the cancellation of his entry.

Section 2289 of the Revised Statutes, as amended by the act of

March 3, 1891 (26 Stat., 1095), provides that every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or has filed his declaration of intention to become such as required by the naturalization laws, shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands: "But no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law."

Construing the clause of this statute above quoted, the Department, in the case of *Leitch v. Moen* (18 L. D., 397), held that the disqualification thereby imposed extends to one who holds land under a contract of purchase, though the payments thereunder have not been completed. No good reason is perceived why this ruling should be changed. The word "proprietor" in the statute means nothing more nor less than owner, and an owner is one who has dominion over a thing, which he may use as he pleases, except as restrained by law or by agreement, and includes any person having a claim or interest in real property, though less than an absolute fee.

But it is suggested that by the act of August 23, 1894, *supra*, it was intended to grant to actual settlers upon abandoned military reservations a then present and vested right to be measured by then existing conditions, and that inasmuch as Longpre was at the date of the act an actual settler upon the land in controversy, and was not then in any sense the proprietor of more than one hundred and sixty acres of land, his purchase from the railway company not having been made, the subsequent purchase did not disqualify him.

This suggestion will not hold. The said act of August 23, 1894, omitting provisions and exceptions not here material, provided:

That all lands not already disposed of included within the limits of any abandoned military reservation heretofore placed under the control of the Secretary of the Interior for disposition under the act approved July fifth, eighteen hundred and eighty-four, . . . are hereby opened to settlement under the public-land laws of the United States and a preference right of entry for a period of six months from the date of this act shall be given all *bona fide* settlers who are qualified to enter under the homestead law and have made improvements and are now residing upon any agricultural lands in said reservations.

It must be noted that under the terms of this act these lands were opened to settlement "under the public land laws of the United States," and that the preference right of entry thereby accorded is to "settlers who are qualified to enter under the homestead law." At the date of this act, section 2289, as amended, prescribed the qualifications of persons who might thereafter claim the benefits of the homestead law, and the ownership of more than one hundred and sixty acres of land was just as surely a disqualification as infancy, the ceasing to be the head of a family, or alienage without declaration of intention to become a citizen under the naturalization laws. And to

argue that a person free from such disqualification at the date of the act might not thereafter disqualify himself from making an entry thereunder is to say that he, for instance, being a citizen, would not disqualify himself by expatriation, or, in the absence of special legislation, that a woman, the head of a family, would not disqualify herself by marriage.

It seems clear—in the nature of things must be true—that the settlers referred to “who are qualified to enter under the homestead law” include only persons who are qualified at the date of the presentation of their applications. (See *Clark v. Mansfield*, 24 L. D., 343.) At such time Longpre was, according to the decisions of this Department in similar cases, the proprietor of more than one hundred and sixty acres of land, and therefore disqualified to make the entry. The Department is keenly alive to the strong equities in favor of this entryman, but must construe acts of Congress according to their manifest intent. The motion is denied.

MINING CLAIM—PATENT PROCEEDINGS—NOTICE.

OSCAR LODGE CLAIM.

Where an application for patent is filed and the proceedings carried to entry by a mineral claimant in the names of himself and his co-owner company, without authority from the latter, and the entry is subsequently canceled for defects in the patent proceedings, upon notice to the former alone, the co-owner company, by claiming under the patent proceedings and asking the reinstatement of the canceled entry, thereby ratifies and confirms the assumed authority exercised by its co-claimant in its behalf, validates the notice upon which the entry was canceled, and is not in position to object that the entry was canceled upon insufficient notice.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *August 13, 1903.* (F. H. B.)

January 25, 1884, The Ouray Discovery and Mining Company and James A. Drummond made entry, No. 839, for the Oscar lode mining claim, survey No. 1672, Lake City, Colorado.

In the transcript of the field notes of survey of the claim, upon which the certificate of the surveyor general was based, the deputy mineral surveyor who surveyed the claim described the improvements as “a discovery cut” and “an interest in a developing tunnel run for the development of the Oscar and other lodes,” said tunnel being 120 feet long. In April, 1886, your office, in due course of administration, found that satisfactory evidence of the corporate existence of the Ouray company had not been furnished; that the abstract of title filed, bearing date October 20, 1883, had not been brought down to the date of the application for patent; and that the report of the

deputy mineral surveyor contained no showing of the proportion of the tunnel claimed on behalf of each claim to which it was sought to accredit it, or that the tunnel was run or used for the development of the respective claims; and the local officers were directed to notify the parties of the defects in the proof, and, in addition, an explanatory affidavit was required of the deputy surveyor. The required affidavit was furnished by the latter and transmitted to the surveyor-general, who withheld his approval thereof. July 7, 1893, your office again called attention to the defects in the proofs and directed the local officers to notify the parties (from whom no response to the requirements previously made had been received) that they would be allowed thirty days within which to submit the required evidence; and copy of your letter to them was served by the local officers upon Drummond. September 20, 1893, your office held the entry for cancellation, subject to appeal, because of default with respect to the evidence called for, notice of which was served on Drummond; and, December 19, 1893, the entry was formally canceled.

September 10, 1902, "Jesse F. McDonald, agent and attorney in fact for The Ouray Discovery and Mining Company," filed petition for reinstatement of the entry, substantially upon the following grounds: That the claimant company never had notice that there were any defects in the proofs submitted at the date of entry, or of the requirements in that behalf by your office in its letter of July 7, 1893, and former letters, which proofs it would otherwise have furnished; that the status of the patent proceedings was first suggested to the company in June, 1902, when it learned that a new location had been made upon the claim by other parties; that it thereupon made inquiry of your office and received in response certified copies of all the correspondence relating to the claim, whence it derived its first definite knowledge of the facts; and that the company has continually been in the actual and undisturbed possession of the claim, and was at the time of the relocation thereof carrying on development work for its benefit. Certified copies of the original and amended articles of incorporation of the company were also submitted. Having been thereupon called upon by your office for evidence of his authority to represent the petitioning company, McDonald filed an abstract of title, extended from October 20, 1883, to December 1, 1902 (but not certified in accordance with the requirements of paragraph 42 of the mining regulations—31 L. D., 474, 481). By this abstract it appears that the Ouray company, by its deed of April 15, 1890, conveyed all its right, title, and interest (shown by the abstract filed at the date of entry to be a three-fourths interest) to The Eli Mining and Land Company; and therewith McDonald filed power of attorney to represent the latter company in the proceedings looking to reinstatement of the entry, and asked that the petition be considered as the petition of

the Eli company. Your office accepted the substitution, and, by decision of January 27, 1903, found and held that the additional evidence called for prior to the cancellation of the entry was essential; that the required evidence of an expenditure in labor or improvements in satisfaction of the requirements of section 2325, Revised Statutes, had not been supplied; that a copy of letter of September 20, 1893, whereby the entry was held for cancellation, was served on James A. Drummond, co-claimant, as evidenced by his signature upon the registry return receipt therefor; and that Drummond was the legal agent of the Ouray company, and the undisputed legal service of notice upon him was also legal service upon the company: Wherefore, "and in view of the seeming negligence of The Eli Mining and Land Company and the disclosed relocation of the claim," the petition was denied.

February 10, 1903, the Eli company filed motion for review of the last-mentioned decision, and urged, as grounds therefor, in substance and effect, that there had not been a "legal service of notice" upon it or the grantor company, or a *regular* cancellation of the entry; that satisfactory evidence of the expenditure in labor or improvements required by section 2325, Revised Statutes, had been furnished; that petitioner had not been negligent in any degree; and that the entry should be reinstated upon the showing made by the record. By its decision of March 2, 1903, your office held as follows:

I have re-examined the case with particular reference to the alleged errors in said office decision, and find that, as stated in said decision, service of notice of the order holding said entry for cancellation was made upon James A. Drummond, a co-owner, who acted in behalf of himself and The Ouray Discovery & Mining Company in the matter of application for patent and entry of said claim. This would appear to have been sufficient service under the regulations.

In the official field notes filed in connection with the application for patent the improvements are stated to consist of a discovery cut and an interest in a tunnel situated upon the Mountain Belle lode, the amount credited to this claim being \$500. Subsequently, the deputy surveyor filed in the United States Surveyor General's office additional affidavits on this point, but no certificate thereon was ever issued by that officer. These additional affidavits do not specify what proportion of said tunnel was claimed by each of the lodes to which it was credited, and "that said tunnel was run or used for the development of the claim, respectively and particularly," as was required by this office. While it may be true that the petitioner for reinstatement was not negligent in the matter of the completion of the proofs required, it is nevertheless true that the entrymen themselves allowed a long period of time to elapse without any effort to comply with the requirements of this office, and the present owner occupies no better status, so far as the reinstatement of the entry is concerned, than his grantors. There being no error in the decision of this office refusing to reinstate said entry, the same must be sustained and the motion for review is accordingly denied.

The Eli company has now appealed to the Department, and makes the following assignments of error:

1st. It was error to hold that legal service of notice of decision holding said entry for cancellation had been given by the Department and the entry *regularly* canceled.

2nd. It was error to hold that evidence of the labor and expenditure required by section 2325 of the United States Statutes has not been furnished.

3rd. It was error to hold that the company represented by the petition, or its grantor, had been negligent in this case.

4th. It was error to deny the reinstatement under its state of facts shown by the proofs in the case.

5th. It was error to hold that notice to James A. Drummond was notice to the company claimant.

6th. It was error to hold that a proper certificate of the \$500 improvements by the United States Surveyor General for Colorado had not been filed with the case.

With respect to the first assignment, it is urged by appellant, in the written argument filed to support its appeal, that Drummond was not the legal representative of the company, and did not in any sense represent it as its agent; but that, "on the contrary, he delegated to himself whatever authority he claimed to represent, and used it to conceal from the company all the facts possible." It is added that Drummond "furnished no part of the money to secure the entry, and took no interest whatever in the outcome of the same." The sufficiency or legality of the notice, with respect to the company, is dependent upon the representative character of Drummond, in its behalf, under the patent proceedings.

Upon examination of the record it is found that the application for patent to the claim involved, filed October 25, 1883, bears the following signatures: "Jas. A. Drummond. Ouray Discovery & Mining Company, by Jas. A. Drummond, co-owner." The application thus purports to be filed by one of two co-owners, acting on behalf and in the interest of both, and both signatures are penned by the same hand. So far as the application is concerned, then, its presentation in the names of both co-owners, whether theretofore authorized by the company on its part or not, was the sole act of Drummond in the avowed interest of both. The record is also found to contain a partly printed and partly written paper, styled "application to purchase," dated January 25, 1884 (the date of the entry), which accompanied the tender of the purchase price of the land, and which bears the signatures: "Jas. A. Drummond, for himself and co-claimant, The Ouray Discovery & Mining Company." These signatures are in the handwriting of the signatures appended to the application for patent. The entry itself, therefore, was avowedly the act of Drummond on behalf of both co-owners. The record evidence discloses that up to this point the proceedings—which, if regular, included all acts necessary to be performed by the applicants thereunder to secure patent—had been conducted on the part of the company professedly by its representative, the co-owner. Upon this co-owner applicant, as principal with respect to his own interest and as the professed agent of the co-owner company, the local officers served notice of the defects in the patent proceedings and of the cancellation of the entry, and his acknowledgment of receipt

thereof accompanies the record in the case. Now raising the first objection to the prosecution of the patent proceedings on the part of the Ouray company by the hand of its co-owner and disavowing the assumption of such representative authority by him, the company's successor in interest seeks, by the partial repudiation of those proceedings, to procure the reinstatement of the entry made thereunder and by virtue thereof.

It is settled that where one contracts or acts *as agent*, without naming a principal, his acts inure to the benefit of the party, although at the time uncertain or unknown, for whom it shall turn out he intended so to contract or act, provided the party thus entitled to become principal ratify the contract or act; and a named principal may ratify and confirm the act of one who has without authority performed it as his agent. If the principal accepts, receives, and holds the proceeds or beneficial results of such an act, he is estopped to deny its validity. In general, conduct, as well as express confirmation, may show a ratification. (See Parsons on Contracts, 8th Ed., Vol. I, Chap. 3, Sec. 3, and cases cited in the notes.) Ratification operates upon the act ratified precisely as though authority to do the act had been *previously* given, except so far as to affect intervening rights of third parties (Cook *v.* Tullis, 18 Wall., 332). But, if the principal ratifies that part of a transaction which favors him, he ratifies the whole (Gaines *v.* Miller, 111 U. S., 395). The principal who intends to repudiate an act is bound to repudiate it *in toto*; he can not accept that which is beneficial and avoid that which is burdensome (Rader's Adm'r *v.* Maddox, 150 U. S., 128; Parsons on Contracts, *supra*). It follows, that if appellant repudiates the representative capacity professed by Drummond, the patent proceedings, being predicated upon joint rights, were prosecuted by him without authority, were a nullity *ab initio*, furnished no foundation for the entry as made, and furnish none for its reinstatement now; and, conversely, if, as is the case, appellant now claims the benefit of the entry, it thereby ratifies *in toto* the patent proceedings upon which that entry was based. As has been said and emphasized, those proceedings were inaugurated and prosecuted to the point of entry by Drummond on his own behalf and *as agent* of the co-owner company on its part; and to ratify the proceedings is necessarily to confirm the assumed representative authority of Drummond in the premises, and to validate the notice served upon him as such agent. That notice to the agent is notice to the principal is a too familiar rule to suggest a necessity for authentication. The succession of appellant to the applicant co-owner company's interest is without effect upon the result, for the former succeeded both to the rights and the liabilities of the latter, and is equally chargeable with the neglect to respond to the requirements set forth in the notice.

The decision here made with respect to the first assignment of error disposes of the third and fifth assignments.

The second and sixth assignments are substantially one. It is sufficient to say that your office committed no error in rejecting, for the reasons stated, the certified report of the deputy surveyor with respect to the required expenditures filed at the time of entry; and equally your office committed no error in rejecting the explanatory affidavit of the deputy (if in fact it embodies the necessary data, which it is not necessary to here decide) because of the absence of the required certificate (Sec. 2325, R. S.) of the surveyor-general, which is found to be the fact. The requirements in question have too often been the subject of decision by the Department to merit discussion or citation of authorities.

The entry was properly canceled, and, in view thereof and of the admitted relocation of the claim, the fourth assignment of error falls also.

The decision of your office is affirmed.

FOREST RESERVE — LIEU SELECTION — ACT OF JUNE 4, 1897.

C. W. CLARKE.

The recording of a deed purporting to convey lands to the United States, and tender thereof to the land department under the exchange provisions of the act of June 4, 1897, constitute a mere assertion by the applicant of his title to the land and his right to make selection; and no equitable title to the land relinquished vests in the United States until the title has been examined, approved, and accepted by the land department.

Where lands in a forest reserve have been of record conveyed to the United States, with a view to the selection of other lands in lieu thereof under the exchange provisions of the act of June 4, 1897, and application to select lieu lands is made but rejected because defective, and a corrected application is subsequently filed, the abstract of title of the relinquished lands must be extended to the date of such subsequent application, so as to show whether or not adverse claims to the land have in the meantime arisen; and if such have arisen they must be removed before selection of lands in lieu of those relinquished will be allowed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *August 13, 1903.* (J. R. W.)

C. W. Clarke appealed from your office decision requiring him to furnish an extension of his abstract of title to the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 16, T. 20 S., R. 33 E., M. D. M., California, relinquished to the United States and assigned as base for his application under the act of June 4, 1897 (30 Stat., 36), to select the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 8, T. 23 N., R. 12 E., M. D. M., Susanville, California.

July 23, 1902, Clarke presented his selection for the last above described land, assigning as base "40 acres in the northwest quarter

of section 16," etc. After rejection of such application by the local office and by your office, Clarke appealed to the Department, which by decision of February 27, 1903 (32 L. D., 26, 27), held that definite assignment of base for a selection is necessary to its approval for like reasons as are required in school indemnity selections, and directed that:

In the absence of any intervening claim for the land applied for a selector may complete his selection, and in this case it would seem entirely proper to allow Clarke to *perfect his selection by a definite assignment of base therefor*, his rights being determined as of the date his application is so completed. The appeal herein is dismissed and the case is remanded to your office. You will give Clarke notice that he will be allowed thirty days from receipt thereof to make and present to your office a formal definite assignment of base in support of such selection.

Before that time, November 17, 1902, Clarke filed a writing that:

I now make this supplemental and amendatory redesignation of the base land therein, specifically describing the same as the northwest quarter of the northwest quarter of section 16.

This made the base definite, and if the conditions existed of selection of land of the class and condition offered, and tender of good title to the base designated, equitable right then attached, and he was entitled to have that selection approved.

March 11, 1903, instead of determining such questions, upon the selection then pending and remanded for readjudication, your office informed Clarke that in absence of an intervening claim he was allowed thirty days to make a new application for the land, "with a *formal definite* assignment of base land in support of his selection." April 4, 1903, he called attention to his definite assignment of base November 17, 1902. April 15, 1903, your office held this to be insufficient and allowed him thirty days in which to make "a new application" with a *formal definite* assignment of base land, and further required a continuation of the abstract of title to the land assigned as base for such selection, properly certified, showing the assigned base tract to be at the date of his selection free from tax liens, pending suits, judgment liens, or other incumbrance, and held that:

While the record title to the land surrendered to the government and offered as a basis in lieu of the land selected in No. 2779 remained in the government, there is serious question if the completed equitable title at least was not re-invested in the selector by the action of the government cancelling the selection made in satisfaction thereof. To remove any complications therefore that might arise by attempt on the part of the selector to dispose of such land after its refusal as a basis of selection and to prevent any conflict with the local authorities in the matters of taxation, this office will require that the selector show that the title to the land offered as a basis of the selection was, at the date of the application, free from any of the objections hereinbefore mentioned.

The appeal contends that by record of Clarke's deed title vested in the United States, and it was error to hold that cancellation of the

previous selection could operate to revest equitable title in Clarke; or to assume that any complication might arise by any attempt of Clarke to dispose of such land after record of his deed to the United States; or to impose the expense and trouble of obtaining a new abstract, as no liens or incumbrances could attach after record of his deed.

The supreme court held in *Cosmos Oil Company v. Gray Eagle Oil Company* (190 U. S., 301) that the record of a deed purporting to convey lands to the United States and its tender to the land department under the exchange provisions of the act of June 4, 1897, was a mere assertion by the applicant of his title and of right to make selection, and that no equitable title vested until the title was examined and approved. It is a necessary deduction from this decision that all equitable right of property in the land relinquished remains in the proponent until the title is examined, approved, and accepted by the land department.

Clarke having acquiesced in the requirement of your office that he make a new selection is no longer asserting any right under his original selection. Under the exchange provisions of the act of June 4, 1897, the land department acts administratively to accept for the United States the title tendered to lands offered in exchange and assigned as base for selections, and may make any objection to the title tendered that a private individual might reasonably do in a similar transaction of exchange. The United States as one of the parties to the exchange is represented by and acts through the land department. It was held in *H. H. Goetjen* (32 L. D., 209) that:

If it is disclosed by the abstract, or in any other manner, that adverse claims exist the land department cannot try the question which claimant has the better title or right. Such a controversy must in some manner be terminated before a title from either claimant can be accepted as a base for selection of public land under the exchange provisions of the act.

Some states claim the right to exercise the taxing power against lands the naked legal title to which is in the United States where the complete equitable right has passed, and the court has upheld such power. *Wisconsin Central R. R. Co. v. Price County* (133 U. S., 496); *Northern Pacific R. R. Co. v. Patterson* (154 U. S., 130, 132); *Carroll v. Safford* (3 How., 441). These were cases wherein equitable title passed from the United States and legal title remained in the government as a mere trustee to the grantee of the United States. No adjudication has been found of a case where title was passing in the converse direction from private holders to the United States. The imposition of a tax is at least an assertion by the state authority imposing it that the ownership or the equitable right of property is in him to whom it was assessed and against whom a tax was levied, and of a power to impose a tax upon it.

So also a deed or other form of conveyance of or charge upon lands by one previously recording a conveyance thereof to the United States would be an assertion of ownership, or right, in the face of which he would not be permitted to make selection of public lands until the right thereby created or attempted to be should be extinguished and complete title be tendered.

Under such circumstances, and until the court decides that lands which have been of record conveyed to the United States, but have not been promptly exchanged for public lands, are not taxable and have passed wholly beyond the grantor's power, prudent administration justifies the requirement of your office that the abstract of title should be extended so as to show whether or not adverse claims have arisen, and to require their removal if they have arisen.

Your office decision, in so far as it requires extension of the abstract of title, is affirmed.

GREER COUNTY, OKLAHOMA—ACT OF JANUARY 18, 1897.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 20, 1903.

Register and Receiver, U. S. Land Office, Mangum, O. T.

GENTLEMEN: My attention has been called to the instructions of February 25, 1897 (24 L. D., 184), prescribing rules and regulations for making entries under the provisions of the act of Congress approved January 18, 1897 (29 Stat., 490), in which instructions the following provision is found:

Under section 5, the right of entry to land within said county which on March 16, 1896, was occupied for church, cemetery, school, or other charitable or voluntary purposes, not for profit, is given to the proper authorities in charge thereof.

In each case the maximum area to be so entered is two acres. Sections numbered 16 and 36, within each township, within said county, are reserved by section 4 of this law for school purposes, and are exempted from the operations of this section.

Section 4 of said act reserved sections 16 and 36 for school purposes and sections 13 and 33 "for such purpose as the future State of Oklahoma may prescribe," and further provided for the selection of an equal area of lands as indemnity for such portions of said sections as "shall be found to have been occupied by actual settlers or for town-site purposes or homesteads" prior to March 16, 1896.

Said section 5 is as follows:

That all lands which on March sixteenth, eighteen hundred and ninety-six, are occupied for church, cemetery, school, or other charitable or voluntary purposes, not for profit, not exceeding two acres in each case, shall be patented to the proper

authorities in charge thereof, under such rules and regulations as the Secretary of the Interior shall establish, upon payment of the government price therefor, excepting for school purposes.

From the general scope and purpose of said act it seems clear that it was not the intent of Congress to except said sections 16 and 36 from the operation of said section 5. It also appears from said section 4 that Congress intended to allow indemnity selections to be made in lieu of any land in sections 16 and 36 occupied for the purposes mentioned in said section 5, as well as any land therein occupied for townsite purposes or homesteads.

Said instructions are therefore hereby amended by striking out and revoking the following provision therein, to wit:

Sections numbered 16 and 36, within each township, within said county, are reserved by section 4 of this law for school purposes, and are exempted from the operations of this section.

Entries will therefore be allowed under section 5 of said act upon sections numbered 16 and 36.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

HOESTEAD—AREA OF ENTRY—ACT OF JUNE 17, 1902.

INSTRUCTIONS.

Under the reclamation act of June 17, 1902, the Secretary of the Interior is empowered to fix the limit of area for each homestead entry under the same project according to the quality and character of the land with reference to its productive value; but all entries must be of contiguous tracts and of not less than forty nor more than one hundred and sixty acres.

All entries under said act must be made according to the ordinary legal subdivisions, and the Secretary has no authority to allow an entry for less than forty acres, nor to subdivide a forty-acre tract for combination with other subdivisions.

The Secretary may require that homestead entries under said act shall comprise certain specified tracts, selected with reference to soil and water supply, whether the areas of the entries are uniform or not.

Secretary Hitchcock to the Director of the Geological Survey, August
(F. L. C.) 21, 1903. (E. F. B.)

The Department is in receipt of your letter of July 18, 1903, relative to the power and authority of the Secretary of the Interior to limit the area per entry of lands irrigable under any project constructed under the act of June 17, 1902 (32 Stat., 388), providing for the construction of irrigation works for the reclamation of arid lands.

You call attention to the inequality and variable character of the

lands under irrigation projects generally, especially with reference to the Truckee-Carson project, and state that the financial success of the scheme will be seriously jeopardized if entries of the lands irrigable under such project cannot be controlled by the Secretary of the Interior, not only as to the limit of acreage, but also as to the particular subdivision or combination of subdivisions that shall constitute an entry, so as to prevent the irrigable and valuable subdivisions from being taken indiscriminately, leaving unirrigable and worthless lands that will never be entered.

Assuming that the object of the law is to secure the maximum number of settlers and actual residents on the land, and at the same time guard the financial success of the operation by equitably distributing the charges for the construction of the works upon the entire territory under any project, you ask to be advised as to the following propositions:

1. Under the reclamation act, can the Secretary decide that the homesteads under the same project shall be of different sizes in accordance with the quality of the land, in order to conform to the requirement that the limit of area per entry shall represent the acreage which may be reasonably required for the support of a family upon the lands in question?
2. May the entries be made for such areas as 60 or 70 acres, which would involve a description of a half or a quarter of a 40-acre tract, as in the case of placer claims under Sec. 2330, U. S. Rev. Stat.?
3. Can the Secretary require that the homesteads shall comprise certain specified tracts selected with reference to soil and water supply by the engineers of the Reclamation Service, whether or not the areas of entry are uniform?
4. In short, can the Secretary, under the general power given by Section 10 of the act, exercise a discretion or liberty of judgment such as that enjoyed by a corporation or large land-owner in subdividing land and providing a complete water supply, so as to insure the success of the project?

The first question must be answered in the affirmative. The fourth section of the reclamation act provides that, upon the determination by the Secretary of the Interior that any project is practicable, he may let contracts for the construction of the same, and "shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question." He is also required to equitably proportion the charge per acre upon said entries, with a view of returning to the reclamation fund the cost of the construction of the project.

The authority to limit the acreage of each entry to the extent required for the support of a family necessarily implies the power to ascertain the productive value of each subdivision, and of its relative value to other subdivisions. As the lands under any one project may be unequal in value and may vary in character, the determination of what quantity of land may reasonably be required for the support of a family can not be intelligently arrived at in the absence of information as to the productive capacity of every subdivision. It is therefore appar-

ent that it was not the intention of Congress that there should be a uniform limit of area under each project, regardless of the character and quality of the different subdivisions, but rather that it was the intention to confer upon the Secretary the power to fix the limit of area of each entry under the same project according to the quality and character of the land with reference to its productive value. To this end he may so classify and combine the different subdivisions as to make practically homestead segregations of the entire territory under any one project, specifying the particular legal subdivisions that shall constitute an entry, and in that manner limit the acreage which in his opinion may be reasonably required for the support of a family, and thereby create the proper bases upon which to equitably proportion the charge to be made per acre with a view of returning to the reclamation fund the cost of construction of the project. The only limitation upon the power of the Secretary is that the lands must be entered, under the provisions of the homestead law, in tracts of not less than 40 nor more than 160 acres. All entries must be of contiguous tracts, as the allowance of any other form of entry would violate the provisions of that law.

Your second question is answered in the negative. As the Secretary has no authority to allow an entry for less than 40 acres, there is also no authority to subdivide a 40-acre tract for combination with other subdivisions. The provision that the lands shall be subject to entry only "under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres" does not imply a power to allow an entry of any amount between said minimum and maximum area, but contemplates that all entries must be made according to the ordinary legal subdivisions. The Secretary may limit the area per entry to the smallest legal subdivision, or may combine with it one or more legal subdivisions, provided the entry will not exceed 160 acres; but he has no power to subdivide or change the ordinary subdivisions fixed by law.

The third question has been practically answered. The express purpose of the act is to authorize the construction of irrigation works only when and where the project is deemed practicable. In determining whether a project is practicable, the cost of the contemplated works must always be considered with reference to the quantity and location of the land which may be irrigated therefrom, in order that the estimated cost of construction may be returned to the reclamation fund. The power to limit the area of entry, within the limitations of the act, to represent the acreage which in the opinion of the Secretary is sufficient for the support of a family, is in furtherance of that object, and no reason is perceived why the Secretary, in furtherance of the same object, should not require that homesteads shall comprise certain specified tracts, selected with reference to soil and water supply, whether the areas of the entries are uniform or not.

The general power given by the tenth section of the act to perform any and all acts, and to make such rules and regulations as may be necessary and proper for the purpose of carrying the act into full force and effect, does not invest him with the same discretion and liberty of judgment that may be exercised by private proprietors. The section confers no greater power than the Secretary would possess without it, and all the power he has must be exercised within the limitations and under the restrictions of the law. The powers expressly conferred by the act are ample. Inequality in value and benefits must necessarily result in many cases, but if the power to limit the area per entry is judiciously exercised, by so classifying and combining the different subdivisions as to equalize in value the several entries as far as possible, it will tend to prevent the waste of any irrigable land, and compel the entire territory made susceptible of irrigation from any works to contribute to the cost of the construction thereof.

In accordance herewith, and as suggested in your letter, you will, in connection with the classification surveys, cause a report to be made designating the areas that shall be taken for each homestead entry, and the particular legal subdivision or subdivisions that shall constitute an entry, with regard to equalizing the value of the entries as far as possible, which report shall be submitted to the Department for consideration and approval, with a view, if concurred in, of incorporating it into the notice of lands irrigable under such project, required to be given by the act.

STATE SELECTION—ACT OF AUGUST 18, 1894.

WILLIAM E. CULLEN.

The reservation from adverse appropriation of lands within a township for the survey of which application has been made by the governor of the State, with a view to selection thereof by the State, for a period from the date of the filing of the application until the expiration of sixty days from the filing of the township plat of survey, as provided for in the act of August 18, 1894, is conditioned upon publication of the notice provided for in said act, to be begun within thirty days from the date of the filing of the application, and in case of failure to begin such publication within the time limited, the State has no such claim to the land as would bar the allowance of an application to select the same in lieu of other lands within a forest reserve relinquished under the exchange provisions of the act of June 4, 1897, with a view to making such lieu selection.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *August 22, 1903.* (J. R. W.)

William E. Cullen appealed from your office decision of April 20, 1903, ordering a hearing to determine the alleged priority of settlement by S. D. Crittenden over Cullen's application, No. 613, your office series, under the act of June 4, 1897 (30 Stat., 36), to select, with other lands, the NW. $\frac{1}{4}$ of Sec. 6, T. 58 N., R. 1 E., B. M. (unsur-

veyed), Coeur d'Alene, Idaho, in lieu of lands relinquished to the United States in the Cascade Forest Reserve, Oregon.

March 29, 1899, under the act of August 18, 1894 (28 Stat., 372, 394), your office withdrew this township from entry or settlement, at the request of the governor for its survey to enable the State of Idaho to make selections for satisfaction of its grants. The governor failed to publish the notice of his application and of the State's exclusive preference right, required by the act of 1894, *supra*, so that the State obtained no preference right, and November 12, 1900, your office revoked the order of March 29, 1899. The State was notified of this order and took no appeal. The approved plat of survey of the township was filed in the local office May 6, 1903.

June 26, 1899, Cullen filed in the local office his application under the act of June 4, 1897, *supra*, which the local office erroneously received and forwarded to your office overlooking the governor's request for the township survey. March 8, 1902, your office received an informal protest by S. D. Crittenden against Cullen's selection, alleging settlement on the land. October 12, 1902, your office received Crittenden's formal, corroborated protest alleging settlement and continuous residence on the land from August 16, 1900, as a homestead, with valuable improvements consisting of a good cabin eighteen by twenty feet, thirty rods of fence, twenty rods of ditch, one acre cleared and cultivated in crop in 1902, and one mile of road, and asking that Cullen's selection be rejected, and to be allowed a homestead entry.

April 20, 1903, your office closed the case as to the State of Idaho, and upon the claims of Cullen and Crittenden held that:

The selection having been filed when the lands were reserved, as aforesaid, was improperly allowed (the State of Idaho *vs.* Cody, 30 L. D., 79-82), but the State's claim having been eliminated the same may be allowed to stand, subject to any prior adverse claim. While the lands were withdrawn from settlement as well as from entry, upon the withdrawal being revoked and the State's claim being denied, the settlement right of Crittenden attached *eo instanti* if he had such a right, and would be superior to the selection of Cullen as to the land so settled upon, and you will accordingly order a hearing upon the allegation of settlement by Crittenden upon the NW. $\frac{1}{4}$ Sec. 6, T. 58 N., R. 1 E., B. M., contained in his protest, giving due notice of the time and place of said hearing to both Crittenden and Cullen, and upon rendering your decision, you will forward the record immediately to this office for consideration.

The act of August 18, 1894 (28 Stat., 372, 394-5), provides that—
upon the application of said governors the Commissioner of the General Land Office shall proceed to immediately notify the Surveyor-General of the application made by the governor of any of the said States of the application made for the withdrawal of said lands, and the Surveyor-General shall proceed to have the survey or surveys so applied for made, as in the cases of surveys of public lands; and the lands that may be found to fall within the limits of such township or townships, as ascertained by the survey, shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until

$\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 32, T. 57 N., R. 7 W., Duluth, Minnesota.

December 12, 1899, Potter made entry for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 5, and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 6, T. 55 N., R. 8 W., Duluth, Minnesota. January 9, 1901, a contest was initiated against the entry, charging that Potter had failed to erect a habitable dwelling and to establish residence thereon before or since making the entry and had wholly abandoned the land. January 30, 1901, Potter filed a relinquishment of the entry. Your office decision held that—

the period for establishing residence on the land had not expired until after the passage of the act of June 5, 1900, and in the absence of any evidence to show otherwise this act of abandonment must be held to have occurred at the end of that period. The application is therefore rejected.

The statute (31 Stat., 267, 270) provides:

That any person, who prior to the passage of this act has made entry under the homestead laws, but from any cause has lost or forfeited the same shall be entitled to the benefits of the homestead laws as though such former entry had not been made.

June 5, 1900, Potter's entry was subsisting and continued in full force and he might at any time up to initiation of the contest, and until January 9, 1901, have established residence on the land, cured his default, and secured title to his claim. He had not lost nor forfeited his claim prior to June 5, 1900. On the contrary, he lost his claim by laches after passage of the act. He therefore is not within its benefits.

Your office decision is affirmed.

PRE-EMPTION—REJECTED APPLICATION—COMPLETION OF CLAIM BY HEIRS.

HEIRS OF SAMUEL L. CHOATE.

Where an application to file pre-emption declaratory statement is erroneously rejected because of supposed conflict with a railroad grant, the land covered thereby being subsequently held not to have passed under the grant, and the applicant had fully complied with the law and earned title to the land prior to his death, his declaratory statement will be considered as having been filed when tendered, and his heirs will be allowed to perfect the claim for their own benefit.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *August 25, 1903.* (E. F. B.)

Walter A. and Bertha Choate, who allege that they are the children and sole surviving heirs of Samuel L. Choate, deceased, have filed a petition asking that the application of Samuel L. Choate to file pre-emption declaratory statement for the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, and lot 8 of section 33, T. 1 S., R. 5 W., S. B. M., Los Angeles, Cali-

fornia, be reinstated, and that petitioners be allowed to transmute the same to homestead entry. By letter of August 14, 1903, you transmit the petition and accompanying papers and recommend that it be granted.

The material facts presented by said petition, and as shown by the records of your office, are as follows:

The tracts are within the primary limits of the Southern Pacific railroad branch line, and at the date of the definite location of the road were within the claimed limits of a Mexican grant of specific boundaries, but fell without the limits of said grant upon the final survey thereof.

Samuel L. Choate applied to file declaratory statement for said tracts September 20, 1889, alleging settlement August 7, 1889. The application was rejected for conflict with the railroad grant, and the tracts were patented to the company August 15, 1894. Subsequently the United States Circuit Court of Appeals decided that—

In cases of Mexican grants by specific boundaries, lands claimed by the grantees to be within those boundaries are not public lands within the operation of a railroad grant, if, at the date of the latter, the question of the true location of the boundaries of the private grant is pending and undetermined (syllabus).

In view of said decision and of the decision of the Department in *Duncanson v. Duncanson* (25 L. D., 108), Sumner B. Wright, who claimed to have acquired all right, title and interest of Samuel L. Choate to the tracts described, filed a petition asking that demand be made upon the railroad company for reconveyance of said tracts and that upon failure of the company to comply with such demand, suit be instituted by the United States against the company to vacate and set aside the patent. Suit was accordingly brought against the company and a decree was obtained cancelling the patent issued to the company for said tracts and restoring the title to the United States.

The petitioners ask that the application of their father, Samuel L. Choate, be reinstated, with a view to allowing them to transmute it to homestead entry. They allege that their father offered to file declaratory statement for said tracts September 20, 1889, having previously established his residence upon the land; that said application was rejected because of conflict with the railroad grant, and the decision rejecting it was finally, upon his appeal, affirmed by the Department April 11, 1892; that notwithstanding such adverse decision, he continued to reside upon and cultivate and improve the land for more than five years after the date of his settlement and of his application to file declaratory statement; that the said Samuel L. Choate died intestate January 20, 1895, leaving no heirs except petitioners, his children; and that he had never located another claim or made another entry in lieu thereof, or voluntarily abandoned his original entry.

The petitioners further allege that shortly prior to August 12, 1899,

they, as heirs of their deceased father, assigned to Sumner B. Wright, "*all of their right to the aforesaid land;*" that on August 12, 1899, the said Sumner B. Wright filed in the Department an application to have demand made upon the railroad company for a reconveyance of the title to the land, and, upon failure to make such reconveyance, that suit be instituted by the United States for cancellation of the patent; that in pursuance of such application suit was brought by the United States against the railroad company, resulting in a decree vacating and setting aside the patent and restoring the title to the United States; "that the undersigned petitioners have reacquired from said Sumner B. Wright all rights in and to the lands covered by their father's said application to file declaratory statement, which they formerly assigned to said Wright."

From the case made by the petition, it appears that Samuel L. Choate at the date of his death had resided upon and cultivated and improved the land for more than five years. At that time he was entitled to make entry under the pre-emption law by filing the proper papers and making final proof and payment. Or he could have transmuted his filing, and, upon proper proof being made, have perfected his claim as a homestead, having earned the land by the required period of residence, cultivation and improvement. The erroneous rejection of his application to file declaratory statement for the land did not affect his right, and, so far as his right to make entry of the land is concerned, his declaratory statement must be considered as having been filed when it was tendered. *Ard v. Brandon* (156 U. S., 537); *Tarpey v. Madsen* (178 U. S., 215).

Samuel L. Choate having died before consummating his claim by filing in due time all the papers essential to the establishment of the same, it is lawful for the executor or administrator of his estate, or one of his heirs, to file the necessary papers to complete the same for the benefit of all the heirs. (See Sec. 2269, Revised Statutes.) The sale by petitioners of their right and interest in such claim, before final proof (which they have since reacquired by transfer from their grantee), did not cause a forfeiture of their right to perfect the claim for their benefit as heirs of the claimant. (These heirs are not seeking to assert a claim in their own right, but only to perfect a claim asserted by their ancestor and which he was prevented from perfecting only by a wrongful denial of his right. All that ought to be required of them is to show that the pre-emptor had complied with the law up to the time of his death; and if it be shown, as alleged here, that he had fully complied with the law in the matters of residence upon and cultivation of the land, the heirs should be allowed to file the necessary papers and make proof of those matters. That they may have opportunity to make the proper showing, your recommendation is approved and the filing will be allowed. This holding is upon the theory that the decree finding the title to said land to be in the United States, and

cancelling the patents heretofore issued to the Southern Pacific Railroad Company, is or shall become final and no steps should be taken hereunder until that fact is shown.

HOMESTEAD—SOLDIERS' ADDITIONAL—SECTION 2306, REVISED STATUTES.

CHARLES TOMPKINS.

The fact that a certificate of soldiers' additional right, issued under section 2306 of the Revised Statutes, has been outstanding for a period of twenty-five years, during which time it has never been located or presented for recertification, is not sufficient ground for the presumption that the same has been lost or destroyed to justify the land department in allowing an application for additional entry based upon said right.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *August 29, 1903.* (D. C. H.)

On February 21, 1899, the local officers transmitted to your office the application of Charles Tompkins, assignee of Lorenzo D. Findley, to make soldiers' additional homestead entry, under section 2306 of the Revised Statutes, for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 29, T. 17 S., R. 9 W., Camden, Arkansas, based on original homestead entry made at Clarksville, Arkansas, by Lorenzo D. Findley, March 17, 1870, for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 12, T. 8 N., R. 20 W., containing eighty acres, which was canceled by relinquishment July 25, 1873.

Your office, on March 29, 1900, rejected said application for the reason that the records show that on April 18, 1878, one T. F. Barnes, attorney, transmitted an application by the soldier, Findley, for additional privileges under section 2306 of the Revised Statutes; that pursuant thereto a certificate of right of entry for eighty acres was issued in the name of said Findley June 6, 1878, and with the papers in the case returned to said Barnes; and that said certificate of right was outstanding and unsatisfied and by it the soldiers' additional right was exhausted.

It further appears from the record that on application of John A. Bunch, the intermediate assignee of Findley, the case was, on June 5, 1902, referred to special agent Lesser, with instructions to interview Barnes, the attorney, and ascertain what became of said certificate of right, and to get any other information he could relative to the matter.

On October 27, 1902, the agent transmitted his report, based on the affidavit of Theodore F. Barnes, the attorney who obtained said certificate, in which he in substance states, that he does not know what has become of the certificate, that he has made search for same among his papers and can not find it; that it may have been sold, but he thinks it was returned to the party from whom he got the claim.

The record further shows that on November 20, 1902, the case was referred to special agent William Jibb, with instructions to fully

investigate the matter and find out whether or not Findley ever assigned his said additional right by power of attorney, and to obtain any other facts he could in connection with the case.

On February 4, 1903, the said agent submitted his report, based upon the affidavit of Lorenzo D. Findley, John Findley, and Lafayette Brashear. Lorenzo D. Findley states, substantially, that he is the same person who made the original homestead entry described herein; that he sold his additional right to eighty acres of land to a certain John A. Bunch, in August, 1898, and received pay therefor; that said Bunch is the only one to whom he ever sold said right; that he never had any attorney in the matter and never heard of Barnes until about four or five years ago; and that if there is any certificate assigning his said right to any one other than Bunch it is false and fraudulent.

John Findley states that he is the brother of the soldier, Lorenzo D. Findley, and served in the army with him; that he owned land adjoining said Findley's original homestead; that his brother told him he sold his additional right to John A. Bunch, but that he never heard of his selling it before that time, and thinks had he sold it before he would have told him about it.

Brashear states that he knows Lorenzo D. Findley well and served with him in the army; that said Findley told him about a year ago that he had sold his additional right, but that he never heard of his selling it prior to that time.

After consideration of the matter in connection with the aforesaid affidavits, your office, on May 14, 1903, held that the evidence did not justify a finding that the said certificate of right was fraudulently procured, and that it did not sufficiently show the loss or destruction of the said outstanding and unsatisfied certificate; and your former decision of March 29, 1900, was therefore adhered to.

The assignee, Tompkins, has appealed to the Department, and the question for consideration is: Was the aforesaid application properly rejected?

There appears to be no question that the certificate was issued and transmitted to T. F. Barnes, and that the same is outstanding, as stated in your decision. There is no sufficient evidence in the case to warrant a finding that the certificate was fraudulently procured, and there is not a particle of evidence to show that the certificate has been lost or destroyed.

Since the case has been here on appeal a copy of the letter transmitting said certificate to Barnes has been procured from your office, and is inserted herein as follows:

I herewith return to you the following additional homestead claims with action as stated:

* * * * *

L. D. Findley (who made original homestead entry at Clarksville, Ark., Feby. 4, 1870, for S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 12, Tp. 8, R. 20, containing 80 acres, which was relinquished

by Mr. Findley, and his entry canceled June 25, 1873), certified to for 80 acres, which can only be used by Mr. Findley in person, and the entry when made by him, must be resided upon, cultivated, and treated as an original entry in every respect.

It would appear from the said letter that the certificate was in the form at that time used in certifying additional homestead rights in cases where the original entry had not been perfected, and that accordingly residence and cultivation of the additional homestead were required as in the case of an original entry. This form of certificate, containing the condition as to residence and cultivation of the additional homestead by the soldier, appears to have been sanctioned by the Department at the time the certificate in question was issued, for in the case of John W. Hays, decided May 8, 1876 (3 Copp's Land Owner, 21), it was held that—

The abandonment of the original entry will not disqualify the soldier for making an additional one, but to perfect title to the additional entry he must comply with the law by actual residence thereon and cultivation thereof for the full required period.

And in the case of Owen McGrann, decided July 10, 1886 (5 L. D., 10), it was held that—

The original entry being canceled for failure to submit final proof, residence and cultivation will be required in case of entry under additional certificate.

While said condition in certificates of this character, requiring residence upon and cultivation of the additional homestead by the soldier, may have hampered the sale of such certificates, it did not invalidate the certificates as evidence of the soldier's right, nor render the assignment thereof valueless in the hands of purchasers. And your office, under the instructions of the Department of June 3, 1897 (24 L. D., 502), was directed, in recertifying the additional right in the name of the transferee, to eliminate said condition, its insertion being without authority of law.

The attention of the Department is directed to the fact that the said certificate of right here in question has never been located, or presented for recertification, although it has been outstanding for about twenty-five years, and this circumstance is relied on by the appellant as strongly aiding the presumption that the said certificate has been lost or destroyed. This fact, with the other, that the soldier has slept upon his right for an equal length of time, together with the other facts and circumstances in the case, have been duly weighed and considered, and the Department is of the opinion that they are not sufficient to outweigh and overcome the record showing that said certificate was regularly issued and that same is outstanding, as hereinbefore stated.

The decision of your office rejecting Tompkins's aforesaid application is therefore affirmed.

CANCELLATION OF HOMESTEAD ENTRY—RIGHTS OF GRANTEE.

THURMAN *v.* WILLIAMS ET AL.

The cancellation of a commuted homestead entry upon a contest initiated subsequently to the submission of final proof, after notice to the entryman, is conclusive as to him, but is not conclusive upon his grantee, if made without notice to such grantee and with no opportunity on the part of the grantee to be heard, and the land department has jurisdiction, at any time prior to the issuance of patent, to hear and determine the rights of the grantee, notwithstanding the termination of the contest and the cancellation of the entry, and upon proper application by the grantee will order a hearing for such purpose.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *September 3, 1903.* (J. R. W.)

The Pearl River Lumber Company, claiming to be grantee of John E. Williams, appealed from your office decision of April 24, 1903, cancelling Williams's commuted homestead entry for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 3, T. 8 N., R. 19 W., Jackson, Mississippi.

Williams made entry July 14, 1899, and offered commutation proof and made cash entry May 29, 1901. August 13, 1902, George W. Thurman filed a contest affidavit, alleging that Williams had failed to reside upon, improve, or cultivate the land. October 9, 1902, your office ordered a hearing. The testimony was taken by direction of the local office before the chancery clerk, Monticello, Mississippi, November 25, 1902. Williams did not appear personally or offer testimony. The contestant adduced witnesses and testified in his own behalf. There was some cross-examination of contestant's witnesses, but it does not appear by whom or by whose authority. December 30, 1902, the local office found in favor of contestant and recommended cancellation of the entry, notice of which was duly served by registered mail received by Williams on or before January 3, 1903.

Prior thereto your office, March 3, 1902, found the commutation proof to be insufficient and held the entry for cancellation. March 6, 1902, Williams was served with copy and notice of his right of appeal by registered mail, which he receipted on or before March 14, 1902, when the registry receipt was returned to the local office. He took no appeal from such action.

April 10, 1903, the Pearl River Lumber Company applied for leave to intervene in the contest, alleging that it purchased the land from Williams June 22, 1901, for five hundred dollars paid; that it was grantee of the premises by deed from Williams and that Thurman's contest was instituted and conducted in collusion with Williams in fraud of the intervener's rights; that Thurman and Williams knew the petitioner was the real party in interest and a *bona fide* purchaser, but gave it no notice of the proceeding, which was conducted without its knowledge until after the final action of the local office recommending cancellation of the entry; that petitioner purchased upon the

assumption that the commutation proof had been accepted, and was unaware of the existing state of facts until after the entry had been canceled; that—

the insufficient proof submitted was in pursuance of a general plan to defraud the petitioner, and unless the opportunity be given it to establish the truth of the facts herein alleged and to produce evidence of the performance of Williams of the requirements of the homestead law prior to the submission of his commutation proof, this fraudulent plan will cause the loss to petitioner of the sum of \$500 paid Williams for said land.

Neither the petition nor the affidavit of A. W. Maxwell filed in its support distinctly alleges as a fact that Williams did comply with the law or that any evidence exists or can be adduced showing or tending to show that he in fact complied with the law as to residence or improvement. It is only by a somewhat liberal inference that such construction can be given to it. Without such averment merit is not shown by the grantee of an entryman who applies in his stead to cure or supplement defective final proof. The careless manner in which the petition and affidavit are drawn is shown by the last allegation of the affidavit, which states that—

Affiant is advised that some of the witnesses who assisted said Williams to make final proof and conclusively showed his continuous residence upon and cultivation of the land in controversy testified before the clerk that he had absolutely abandoned the entry and had not and did not comply with the law.

This affidavit was made four months after the contest evidence was taken and is negatived by the record. There is neither identity nor similarity of name of any witness in the two proceedings. The proof witnesses were the entryman Williams, Houston Bozeman, and John R. Polk; the contest witnesses, contestant Thurman, Theodore W. Bass, and D. J. Sterling. The proof witnesses seem to have testified candidly, but taking their testimony as true, the facts did not authorize the entry, and it was canceled for the insufficiency of the commutation proof alone.

Considering the circumstances under which the petition was filed by the grantee of an entryman who made default in proceedings against his entry, the petition was substantially one to be permitted to prove compliance with the law by the entryman, the petitioner's grantor, to whose rights it had succeeded. It had not been notified of the proceeding and avers that it did not know of it and that Thurman knew. If Thurman did know, he should have given it notice. Williams, who did know, was guilty of bad faith if he did not notify his grantee. In a case where the parties were in similar relations to each other (*Guaranty Savings Bank v. Bladow*, 176 U. S., 448) the court (*ib.*, 454) held:

But the cancellation, although conclusive as to the entryman, upon all questions of fact, if made after notice to him, would not be conclusive upon the mortgagee if made without notice to such mortgagee and with no opportunity on its part to be heard. That is, it would not prevent the mortgagee, before the issuing of a patent,

the hearing plaintiff appeared and submitted testimony, defendant making default. The local officers recommended cancellation of the entry, and notice of their decision was mailed to defendant by registered letters, but said letters were returned unclaimed. The record was transmitted to your office July 14, 1902, with report that no appeal had been filed.

October 24, 1902, the local officers transmitted a letter from defendant containing evidence of his military service, as follows:

FORT H. G. WRIGHT, NEW YORK,
October 18, 1902.

I certify that the military record of Frederick R. Jaynes is as follows:

Enlisted in company "K" 33d U. S. V. August 14, 1899; discharged April 17, 1901.

Enlisted in 12th company Coast Artillery, October 8, 1901.

I further certify that Sergeant Frederick R. Jaynes was on duty with this company from October 8, 1901, to the present date; that he served at Fort Clark, Texas, until June 26, 1902, when this company was transferred to Fort H. G. Wright, New York, where he is at present.

W. C. RAFFERTY, *Captain Artillery Corps,*
Commanding 12th Co. Coast Artillery.

February 11, 1903, there was transmitted a motion for rehearing filed by defendant, together with his affidavit in support thereof, in which he alleges that—

he is the identical person who made homestead entry No. 1233, at the United States local land office at Lawton, Oklahoma Territory, on the 17th day of August, 1901, for the southeast quarter of section two, in township two north, of range eight west of the Indian meridian, in Comanche county, Oklahoma Territory; that he made said homestead entry in good faith for the purpose of obtaining a home for himself and family and with the intention of complying with the homestead laws; that his family consists of his wife and a little boy about five years old, who at the time said homestead entry was made, and ever since, were and still are in the State of Pennsylvania, where his wife is teaching music in order to contribute to the support of herself and child; that defendant and his family have very little means and it is necessary for them to earn their living; that for some time previous to May, 1901, defendant had been serving as a soldier in the United States army, in the Philippine Islands, and while there became sick of typhoid fever, from the effects of which he had not fully recovered at the time he made said homestead entry; that on account of said sickness, he was unable to do hard work at the time he made said homestead entry and was not physically able to stand cold weather, and for this reason, about the first of October, 1901, he left the town of Anadarko, in Caddo county, Oklahoma Territory, where he had been employed as night watchman for a railroad since the 15th of August, 1901, and went to southern Texas on account of his health; that while in Texas, it was necessary for him to procure some kind of employment in order to enable him to live, and as he had the opportunity of enlisting in the United States army at Fort Clark, Texas, and of procuring office work as company clerk, which he could perform without injury to his health, he enlisted in the twelfth company of United States Coast Artillery at Fort Clark, Texas, on the 15th day of October, 1901, and has served in said company ever since said date up to the date of making this affidavit, and his term of enlistment runs for a period of three years from said 15th day of October, 1901; that the absence of the defendant and his family from said land is due to his employment in the army of the United States as aforesaid.

Defendant further swears that he had no actual notice of the pendency of the contest filed against his said homestead entry by E. J. Waltermire, till about the 15th of October, 1902, and had no opportunity of making a defence thereto before the United States local land office.

As hereinbefore shown by the certificate of the captain the company above named was transferred to Fort H. G. Wright, New York, June 26, 1902.

February 20, 1903, the local officers transmitted a demurrer, filed by plaintiff, to the evidence in support of the motion for rehearing, on the ground that defendant never established residence on the land in question prior to the date of his enlistment. April 5, 1903, your office held that said demurrer was well taken, the case of *Murray v. Chapman* (31 L. D., 169), being cited in support of such action. Your office accordingly denied the motion for rehearing and defendant has now appealed here.

It will be observed that defendant herein enlisted before the expiration of six months from the date of his entry. There is a marked distinction between this case and that of *Murray v. Chapman, supra*. In that case the facts were that the entryman not only did not establish residence within six months from the date of entry but was in default nearly two and a half years prior to his enlistment. The question presented was whether default in the matter of establishing residence is cured, under the act of June 16, 1898 (30 Stat., 473), by enlistment in the military or naval service of the government in time of war, and it was held that it was not. In this case there was no default existing at the time the defendant enlisted. His entry was made August 17, 1901, and he enlisted October 8, 1901, less than two months from date of entry. Under the regulations he was entitled to six months from date of entry within which to establish residence, during which time he could not be charged with default and there was no default to cure. Before and at the expiration of that time he had enlisted in the military service of the government and was therefore within the saving provisions of the act of June 16, 1898, *supra*.

As the truth of the statement as to defendant's enlistment and service is necessarily admitted by plaintiff's demurrer, there is no necessity of ordering a hearing to afford defendant an opportunity to prove said statement. His motion for rehearing is therefore denied, and the decision of your office to that extent is affirmed. The contest in this case is dismissed, and defendant's entry will be held intact subject to compliance with law.

WITHDRAWAL OF PUBLIC LANDS FOR IRRIGATION PURPOSES—ACT
OF JUNE 17, 1902.

OPINION.

There is no authority to make such executive withdrawal of public lands in a State as will reserve the waters of a stream flowing over the same from appropriation under the laws of the State, or will in any manner interfere with its laws relating to the control, appropriation, use, or distribution of water.

Assistant Attorney-General Campbell to the Secretary of the Interior,
September 5, 1903. (E. F. B.)

I am in receipt, by reference, of a communication from the Director of the Geological Survey, recommending that all the lands within a half-mile on each side of the center line of Salmon river, Okanogan county, Washington, together with the water flowing thereon, be withdrawn from further disposition, as the same are required for engineering works contemplated under the provisions of the act of June 17, 1902 (32 Stat., 388), known as the "act for the reclamation of arid lands." Said communication has been referred to me for an opinion as to whether or not such withdrawal can be legally made.

The purpose to be accomplished by the withdrawal, as will be seen from the text of the letter, is to control the use of the water passing through the lands proposed to be withdrawn, so as to prevent its appropriation by others in any manner that will impair the continuous flow of the water through said lands, in violation of the common law right of riparian proprietors. The practical question thus presented is, whether the United States, by the exercise of executive authority, has the right to control the use of unappropriated waters passing through the public lands in a State, so as to prevent their appropriation by others for any of the beneficial uses recognized and allowed by the statutes of the State.

The United States, as proprietor of the public lands through which a stream of water naturally flows, has the same property and right in the stream that any other owner of land has, be it usufructuary or otherwise. The stream of water is part and parcel of the land, and the right to the use of it and to its continuous flow, without alteration or diminution, is, under the common law, a right incident to the ownership of the soil, enjoyed alike by every riparian proprietor. It is not a property in the water, but a simple usufruct as it passes along. 3 Kent's Com., Sec. 439; *Union M. & M. C. v. Ferris* (2 Sawy., 176); *Vansickle v. Haines* (7 Nev., 249); *Lux v. Haggin* (69 Cal., 255).

Such is the cardinal rule that controls in every State of the Union which has simply adopted the common law. While this is true, "it is also true that as to every stream within its dominion a State may change this common law rule and permit the appropriation of the flow-

ing waters for such purposes as it deems wise." (*United States v. Rio Grande Irrigation Co.*, 174 U. S., 690-702.) But, "in the absence of specific authority from Congress, a State can not by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property." (*Id.*, 703.)

It thus appears, that, while the United States, as to the public lands within a State, and the innavigable streams and lakes situated therein, has only the right of a riparian proprietor, such right, without express authority from Congress, can not be controlled by State laws regulating the control and appropriation of waters within its dominion. The exemption of the United States, as to its public lands, from State control of the innavigable waters situated therein, is by virtue of its absolute power of disposition of the public lands, with all the rights incident thereto. "No State legislature can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made." (*Gibson v. Chouteau* (13 Wall., 92, 99); see, also, *Irvine v. Marshall* (20 How., 558).

In all the arid land States the common law rule as to the right of a riparian proprietor to the continued flow of a stream over his land has been changed, and rights to the use of water for manufacturing, mining, agricultural and other beneficial purposes have accrued and vested, under local customs, the laws of the States and the decisions of the courts. The statutes of a State providing for the diversion and appropriation of the waters of a flowing stream for irrigation or other public uses is a valid exercise of the legislative power of a sovereign State. (*Fallbrook Irrigation District v. Bradley*, 164 U. S., 112.) The constitution of the State of Washington declares that "the use of the waters of this State for irrigation, mining, and manufacturing purposes shall be deemed a public use." The laws of the State provide that the use of such water may be acquired by appropriation, and as between appropriations the first in time shall be first in right. The right thus acquired is a property right that may be transferred by deed. Although in that State, as in all the other States of the arid West, the common law was adopted and recognized, their peculiar physical conditions soon "compelled a departure from the common law rule, and justified an appropriation of flowing waters for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those States, by custom and by State legislation, a different rule—a rule which prevents, under certain circumstances, the appropriation of the waters of a flowing stream for other than

domestic purposes." *United States v. Rio Grande Irrigation Co.*, *supra*, page 704.

Such legislation would, however, have had no effect upon the rights of the United States as to the public lands and the waters of the streams and lakes thereon, but for the act of July 26, 1866 (14 Stat., 253—Rev. Stat., Sec. 2339), and subsequent acts of the same character. The effect of the act of July 26, 1866, was to recognize, so far as the United States is concerned, the validity of the local customs, laws, and decisions of courts, in respect to the appropriation of water. *Broder v. Water Co.* (101 U. S., 274); *Atchison v. Peterson* (20 Wall., 507); *Basey v. Gallagher* (*Id.*, 670).

The act of July 9, 1870 (16 Stat., 217—Rev. Stat., Sec. 2340), amending the act of July 26, 1866, provided that "all patents granted, or pre-emption or homestead rights allowed, shall be subject to any vested and accrued water rights" as may have been acquired under said act of July 26, 1866.

The act of March 3, 1877 (19 Stat., 377), providing for the sale of desert lands, authorizes the use of water upon said lands necessary for the irrigation and reclamation thereof, and further provides that "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."

Such right is again recognized and sanctioned by section 18 of the act of March 3, 1891 (26 Stat., 1095), granting the right of way over the public lands for canals, ditches, etc., which provides that "the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."

These acts evince a clear and definite purpose to authorize and assent to the appropriation of water upon the public lands in contravention of the common law rule as to continuous flow. As stated by the court in *United States v. Rio Grande Irrigation Co.*, *supra* (page 706), "the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to common law rule, which permitted the appropriation of these waters for legitimate industries."

The question again came before the court in *Gutierrez v. Albuquerque Land Co.* (188 U. S., 545), involving the validity of the Territorial act providing for the construction of canals and reservoirs and for the diversion and appropriation of the waters in the Territory of New Mexico for irrigation or other public uses. One of the contentions urged against the right to divert the water was, as stated by the court, "that the territorial act was invalid, because it assumed to

dispose of property of the United States without its consent." The court, after stating that the proposition proceeded upon the hypothesis that the waters affected by the statute are public waters—the property, not of the Territory, or of private individuals, but of the United States, and that the statute permits private persons and corporations, for pecuniary profit, to acquire the unappropriated portion of such public waters, in violation of the right of the United States to control and dispose of the same—said (p. 552):

We think, in view of the legislation of Congress on the subject of the appropriation of water on the public domain, particularly referred to in the opinion of this court in *United States v. Rio Grande Irrigation Co.* (174 U. S., 690, 704, 706), the objection is devoid of merit.

As illustrative of the purpose of Congress to continue to recognize and sanction the right to appropriate the waters upon the public lands for beneficial uses, under the laws of the States and Territories, the court refers to section 8 of the act of June 17, 1902, *supra*, which, it observes, "reflexively" illustrates the purport of the previous acts; and it concludes, that the act of the Territory of New Mexico then under consideration "is not inconsistent with the legislation of Congress on the subject of the disposal of waters flowing over the public domain of the United States." (p. 554.)

Section 8 of the act of June 17, 1902, referred to by the court, is as follows:

That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the federal government or of any land-owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

The absolute right to appropriate the waters flowing over the public lands has been so obviously sanctioned by the acts referred to, and so clearly determined by the decisions cited, as to be no longer an open question. The Director of the Geological Survey, however, bases his recommendation for a withdrawal of land and the riparian right incident thereto upon the theory that whatever recognition and assent may have heretofore been given to the appropriation of the waters on the public lands, the United States may at any time resume the control of all unappropriated waters on such lands, and that "as the Secretary of the Interior has full power to withdraw from entry any unappropriated lands which, in his opinion, may be necessary for public uses, there appears to be no reason why the Secretary may not, at the same time, withdraw both the land and the water from further appropriation, when the same are required for public use."

Whether the United States, by the legislative branch of the government, may resume its common law right of riparian proprietorship as to the unappropriated waters flowing over and upon the public domain, by the repeal of the several statutes recognizing rights in contravention thereof, is a question that need not be discussed in determining the question submitted. It is sufficient to say that no such power or authority rests with the executive branch of the government, in view of the express statutory provision which recognizes and assents to the appropriation of such waters. Those acts are still in full force and effect, and their operation can not be limited or suspended by executive authority. Section 8 of the reclamation act is an emphatic declaration that such laws are to continue in force. It expressly declares that in carrying out the provisions of the act it shall not "interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder," but that it "shall proceed in conformity with such laws." A withdrawal of waters from appropriation under the State and Territorial laws would be in direct conflict with the provisions of said section.

I have therefore to advise that there is no authority to make such executive withdrawal of public lands in a State as will reserve the waters of a stream flowing over the same from appropriation under the laws of the State, or will in any manner interfere with its laws relating to the control, appropriation, use, or distribution of water.

I would advise, however, that the land be withdrawn, so that the rights of the United States as proprietor of the land may be protected as far as the reservation of land will protect and preserve such rights.

Approved:

E. A. HITCHCOCK, *Secretary*.

REPAYMENT—SECTION 5, ACT OF MARCH 3, 1887—SECTION 2, ACT OF
JUNE 16, 1880.

JACKSON A. GRAVES.

During the pendency of the suit to establish the title of the United States to certain lands in California within the conflicting limits of the grants in aid of the Southern Pacific branch line and the Atlantic and Pacific railroad, and to determine the *bona fides* of alleged purchases thereof from the Southern Pacific company, such lands were not subject to disposal, and a purchase made of any such lands during such time under the provisions of section 5 of the act of March 3, 1887, by one adjudged in the pending suit not to be a *bona fide* purchaser, is an entry erroneously allowed, which can not be confirmed within the meaning of section 2 of the act of June 16, 1880, and the purchaser is entitled to repayment of the money paid on account of such purchase.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *September 11, 1903.* (F. W. C.)

With your office letter of July 27, last, was forwarded a motion for review of departmental decision of June 10, last (not reported), affirming your office decision of March 16, last, rejecting the application filed by Jackson A. Graves for repayment of the purchase money paid by him in making cash entry No. 5640, August 17, 1899, under the provisions of section 5, act of March 3, 1887 (24 Stat., 556), for the S. $\frac{1}{2}$, Sec. 7, S. $\frac{1}{2}$, Sec. 9, and all of section 11, T. 7 N., R. 11 W., the SW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 11, and all of section 13, T. 7 N., R. 12 W., S. B. M., all within the Los Angeles land district, California.

The lands in question were involved in the suit brought by the United States against the Southern Pacific Railroad Company *et al.*, in what is known as case No. 184. This suit was brought to establish the title of the United States in about 700,000 acres of land within the conflicting limits of the grants made in aid of the Southern Pacific branch line and the Atlantic and Pacific railroad, and on June 25, 1894, the circuit court of the United States for the southern district of California directed that decree be entered therein in favor of the government. On appeal to the circuit court of appeals the decree below was affirmed, June 24, 1895, and the case was carried to the supreme court of the United States, and that court, on October 18, 1897 (168 U. S., 1), affirmed the decree in all respects as to the Southern Pacific Railroad Company as well as to the trustees in the mortgage executed by that company, and affirmed also as to the other defendants, subject, however, to the right of the government to proceed in the circuit court to a final decree as to those defendants. It might be here stated that the Southern Pacific Railroad Company had sold large portions of the lands involved in said suit and its purchasers were made parties to the suit; the other defendants referred to in the decree being such purchasers.

Upon the further proceedings in said case the circuit court, as well as the circuit court of appeals, adjudged all of the purchasers to be *bona fide* purchasers, and upon appeal to the supreme court of the United States that court, on January 27, 1902 (184 U. S., 49), affirmed the decree of the court of appeals in all respects except as to the lands standing in the name of Jackson A. Graves, and as to those lands reversed the decree, finding that Graves was not a *bona fide* purchaser, and remanded the case to the circuit court for the southern district of California for further proceedings in conformity with its opinion. Thereafter, on September 8, 1902, a special decree was taken in the circuit court of the United States for the southern district of California as to the lands involved in said suit No. 184 and included in the alleged purchase of Jackson A. Graves, the court

ordering, adjudging and decreeing that the United States is the owner by title absolute and in fee unincumbered as to all of said lands and that Jackson A. Graves has no right, title, interest or lien in or upon said lands. Included in said decree are the tracts embraced in Graves's purchase made under the provisions of section 5 of the act of March 3, 1887, and on account of which the application for repayment under consideration is made. The purchase in question was allowed by the local officers on August 17, 1899.

From the previous recitation it is apparent that because of the pending suit the local officers were without jurisdiction and should not have allowed Graves's purchase. This view of the case was not presented in your office decision of March 16, 1903, nor considered in the departmental decision under review. Properly considered, said purchase was erroneously allowed and can not be confirmed within the meaning of section 2 of the act of June 16, 1880 (21 Stat., 287), which authorizes repayment in all cases where homestead or timber-culture or desert-land entries or other entries of public lands have been erroneously allowed and can not be confirmed.

The case being *ex parte*, an entertainment of the motion, as provided for in the Rules of Practice, is deemed unnecessary, and for the reasons herein stated the motion is granted, departmental decision of June 10, 1903, is recalled and vacated, and your office decision of March 16, 1903, is reversed.

The application for repayment is herewith returned, together with the other papers, for your further consideration and action in the light of the decision herein made.

RELINQUISHMENT—DESERT-LAND ENTRY—ACT OF JUNE 4, 1897.

MARY STANTON.

A relinquishment by a desert-land entryman, accompanied by his application to select the relinquished land in lieu of other land within a forest reserve deeded by him to the United States under the provisions of the act of June 4, 1897, which relinquishment and application are made for the express purpose of completing title by exchange under said act instead of by compliance with the desert-land law, is not absolute in effect, but is conditioned upon the acceptance of the application to select; and where such application is not allowed, and entries of the relinquished land are permitted to be made by other parties, claimants under such entries will be required to show cause why their entries should not be canceled and the original desert-land entry reinstated.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, September 18, 1903.* (G. B. G.)

This is the appeal of Mrs. Mary Stanton from your office decision of March 13, 1903, rejecting and holding for cancellation her selection

No. 369 under the act of June 4, 1897 (30 Stat., 11, 36), for the whole of Sec. 8, T. 13 N., R. 66 W., Cheyenne land district, Wyoming, in lieu of a section of patented land in the Sierra Forest Reserve, which she owned through mesne conveyances from the State of California.

With her application Mrs. Stanton presented a deed, in proper form, which had been duly recorded, to the United States for the tract within the forest reserve, and at the same time filed with the local officers her relinquishment to the United States of all right, title, and interest which she then had in the tract applied for by reason of her subsisting desert-land entry thereof. Her application was expressly described as an application for a change of entry, and her manifest intention was to complete title to the land so embraced in said entry by making the exchange rather than by completing title thereto under the desert-land law. She failed, however, to file a non-occupancy affidavit as required by the regulations of the Department, and her proffer of exchange was for this reason not complete. Your office afterwards called the attention of the local officers to the omission and directed them to notify her of it. It appears that a notice was sent, but it was not sent to the address given by her in her application papers and she never received it. Upon her failure to respond, your office rejected her application, and Maud McGregor, William H. Strope, Henry P. Andrews, and John D. Corey made homestead entries of the relinquished land.

Your office refuses to reinstate the application upon the ground that the applicant, in the presence of these intervening adverse claims, can not be permitted to perfect her application. The Department does not concur in this disposition of the case. Mary Stanton's relinquishment was filed with the understanding on her part, and with the acquiescence of officers of the government, that she would be permitted to re-enter the land by virtue of the provisions of the act of June 4, 1897. It is true that the implied agreement was that the substitution would only be allowed upon her compliance with the provisions of said act and the regulations of the Department thereunder, but it was undoubtedly her understanding that the relinquishment would only become effective upon the approval of her application.

This was not an ordinary relinquishment, and it is not believed that it should be treated as such. The Department is of opinion that the local officers erred in noting it of record. It was proffered conditionally and should have been so received, and held to await the action of the Department upon her application. Your office is directed to give notice to the homestead entrymen to show cause why their entries shall not be canceled and Mrs. Stanton's desert-land entry reinstated pending the further consideration of her application.

HOMESTEAD—SOLDIERS' ADDITIONAL—SECTION 2306, REVISED STATUTES.

JOHN S. OWEN.

To entitle one, otherwise qualified, to make an additional homestead entry under section 2306 of the Revised Statutes, he must not only have made entry for less than one hundred and sixty acres prior to the enactment of that section, but must have thereby, under existing laws, exhausted his homestead right.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 21, 1903.* (A. S. T.)

John S. Owen has appealed to this Department from your office decision of May 15, 1903, rejecting his application to enter under the provisions of section 2306 of the Revised Statutes, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 32, T. 33 N., R. 2 W., 4th P. M., Eau Claire land district, Wisconsin.

Said application is based upon a homestead entry made by Presley Tharp on December 23, 1867, for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 34, T. 5 S., R. 11 W., Huntsville land district, Alabama, containing 79 acres, and upon the service of said Tharp for more than ninety days in the army of the United States in the war of the rebellion, and upon various assignments of the alleged right of additional entry whereby said Owen claims to be the owner thereof.

Your office rejected the application on the ground that the entry made by Presley Tharp on December 23, 1867, does not constitute a sufficient basis for an additional entry under section 2306 of the Revised Statutes, for the reason that a portion of the land embraced therein was not subject to entry because it was covered by a cash entry previously made and upon which patent had issued, wherefore said entry of Tharp could not have been perfected as made, and that therefore Tharp did not exhaust or impair his homestead right by making said entry, and hence was not entitled to an additional entry under said section.

It appears that your office, on July 29, 1868, held that Tharp's said entry was illegal as to 39.50 acres of the land embraced therein, because of conflict with said cash entry, and that Tharp was allowed sixty days within which to elect whether he would accept that portion of the land covered by his entry not in conflict with the prior entry, in satisfaction of his homestead right, or permit the cancellation of the entire entry with the right to make another homestead entry for one hundred and sixty acres.

It does not affirmatively appear that Tharp received notice of said action of your office. At any rate he seems to have taken no steps to notify your office or the local office of any such election made by him.

On July 16, 1875, his said entry was canceled for failure to submit final proof thereon.

It appears that Presley Tharp died on January 25, 1892, leaving his widow, Susan Tharp, surviving, and that on February 16, 1899, she sold and assigned to one Cos Altenberg her alleged right of additional homestead entry for 81 acres as widow of Presley Tharp, deceased.

On August 14, 1899, Altenberg sold and assigned said right to Burdett, Thompson and Law, of Washington, D. C., who, on August 25, 1899, sold and assigned the same to J. M. Longnecker of Delta, Ohio, who on August 15, 1901, assigned the same to Henry N. Copp of Washington, D. C., who on November 5, 1901, sold and assigned to John S. Owen, the present applicant, 80 acres of said alleged right, expressly reserving one acre thereof to himself.

In your said decision of May 15, 1903, it is stated that the records of your office show that said additional right "has been transferred to the extent of one acre, and located to such extent, on lot 5, section 20, T. 127 N., R. 32 W., 5th P. M., St. Cloud, Minnesota, containing 1.54 acres, under application of Robert H. Sliter."

It does not appear by whom this transfer of a fractional part of the right was made, nor when the entry was made by Sliter, but the one acre thus transferred and located is supposed to be the fractional part of said alleged right retained and reserved by Henry N. Copp in his assignment to Owen. Your office held, in substance, that Tharp's failure to expressly make the election suggested by your decision of July 29, 1868, was in effect an election to have his entire entry canceled with the privilege of making another entry for 160 acres; that having, by his silence, made such election, he was estopped from claiming that his homestead right was to any extent impaired or exhausted; and that, therefore, he was not entitled to the benefit of section 2306 of the Revised Statutes. His subsequent failure to offer proof in support of his entry is referred to as evidence showing his acquiescence in the cancellation of his entry with the right to make another entry for 160 acres.

This Department does not concur in that holding. Tharp's entry was valid as to that portion of the land not covered by the prior cash entry, and your office had no authority to cancel it, without his express consent, on the mere ground that it was invalid as to other lands sought to be embraced therein.

As to the land covered by the prior cash entry and already patented, the entry was a mere nullity and should have been canceled for that reason, but that fact did not affect the validity of the entry as to the portion not in conflict, and your office had no authority to require the entryman to elect whether or not he would have it canceled with the privilege of making another entry, and his rights in the premises were not prejudiced or in any wise affected by his failure to respond when called upon to make such election.

Your letter of July 29, 1868, merely amounted to an invitation to him to make an election. It was an offer to allow him the privilege

of making another entry, if he chose to do so, because he had failed to get a portion of the land which he thought he was getting by his entry. He could accept the offer or not as he chose, but unless he had accepted it, your office could not lawfully have canceled his entry, and this seems to have been so understood at the time. It also seems that your office did not then consider that his failure to respond to your proposal warranted the cancellation of his entry, for it was not canceled until 1875, and then for failure to offer final proof, and not because of his implied acceptance of said proposition.

If no such proposition had ever been made to Tharp, and if he, upon learning of the defect in his entry, had relinquished it *in toto* without stating his reason for doing so, such act on his part might reasonably have been construed as an election to take none of the land because he could not get it all, and in such a case he might have been allowed to make another entry for 160 acres, as though the first entry had not been made. In that case he would clearly not have been entitled to the benefit of section 2306 of the Revised Statutes, although as a matter of fact he had made one valid entry for less than 160 acres. The Statute in question provides that—

Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

The intention of section 2304 of the Revised Statutes was to allow each person who had served ninety days or more in the army during the civil war, and had been honorably discharged, to take 160 acres of the public land as a homestead, and when they had theretofore made entries for less than that amount, and had thus exhausted their rights under existing laws, section 2306, above quoted, allowed them to make second, or additional entries, so that they might acquire the full amount of 160 acres. This right to make an additional entry was conferred upon certain persons as a sort of compensation for past services performed by them. It was conferred upon no other class, and one, not of this favored class, who had made entry for a less amount of land than 160 acres, had exhausted his homestead right and was not entitled to make another entry. Therefore, in determining whether or not one is entitled under section 2306 to make an additional entry, it is necessary to ascertain whether or not, prior to the passage of that section, he had *exhausted his homestead rights* by making entry for a less amount than 160 acres. Not merely whether or not he had *made entry* for a less amount, but whether or not he had thereby *exhausted his right*.

One who makes entry for land supposed to be vacant and subject to entry, and so described upon the public records, pays the entry fees, receives his receipt therefor, and has his entry duly recorded, has

made an entry, though it may subsequently transpire that the land was not subject to entry, because already appropriated, and, although there may be no record evidence of such prior appropriation it may transpire that some one had made settlement upon it prior to the entry, in which case the entry would be canceled for conflict with the prior settlement claim. The homestead rights of the entryman would not be exhausted nor impaired by reason of making the entry, and hence the making of such an entry prior to the passage of the act in question would not constitute a sufficient basis for an additional entry, because it did not exhaust or impair the original homestead right.

In the case at bar, Tharp made an entry which was valid as to 39.50 acres of the land embraced therein. He did not choose to relinquish it because other lands which he thought he had entered were not open to entry. Inasmuch, therefore, as his entry was valid as to 39.50 acres and was not relinquished, it operated to exhaust his homestead rights under the then existing laws, and having been a soldier he was accordingly entitled to the benefit of section 2306 of the Revised Statutes, and section 2307 allows the same right to his widow.

In the various assignments of the right in question, it is erroneously described as a right of additional entry under section 2306, whereas it is only allowed to the widow by section 2307 of the Revised Statutes, but this error in description is immaterial, since it is evident that the intention was to assign and transfer the right of the widow to make an additional entry, and the assignments in the record seem to be sufficient for that purpose.

Your said decision is reversed, and if there be no other objection the application will be allowed.

SWAMP LAND GRANT—REQUEST FOR ISSUE OF PATENT—ACT OF
SEPTEMBER 28, 1850.

MORROW ET AL. *v.* STATE OF OREGON ET AL.

Where a State has accepted the grant of swamp and overflowed lands made by the act of September 28, 1850, has disposed of and conveyed all its interest in certain of the lands claimed thereunder, and requests for the issuance of patent therefor, as provided by said act, have been made by different governors of the State, such patent may issue to the grantees of the State without further request on the part of the present governor.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 25, 1903.* (J. R. W.)

The Department is in receipt of your office report of August 7, 1903, relative to issue of patent for lands embraced in approved swamp land list number 70 of the State of Oregon, Lakeview district, Oregon.

March 16, 1903, the Department held, in *Morrow et al. v. The State of Oregon et al.* (32 L. D., 54, 64), that these lands at the date of the grant, March 12, 1860, "were swamp lands, subject at times to be

entirely overflowed and at all seasons were thereby rendered unfit for cultivation," and directed your office to "prepare and submit for approval a new swamp land list embracing such of the lands in controversy as properly pass to the State under this decision." Pursuant to this direction swamp land list No. 70, prepared by your office and submitted to the Department, was approved July 2, 1903, and a certified copy was transmitted to the governor of the State of Oregon July 10, 1903. July 30, 1903, the governor addressed to the Department a telegram that:

Approved list number seventy swamp lands, Lakeview district, Oregon, received. Again I earnestly request that no patent issue until request therefor is made by me pursuant to acts of congress, September 28, 1850, extended to Oregon by act of March 12, 1860. No one has authority from me to represent the State of Oregon in requesting issuance of patents for the lands or any of them embraced in said list, though I am just informed that some one pretends to represent the governor of Oregon for that purpose. The matter is being investigated by me and until satisfied as to the *bona fides* of the claim of the State to these lands I will make no request for issuance of patent.

August 5, 1903, the same was referred to your office for report and recommendation as to action to be taken. Your office report of August 7, 1903, states that:

July 27, 1903, the governor addressed a communication to this office in which he says:

"I do not desire to have you issue a patent at this time, but to withhold the same pending a further investigation by State authorities. Kindly, therefore, withhold the patent until further advised by this office."

His letter has been attached to the list, and, in my opinion, patent can not issue until the governor makes a formal request therefor, as Sec. 2 of the act of Sept. 28, 1850 (9 Stat., 519), which was extended to Oregon by the act of March 12, 1860 (12 Stat., 3), provides: "and, at the request of said governor, cause a patent to be issued to the State therefor." As the governor declines to ask for a patent, as provided for by the statute, I do not see that one can be properly issued at this time, and it is the intention of this office to suspend the whole matter until such time as the governor or his successor does transmit a request for the patent, or until you order otherwise.

The Warner Live Stock Company, grantee of the lands and party to the controversy, has filed in the Department its request for the issue of a patent. The controversy has been waged many years and its history more fully appears in departmental decision of May 13, 1899, in *Morrow et al. v. State of Oregon et al.* (28 L. D., 390), and in *Warner Live Stock Company v. Smith* (165 U. S., 28). The State for value paid sold and conveyed the lands in 1883 and 1884 to H. C. Owens and R. F. and Martin McConnaughy, and their title through mesne conveyances came to the Warner Live Stock Company. Prior to April 5, 1897, the governor of the State of Oregon requested patent to be issued for these lands, and again on that date the governor addressed the Department as follows:

In accordance with the provisions of the acts of Congress approved September 28, 1850 (9 Stat., 519), and March 12, 1860 (12 Stat., 3), I have the honor to request

that you will cause patents to be issued to the State of Oregon for lands described in approved swamp land lists 30 and 31, Lakeview district, which said lists were approved by Mr. Secretary Noble on April 9, 1892, and December 3, 1892, respectively. The issuance of these patents has heretofore been requested by my predecessor in office, but I am advised that the patents have not yet been received.

Also, February 6, 1895, the governor, under the great seal of the State, gave authority to counsel as follows:

STATE OF OREGON
EXECUTIVE DEPARTMENT
Salem, February 6th, 1895.

Messrs. Phillips & McKenney,
Attorneys at Law,
Washington, D. C.

GENTLEMEN.

You are hereby authorized to appear and represent the State of Oregon in any proceedings involving the title to approved swamp land lists Nos. 30 and 31, and represent the State of Oregon therein and to institute such proceedings in the name of the State of Oregon or otherwise as may be deemed necessary to determine the rights of the State or its grantees to the land embraced in such lists.

WM. T. LORD, *Governor of Oregon.*

Attest:

[SEAL.]

H. R. KINCAID, *Secretary of State.*

The controversy has ever since been waged under the authority thus granted, necessarily at no inconsiderable expense, and to a successful termination. The question is presented, whether such former repeated requests by the governors of the State can be revoked and vacated and the grantee of the State be defeated of the fruits of a controversy waged by its authority for vindication of a title the State had sold for value to its predecessors in interest.

The right of the grantee of an equitable title or of an interest therein, to be heard in proceedings affecting his interest, and to take proceedings for perfecting the legal title, is fully recognized by the courts. In *Guaranty Savings Bank v. Bladow* (176 U. S., 448), one who had made an entry of public lands gave a mortgage thereon, and afterward, before issue of patent, a contest was instituted against it. No notice of the contest was given to the mortgagee, and the entry was canceled upon proceedings against the entryman alone. In its discussion of the case arising upon an attempt to foreclose the mortgage the court (*ib.*, 454) said that the cancellation of the entry without notice to the mortgagee "would not prevent the mortgagee, before the issuing of a patent, from taking proceedings in the land department, and therein showing the validity of the entry," thus clearly recognizing the right of the mortgagee in such case to be heard in the land department and to be allowed to prove compliance with the law by the mortgagor and to uphold and establish the right of the entryman to a patent for protection of the mortgage interest. The case is still stronger where, as in this instance, the entire estate was conveyed for value, instead of a mere lien charged upon it as security for a debt.

In *Thayer v. Spratt* (189 U. S., 346) an entry had been canceled without notice to the entryman's grantee. The land was subsequently entered by another who received patent therefor. The grantee of the original entryman then brought suit to quiet his title and to hold the patentee trustee of the title to him, and prevailed. It was held that he was entitled to prove the validity of his grantor's entry, and having done so the title conveyed by the patent was held in trust for him. But what a grantee may do after patent issues to another, with more reason he may do while the proceedings are pending.

The right of subsequent grantees to appear as parties and to intervene in controversies relating to matters in which they have become interested is too well established in the land department and the courts to need citation of authority. It is not a matter of grace, but of right, and sometimes is essential to prevent failure of justice by laches, bad faith, or collusive action of one who is a mere nominal party. In the present instance the State parted with all its interest more than nineteen years ago. Since that time it has had no interest other than that which a grantor in good morals should have to co-operate to assure to its grantee the title to that for which he paid, and the price for which the State still retains. This moral motive often proves insufficient when controversies are prolonged, especially in case of public bodies or parties whose officers change and are succeeded by others not conversant with and feeling no individual responsibility to carry out the contracts of their predecessors. The power of the land department to permit the real party to intervene for the protection of his right is an incident to and inherent in its jurisdiction to hear land controversies. In *Gumbel v. Pitkin* (124 U. S., 131, 146), where intervention raised a controversy between citizens of the same State, of which the court had no original jurisdiction, the court held that there was jurisdiction to try the controversy so raised between citizens of the same State, and held that:

As we have already seen, and as has been many times declared by this court, the equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise, and may be invoked by strangers to the litigation as incident to the jurisdiction already vested, without regard to the citizenship of the complaining and intervening party.

In the present case the Warner Live Stock Company was in no sense a stranger to the litigation between the State and the adverse claimants, but was a privy to the State, holder by its grant of all its interests in the subject of controversy under a conveyance that the State has never attempted to revoke and the consideration for which it retains. Such a party, a successor in interest rather than an intervener, is in view of the courts seized of all the interest and entitled to all the remedies of his grantor and to direct and control the proceedings. The grantor will not be permitted to defeat his own grant.

ment relative to a notice entitled in the cause and addressed to the Secretary of the Interior and Commissioner of the General Land Office, signed by counsel for contestants, which states that—

the undersigned will, within the time prescribed by the Rules of Practice, submit a motion for a review of the decision rendered by Hon. Thomas Ryan, Acting Secretary of the Interior, in the above-entitled matter, on September 25, 1903, and they respectfully request that no action be taken by either of you in said matter, until they shall duly file said motion.

Your office letter states that:

In my judgment the Rules of Practice do not provide for a motion for a review of a decision of this character, but on account of the importance of this case and the fact that it is before this office for final action, and that the communication is addressed jointly to the Secretary of the Interior and the Commissioner of the General Land Office, I deem it best to submit the matter to you and will await your instructions before proceeding further in the case.

The Department concurs in the opinion of your office that such motion is not within the intent or purpose of the Rules of Practice. The purpose of a motion for review is to permit parties to call attention to and to ask correction of errors in findings of fact or conclusions of law, affecting and defining the rights of the parties. The rights of the parties to this controversy were finally defined and determined, May 5, 1903 (32 L. D., 123), by the overruling of the motion for review of departmental decision of March 16, 1903 (32 L. D., 54).

The decision of September 25, 1903 (32 L. D., 265), related only to procedure of the land department in execution of its final judgment and the completion and closing of its record by issuing the instrument which evidences the close of its jurisdiction by formally transferring the title. The rights of the parties are nowise thereby affected, but the land department, having closed its administrative duties, passes the title to the one to whom it has adjudged the right, and thereby enables the parties deeming themselves aggrieved by its decision to seek judicial correction of errors by the courts. Such motion, if filed, will call for no action by the Department, and notice of intention to file it is no reason for delay in final action in the case.

SWAMP GRANT—FIELD NOTES OF SURVEY.

STATE OF LOUISIANA.

The duty of identifying the lands passing to the State of Louisiana under the swamp grants of March 2, 1849, and September 28, 1850, devolves upon the Secretary of the Interior for the time being, and it is within the power of that officer to resort to such plan of identification as seems to him best calculated to secure a proper adjustment of said grants.

The history of procedure by the land department in the adjustment of these grants reviewed and specific instructions given for a speedy final adjustment thereof.

has never entered into an agreement with the United States whereby and whereunder these grants can be adjusted upon the field-notes of survey alone. Second, admitting there was such an agreement as to part of the lands, the course pursued by the land department and Congress inconsistent therewith and the change in the conditions over which the State has had no control would serve to abrogate or render the same nugatory. Third, that the field-notes of survey do not supply any affirmative evidence, either way, as to the character of many tracts of land which form the basis for swamp land claims, and therefore could not in such instances be relied on by the Department in the performance of the mandatory duty imposed upon the Secretary of the Interior by law to identify all of the lands passing under these grants. Fourth, that the rigor of the rule now in force as to the reading of field-notes of survey should be relaxed, especially as to surveys made before the swamp land grants. Fifth, that the documentary evidence on file, including such field-notes as supply affirmative evidence, the testimony adduced before or filed with the surveyors-general, and the "decisions" of surveyors-general thereon should be utilized by the Department, and that no rule of adjustment should be enunciated by the Department which would conflict with the provisions of the law or the rights of any possible grantees under the law.

The "swamp and overflowed" lands in the State of Louisiana rendered thereby "unfit for cultivation" were granted to that State by the acts of March 2, 1849 (9 Stat., 352), and September 28, 1850 (id., 519). These grants were *in presenti* and operated as of their respective dates to invest the State with the equitable title to all such lands, with certain exceptions therein named. The exceptions in the act of 1849 were of "lands claimed or held by individuals" and certain lands "fronting on rivers, creeks, bayous, watercourses, &c.," but the grant of 1850 was "the whole of those swamp and overflowed lands, made unfit thereby for cultivation," which remained unsold at that date. The act of 1850 was therefore substantially a re-enactment of the act of 1849, so far as the State of Louisiana was concerned, but removed all the restrictions and exceptions in the former act. See opinions of Attorney-General Garland (5 L. D., 464), the opinion of Assistant Attorney-General Hall (17 L. D., 440), and State of Louisiana, on review (26 L. D., 5, 8). The act of 1850 contemplates that the Secretary of the Interior will identify the lands described therein. *United States v. Louisiana* (123 U. S., 32, 37); *Wright v. Roseberry* (121 U. S., 488).

The legal title to the lands granted by the act of 1849 passes to the State upon the approval by the Secretary of the Treasury (now Secretary of the Interior) of lists to be made out and certified by the deputies and surveyors-general, and to those granted by the act of 1850, by the issuance of a patent under the direction of the Secretary of the

Interior. Under the later act it was made the duty of the Secretary of the Interior to cause accurate lists and plats of the lands granted to the State to be transmitted to the governor thereof, and to issue patent upon the request of the governor. March 21, 1850, which was after the grant of 1849 and prior to the grant of 1850, the legislature of the State passed an act authorizing the governor thereof to contract with responsible persons for the selection of the swamp and overflowed lands granted by the act of 1849, such person to be acceptable to the United States surveyor-general of that State, but provided:

That no contract shall be made for the survey of any said lands that can be selected and listed to the satisfaction of the proper department of the government of the United States, by the field notes on file in the surveyor-general's office.

In a general circular of the land department of November 21, 1850 (1 Lester, 543), addressed to surveyors-general, it was said:

The only reliable data in your possession from which these lists can be made out are the field notes of the surveys on file in your office; and if the authorities of the State are willing to adopt these as the basis of those lists, you will so regard them. If not, and those authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will so report them. . . . The affidavits of the county surveyors and other respectable persons, that they understand and have examined the lines, and that the lands bounded by lines thus examined and particularly designated in the affidavits are of the character embraced by the law, should be sufficient.

In transmitting a copy of this circular to the governor of Louisiana, on the day of its date, it was said by the Commissioner of the General Land Office:

You will perceive that by these instructions the surveyor general is authorized to receive such reliable evidence of the character of any of these lands as may be presented by the authorities of the State; and, as many of the lands were probably surveyed at the dry seasons, and hence are not represented by the descriptive notes or plats as being of that character, I have supposed that it may be a matter of sufficient importance to induce you to call upon the county surveyors, or other respectable persons of your State, for a statement, under oath, of the swamp and overflowed lands in their respective counties. Such testimony you perceive will be regarded as establishing the facts in the case, and on receipt of the reports of the surveyor general, lists of the lands will be prepared as required by the act, submitted for the approval of the Secretary of the Interior, and plats and patents for the lands thus approved will at once be prepared and forwarded to you.

This letter and accompanying circular were acknowledged by the governor of the State December 5, 1850, in a communication to the Commissioner of the General Land Office, in which it was said, among other things:

The legislature of this State at its last session passed a law by which the agent of the State, appointed for the purpose of selecting the swamp lands, was required to be governed by the field notes as far as practicable in making those selections.

After full consultation with the surveyor general and the State agent, and in view of the aforementioned law, I feel authorized to say that in making future selections in the remaining townships the State will be satisfied in being governed by the field notes on file in the surveyor general's office.

Following the instructions and permission given by your said office circular of November 21, 1850, and your said office letter of the same date, the surveyor-general of Louisiana proceeded to identify and list the swamp and overflowed lands of that State, by the field-notes of survey or upon "the affidavits of the county surveyor and other respectable persons," and while some of these lists were approved and some of the lands embraced therein patented to the State, many of them were confirmed to the State by the act of March 3, 1857, *supra*. Up to this time the practice had surely been to list some of these lands upon evidence of their swampy character other than the field-notes of survey, and these methods of identification had not apparently been questioned by the land department. Both the State and the United States had proceeded upon the theory that the State was not bound by the field-notes of survey, unless these notes showed affirmatively that the lands were swamp.

It was not until November 28, 1873, that the land department by formal declaration took a more restricted view as to selections under the act of 1849 (see your office letter of that date to the surveyor-general of Louisiana). Twelve years later, to wit, on November 21, 1885, in a letter of that date to the attorney for the State (see 4 L. D., 524), your office said: "The rule in force from the beginning has been that a State having elected to take swamp land by field-notes and plats of survey is bound by them, as is also the government." In support of this pronouncement some early decisions of the Secretary of the Interior are cited, but an examination of these decisions discloses that they had no reference to the State of Louisiana. May 12, 1886, the Department considered this same matter on appeal and affirmed your said office letter, but this decision was afterwards recalled, and March 25, 1887 (5 L. D., 514), it was said that the record failed to show any written agreement on the part of the State to accept the field-notes of survey as the basis of adjustment, and directed that it might elect as to whether such field-notes should be made the basis of the final adjustment of said grants. April 14, 1887, however, the Department having before it part of the correspondence between your office and the governor of the State, hereinbefore set out, held that the State had already elected to stand upon the field-notes of survey, and that after the lapse of nearly forty years was estopped from denying such election.

Your office reports that from 1885 to 1891 claims amounting to nearly half a million acres were filed therein by Washington attorneys, on their own reading of the field-notes of survey without having been submitted to the surveyor-general for his action, as required by the regulations, that these claims were made special, and speedily adjusted, with the exception of indemnity list No. 25, and that it is in great part the remnants of these irregular claims which constitute the pending unadjudicated claims of the State. It thus appears that no

particular rule of adjustment has prevailed with reference to these grants, and upon a most careful consideration of the subject the Department is now of opinion that no comprehensive rule of adjustment was ever agreed upon. In the first place, the act of the State legislature could only have applied to the grant of 1849, and if the governor of the State needed legislative authority to act in the premises that authority did not extend to the grant of 1850. In the second place, the legislative act only evinces on the part of the State an intention to rely upon the field-notes of survey in instances where the lands could "be selected and listed to the satisfaction of the proper department of the government of the United States, by the field notes," and in formulating a rule of evidence could not apply to lands in instances where the field-notes of survey were silent as to the character of the lands. Moreover, there is force in the suggestion that it was only intended to apply to lands which had already been surveyed, inasmuch as the field-notes referred to were those "on file in the surveyor-general's office." In the third place, assuming that the governor of the State was authorized to act without the authority conferred by the legislative act, *supra*, it is nevertheless true that he was acting upon the authority of that act, and the presumption is authorized that he did not intend to go beyond it. The terms of the act may therefore be considered in attempting to reach a conclusion as to what that officer meant by the language used in his said letter of November 24, 1850. Therefore, when he said that he felt "authorized," "in view of the aforementioned law," "to say that in making future selections in the remaining townships the State will be satisfied in being governed by the field notes on file in the surveyor general's office," the conclusion seems irresistible that he referred to only such lands in regard to which the field-notes of survey made an affirmative showing, and perhaps only as to existing surveys. This view is strengthened by the fact that under the then-existing instructions to the surveyor-general of that State, as then construed, it is clear the land department was of opinion that the State would be entitled to lands "surveyed at the dry seasons" and "not represented by the descriptive notes or plats" as being of a swampy character. In view of this fact it is highly improbable that it was the intention of the governor to waive the State's claim to this class of lands, and with still better reason the conclusion is warranted that it was neither the intention of the land department to deny nor the State to waive its claim to lands in instances where the field-notes left doubt as to the character of the lands.

The conclusion of this matter, therefore, is that it was the purpose of the State to accept the field-notes of survey only where they furnished affirmative evidence as to the character of the land. The subsequent action of the land department shows that it was received

in this sense only. It should be here said, however, that without regard to the scope of the agreement the plan of adjustment thereby contemplated was only agreed upon in the sense that the parties thereto concurred in the view that it was the best thing to do, and it being the duty of the Secretary of the Interior, for the time being, to identify the lands passing to the State under the swamp grant, that officer undoubtedly had the power at any time to resort to such plan of identification as seemed to him desirable. See State of Minnesota (32 L. D., 65, 69). As a result of the exercise of this authority no uniform rule of adjustment has been adhered to. The field-note method seems to have been accepted as a convenient one, unless the claim of the State was disputed, and in such instances whatever appeared from the field-notes, adverse claimants have been permitted to introduce other proof as to the character of lands, and the State has been required to defend its title thereto. Since the approval of the circular of December 13, 1886 (5 L. D., 279), the procedure has been thereunder in so far as it is applicable, and the character of the lands involved has been determined upon the evidence submitted at hearings held before the local officers. The uncertainty of the practice has given rise to much confusion and has in great measure delayed the adjustment of the swamp land grants to this State.

To the end, therefore, that these grants may be speedily adjusted upon a basis fair to both the State and the United States, your office will in the future be governed by the following instructions:

(1) All pending selections under the swamp land grants to the State of Louisiana, whether made by surveyors-general or by agents of the State, in respect to which no adverse claim is asserted, will be approved or patented to the State as they may have been selected under the grant of 1849 or 1850, in all cases where they are shown by the field notes of survey or by affidavits filed at the time of selection under the practice hereinbefore referred to, to have been swamp and overflowed lands rendered unfit thereby for cultivation at the date of the grant. In reading the field notes of survey the same rule will apply as to surveys made before the grant as is now applied to surveys made since the grant; that is, if by the field notes of survey the lands are shown to be swamp and overflowed they will be presumed to have been rendered thereby unfit for cultivation. See State of Louisiana (5 L. D., 514). All future selections under said grants will be disposed of according to the showing evidenced by the field notes of survey alone.

(2) Where there are two or more surveys of the same lands, that survey which has been finally approved and which is recognized as the existing or subsisting official survey is the one to the field notes of which alone attention will be given hereunder; and, swamp land being generally the exception and not the rule throughout the public land States having a swamp land grant, and it being the practice in public

surveys to make special notation of the swamp lands rather than of the dry or non-swampy lands, the silence of the field notes and surveyor's return respecting the character of the land will be treated as equivalent to a statement that the land is dry or not swampy. Where there has been more than one approved survey of any of the lands involved in the adjustment of these grants, special effect will be given to the field notes of that survey made nearest in point of time to the date of the grant.

(3) In townships which have been heretofore surveyed and on account of which lists of swamp lands have been presented which purported to include, or should have included, the whole of the swamp lands in that township, no further selections will be considered, it not being the intention of the Department to afford opportunity to the State under a more liberal ruling, designed for the purpose of facilitating the adjustment of pending selections, to reopen its grant, so far as the same may have been adjusted under former practice, by presenting new selections, and in this connection your attention is particularly invited to paragraph 6 of circular of September 19, 1891 (13 L. D., 301), and you will see that the directions therein given are strictly complied with.

(4) In all future surveys of public lands in Louisiana, care must be taken by your office and by the surveyor-general's office to put the surveys in the hands of capable and honest surveyors, and to exact from them a faithful and efficient performance of their duty, including a faithful and accurate notation of the swampy or non-swampy character of the lands surveyed. After such surveys have been completed in the field, and at the earliest suitable time, especial care must be taken to have them carefully inspected with reference to the accuracy of the surveyor's notation respecting the character of the land, with a view to having such surveys and notations perfected and corrected, where deficient or inaccurate.

(5) All existing contests or controversies between the State and an actual *bona fide* homestead or preemption settler, whether the settlement was made before or after survey, will be disposed of under the provisions of the circular of December 13, 1886, *supra*, under which the settlement was effected and the contest or controversy begun.

(6) All existing contests or controversies in which there is no claim of actual *bona fide* preemption or homestead settlement, where the State's selection rests upon the field notes alone, will be disposed of according to the showing made by such field notes, there being nothing in such contests or controversies which would entitle the claimants adverse to the State to have the contest disposed of under the circular of December 13, 1886, unless the same has heretofore been carried to a hearing, and by this is meant where testimony has been submitted and decision rendered thereon. But all such controversies, where the

State's selection rests in whole or in part upon affidavits submitted with the selection, will be disposed of under said circular.

(7) All contests or controversies hereafter begun respecting the swampy or non-swampy character of the lands in Louisiana, whether heretofore or hereafter surveyed, where the State's selection rests upon the field notes alone, will be determined according to the showing made by the field notes of survey; but all such contests or controversies, where the State's selection rests in whole or in part upon affidavits submitted with selections heretofore made, will be disposed of under the circular of December 13, 1886.

(8) Your office will readjudicate in the light of these instructions the case here particularly involved, and also the other cases, about twenty in number, which were suspended by departmental order of April 11, 1901.

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IRRIGATION OF ARID LANDS—ARTESIAN WELLS—SECTION 2, ACT OF
JUNE 17, 1902.

INSTRUCTIONS.

The phrase "including artesian wells," in section two of the act of June 17, 1902, is used to describe one class of irrigation works to be located and constructed in carrying out the scheme for reclaiming arid lands provided for in said act, and it is not contemplated by said section that such wells may be sunk as a part of the preliminary examinations authorized therein.

In the prosecution of the work provided for in said act it is not permissible to sink an artesian well where it is believed that if water is found it will not be suitable or needed or used for irrigation purposes.

Secretary Hitchcock to the Director of the Geological Survey, March 3, 1903. (W. V. D.) (W. C. P.)

The Department is in receipt of your communication (F. H. N.) of February 20, 1903, in which you call attention to the provisions of the act of June 17, 1902 (32 Stat., 388), relating to artesian wells in connection with irrigation schemes, and submit three questions, as follows:

Do the words "including artesian wells," in section 2 of the reclamation law of June 17, 1902, refer only to the location and construction of irrigation works for the storage, diversion, and development of waters, or may the phrase "artesian wells" be considered as referring back to the preceding words "examinations and surveys?"

Is it permissible under this law to sink artesian wells purely for experimental purposes when there are no reasons for supposing that water can probably be had, or it is suspected that the well will produce salt or alkaline water, instead of fresh water suitable for irrigation?

Is it permissible to sink an artesian well in localities where it is believed that fresh water may be had but it is not probable that the water will be used for irrigation, or where the water may be desired for other purposes, and irrigation, although practicable, is not absolutely necessary for agriculture?

The act in question provides that all moneys received from the sale and disposal of public lands in certain States and Territories shall be reserved, set aside and appropriated as a special fund in the Treasury, to be known as the "reclamation fund," and used in the examination and survey for and construction of irrigating works for the storage, diversion and development of waters in the reclamation of the arid and semiarid lands in said States and Territories. Section 2 of said act reads as follows:

That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction as well as of those which have been completed.

The phrase "including artesian wells" refers directly to irrigation works, thus describing artesian wells as one class of such works to be located and constructed in carrying out the scheme for reclaiming arid lands. Preliminary examinations and surveys will probably be necessary to the sinking of any artesian well, but no reasonable construction of the language used will sustain the conclusion that said act contemplates the sinking of such wells as a part of the preliminary examinations authorized.

The statement of the purpose of this act would seem to leave no room for two opinions upon the matters presented by the second and third questions. The fund created thereby is to be used to develop and conserve the water supply for irrigation purposes. Chimerical propositions are not to be exploited. In the prosecution of this work no project, whether it involve the scheme of artesian wells, the construction of reservoirs, or of any other irrigation works, should be entered upon that does not appear to be feasible and that does not present a probability that it will tend to the attainment of the object proposed. It is not permissible to sink an artesian well or to construct any work for conserving water when there are no reasons for supposing that water can probably be had or that, if had, it will not be suitable for irrigation purposes. Neither is it permissible to sink an artesian well, or to undertake any other work tending to develop or conserve the water supply where it is not probable that the water will be needed or used for irrigation.

INDIAN LANDS—BITTER ROOT VALLEY—SECTION 7, ACT OF MARCH 3,
1891.GAGNON *v.* TILLMON.

The acts of June 5, 1872, and February 11, 1874, which are the only authority for the disposal of the lands in the fifteen townships in the Bitter Root Valley opened to settlement by the act of June 5, 1872, specifically provide for their disposal to actual settlers only; hence such lands are not subject to entry under the timber and stone act; and an entry thereof allowed under said act, being without authority of law, and therefore illegal in its inception, is not subject to the confirmatory operation of the proviso to section 7 of the act of March 3, 1891.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *October 7, 1903.* (A. W. P.)

Sarah M. Gagnon has appealed from your office decision of April 27, 1903, rejecting her affidavit of contest against the timber and stone cash entry No. 1216, made January 2, 1900, by Mary M. Tillmon, for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 12, T. 10 N., R. 19 W., Missoula, Montana, land district.

It appears that defendant filed her sworn timber land application for the above described tract October 24, 1899, under which proof was made January 2, 1900, and that final certificate issued thereon on that date.

On March 21, 1903, Sarah M. Gagnon filed with the local officers an affidavit of contest against said cash entry, alleging that the entry was improperly allowed.

The local officers forwarded the said affidavit of contest to your office, and by decision of April 27, 1903, appealed from, you rejected the same, as more than two years had elapsed since the issuance of the receiver's receipt upon the final entry, said action being based upon the proviso to section 7 (misstated by you as section 3) of the act of March 3, 1891 (26 Stat., 1095), as follows:

That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him.

From a careful examination of the records of your office it appears that the tract in controversy was included in the lands ceded to the United States by the Flathead and other Indians under the treaty of July 16, 1855, ratified by the Senate March 8, 1859 (12 Stat., 975), and within one of the fifteen townships in the Bitter Root Valley—as shown by the map of said valley approved by the Department April 14, 1894—opened to settlement by the act of June 5, 1872 (17 Stat., 226), and to which the benefit of the homestead act was extended by

the second section of the act of February 11, 1874 (18 Stat., 15). These two acts, which constitute the only authority for the disposal of the lands in the said fifteen townships, specifically provide for their disposal to actual settlers only; hence said lands are not subject to entry under the timber and stone act. Webb McCaslin (31 L. D., 243). Tillmon's timber land entry having been made without authority of law was clearly illegal in its inception, and not therefore within the confirmatory operation of the proviso to section 7 of the act of March 3, 1891, *supra*. United States *v.* Smith (13 L. D., 533).

Your office decision is accordingly reversed, and as Gagnon's affidavit of contest was by said decision rejected on this ground alone, the same is returned herewith for appropriate consideration.

CEDED CHIPPEWA LANDS—HOMESTEAD ENTRY—QUALIFICATIONS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., *October 9, 1903.*

The following persons are not qualified to make homestead entry in the ceded portion of the Red Lake and other Chippewa reservations in Minnesota:

1. Any person who has an existing homestead entry or who, after June 5, 1900, abandoned or relinquished such an entry.
2. A married woman, unless she has been deserted or abandoned by her husband, or comes within the terms of the act of June 6, 1900 (31 Stat., 683).
3. One not a citizen of the United States, or who has not declared his intention to become such.
4. Any one under twenty-one years of age, not the head of a family, unless he has served in the Army or Navy of the United States for not less than fourteen days during actual war.
5. Any one who is the proprietor of more than one hundred and sixty acres of land in any State or Territory.
6. One who has perfected title to a homestead of one hundred and sixty acres by proof of residence and cultivation for five years, unless covered by the act of May 22, 1902 (32 Stat., 203).
7. One who has perfected title to a homestead of one hundred and sixty acres under section 2, act of June 15, 1880.
8. One who, if allowed to make a homestead entry, would thereby acquire, with any other lands he may have entered since August 30, 1890, more than three hundred and twenty acres of nonmineral land.

W. A. RICHARDS, *Commissioner.*

Approved:

THOS. RYAN, *Acting Secretary.*

the land department and persons dealing with it from interference, annoyance and delay to public business by meddlesome, mischievous, or malicious and irresponsible persons.

Your office decision is affirmed.

FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

INSTRUCTIONS.

Claims to lands within a forest reserve relinquished to the United States with a view to the selection of other lands in lieu thereof under the exchange provisions of the act of June 4, 1897, arising not by act or sufferance of the relinquisher, but independently asserted by third parties under the laws and supposed title of the United States, after record of a defectively authenticated deed for the relinquished land, subsequently cured, constitute no bar to consummation of the exchange under said act.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *October 13, 1903.* (J. R. W.)

The Department is in receipt of your letter of October 7, 1903, asking instructions in cases arising under the exchange provisions of the act of June 4, 1897 (30 Stat., 36), wherein the extended abstract of title, made after curing defects previously existing therein, shows the initiation of claims under the public land laws of the United States.

With your office letter are transmitted, for illustration of its object, the applications of Frederick A. Kribs, numbers 3453 and 3454, your office series, presented at Roseburg, Oregon, to select lands in lieu of lands in the Sierra forest reserve, California, relinquished to the United States under the act of 1897, *supra*. The abstract of title as originally submitted disclosed that the deed of Mr. Kribs to the United States, and that of his grantor to him, for the lands assigned as basis for such applications, were acknowledged before a notary public in Douglas county, Oregon, in June, 1900, without the authentication of the notary's authority and signature required by section 1189 of the Civil Code of California, as amended February 26, 1897 (acts of 1897, California, p. 45), to entitle such deeds to be recorded, and in consequence of such defect your office, April 8, 1903, required proper authentication and rerecord of such deeds and an extension of the abstract of title to that time under the rule in Frank H. Hereford (32 L. D., 31).

Upon return of the abstract so extended it appeared that after the original record of Krib's deed to the United States, June 27, 1900, and prior to its legal authentication and rerecord, June 22, 1903, viz., between April 16, and July 9, 1902, notices of mineral lode claims were recorded in the proper county office affecting part of the land assigned as basis for the selections, which lode claims the locator had deeded to the Kern River Mining, Milling and Development Company,

a corporation. It also showed the record of a "builder's contract" for construction of a pole line for transmission of electricity across certain of the lands, an application by the Kern River company for right of way of which line is said to be pending and not approved.

Your office states its opinion to be that such claims asserted against the land relinquished should not be regarded as objections to, or defects in, the title tendered.

The Department concurs in the view so expressed. The general rule is that deeds, neither acknowledged or witnessed as required by local recording acts, and not entitled to be recorded, are good and operative between the parties and against volunteers and all persons having actual notice of them. The object of the recording acts and of statutes relating to form of execution and authentication for record is to give constructive notice of the conveyance and transfer of title.

As the United States solicits conveyance to itself of all lands not mineral held in private right in the forest reserves, deeds made under the act of June 4, 1897, to the government, must be given the same force as like deeds between private parties. The regulations, however, require the record of the title relinquished to be made by the grantor. The rule in the Hereford case is simply that such a deed shall be recorded as by the law of the place is entitled to be recorded as constructive notice to others, so as to prevent defeat of such title by some subsequent *bona fide* purchaser, or its impairment by the attaching of liens which defeat it or detract from its completeness. It is therefore necessary that the abstract of title be extended to show that the grantor, after the ineffective record of his defective deed, has not himself asserted ownership, or made other conveyance, or made, attempted to make, or suffered a claim or lien upon the property adverse to the title he had granted to the United States.

Rights asserted under the public and mineral land laws and right-of-way laws across the public land or reserves are not of that character. Their validity rests *upon* and arise out of the title in the government and are in privity with it, not adverse to it. The validity of such rights is a question between the claimant and the United States, and is solely within the jurisdiction of the land department to determine in the first instance. Should a relinquisher seek the aid of a court to remove such a claim, it is probable that the court would refuse to take cognizance of it upon the ground that the land department must first pass upon it.

If upon approval of a selection title to the basis assigned therefor vests by relation as of the time of record of the deed to the United States, the mineral claim, right of way, water right, and claims of such character, exist and depend for their validity upon the law, or grant of the United States, not upon any act, default or sufferance of the relinquisher. If the claims are merely fraudulent, devices for unlawfully holding possession and using reserved lands of the United

States, the government is competent to deal with them. If the title is viewed as not vesting in the United States until approval of the selection, without relation to the record of the deed, then such claims are merely void, without legal basis for their origin. Whatever validity they have depends on the validity of the relinquisher's conveyance and upon the grant or laws of the United States, without act or responsibility of the relinquisher, who is not responsible for them and can not justly be required to remove them.

Such assertions of claims arising not by act or sufferance of the relinquisher, but independently asserted by third parties under the laws and the supposed title of the United States, after record of a defectively authenticated deed, subsequently cured, will be disregarded.

SOLDIERS' ADDITIONAL HOMESTEAD—SECTION 2306, REVISED STATUTES.

JOHN BALDWIN.

A homestead entry made subsequent to the the approval of section 2306 of the Revised Statutes, as the result of a contest against a former entry covering the same land initiated prior to the approval of said section, though not carried to a successful termination until subsequent thereto, does not constitute a sufficient basis for an additional entry under said section.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 17, 1903.* (C. J. G.)

An appeal has been filed by John Baldwin, assignee of the claimed soldiers' additional homestead right of Samuel F. Mervin, from the decision of your office of August 12, 1903, rejecting his application to enter, under section 2306 of the Revised Statutes, the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 35, T. 31 N., R. 24 E., Santa Fe, New Mexico,

The basis for the rejection of the application by your office was that the soldier's original entry was made August 2, 1875, a date subsequent to that of the approval of section 2306 of the Revised Statutes, June 22, 1874, which provides:

Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

It is alleged that prior to June 22, 1874, the soldier had initiated contest against an entry covering the land which was subsequently embraced in his original entry, and it is therefore asked that the application to make additional entry be approved on the ground that the soldier's "right to said land attached from the date of contest." There is nothing in the record here to support the allegation made, but if it be granted that the facts are as stated, still it must be held that the initiation of a contest is not the equivalent of an entry within

the meaning of section 2306 of the Revised Statutes. It is not claimed that the former entry did not remain of record until after the approval of the Revised Statutes, or that the soldier had secured a preference right to enter the land prior thereto, but only that he had instituted contest. This did not give him an accrued right, but was merely the initiation of a right which was in no sense the equivalent of an entry. In the case of *Strader v. Goodhue* (31 L. D., 137), referring to the act of May 14, 1880 (21 Stat., 140), it was held (syllabus):

The preferred right of entry accorded a contestant is not a vested right until he has "contested, paid the land office fees, and procured the cancellation" of the entry attacked.

In *Fred W. Ashton* (31 L. D., 356), which presents stronger facts than the one under consideration in favor of the point contended for, it was held (syllabus):

The filing of a soldiers' declaratory statement is not the equivalent of an entry, within the meaning of section 2306 of the Revised Statutes, granting the right to make a soldiers' additional homestead entry to persons "who may have *heretofore entered* under the homestead laws less than one hundred and sixty acres of land."

And in that case it was said:

As the statute (Sec. 2306 R. S.) limits the right of additional entry to persons "who may have heretofore entered under the homestead laws less than one hundred and sixty acres of land," and as it appears that the entry here in question was made after the date of the approval of the Revised Statutes, it follows that this case does not come within the terms of the aforesaid section of said statutes, and that the action of your office in rejecting Ashton's application was right and proper.

See also in this connection *August W. Hendrickson* (13 L. D., 169); *Charles Moore* (17 L. D., 149); and *Henry W. Butcher* (26 L. D., 474).

The discussion herein is along the line of the concession that a contestant could secure a preference right prior to the act of May 14, 1880, *supra*, specifically according such right, a matter which it is unnecessary to determine in passing upon this case, as in any event the conclusion as to this applicant's rights in the premises would be the same.

The decision of your office is hereby affirmed.

PRIVATE CLAIM—RIGHT OF PURCHASE—ACT OF JANUARY 14, 1901.

PRIEST *v.* SMITH.

In case of a conflict of claims under the act of January 14, 1901, between one who subsequent to the decision of the Court of Private Land Claims, sustaining the grant, and prior to May 23, 1898, the date of the decision of the Supreme Court holding said lands to be the property of the United States, had purchased from the grant claimants a portion of said lands and had established his home thereon, and one who prior to the passage of said act had occupied a portion of the land with the intention of entering the same under the homestead or desert land laws, the respective rights of the claimants must be determined by priority of initiation.

The right to purchase from the United States accorded by the act of January 14, 1901, is limited to those who purchased the lands claimed by them from the grant claimants subsequent to the decision of the Court of Private Land Claims, sustaining the grant, and prior to May 23, 1898, the date of the decision of the Supreme Court holding said lands to belong to the United States, and who established permanent homes on the lands so purchased.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *October 27 1903.*
(A. S. T.)

On April 8, 1901, Cassius M. Smith made homestead entry for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 29, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 32, T. 8 S., R. 23 W., Tucson land district, Arizona.

On April 12, 1901, Ward Priest filed an affidavit of contest against said entry, charging that he was a prior settler on the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 32, and that he had purchased twenty acres thereof from the claimant under the Algodones grant, and he claimed a preference right to purchase the same under the provisions of the act of January 14, 1901 (31 Stat., 729).

A hearing was had, both parties appearing and offering testimony, whereupon the local officers found that Priest was a settler and resident on the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 32 when Smith's entry was made, and prior thereto, and that Smith had never resided on that legal subdivision of the land; and they recommended that Smith's entry be canceled as to the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 32, and that Priest be awarded a preference right of entry for the same; and inasmuch as the cancellation of Smith's entry as to that portion of the land would leave the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 32 non-contiguous to the other land embraced in his entry, they recommended that his entry be canceled as to it also.

Smith appealed to your office, where, on February 5, 1903, a decision was rendered affirming the action of the local officers, and from that decision Smith appealed to this Department, where, on June 27, 1903, a decision was rendered (not reported) reversing your said decision and dismissing the contest.

Priest has filed a motion for review of said departmental decision.

Priest claims to have established his residence on the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section in 1895 and to have resided on that quarter section ever since, but the proof does not sustain his claim of residence prior to 1899, when he established his residence on the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, and has maintained the same ever since. He purchased the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section from one French, who claimed to have purchased it from the grantees in the Algodones grant, the deed from French to Priest being dated August 16, 1899, and Priest was residing on the land at the time of the passage of the act of January 14, 1901, *supra*.

On August 13, 1895, Smith purchased from Belle Gillespie and Sam

S. Gillespie the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 29, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 32. At the time of his purchase there was a dwelling house on the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 29, and he established his residence in it in 1895, claiming the land purchased from the Gillespies as a homestead. At that time the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 32 was being cultivated by one Crane, who was the tenant of French, from whom Priest subsequently purchased said tract, but no one was residing on it. Smith, though claiming the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 32 as a part of his homestead, did not take actual possession of any portion of it till 1897, when he planted a crop of sorghum on the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, constructed some irrigation ditches, and built some fence on it, and he has had possession of that tract ever since, claiming it as a part of his homestead in connection with the land on which he lives in Sec. 29.

Priest established his residence on the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 32 in 1899, claiming it under his purchase from French, his deed being dated August 16, 1899, and he has maintained his residence there ever since, and he now claims a right to purchase the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 32, under the act of January 14, 1901, *supra*, on the ground that he is a remote purchaser from the Algodones Company of the west half of that tract, and was residing on it at the time of the passage of the act.

The preamble to the act recites that the Court of Private Land Claims had rendered a decision sustaining the grant to the Algodones Company; that thereafter numbers of citizens had purchased from said company portions of said lands and established permanent homes thereon; that the Supreme Court of the United States had rendered a decision reversing the decision of the Court of Private Land Claims and holding that said lands belonged to the United States; and that, unless the persons who had thus purchased from the Algodones Company and established homes on the land should be permitted to purchase such lands from the government, they would lose their homes. It was therefore enacted:

That where such persons in good faith and for valuable considerations purchased from the grant claimants prior to May twenty-third, eighteen hundred and ninety-eight, portions of the land covered by the said grant, and have occupied and improved the same, such persons may, within six months from and after the passage of this act, or within three months after the said lands shall be restored to entry, purchase the same at the price of one dollar and twenty-five cents per acre, upon making proof of the facts required by this act under regulations to be provided by the Commissioner of the General Land Office and approved by the Secretary of the Interior, joint entries being admissible where two or more persons have purchased lands on the same forty-acre tract: *Provided*, That no one person shall purchase more than forty acres, and no purchase shall be allowed for a less quantity than that contained in the smallest legal subdivision.

Sec. 2. That where persons duly qualified to make entry under the homestead or

desert-land laws have occupied any of said lands with the intention of entering the same under the homestead or desert-land laws, such persons shall be allowed three months from and after the passage of this act, or after the said lands shall be restored to entry, within which to make their entries, and the fact that such persons have improved or reclaimed such desert lands shall be no bar to their making such entries.

It will be observed that the act above quoted confers preference rights upon two classes of persons—viz., those who prior to May 23, 1898, had purchased from the grant claimants portions of said lands and had established homes thereon, and those who prior to the passage of the act had occupied portions of the land with the intention of entering the same under the homestead or desert-land laws. Neither of these classes of preferred claimants is given preference over the other, but the rights awarded to them by the statute seem to be of equal dignity, and therefore, in case of a conflict between claimants of the two classes, their respective rights must be determined by priority of initiation, just as is done in other cases of conflicting claims arising under the same statute.

Applying this rule, the Department, in the decision complained of, found that Smith's claim was entitled to the preference because it was first initiated, he having taken possession of, improved, and cultivated a portion of the land in 1897, while Priest did not purchase from French, nor establish his residence on the land until 1899, and said decision is based principally upon this ground. But it was also found that Priest had not furnished sufficient evidence to show that his vendor, French, was a purchaser from the Algodones Company, and therefore it was held that he was not entitled to purchase the land as a remote purchaser from the company.

But if it be conceded that French was a purchaser from the Algodones Company, Priest would not be entitled to the benefit of said statute, for the simple reason that such benefits are expressly limited to those who purchased prior to May 23, 1898, and Priest's purchase from French was subsequent to that time. That was the date of the decision of the Supreme Court in the case of *United States v. Coe* (170 U. S., 681), wherein it was held that the land belonged to the United States, and those who purchased from the grant claimants after that decision did so with notice that the company had no title to the land.

It may be said that Priest purchased whatever right French had to the land, and that he is now entitled to the same rights and privileges with respect to it that French would be if he had not sold to Priest, but this proposition leaves Priest in no better situation, for the reason that French had never established a home on the land, and this Department, in the case of *Lynn v. Miles* (32 L. D., 11), held that the statute applied only to purchasers from the Algodones Company who had established permanent homes on the land.

It was clearly the intention of Congress to award the right of purchase to those who, relying upon the judgment of the Court of Private Land Claims, had purchased and established permanent homes on the land prior to the decision of the Supreme Court in the case of the *United States v. Coe, supra*. The establishment of a home on the land after that time would confer no rights under the statute any more than would an original purchase from the Algodones Company after that time; and so, if French had not sold to Priest, and if he had established his residence on the land in 1899, as Priest did, it would not have given him a right to purchase the land under the statute in question.

But there is still another reason why French would not have been qualified to purchase under the statute. The preamble to the statute, after reciting the rendition of the judgment by the Court of Private Land Claims sustaining the grant, states that—

immediately thereafter, the said alleged grantees for large and valuable considerations sold to numbers of people, citizens and *bona fide* settlers on said lands, . . . and said settlers then believing that they had a *bona fide* title to said lands sold, made lasting and valuable improvements, and permanent homes thereon . . .

Therefore: Be it enacted . . . That where *such persons* in good faith and for valuable considerations purchased from the grant claimants, prior to May twenty-third, eighteen hundred and ninety-eight, . . . *such persons* may . . . purchase the same at the price of one dollar and twenty-five cents per acre.

The statute limits the right to purchase to "*such persons*" as are described in the preamble—viz., persons who, after the decision of the Court of Private Land Claims and prior to the decision of the Supreme Court, purchased in good faith from the grant claimants. French was not such a person, because his alleged purchase from the grant claimants was in July, 1893, long prior to the decision of the Court of Private Land Claims, and therefore he was not in a situation to claim that he had been misled by said decision.

The statute awards the right to purchase only to those who purchased from the grant claimants between the dates of the two decisions, and French's purchase was prior to the first decision, while Priest's was subsequent to the last one, and therefore neither of them is *such a person* as described in the statute.

This Department has held that, upon the final rejection of the claims under the Algodones grant, the land embraced therein immediately became subject to settlement and entry. Katharine Davis (30 L. D., 220). Smith was a settler on the land prior to and at the time when it was opened to entry, and his settlement was prior to that of Priest, and it was properly held that his rights were superior to the claim of Priest.

Several affidavits have been filed with the motion for review wherein it is alleged that Priest has made extensive improvements on the land in question, and he states in a letter to this Department that, if said decision is adhered to, it will have the effect to deprive him of his

home and of the fruits of much labor and hardship. It is to be regretted if he should suffer such loss, but this Department in deciding contests between conflicting claimants must be guided by the law and the evidence, regardless of the amount that may be lost or gained by the contending parties. Moreover, if Priest has expended a large amount of money and labor in the improvement of the land in question, basing his claim upon his purchase from French, he is not in a position to complain that he is likely to suffer loss thereby, because he had full notice that the land belonged to the United States, and if he placed extensive improvements thereon he did so at his peril.

The motion presents no sufficient reason for disturbing said decision, and none appearing otherwise, it is denied.

INDIAN HOMESTEAD—ACT OF JULY 4, 1884.

DOC JIM.

Until the issuance of final patent on an Indian homestead entry under the act of July 4, 1884, the land department retains jurisdiction over the land embraced therein and is bound to protect the rights of the homesteader.

No preference right of entry is acquired by filing a contest and procuring the cancellation of an Indian homestead entry made under the act of July 4, 1884.

The relinquishment of an Indian homestead entry made under the act of July 4, 1884, does not become effective until approved by the Department.

Acting Secretary Ryan to the Commissioner of Indian Affairs, October (F. L. C.) 27, 1903. (C. J. G.)

The Department has considered the case of Doc Jim, an Indian, submitted by your office letter of August 4, 1903, involving his homestead entry No. 358, Yakima series, for the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 5, T. 23 N., R. 19 E., Waterville, Washington.

The land is within the primary limits of the grant opposite the Cascade branch line of the Northern Pacific Railway Company as definitely located December 8, 1884. The notice of withdrawal on account of the location was received in the local office January 20, 1888. The homestead entry of Doc Jim was made March 30, 1885. In a case on appeal involving the conflicting claims of the railway company and Doc Jim, the Department under date of May 1, 1901 (not reported), held that as the latter, following the passage of the act of July 1, 1898 (30 Stat., 597, 620), filed his election to retain this land as against the company, said claims should be adjusted under the provisions of said act, which are as follows:

That where, prior to January first, eighteen hundred and ninety-eight, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite

location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands.

The railway company relinquished its claim to the land in question, the relinquishment was accepted, and the case finally closed by the General Land Office. Doc Jim was notified of the action taken and that he might proceed to perfect his claim to the land. He applied to submit final proof on his entry and a day was set for a hearing thereon. But he failed to submit proof and on the contrary filed a relinquishment of his entry.

The further facts in the case, as gathered from the reports of an Indian agent sent to investigate the same, are very fully set forth in your office letter, from which it is fair to conclude that some pressure, although not necessarily of a reprehensible and dishonest character, was brought to bear on Doc Jim to induce him to relinquish his entry. He was offered a money consideration for the land and seems to have been impressed with the idea that he was subject to contest for failure to comply with the law under which the entry was made. There is grave doubt as to whether he was in a position to submit satisfactory final proof, judged by the rule applicable to the ordinary homesteader in such matters. Charges were subsequently filed against him by the purchaser of his relinquishment, pending action on the latter, and a hearing was had thereon.

On account of the contradictory character of the evidence relative thereto it is impossible to determine with sufficient certainty whether the act of Doc Jim in relinquishing his entry was entirely voluntary or not. There are papers filed indicating on their face a willingness on his part to sell the land. On the contrary the Indian agent reports that both Doc Jim and members of his family have expressed a desire to retain the land, and it is gathered from the record that he would have proceeded to submit his final proof had he not been advised to the contrary by one claiming to act in his behalf as well as in that of the purchaser of his relinquishment. Under all the circumstances the Department is warranted in taking such action as is seemingly for the best interests and welfare of the Indian, unless such a claim has attached to the land as deserves recognition and would rightfully prevent action in his favor.

The act of March 3, 1875 (18 Stat., 402, 420), extended the benefits of the homestead law to—

any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon his tribal relations.

The act of July 4, 1884 (23 Stat., 76, 96), further extended the same benefits as follows:

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; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

Any question as to the sufficiency of Doc Jim's claim to the land in question as against the Northern Pacific Railway Company, for the purposes at least contemplated by the act of July 1, 1898, *supra*, was settled by departmental decision of May 1, 1901, *supra*. It appears that his entry was made under the act of July 4, 1884, *supra*, which confers the benefits of the homestead law upon "Indians" as distinguished from "citizens of the United States." Both the acts of 1875 and 1884 provide special rules and limitations not applicable to other homestead cases, and impose certain restrictions, as to encumbrance and alienation, upon the title the beneficiaries secure. The language of section 5 of the act of February 8, 1887 (24 Stat., 388, 389), with respect to the issuance of patents upon Indian allotments and the trusteeship of the United States, closely follows that of the act of 1884 with respect to Indian homesteads. It is well settled that the issuance of the first or trust patent on an allotment does not terminate the jurisdiction of the Department. Until the issuance of final patent the allottee remains as a ward subject to guardianship, whose rights the Department is bound to protect. The language of the act of 1884 is undoubtedly susceptible of the same construction, and all the reasons for the exercise of the protecting care of the government in the case of an Indian allottee are equally applicable in the case of the Indian homesteader.

The hearing had on the charges brought against Doc Jim's entry, pending departmental action on his relinquishment, was evidently premature, and consequently no rights were secured thereunder. In the matter of an allotment, on account of the peculiar status of the Indian, no encouragement has ever been given to third parties to attack the same with the hope or expectation of securing any advantage by reason of such attack. In the event of the cancellation of the allotment no

preference right to enter the land is acquired, as it is held that section 2 of the act of May 14, 1880 (21 Stat., 140), giving a preference right of entry to a successful contestant, does not extend to charges brought against an Indian allotment. The same rule would seem to be equally applicable in the case of an attack upon an Indian homestead entry where the United States is to hold the land in trust for the Indian and his heirs. The question with what degree of strictness compliance with the general homestead law by the Indian homesteader should be insisted upon has always been one for grave consideration, but that is a matter between the government and its ward. Doc Jim has undoubtedly all along laid some claim to the land embraced in his entry, and for a time at least performed acts of cultivation and of residence.

As between the parties the relinquishment in question was conditional upon the payment of a certain sum of money to the Indian, upon its approval. The consideration that may have been promised by the purchaser is of no moment in determining the proper disposition of the land. The Department is not in a position to enforce payment of the promised consideration even were it proper to give any recognition to such transactions. The relinquishment of an allotment does not become effective until approved by the Department. The same rule is clearly applicable to an Indian homestead entry where the United States is to act as trustee for the Indian and his heirs.

Under all the circumstances of the case your office recommends that the land in question be allotted to Ignas, a grandson of Doc Jim, under section 4 of the general allotment act. With this end in view your office has procured another relinquishment from Doc Jim and an application for allotment has been made by Ignas. This arrangement apparently has the consent and approval of the Indians interested. It is unfortunate, however, that a second relinquishment was called for. This action only served to further confuse conditions that were already complicated. The Department is not disposed to accept either relinquishment, and it is not necessary to what it regards as a proper disposition of the land that it should, but under the circumstances deems that it has sufficient facts before it to warrant the cancellation of Doc Jim's homestead entry and the reservation of the land with a view to its allotment as suggested. Said entry will therefore be canceled, the contest against the same will be dismissed, and the application to locate the land embraced therein denied. The contestant and applicant should be notified of this action. Your office will forward all necessary papers to the General Land Office, with a copy of this paper, in order that suitable action may be taken in accordance with the views and directions contained therein, and the land in question allotted to Ignas, as contemplated.

SOLDIERS' ADDITIONAL HOMESTEAD—SECTION 2306, REVISED STATUTES.

DAVID WERNER.

If a soldier fails to exercise his additional homestead right under section 2306 of the Revised Statutes during his lifetime, and leaves no widow or minor children surviving him, said right remains an asset of his estate, subject to the control and disposition of his heirs at law; and a sale and assignment of the right by such heirs can in no wise be affected by the action of an administrator of the soldier's estate subsequently appointed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *November 6, 1903.* (C. J. G.)

An appeal has been filed by David Werner, as assignee of the claimed soldiers' additional homestead right of Lewis Logan, deceased, from the decision of your office of July 23, 1903, rejecting his application to enter under section 2306 of the Revised Statutes, the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 12, T. 148 N., R. 76 W., Bismarck, North Dakota.

The application is based upon a sale and an assignment of the right in question, made by William Scott, as administrator of the estate of said Lewis Logan, and was rejected by your office for the reason that "a valid and legal sale of said right was made prior to the sale upon which the application herein is based."

The record shows that at the time of his death, May 3, 1899, Lewis Logan was entitled to a soldiers' additional homestead right to eighty acres of land. He left no widow, his wife having died several years before, nor minor orphan children, but surviving him were three adult sons, to wit: Henry Logan, William Logan and Jesse (otherwise known as Logan) Logan. In a will executed March 28, 1899, he devised to his son Henry a certain described tract of land, and to his two other sons the balance of the land owned by him adjoining that tract. An executor was named in the will, a stranger, but he never qualified and no probate proceedings were ever had as to said will.

The three sons mentioned, as the sole heirs at law of Lewis Logan, sold and assigned the additional right to F. W. McReynolds, July 30, 1900, who in turn transferred the same to Francis M. Walcott, August 6, 1900. Thereupon the latter made application to enter under said right the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 11, and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 14, T. 28 N., R. 37 W., Valentine, Nebraska, which was rejected by your office October 5, 1901, subject to the right of appeal within sixty days, for the reason "that the soldier, Lewis Logan, died May 3, 1899, leaving no widow nor minor children, and his additional right thereupon became an asset of his estate to be administered and it can be legally assigned only by his personal representative," the cases of Williford Jenkins (29 L. D., 510), and Julia A. Lawrence (29 L. D., 658), being cited.

December 2, 1901, Walcott applied for and was granted by your office an extension of time for ninety days "in which to file a confirmatory assignment by an administrator." Further and like extensions for the same purpose were requested April 14, and August 13, 1902, and granted May 14, and October 11, 1902, respectively. In the request of August 13, 1902, it was said:

In view of the recent decision of the Hon. Secretary in which he decided that administration was not necessary in certain instances, I would ask for a modification of the requirements in this case in conformity therewith.

The extension and modification were granted by your office October 11, 1902, as follows:

The request for the extension of time is hereby granted, and the applicant is allowed ninety days from date hereof, within which to furnish evidence sufficient to show that the persons making the assignment in this case were the sole and only heirs of the said soldier, and that they had the right and authority to dispose of same, and such other evidence as is necessary to make out the case in accordance with the decision of the Honorable Secretary in the case of Robert E. Sloan, assignee of Alvin O. McCreery, decided June 30, 1902.

December 4, 1902, the Walcott papers were withdrawn from your office for use, as it is alleged, in a Kentucky court. Thereupon your office, in transmitting said papers, made its decision of October 5, 1901, rejecting Walcott's application, final and closed the case, his formal application to enter and accompanying affidavit being retained in the files.

April 30, 1903, Walcott applied to have his application of October 30, 1900, reinstated, and refiled the original papers, and in addition thereto furnished a certified copy of the last will and testament of Lewis Logan devising his estate to his three sons. Your office held, June 17, 1903, that this additional evidence was not sufficient to warrant the reinstatement of Walcott's application. He was at the same time informed, however, that the requirements of your office under date of October 11, 1902, must first be complied with and he was allowed sixty days for that purpose. In response he furnished, June 29, 1903, the following certificate of the probate judge of Shelby county, Kentucky:

COUNTY COURT OF SHELBY COUNTY, KENTUCKY.

I, E. H. Davis, Judge of said Court, having sole jurisdiction of probate matters, do hereby certify that Lewis Logan, late of this County and State, deceased, died on or about the 3rd day of May, 1899; that he left a last will and testament which was duly admitted to record as such on the 12 day of June, 1899; that J. W. McDowell, the executor named therein never qualified and was never authorized to act as such; that said Lewis Logan, deceased, left as sole heirs and next of kin the following three children, all above the age of twenty-one years: Henry Logan, William Logan, and Jesse (otherwise known as Logan) Logan; that up to and prior to January 1, 1901, no letters of administration were ever issued on said estate, no administrator was ever appointed, and no application for the appointment of an administrator was ever filed

in this court, and that no one ever acted in that capacity in this jurisdiction at any time prior to said date (January 1, 1901); that so far as the records of this court show, said Lewis Logan left no debts and no claims have ever been filed in this court against his said estate; that said Lewis Logan left real estate, as shown by his will, in this county against which claims could have been levied had he left any debts.

In view of the showing made by Walcott your office in its decision of October 11, 1903, held that he was a qualified applicant for the exercise of the additional right in question and that upon complying with certain stated requirements, such as furnishing a non-saline affidavit, etc., his application, based on the sale and assignment by the heirs at law of Lewis Logan, would be allowed.

In the meantime, to wit, November 18, 1902, David Werner, appellant herein, made his application to enter hereinbefore referred to. The same was based on a sale and an assignment of additional right made January 6, 1902, in two separate papers, by William Scott, as administrator of the estate of Lewis Logan, deceased, to Henry N. Copp, who in turn sold and assigned said right to Werner January 18, 1902. In support of the application there was filed a certified copy of an order of the probate judge of Shelby county, Kentucky, under date of December 10, 1901, appointing William M. Scott administrator, it being set forth in said order that the executor named in the will of Lewis Logan had declined to act. Annexed to the order was a certified copy of said will. There was also filed a certified copy of the order of the court authorizing the sale to Henry N. Copp of the additional homestead right of Lewis Logan. The application of Werner was denied by your office July 23, 1903, for the reason hereinbefore stated. The application of Francis M. Walcott was at the same time suspended to await final decision in this case.

It is urged in support of Werner's appeal that whatever claim Walcott may have had was lost by his failure to appeal from the decision of your office of October 5, 1901, rejecting his application, which thereby became final. This argument is satisfactorily answered and refuted by the record itself of the facts in the case.

It is observed that at the time letters of administration were applied for and granted to Scott, and at the time of the sale and assignment of the additional right by him, the application of Walcott to enter, based upon a sale and assignment of said right by the heirs at law of Lewis Logan, was pending. It is not denied that said right was in fact sold and assigned by the three sons of Lewis Logan, nor is it denied that they are his sole heirs at law. The only question therefore is as to the validity of the sale and assignment of the additional right by said heirs at law.

This case is clearly distinguishable from those cited in the decision of your office of October 5, 1901, and relied upon by the appellant herein. In the one case the beneficiary of the additional right left a

the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 9, T. 67 N., R. 24 W., 4th P. M., Duluth, Minnesota, applications of Litchfield, numbers 1454 and 1456, your office series, under the act of June 4, 1897 (30 Stat., 36), to select these with other lands in lieu of lands relinquished to the United States in a forest reservation.

November 6, 1899, Litchfield presented his applications at the local office for the lands then unsurveyed, with his recorded deed of relinquishment to the United States of the lands in a forest reserve, assigned as base therefor, abstract of title thereto, and an affidavit that the land applied for was unoccupied, no non-mineral affidavit being required in that state. December 4, 1899, the papers were transmitted to your office.

April 9, 1902, the plat of survey was filed in the local office, on which day Charley Anderson filed application for homestead entry of the land in controversy, alleging settlement thereon June 29, 1899, and improvements valued at \$150, consisting of a house, sixteen by eighteen feet, two acres slashed, about three-fourths of an acre cleared, and "a road cut about eighty rods to said cabin."

The local office ordered a hearing, the evidence to be taken July 21, before a United States court commissioner, at Koochiching, and for hearing at the local office July 26, 1902. Both parties appeared in person and with counsel, and by stipulation the testimony of witnesses was taken stenographically.

October 8, 1902, the local office found that Anderson from early in the fall of 1899 was owner of more than one hundred and sixty acres of land, was thereby disqualified to make entry, and recommended rejection of his application. Anderson appealed, and your office made no decision upon his application, and without passing upon it canceled Litchfield's applications to select the land embraced in Anderson's claim.

The local officers decided the case and the appellants argue it here upon the theory that unless land be occupied by one qualified and intending to claim it under settlement laws, who has settled and resided upon and improved the same as required by those laws, it must be considered as "vacant land open to settlement" and subject to appropriation under the act of June 4, 1897. This is not the theory accepted by this Department. If the land be actually occupied it is not vacant. Whether the occupancy is such as meets the requirements of the homestead or other laws or whether the occupant is qualified to assert and maintain a claim under those laws are questions which will not be tried and determined under an application to select the land under the act of 1897. It is clear that this land showed evidence of occupancy when the non-occupancy affidavit in support of Litchfield's application was executed and when that application was presented the occupant was yet in possession of the land and improvements. The conditions were

such as to justify your conclusion that the signs of settlement and improvement were sufficient to charge the selector with notice thereof. Under the rulings of the Department land in the condition of this is not "vacant" within the purview of the act of 1897.

The decision appealed from is affirmed.

MILITARY RESERVATION—LIMITATION OF AREA—ACTS OF FEBRUARY 14, 1853, AND MAY 26, 1864.

A. WILBUR CATLIN.

The provision in section 13 of the act of May 26, 1864, creating the Territory of Montana, that "all laws of the United States which are not locally inapplicable shall have the same force and effect within said Territory of Montana as elsewhere in the United States," was intended to give effect in said Territory only to such *general* laws as were not locally inapplicable, and did not operate to carry into effect as to said Territory the *special* limitation contained in the act of February 14, 1853, by which the authority of the executive to establish reservations was restricted to not exceeding six hundred and forty acres at any one place.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November, 18, 1903.* (C. J. G.)

An appeal has been filed by A. Wilbur Catlin from the decision of your office of August 6, 1903, sustaining the action of the local officers in rejecting his application to make homestead entry for the SE.¼ SE.¼, Sec. 30, T.13 N., R.19 W., Missoula, Montana, for the reason that the tract applied for is within the Fort Missoula Military Reservation.

The Fort Missoula Military Reservation was originally established with an area of 640 acres by executive order of February 19, 1877. The same was enlarged by an additional reservation of 560.23 acres by executive order of August 5, 1878. The land covered by Catlin's application is a part of the additional reservation. It is urged by him that the executive order of August 5, 1878, was "in contravention of an act of Congress and therefore necessarily unauthorized and of no force and effect."

The tracts of land covered by both executive orders were originally within the boundaries of the Territory of Oregon as defined in section 1 of the act of August 14, 1848 (9 Stat., 323), establishing the territorial government. Section 14 of the act of September 27, 1850 (9 Stat., 496, 500), entitled "An act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey, and to make donations to settlers of the said public lands," provided:

That such portions of the public lands as may be designated under the authority of the President of the United States, for forts, magazines, arsenals, dock-yards, and other needful public uses, shall be reserved and excepted from the operation of this act.

This section placed no limitation upon the amount of land the President might reserve for the purposes indicated. The act, however, was amended in this particular by section 9 of the act of February 14, 1853 (10 Stat., 158, 160), as follows:

That all reservations heretofore, as well as hereafter, made in pursuance of the fourteenth section of the act to which this is an amendment, shall, for magazines, arsenals, dock-yards, and other needful public uses, except for forts, be limited to an amount not exceeding twenty acres for each and every of said objects at any one point or place, and for forts to an amount not exceeding six hundred and forty acres at any one point or place.

By the act of March 2, 1853 (10 Stat., 172), entitled "An act to establish the territorial government of Washington," the tracts of land covered by the executive orders in question fell within the limits of the Territory of Washington, as defined by that act. And in section 6 of the act of July 17, 1854 (10 Stat., 305, 306), entitled "An act to amend the act approved September twenty-seven, eighteen hundred and fifty, to create the office of surveyor-general of the public lands in Oregon, etc., and also the act amendatory thereof, approved February nineteen [fourteenth], eighteen hundred and fifty-three," it was declared "that all the provisions of this act, and the acts of which it is amendatory, shall be extended to all the lands in Oregon and Washington Territories."

The Territory of Montana was created partly out of the Territories of Oregon and Washington by the act of May 26, 1864 (13 Stat., 85), and the tracts of land covered by the executive orders in question fell within the limits of the Territory of Montana, as defined by that act. They were within such limits at the date of said executive orders and still remain so.

In the case of Fort Boise Hay Reservation (6 L. D., 16), having reference to the limitation in section 9 of the act of February 14, 1853, *supra*, and involving lands in Idaho, it was held (syllabus):

An executive withdrawal of lands for the purpose of a military reservation, in violation of the statute fixing the amount of land that may be so withdrawn for such purpose, does not take such land out of the class of public lands so as to require their disposal by special enactment.

In the cases of Fort Ellis (6 L. D., 46); Thomas J. Yeates (9 L. D., 67); and Frank Bouslog (9 L. D., 104), it was held that the limitation in section 9 of the act of February 14, 1853, *supra*, as to the amount of land that may be withdrawn for a military reservation, is not applicable outside the territorial boundaries of Oregon.

In section 13 of the act of May 26, 1864, *supra*, establishing the Territory of Montana, it was provided:

That the constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Territory of Montana as elsewhere within the United States.

A similar provision was made in the act of March 3, 1863 (12 Stat., 808), establishing the Territory of Idaho.

July 25, 1887, one James H. T. Ryman made application to enter, under the desert land act, a tract of land in the same section as that applied for by Catlin, which was rejected by the local officers because the same was "for land embraced in the Fort Missoula Military Reservation." The case came before the Department on appeal, where decision was rendered February 27, 1889 (not reported). It was held in said decision that "the law restricting military reservations for forts to an area of six hundred and forty acres within the bounds of the Territory of Oregon as originally established was locally not inapplicable to the part of it which was subsequently included within the limits of the Territory of Montana." In support of this construction the case of Fort Boise Hay Reservation, *supra*, was cited. The conclusion was therefore expressed "that the said executive order of August 5, 1878, was in contravention of the provisions of an act of Congress and therefore necessarily unauthorized and of no force and effect." In view, however, of the fact that the War Department retained full control over the land covered by said executive order, further action upon Ryman's application was suspended until communication was had with that department with a view to obtaining a relinquishment of the reservation involved, held as it was considered in contravention of law. Your office was advised accordingly and directed to transmit the reply of the War Department to such communication to this Department for further directions in the case. This was done, but in the meantime the War Department had sought an opinion from the Attorney General in the matter. Having before it the reply of the War Department and the said opinion of the Attorney General, this Department passed upon Ryman's application December 2, 1889, case of James H. T. Ryman (9 L.D., 600), concluding as follows:

While the War Department assumes and exercises for military purposes full control over the land in question and the military, under order of the said department, holds actual possession of it, this Department will not interfere, and Ryman's application must therefore be denied.

In considering the effect of the provision in section 13 of the act of May 26, 1864, *supra*, establishing the Territory of Montana, the Attorney-General in the opinion referred to (Vol. 19 of the Opinions of the Attorney General, page 370), used the following language:

It is said that the limitation of 640 acres for forts, at first especially applied to Oregon Territory, and, afterwards, especially applied to Washington Territory, is in force in Montana under the provision just quoted from the act of May 26, 1864, because that limitation is not locally inapplicable to Montana.

But was it the purpose of Congress to make operative in Montana all the special and local legislation in the statute books of the United States that might not be locally inapplicable to that particular region? It is manifest that the argument that would admit *any* particular special legislation would necessarily extend to all; the language being "*all laws . . . not locally inapplicable.*" The result of such an interpretation of the act of 1864 would be a medley of laws, no one of which might

be locally inapplicable to Montana, while, taken together, they would make an incongruous mass of legislation.

In my view such was not the intention of Congress, but that intention was, I think, to give effect in Montana only to all *general* laws of the United States not locally inapplicable; such, for instance, as laws relating to civil rights, marine ports of entry, etc. I do not think it would be reasonable or safe to give any larger sense to the act of 1864.

In addition to the considerations already stated, it may be remarked that the legislation specially applicable to Oregon was, as we have seen, made operative in Washington Territory by *express terms*, and it may be entitled to some weight in this discussion that during the period of eleven years which has elapsed since the alleged invalid executive order of August 5, 1878, was made, Congress has seemingly acquiesced in that order, which would probably not have been the case if Congress had thought that the executive department of the Government had acted in open disregard of limitations of authority which were intended to apply to that department.

Unless, therefore, I should take the extraordinary position that the effect of section 9 of the act of 1853 (*supra*) was to impose a burden on all the land in the then Territory of Oregon, and that Congress intended that the burden so imposed should run with and follow that land, like a covenant, after the land had ceased to belong to that particular Territory, I must conclude that the executive order of August 5, 1887 [sic], was not in conflict with section 9 of the act of February 14, 1883 (*supra*), that statute having no application to the subject whatever.

If it is objected that, if we exclude, as inapplicable to these lands in Montana, the act of 1853 restricting the reservation to 640 acres, we for the same reason must exclude the original act of 1850, which, it is said, grants to the President the power to make any reservation. To this I answer that in my opinion the validity of the executive order of August 5, 1878, and that of February 19, 1877, to which it was supplemental, rest not on that statute, but on a long-established and long-recognized power in the President to withhold from sale or settlement, at discretion, such parts of the national domain, open to entry and settlement, as he may deem proper. This power Congress recognizes in the legislation above discussed, which does not grant any such power, but only seeks to restrict one already existing. When Congress creates an exception from a power, it necessarily affirms the existence of such power, and hence the well known axiom that the exception proves the rule.

It may indeed be stated that Congress has, in other legislation, repeatedly recognized the existence of this power of the President. For instance, the pre-emption act of 29th of May, 1830 (4 Stat., 421), contains the following clause: "Nor shall the right of preemption contemplated by this act extend to any land which is reserved from sale by act of Congress or *by order of the President*, or which may have been appropriated for any purpose whatever." So by the preemption act of September 4, 1841 (5 Stat., 456), "land included in any reservation by any treaty, law, or *proclamation of the President* of the United States, or reserved for salines or for other purposes, are exempted from entry under the act."

In addition to this Congressional recognition, the Supreme Court of the United States has repeatedly adjudged the existence of this power in the President. (*Wolcott v. Des Moines Company*, 5 Wall., 681; *Grisar v. McDowell*, 8 [sic] ib., 363; *Wolsey v. Chapman*, 101 U. S. R., 755; *Williams v. Baker*, 17 Wall., 144; *Wilcox v. Jackson*, 13 Pet., 498).

It follows, therefore, that the President was fully empowered to make the executive order of August 5, 1878, and that while that order remains unrevoked the land covered by it is not open to entry or settlement. In reaching this conclusion I have not overlooked the distinction, claimed on behalf of the War Department to obtain, between "posts" and "forts", and which some of the statutes seem to recognize, but have preferred to rest my conclusions on the broader grounds that the restrictive act of 1853 is wholly inapplicable to these lands in Montana.

The above construction was accepted by the Department in the case of Northern Pacific R. R. Co. (27 L. D., 505), and so much of the decision in the case of Fort Boise Hay Reservation, *supra*, as denied the right in the Executive to make a military reservation in Idaho, in excess of six hundred and forty acres, was overruled.

It appears that the lands covered by the executive orders in question are still under the control of the War Department, that is, they have not been relinquished by that department and placed under the control of this Department for disposal. At the date of the executive order for the enlargement of the Fort Missoula military reservation the land applied for by Catlin was a part of the public domain to which he was asserting no claim. It is not therefore as if he were prejudiced in any manner by the withdrawal. As was said in the case of *Grisar v. McDowell, supra*:

If the lands were at the time a part of the public domain, as they must be considered to be, . . . it is of no consequence to the plaintiff whether or not the President possessed sufficient authority to make the reservation in question. It is enough that the title had not passed to the plaintiff.

The decision of your office herein is affirmed.

RIGHT OF WAY—RAILROAD GRANT—INDIAN LANDS—HIGHWAYS.

OPINION.

The grant of a right of way through the Indian Territory, made to the Kansas and Arkansas Valley Railroad Company by the acts of June 1, 1886, and February 24, 1891, was of an easement only and not of the fee, subject to the legislative power to declare and open highways or roads across such right of way wherever necessary and proper for the public convenience; and under the act of June 30, 1902, providing for the allotment and disposal of the Creek Indian lands, the Indian Office, under the supervision of the Secretary of the Interior, may make orders establishing highways or roads over and across said lands, whenever necessary for the public good, and enforce them across such railroad right of way by removing the obstructing fences of the company.

Assistant Attorney-General Campbell to the Secretary of the Interior,
November 20, 1903. (J. R. W.)

I am in receipt, by reference of the Acting Secretary, October 15, 1903, of the communication from the Commissioner of Indian Affairs of October 7, 1903, with enclosures and report from the United States Indian Inspector for Indian Territory and the United States Indian Agent, Union Agency, respecting complaint by the National Attorney for the Creek Nation, to the effect that the Kansas and Arkansas Valley Railroad Company had fenced its right of way through certain allotments in the Creek Nation, and had not opened a certain section line road, whereby certain allottees have no access to their land

except by a long circuit. The reference requests my opinion in the matter.

It appears by the enclosures that the Kansas and Arkansas Valley Railroad has constructed and is operating a railroad, which is fenced on each side, through township 17 north, range 18 east, I. M., from the town of Wagoner, on the north line of section 22, southeasterly to beyond section 36, passing through parts of sections 22, 23, 26, 25, and 36, a distance in a direct line of about three and a half miles, and intersecting five section lines. The fence is continuous, with no open public crossing, and but one private one about a mile southeast from Wagoner, kept closed by gates. Sarah Barnett, a Creek citizen, has taken the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 25 as her allotment, which is so intersected by the railroad that thirty acres are on one side of the railway and forty-five acres on the other. Minnie P. Cane, a minor, by her father as natural guardian, has taken as her allotment the NW. $\frac{1}{4}$ of Sec. 36, also intersected by the railway. These allotments are substantially improved and productive farms, having as a common boundary line the line dividing sections 25 and 36, which line is opened as a public road, or highway, up to each side of the railway. The railroad company has been requested by the authorities of the Creek Nation to open its fences and establish a highway crossing so as to permit an uninterrupted highway along this section line, but the railroad company refuses so to do. If this road were opened the allottees would have a convenient passage from one part of their lands to the other, whereas now it requires the travel of a mile and a half to go from one part of these intersected farms to the other, instead of a few rods only, owing to the obstruction of the fenced right of way of the railway. The railway company having been requested by the authorities of the nation to open the section line road-crossings has refused so to do, apparently claiming that it is under no obligation to permit the passage of highways, or to afford to proprietors whose lands are intersected by it a passage across its right of way. It claims the right itself to determine the necessity or propriety of a crossing, and to permit a crossing only if itself deems such to be necessary, "voluntarily and not because it is bound" to do so, and "without assuming any expense with reference to the same."

This clear definition of a claim so high and imperious as to assert itself sole judge of public and private right to intercommunication and construction and use of highways and private ways suggests at least a doubt if such claim is well founded. It can not be readily conceded that the public have granted all right to convenient passage by highways and to establish them, even to secure the more rapid means of transport by railways. I am of opinion that the claim thus made is not well founded.

The railway obtained its right of way under the acts of June 1,

1886 (24 Stat., 73), February 24, 1891 (26 Stat., 783), and June 6, 1894 (28 Stat., 86), extending the last cited act. Nothing in these acts purports to exempt the railway company from obligation to obey future legislation respecting passage of its lines that development of the country may necessitate. No matter is more essential to the public convenience, progress, and prosperity than that of passage from place to place over and by means of public roads and ways, and no grant, like that of right of way to the railway company in the present instance, can be held to exclude the power to declare and open highways without an express legislative declaration to that effect. *Charles River Bridge v. Warren River Bridge* (11 Pet., 420, 539); *Belmont Bridge v. Wheeling Bridge* (138 U. S., 287, 292). The right which the railway company obtained by its grant was therefore subject to the legislative power to establish or to authorize the establishing of such highways and roads as the future progress and development of the country traversed should make necessary.

The grant was an easement only and not of the fee. The act provided, Sec. 2 (24 Stat., 73; and 26 Stat., 783-4):

That said corporation is authorized to take and use for all purposes of a railway, and for no other purpose, a right of way *Provided further*, That no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines; and when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall have been taken.

The act of June 30, 1902 (32 Stat., 500, 502, Sec. 10), providing for allotment and disposal of the Creek lands, provides that:

Public highways or roads 3 rods in width, being 1 and one-half rods on each side of the section line, may be established along all section lines without any compensation being paid therefor; and all allottees, purchasers, and others shall take the title to such lands subject to this provision. And public highways or roads may be established elsewhere whenever necessary for the public good, the actual value of the land taken elsewhere than along section lines to be determined under the direction of the Secretary of the Interior while the tribal government continues, and to be paid by the Creek Nation during that time; and if buildings or other improvements are damaged in consequence of the establishment of such public highways or roads, whether along sections lines or elsewhere, such damages, during the continuance of the tribal government, shall be determined and paid in the same manner.

It is thus seen that while Congress has not expressly declared all section lines to be highways, and the act does not of its own force make them such, yet it expressly authorized the establishment of highways on all such lines without compensation for the land taken, requiring compensation only for buildings or other improvements taken or damaged. I have not before me the Creek laws and am unable to say by what proceedings, or in what manner, or if any provision is therein made defining how public roads are declared, established, or opened. The papers in the case, however, state that "the road is now open

upon said section line up to the railroad on each side." This is not disputed or questioned by the railway company, and I therefore assume that such action has been had by the proper authorities as is necessary under the power conferred by Congress for the establishment and opening of the highway on the section line in question. No doubt can exist of the power of Congress to grant such authority, and, assuming from the record that such authority has been exercised, and the road established, the refusal of the railroad company to open its fences is merely an unlawful obstruction of the highway which the police of the locality may lawfully by force remove.

If action has not in fact been taken by tribal authority under the act of Congress above cited, then such power necessarily inheres in the Indian Office, under supervision of the Secretary of the Interior as its head, to determine the necessity and to make such orders and enforce them.

The attorney for the Creek Nation, prosecuting the complaint on its behalf, prays "that the road on the section line dividing sections 25 and 36 be opened as provided by law." The Indian agent, in his letter of September 21, 1903, says that the national attorney—

requests that the Missouri Pacific Railroad Company be notified, if I determine that this crossing is a necessity, to open the same, and upon their failure or refusal to do so, that the Indian policemen be instructed to remove the fences at that point and open the road.

If by these statements it is intended to be indicated that no order establishing a road at this point or along this section line has in fact been made, and that the case is one of an application merely by the Creek authorities for an order by the Indian Office establishing a road, then, in my opinion, the record makes a proper case for action of the Indian Office, which may, under the act above cited and after notice to the railway company, consider the case, make an order establishing a road if in its judgment necessary or proper for the public convenience, and upon such order being made to enforce it by the Indian police removing the obstructing fences.

Approved:

E. A. HITCHCOCK, *Secretary.*

FOREST RESERVES—TEMPORARY WITHDRAWALS—MINERAL LANDS.

INSTRUCTIONS.

Directions given that specific exception be made of mineral lands in all orders for the temporary withdrawal of lands from entry and location with a view to determining whether they shall be included within a permanent forest reservation.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 21, 1903.* (W. C. P.)

The Department is in receipt of a letter of the 20th instant, asking whether temporary withdrawals for proposed forest reserves have the

effect of preventing mineral locations and entries being made upon the lands thus withdrawn.

The act of June 4, 1897 (30 Stat., 36), explicitly provides that nothing therein shall prohibit "any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating and developing the mineral resources thereof," and provides that any mineral lands in any forest reservation shall be subject to location and entry under the mineral laws. In view of this provision as to the effect of the creation of a forest reserve upon mineral lands included therein, there would seem to be no good purpose served in withdrawing such lands under a temporary order for the purpose of determining whether a permanent reservation shall be established.

Without discussing the effect in law of a temporary withdrawal which contains no excepting clause in respect of mineral lands, the Department is of opinion that good administration and the best interests of the public require that specific exception should be made of mineral land, in substantially the language of the statute, in all orders for temporary withdrawals in such cases. Your office is therefore directed to include such an exception in all orders hereafter issued.

It is presumed from your office letter that it was not intended to withdraw mineral lands from entry and location by the temporary orders heretofore issued, but that some of the local officers have given such orders a different construction. To properly carry out the intention of your office it would seem advisable to instruct the various local officers that it was not intended in any order heretofore issued to prevent locations and entries under the mineral laws.

OKLAHOMA LAND—GREER COUNTY—OCCUPANT—SECTION 1, ACT OF
JANUARY 18, 1897.

CLANCY *v.* PARISH.

The preference right of entry accorded by section 1 of the act of January 18, 1897, relating to lands in Greer county, Oklahoma, is limited to *bona fide* occupants of the land on March 16, 1896.

Under said section a widow is entitled to make entry of any land in said county, not exceeding one hundred and sixty acres, upon which her deceased husband had actually established residence prior to March 16, 1896, which she can perfect under her widow's right; and can also enter in her individual right other lands, not exceeding one hundred and sixty acres, of which she was an actual *bona fide* occupant on March 16, 1896, and can purchase, in her individual right, one hundred and sixty acres of additional land of which she was in actual possession on said date; but she has no right of purchase of additional land, as widow, under said section, by virtue of any occupancy of her husband.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 24, 1903.* (E. F. B.)

With your letter of September 5, 1903, you transmit the appeal of George W. Clancy from the decision of your office of July 24, 1903,

refusing his application to contest the cash entry, made by Annie Parish, March 15, 1902, for the SW. $\frac{1}{4}$ of Sec. 24, T. 8 N., R. 23 W., Mangum, Oklahoma, under the act of January 18, 1897 (29 Stat., 490), providing for the entry of lands in Greer county, Oklahoma, and giving preference rights to settlers.

The defendant is the widow of Martin P. Parish, who died *June 17, 1895*. On September 11, 1897, she made homestead entry of lots 1, 2, 3, and 4, Sec. 19, T. 8 N., R. 22 W., as widow of said Martin P. Parish, and on the same day she made homestead entry of the NE. $\frac{1}{4}$ of Sec. 24, T. 8 N., R. 23 W., in her individual right. Final proof on both of said entries was made March 15, 1902, and final certificates issued. On that day she also made cash entry for the SE. $\frac{1}{4}$ of said section 24, as the widow of Martin P. Parish, and at the same time made entry in her individual right for the SW. $\frac{1}{4}$ of the section.

George W. Clancy, the appellant herein, filed a protest against the allowance of the last mentioned cash entry, contending that the defendant had exhausted her right to purchase lands under the act of January 18, 1897, *supra*, when she made cash entry for the SE. $\frac{1}{4}$ of said section as widow of Martin P. Parish. You dismissed the protest, holding, in effect, that the defendant as the widow of said Parish had the right under the first section of said act to make homestead entry and purchase additional land, by virtue of her husband's occupancy, and had also the right to make homestead entry and to purchase additional land under the provisions of said section in her own right, by virtue of her individual occupancy.

The section of the act under which said entries were made is as follows:

That every person qualified under the homestead laws of the United States, who, on March sixteenth, eighteen hundred and ninety-six, was a *bona fide* occupant of land within the territory established as Greer county, Oklahoma, shall be entitled to continue his occupation of such land with improvements thereon, not exceeding one hundred and sixty acres, and shall be allowed six months preference right from the passage of this act within which to initiate his claim thereto, and shall be entitled to perfect title thereto under the provisions of the homestead law, upon payment of land office fees only, at the expiration of five years from the date of entry, except that such person shall receive credit for all time during which he or those under whom he claims shall have continuously occupied the same prior to March sixteenth, eighteen hundred and ninety-six. Every such person shall also have the right, for six months prior to all other persons, to purchase at one dollar an acre, in five equal annual payments, any additional land of which he was in actual possession on March sixteenth, eighteen hundred and ninety-six, not exceeding one hundred and sixty acres, which, prior to said date, shall have been cultivated, purchased, or improved by him. When any person entitled to a homestead or additional land, as above provided, is the head of a family, and though still living, shall not take such homestead or additional land, within six months from the passage of this act, any member of such family over the age of twenty-one years, other than husband or wife, shall succeed to the right to take such homestead or additional land for three months longer, and any such member of the family shall also have the right to take, as before provided, any excess of additional land actually cultivated or improved prior to

March sixteenth, eighteen hundred and ninety-six, above the amount to which such head of the family is entitled, not to exceed one hundred and sixty acres to any one person thus taking as a member of such family.

In case of the death of any settler who actually established residence and made improvement on land in said Greer county prior to March sixteenth, eighteen hundred and ninety-six, the entry shall be treated as having accrued at the time the residence was established, and sections twenty-two hundred and ninety-one and twenty-two hundred and ninety-two of the Revised Statutes shall be applicable thereto.

Any person entitled to such homestead or additional land shall have the right prior to January first, eighteen hundred and ninety-seven, from the passage of this act to remove all crops and improvements he may have on land not taken by him.

Prior to the passage of said act the lands in Greer county, Oklahoma, were not subject to settlement and entry under the land laws of the United States, and the occupancy of such lands, as public lands of the United States, prior to that date was without authority. No right whatever was secured by such occupancy until it was conferred by the act aforesaid, which gave to every person who on *March 16, 1896*, was a *bona fide occupant* of such land, the preference right for six months from the passage of the act, to make homestead entry of the land occupied, not exceeding one hundred and sixty acres, and to every such person, was also given the right to purchase any additional land of which he was in *actual possession on March 16, 1896*, not exceeding one hundred and sixty acres.

The actual *bona fide* occupancy of the land at the particular date named in the act is the test of the right to make any entry under said section. *Bobbitt v. Endsley* (30 L. D., 435). As Parish acquired no right whatever by reason of any occupancy of the land prior to March 16, 1896, and having died prior to that date, he left no right by virtue of his bare occupancy that was protected by the act, unless there is some provision in the statute recognizing that such occupancy could have been perpetuated by the occupancy of his widow at the specific date fixed by the act. If there is such provision, it must be found in the second paragraph of said section, which provides that in case of the death of any settler *who actually established residence* and made improvements on lands in said county prior to March 16, 1896, the entry shall be treated as having accrued at the time the residence was established, and sections 2291 and 2292 of the Revised Statutes, providing for the perfecting of entries by the widows or heirs of deceased entryman, shall be applicable thereto.

It will be seen that there are two classes provided for by said section. First: *Bona fide* occupants of the land on March 16, 1896—who need not be actual residents—who are given a preference right to make homestead entry of the lands occupied to the extent of one hundred and sixty acres, and to purchase the same quantity of additional lands of which they were in actual possession at said date. Second: The widow and heirs of a deceased settler, who actually

established residence and made improvements on land in said county, *prior to* March 16, 1896. In the latter class the entry may be made by the widow, or heirs, in case of her death, and such entry shall be treated as having accrued at the time the residence was established. The section secures to the widow and the heirs the same right that is secured by the general homestead law, and fixes the initial period of her right, not on March 16, 1896, but at the time the residence of the husband was established.

Under this section the widow is entitled to make entry of any tract of land in said county, not exceeding one hundred and sixty acres, upon which her deceased husband had actually established residence prior to March 16, 1896, which she can perfect under her widow's right, and can also enter in her individual right other lands not exceeding one hundred and sixty acres of which she was an actual *bona fide* occupant on March 16, 1896, and can purchase one hundred and sixty acres of additional land of which she was in actual possession on said date.

Her right to make entry of lands and to purchase additional lands is, however, by virtue of her individual occupancy at the specific date fixed in the act, and not by virtue of any occupancy of her husband, who was not in life at that date. But she has no right of purchase of any additional land under the second paragraph of said section, which confers upon her merely the widow's right under the general homestead law.

As the protestant does not claim any right by settlement upon the particular tract covered by his protest, the defendant will be allowed the right to elect which of the tracts she desires to purchase under her individual right, and the other entry will be canceled.

Your decision is modified.

FOREST RESERVES--LIEU SELECTION--OCCUPANCY--ACT OF JUNE 4,
1897.

JAMES M. MILLER.

Defined rights of occupancy, in the nature of easements and protected by statutes, which can not be injuriously affected by disposal of the fee of the servient lands, do not exclude such lands from selection under the act of June 4, 1897.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 24, 1903.* (J. R. W.)

James M. Miller appealed from your office decision of June 4, 1903, rejecting his application, number 3147, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 32, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 30, T. 6 S., R. 28 E., and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 21, T. 8 S., R. 27 E., N. M. M., Roswell, New Mexico, in lieu of lands relinquished to the United States.

The only question presented by the record arises from the fact that your office records show that February 8, 1900, the Pecos Valley and Northeastern Railway Company, prior to the date of Miller's application, filed its plat under the act of March 3, 1875 (18 Stat., 482), claiming right of way and station grounds, comprising eight acres in the northwest part of NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 21, T. 8 S., R. 27 E., one of the subdivisions applied for by Mr. Miller. This plat was approved by the Secretary of the Interior July 12, 1900. Miller's non-mineral and non-occupancy affidavit states that—

Said land is essentially non-mineral in character, has upon it no mining or other improvements, and is not in any manner occupied adversely to the selector except the right of way and depot grounds of the P. V. and N. E. Ry., now used by said company, being some 8 acres of the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 21, Tp. 8 S., of Rge. 27 E., to which 8 acres more or less your applicant waives his rights, if any.

Your office held that—

The act of June 4, 1897, *supra*, confines the right of selection to "vacant land open to settlement," and this is held to require proof by the selector that the tract applied for by him is not, as a matter of fact, occupied adversely to him. The language of the statute appears to sufficiently express the intention of Congress to limit the right of selection to land unoccupied as a matter of fact by anyone other than the selector, without regard to the character of such occupation.

* * * * *

It is admitted that that tract is occupied, not only by the right of way, or line, of the railroad, as to the effect of which, if alone to be considered, a reasonable doubt might be entertained, but, to the extent of about eight acres, as station grounds at Campbell Station. This implies an occupation of some importance and one liable to be continuing and increasing. I do not think a tract admittedly in that condition can properly be held to be subject to selection as unoccupied land, and therefore hold that the selection must be rejected as to the said NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 21, T. 8 S., R. 27 E.

The occupancy of the railroad company is not of the tract, nor does it affect any part of the tract outside the lines of its filed plat segregating that portion to which it claims rights. While its right in and to the portion it claims is a mere easement, that right is defined and fully protected by the law under which it is taken, so that a reservation of its right is not necessary in a patent granted by the government upon disposal of the tract. *Dunlap v. Shingle Springs and Placerville R. R. Co.* (23 L. D., 67); *Denver and Rio Grande R. R. Co. v. Clack* (29 L. D., 478). Defined rights of occupancy in the nature of easements granted and protected by statute and which can not be injuriously affected by disposal of the fee of the servient lands, do not in view of the Department exclude such lands from selection under the act of June 4, 1897.

Your office decision is therefore vacated and the case remanded to your office for further proceedings, in which the railway easement will be disregarded, and, if no other objection appears, the selection will be approved.

judgment apportioning the land as aforesaid between the said contestants being without legal warrant and authority is vacated and set aside. (*Sumner v. Roberts* 23 L. D., 201; *Hopkins v. Wagner et al.*, 23 L. D., 400.) In this connection, see also *Harding v. Moss* (24 L. D., 160); *Irwin v. Newsom* (24 L. D., 189); *Hall v. Mitchell* (24 L. D., 584).

In this case both the contestants claim to have entered upon the land in controversy immediately after twelve o'clock on the night of October 4, 1901, and to have made initial acts of settlement, and each claims to have followed his acts up within a reasonable time by permanent improvements and residence. It appears from the testimony that the said contestants entered upon the land at or about the same time and commenced their initial acts of settlement; that Dunagan drove a stake in the ground with notice of his claim affixed thereto; that he cut some brush and piled it by the stake, and chopped some holes in the ground with an axe; that after performing said acts of alleged settlement he left the land the same night, and was absent therefrom for three or four days, when he returned to the claim, commenced the erection of a house, and completed same in a short time and established residence therein. The testimony shows that Caldwell went upon the land on the night of October 4, 1901, with a load of lumber and immediately commenced building a house; that he erected the frame and put some of the weather-boarding on, and slept in the improvements that night; that the next day he went to the home of his wife's father, about eight miles distant, got his wife and children and some household goods, and returned to the claim, and that he and his family slept that night in the house, and have ever since maintained residence on the claim.

It appearing from the evidence that the initial acts performed by Caldwell when he entered upon the land on the night of October 4, 1901, were of a substantial and permanent character, showing clearly his intention to appropriate the land under the law, and that said acts were followed up with the utmost diligence by the erection of a house and the establishment of residence on the claim, the Department holds that he was the first actual settler on the land, and as such entitled to make entry for the whole of the tract in controversy.

The decision of your office, in so far as it holds the entry of Penola Sparks for cancellation, is affirmed, and it being the opinion of the Department that Caldwell has the superior right to the land in controversy, he will be allowed to enter the entire tract claimed by him and upon which he has settled, and it is so directed.

FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

FRANCIS W. GIRAND.

Defects in or omissions from the abstract of title of the base lands accompanying an application to select lands under the exchange provisions of the act of June 4, 1897, which are cured or supplied by the records of the land department, will be disregarded in passing upon the sufficiency of such application and the showing made in support thereof.

An application to select lieu lands under the exchange provisions of the act of June 4, 1897, can not be allowed where it is shown by the abstract of title accompanying the same that there is excepted and reserved from the tract assigned as base for the selection a strip of land for railroad purposes and that said base land is encumbered by a perpetual obligation to maintain fences inclosing such reserved strip.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 27, 1903.* (J. R. W.)

Florence A. Coffin, as attorney in fact for Francis W. Girand, appealed from your office decisions of June 20, and August 29, 1903, rejecting her two applications under the act of June 4, 1897 (30 Stat., 36), to select the fractional NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 1, T. 37 N., R. 28 W., in lieu of the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 13, T. 21 N., R. 7 E., G. and S. R. M., and to select the fractional NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 1, T. 37 N., R. 28 W., in lieu of the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 13, T. 21 N., R. 7 E., G. and S. R. M., both tracts assigned as base for the selections being in the San Francisco Mountains Forest Reserve, and the lands applied for subject to entry at the St. Cloud local office, Minnesota.

October 20, 1902, the applications were presented at the local office and rejected for defect of the abstract to show title in the applicant to the land assigned as basis therefor. The applicant appealed to your office, which affirmed the action of the local office. The objections to the abstract of title were that (1) it failed to show origin of title out of the United States; (2) two easements, hereafter noticed, granted or reserved by the deeds shown by the abstract. For these defects your office, June 20, 1903, rejected the selections. August 25, 1903, counsel for the applicant requested your office to—

return all abstracts and deeds to the district office for delivery to the party entitled thereto, so that the defect in the title can be cured and the abstract continued. While this is being done, I have the honor to request that further action in pursuance of said letter "R" be suspended.

Your office held, August 29, 1903—

that there was no condition attached to the rejection of Girand's applications to select; the rejection was outright subject to appeal by Girand. Such being the case, this office must decline to comply with your request.

Your office letter states that "the records of this office reveal also that patent has in fact issued from the government to the Santa Fe

Pacific Railroad Company." This being a fact of record in your office, it removed all objection to the title for failure of the abstract to show initiation of title out of the United States. An abstract of title is not of the substance of an exchange under the act of June 4, 1897. The act authorizes an "owner" of land in a forest reserve to relinquish it to the United States and to select land in lieu thereof. The requirement of an abstract of title from the grant by the United States back to the United States is purely an administrative one as evidence merely and to aid the land department in determining whether the relinquisher was owner, so that good title is vested in the United States by the deed of relinquishment. But the records of the land department are the primary evidence of the fact of passing of title out of the United States, and when such fact is thereby shown your office needs no further evidence by abstract of title or otherwise as basis for its action upon the title tendered to the government. Though the abstract of title may be in that respect defective, it is error of your office to reject the title for that reason. If its own records supply the omitted fact, such defect is formal merely, is cured by the record, and should be disregarded in disposal of the case by your office.

In the present case your office record showed that title passed from the government to the Santa Fe Pacific Railroad Company by patent. The abstract then showed that said company, April 16, 1898, conveyed to T. G. Norris, who June 4, 1902, conveyed to Francis W. Girand, who by deeds of July 5, 1902, and August 25, 1902, conveyed to the United States under the exchange provisions of the act of June 4, 1897. It only remained to consider whether the existence of other conveyances that might affect or divert the title was by the certificates to the abstract clearly excluded, and whether the title as shown by the deeds was free of liens, easements, or other incumbrances of objectionable character.

The certificate of the county recorder is:

that the within and following 11 pages constitute a full, true, correct and complete abstract of the title to the above described real property, according to the records of my said office, certificate and caption excepted from paging.

Examination of the abstract shows, commencing next after this certificate, but eight numbered pages, instead of eleven, as stated, the eighth being followed by another page not numbered of Girand's second deed of August 25, 1902, to the United States. This is followed by another page, not numbered, carrying the certificate of the clerk of the district court as to judgments and of the county treasurer as to taxes. The abstract is thus indicated to be three (3) pages short of what it consisted of at the time it received the certificate of the county recorder. This does not conclusively show that sheets have been removed, but destroys the evidential character of the abstract and prevents its approval until re-examined and re-certified by the county recorder.

The next question presented, passing this defect and assuming it to be removed, is, do the deeds shown by the abstract vest a title in the United States free of liens, easements, or other incumbrances of objectionable character?

Number 5 of the abstract shows a conveyance by warranty deed of T. G. Norris and wife, October 27, 1893, to the Arizona Lumber and Timber Company, a corporation, whereby the—

grantors grant, sell and convey unto said corporation all the trees and timber 15' and over at the butt, standing, growing or being on Section Thirteen (13), Township Twenty-one (21), Range Seven (7) East, together with the permanent easement of way and the right to the use of any and all parts of said tract of land for the purpose of logging and lumbering over, across and upon said land until said timber is removed.

This was over four years prior to the conveyance of the land by the railroad company to Norris, April 16, 1898, but as Norris's deed was a warranty, his title when obtained inured by estoppel to cure the defect of title in his conveyance.

Page 6 of the abstract shows that July 1, 1902, the Arizona Lumber and Timber Company, incorporated, by its president and secretary thereunto authorized by its board of directors, by quitclaim deed, released and reconveyed the land to Thomas G. Norris. Your office, however, held that "there is nothing shown as to the release of the *permanent* easement granted in the deed from Norris to the Arizona Lumber and Timber Company in 1893." Therein your office clearly erred. The Arizona Lumber and Timber Company had no other interest in the land except the easement to enter and remove the timber. The easement though in the deed stated to be "permanent" was "for the purpose of logging and lumbering," and was only "until said timber is removed." The easement had no more permanence than its purpose. It was an incident to the grant of the trees. When the right to remove the trees terminated, or was well released, the easement also ceased.

The deed by the railroad company to Norris, page 4 of the abstract, contained a clause:

Reserving to said grantor, all that portion of said land, if any, which lies within lines drawn parallel with and one hundred feet in width on each side of the center line of its railroad, as now constructed or hereafter to be constructed, and any greater width where necessary permanently to include all their cuts, embankments and ditches, and other works necessary to secure and protect the main line of said railroad.

The "one hundred feet in width on each side of the center line of its railroad" is not conveyed by the deed. The reservation is not of an easement or right of way, but of the land itself, and as there is prefixed to the abstract a blue print chart purporting to show the location of such reserved land excepted from the deed, this chart, if properly authenticated, would make the excepted and reserved land definite and certain, segregating it from the government subdivision in which

it lies, and thereby show the area and portion conveyed to Norris, and, that being so ascertained, the remaining fractional parts of the tract constitute valid base for selections under the act of June 4, 1897. Ricard L. Powell (32 L. D., 121). The blue print chart, however, is not authenticated. It precedes the certificate of the county recorder, and is not referred to or included in that certificate, which certifies only "the within and following 11 pages," of which only eight have reached the Department. Nor is it certified by the chief engineer officer of the railroad company. It is annexed to the abstract and may have been intended to be a part of it, and to be covered by the authenticating certificate, but its position and the wording of the certificate exclude it.

The deed of the railway company contains the further reservation: also reserves a right of way fifty feet wide for pipe line or open ditches or ditch, where necessary to convey water to said railroad, and wider if necessary.

This reservation is of an easement or right of way only. The chart does not indicate an assertion, or location and fixing of such right upon the ground, but there is no limitation within which it shall be located and defined. While the nature of the easement is not in itself objectionable, and it is such as the Secretary of the Interior might approve upon the submission of a map conformable to rules and regulations, the reservation of such easement is objectionable because of its indefinite character as to location upon the ground and as to time when such water conduit or canal may in future be made. As it could not be granted if presented as an application for the Secretary's approval, a conveyance of the land subject to such a reservation can not be accepted. It is therefore necessary that this reservation shall be released by the company before the title can be accepted.

Another objectionable feature of the title tendered is that in the deed of the railroad company to Norris the consideration is stated to be \$1600 paid—

and the further consideration that the said T. G. Norris and his grantees, and all subsequent grantees shall build and maintain at all times in good repair a lawful fence along the right of way on the herein described land at all places where the said land adjoins the right of way of the said Santa Fe Pacific Railroad Company.

Whether this is to be construed as a continuing agreement which the successive grantees become parties to and assume performance of by accepting the title, or is, as stated, a part of the consideration for failure of which title would be forfeited, or is a covenant running with the land, for breach of which damages would be awarded and imposed upon the land, is here immaterial, as it clearly is within the definition of an incumbrance, which is—

any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee.

The United States can not under the act of 1897 accept title to land burdened with the perpetual obligation to maintain fences, and this part or obligation of the consideration clause of the railway company's deed must be released before the title can be accepted.

The local office properly rejected the applications, as the title shown by the abstract did not show origin out of the United States. But when the applications reached your office, and its records showed that title had passed from the United States to the railroad company, from which the applicant derived title, and the abstract of title certified by the county recorder to be "full, true, correct and complete," showed that no other grant of the land had been made by the patentee company, the title should not have been rejected because the patentee had not recorded its patent. Your office should consider its own record, together with the abstract of title, in determining if the applicant, proponent of the title, was owner of the land he assigned as base for the selection.

No other objections to the title proposed are disclosed by the record now here than the two above mentioned in the deed by the railroad company. If they can be removed by the proponent within a reasonable time, prompt adjustment of his right to make selection and economy of administration require that he be permitted to do so, rather than to be required to make another selection necessitating another examination of the record. The applicant will therefore be allowed reasonable time, to be fixed by your office, to complete and perfect his abstract and to remove from the title to the land the two incumbrances noted, upon compliance with which requirements, if no other defect appear, the applications will be approved.

Your office decision is vacated, and the papers are herewith returned for further proceedings appropriate thereto.

INDIAN LANDS—RESERVATION—TOWNSITE—ACTS OF JUNE 27, 1902,
AND FEBRUARY 9, 1903.

RICHARDS TOWNSITE.

Section 5 of the act of June 27, 1902, appropriating a portion of the ceded Chippewa lands in Minnesota to be selected and set apart as a reservation for experimental forestry purposes, was not repealed by the act of February 9, 1903, relating to townsites; and when said lands had been selected and segregated by the land department, in accordance with said section, they were excluded from any other appropriation, by townsite entry, or otherwise.

Promulgation of an order of withdrawal of lands for the purpose of carrying into effect the provisions of section five of the act of June 27, 1902, is not essential, since said lands were never opened to settlement or entry; but where prior to final action under said act, in the absence of such promulgation and in ignorance of the order of withdrawal, a townsite settlement was in good faith made upon lands included therein, under the act of February 9, 1903, the land department may modify the order of withdrawal and exclude therefrom the lands embraced in the townsite application.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 28, 1903.* (J. R. W.)

The Commissioner of Indian Affairs, by letters of October 15, and 22, 1903, reported the occupation by certain parties of section 28, township 145 north, range 28 west, 5th P. M., in the ceded Chippewa Reserve, Minnesota, for townsite purposes, under the act of February 9, 1903 (32 Stat., 820), and requested an early decision upon the questions presented, so that he might advise the acting agent at Leech Lake Agency.

October 17, 1903, the matter was referred to your office for report. October 26, 1903, your office reported that the lands are within the area of about 300,000 acres designated by the plan submitted by the Department of Agriculture and approved by this Department April 23, 1903, to be temporarily withdrawn from disposal, from which are to be selected by the Forester of the Department of Agriculture the 200,000 acres of pine lands authorized by section 5 of the act of June 27, 1902 (32 Stat., 400). Your office was of opinion—

First. That the act of February 9, 1903, *supra*, authorized townsite settlement and entry on the ceded lands from its passage.

Second. That the approval by this Department April 23, 1903, of the plan submitted by the Department of Agriculture operated as a withdrawal of all lands within the designated area from any appropriation or settlement until the selections contemplated could be made and the excess of land released from its operation.

Third. That, as Congress intended by the act of February 9, 1903, to allow townsite settlement and entry of "pine land" without waiting sale and removal of the timber, the minimum price to be paid upon such entries must include the appraised value of the timber thereon, in addition to the price of the land.

Your office recommended that no townsite settlement or entry be allowed within the area of lands withdrawn April 23, 1903.

The townsite claimants asked and were allowed an oral hearing before the Department. They contended:

1st. That it is not in the power of the Department to withdraw lands in any part of the ceded reservations from operation of the act of February 9, 1903.

2d. That, granting the power to make such withdrawal, the attempted one is inoperative, because (a) no formal order was made or promulgated, and (b) had it been formally made and promulgated, it is ineffectual, because it includes an area in excess of the reservation authorized by the act of June 27, 1902.

3d. That as no final action has been taken under the act of June 27, 1902, the Department may modify its action of April 23, 1903, and permit the entry applied for, and should do so under the circumstances of the present case.

The first and second contentions can not be sustained.

The act of June 27, 1902, appropriated 200,000 acres of the pine lands, termed forestry lands, to be selected and set apart for experiment in reforestation, which lands, with not to exceed 25,000 acres of the included or contiguous agricultural lands necessary to economical administration of the forestry lands, were constituted a forest reserve under the act of March 3, 1891 (26 Stat., 1103). The act of February 9, 1903, did not in terms or by necessary implication repeal this provision. There remains a large area of ceded lands upon which the later act may operate. The policy of Congress has been to eliminate from the forest reserves all private holding of land within them. To that end the exchange provisions of the act of June 4, 1897 (30 Stat., 36), were directed. By the act of March 3, 1891, the President was authorized "to set apart and reserve" as "public reservations" lands as forest reserves, and by the act of June 27, 1902, "the forestry lands" upon removal of the timber—

shall without act, resolution, or proclamation forthwith become and be part of a forest reserve, the same as though set apart by proclamation of the President in accordance with the act of Congress.

There is no mistaking this language, or room for construction. Congress having plenary power over the disposal of public lands, set apart and dedicated this area from the ceded lands, and all that remained for the land department was to select and segregate the reservation from the other ceded lands. When that is done, such dedication is complete and excludes any other appropriation, by townsite entry, or otherwise, until Congress relieves the land from such reservation, which clearly is not done by the act of February 9, 1903, there being other lands upon which that act may operate.

Nor is the second contention well founded. The land department is charged with the duty of segregating from the ceded lands the reserve created by Congress. The general body from which it is to select the reserved land is broken and intermingled with allotted lands, none of which can be taken, and agricultural lands, only a limited amount of which can be included, and the government is engaged in a public work whereby an uncertain area of lands in the general body from which the reserve is to be taken will be flooded by the Lake Winnibigoshish dam and reservoir, for the improvement of the Mississippi River. The engineers are at work, but have not yet completed their survey of the flowage lines, and it can not be told with certainty what lands will be flooded and rendered unsuitable for reforestation and unfit to be included in the forest reserve.

Confronted by these conditions the land department must of necessity withdraw from present appropriation what may prove to be a somewhat larger area of land than is to be permanently reserved, so that it can execute the will of Congress and have, when such factors

now uncertain are determined, the area of land that Congress has dedicated. In determining the area of the temporary withdrawal, it has exercised its best judgment, and its action in that respect is in accord with long established practice. There is, however, no ascertained or certain excess. Until an excess is ascertained it can not be said that the withdrawal made is in excess of authority conferred.

But it is insisted that no withdrawal was in fact made. This contention rests upon an assumption that a withdrawal can only be made by formal order promulgated as a decision or order to the local office and the public. The lands in question were not open to settlement and the same need of promulgation did not exist as in case of lands open generally to appropriation under the land laws. It would not ordinarily occur that population would gather and make an urban settlement where the surrounding lands are not subject to individual appropriation.

Executive orders are, however, merely rules for action of the executive departments, and are in their nature effective from their date, whether promulgated or not. As no entry could be made at the local office for these ceded lands, it was not necessary that the local office be advised of the withdrawal.

Nor is it open to doubt whether there was a withdrawal of these lands. April 18, 1903, your office reported to the Department two plans of proceeding, recommending adoption of that in which a certain area circumscribed and indicated on an accompanying map be withheld from appropriation, and that the area—

outside the first selection and within the heavy black line be opened neither to lumbering nor settlement until the Bureau has made its final selection therein. The Bureau of Forestry is prepared to make a first selection under this second plan of approximately 105,000 acres, of which 90,000 is classed as pine land and 15,000 as agricultural land, upon the following two conditions:

(a) That for all land included in the first selection which shall hereafter be found to lie within the flowage line now being delineated by the War Department, an equal area shall be allowed to the reserve in further selections.

(b) That for all lands within the limits of the first selection now in process of allotment, or which shall hereafter be allotted to the Indians (and which are included in the approved lists received by this Bureau from the Secretary of the Interior), an equal area shall be allowed to the reserve in further selections.

April 23, 1903, such recommendation was approved by the Department. This was all that was necessary to effect a valid withdrawal of lands so circumscribed. For reasons therein appearing and hereinbefore shown, a definite selection limited to the area fixed by law and naming the particular sections was not then, nor is now, possible, and all that was possible was a temporary and approximate withdrawal preparatory to definite selection when data should be obtained enabling the land department to make a definite and final one.

That the Department can modify its action of April 23, 1903, is no

doubt true, no final action having been taken as to designation of the forestry lands appropriated by the act of June 27, 1902. While it is not essential to the effect of an order of withdrawal that it should be promulgated to the public, yet the Department may properly consider the fact that no promulgation or notice to the public had been made of such order in considering the claims of those acting in ignorance of it. In the present instance, the townsite settlement has been made in faith of the act of February 9, 1903, and in entire ignorance of the action of the Department, April 23, 1903. It is therefore deemed by the Department proper to modify the order of April 23, 1903, so as to exclude therefrom the lands in section 28, township 145 north, range 28 west, embraced in the Richards townsite application.

That there may not be further question as to the order of withdrawal or any action by the public in ignorance of it, you are hereby directed to at once temporarily withdraw and reserve from disposition other than that provided by the act of June 27, 1902 (32 Stat., 400), all the lands included in departmental action of April 23, 1903, except those lands covered by the Richards townsite application, and you will promulgate this order and your order of withdrawal by transmitting a copy of each to the local land office and to the Commissioner of Indian Affairs for his information.

FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

AUGUSTE FERRIER.

An application to select lands under the exchange provisions of the act of June 4, 1897, must be accompanied by a certificate from the clerk of the proper court of the county wherein the base lands are located, showing that there are no judgments of record or suits pending affecting the title to said base lands, and also by an affidavit of the applicant that such lands have not been assigned as base for any other application made by him under said act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 28, 1903.* (J. R. W.)

Auguste Ferrier appealed from your office decision of June 19, 1903, rejecting his application under the act of June 4, 1897 (30 Stat., 36), to select the SE. $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 20, and the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 29, T. 17 N., R. 4 E., B. M., Boise, Idaho, in lieu of land in Sec. 33, T. 4 N., R. 15 W., S. B. M., California, situate in the Pine Mountain and Zaca Lake Forest Reserve, Los Angeles county, California.

The application was rejected by the local office for want of a certificate from the clerk of the proper court of Los Angeles county, California, showing that there are no judgments of record or suits pending affecting the title to the land assigned as base for the application and for lack of an affidavit by Auguste Ferrier that such land

had not been assigned as base for any other application made by him. The action of the local office, on Ferrier's appeal to your office, was affirmed.

The appeal here assigns both these rulings as error, and are in substance that no certificate of the clerks of the courts should be required, but that the certificates of the abstract company and of the county recorder should be accepted as sufficient, and further that no affidavit should be required from the applicant that he had not assigned the same land here offered as base for previous applications under the act.

It would be sufficient here to say that neither the certificate of the recorder nor of the abstract company upon the present abstract professes to negative or speaks upon the existence of judgments, so that the abstract is wholly deficient in that respect. But had the certificates professed to speak to that question, there was no error in your office decision.

The land department must take cognizance of the law that the United States circuit and district courts hold terms in that county, and that proceedings therein may affect the title to such lands, and judgments in those courts are liens upon lands in that county, as well as those in the state courts. The recorder of said county is charged with no official duty in regard to the proceedings in the courts or to judgments by them rendered, and his certificate, if made, is extra-official, amounting to no more than an unofficial statement that he has examined the records in the offices of the clerks of the courts and finds no suits pending, or judgments that affect or are liens upon the title to such lands. Such a certificate is not within the obligation of his oath of office, or within the liability of his official bond, if untrue. The mere statement of the legal effect of such certificate shows that it has no evidential value and adds nothing to the credit due to the abstract.

Nor is the certificate of the abstract company of value, for no law of California gives to abstracts of title any evidential force, or gives to abstracters an official standing, or requires of them a bond. All that has been said respecting the certificate of the county recorder applies equally to the abstracter's certificate.

If it were otherwise, the same result must follow, for one requiring an abstract of title in a purchase or exchange of land may stipulate for such abstract as he desires and is willing to credit. The regulations (31 L. D., 374) require that the abstract of title shall be "duly authenticated." Anderson's Dictionary of Law gives this definition:

Authentic. In legal parlance, duly vested with all formalities and legally attested.

Authentication. Official, legal attestation to a thing done; as, of a copy made of an act of legislation, or of the record in a court or other public office.

As the law of California gives abstracters no official status whereby their certificates have evidential value, their abstracts can be authenticated only when certified by the officers having custody of the records.

to the condition of which they respectively certify. The requirement is reasonable and must be complied with.

Nor is the requirement of the applicant's affidavit, that he has not made the same land the base for any former application, an unreasonable one. It is a matter of common experience in administration of the act of June 4, 1897, that parties repeatedly use the same base for different applications at different land offices, causing great confusion and delay. The applicant knows whether he has so done or not, and the requirement that he make oath to such fact when presenting his applications tends to check this reprehensible practice and is easily complied with by one acting in good faith.

Your office decision is affirmed.

SWAMP LANDS—RESERVATION FOR SCHOOL PURPOSES.

STATE OF MINNESOTA.

Swamp and overflowed lands lying within sections sixteen and thirty-six in the four townships in the White Earth Indian reservation, in the State of Minnesota, ceded to the United States under the act of January 14, 1889, did not pass to the State under its grant of swamp lands made by the act of March 12, 1860, said sections being on that date in reservation for school purposes by virtue of the acts of March 3, 1849, and February 26, 1857.

Assistant Attorney-General Campbell to the Secretary of the Interior,
December 3, 1903. (G. B. G.)

By your reference of November 14, 1903, I am asked for an opinion upon the question presented in a communication to you from the Acting Commissioner of the General Land Office, dated November 9, 1903. Briefly stated, that question is, whether certain swamp and overflowed lands, falling within sections sixteen and thirty-six upon survey and lying within the four townships in the White Earth Indian Reservation, in the State of Minnesota, which were ceded to the United States under and pursuant to the act of January 14, 1889 (25 Stat., 642), passed to the State under its swamp land grant of March 12, 1860 (12 Stat., 3).

In the case of the State of Minnesota (27 L. D., 418), it was set out that the White Earth Indian Reservation was established by the treaties of May 7, 1864 (13 Stat., 693), and March 19, 1867 (16 Stat., 719), that said reservation was not made in pursuance of any law enacted prior to the act of March 12, 1860, granting swamp lands to that State, and held that lands of the character granted, lying within said reservation, are not *thereby* excluded from the operation of said grant. No question appears to have been made in that case as to the status of sections sixteen and thirty-six within the reservation, and the effect of the special legislation affecting these sections existing at the date of the

swamp grant was not considered. It was merely held that there was no such Indian claim or occupancy existing at that date as prevented the State's swamp land grant from attaching generally to such of the lands within the four ceded townships as of the character granted. The question now presented requires consideration of this legislation.

By the eighteenth section of the act of March 3, 1849 (9 Stat., 403, 408), sections sixteen and thirty-six in each township in the Territory of Minnesota were "reserved for the purpose of being applied to schools in said Territory and in the States and Territories hereafter to be erected out of the same." By the fifth section of the act of February 26, 1857 (11 Stat., 166, 167), it was declared:

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

Whatever else may be the legal effect of these acts upon the lands in controversy, they certainly put them in reservation with an ultimate purpose of donation to the State of Minnesota for school purposes. This Congress undoubtedly had the right to do, without regard to their status as Indian lands, and that it was its purpose to do so is equally clear. The reservation so created by said act of March 3, 1849, and perpetuated by the said act of February 26, 1857, existed at the date of the swamp grant to the State made by the act of March 12, 1860, *supra*. Now, this act in extending to the State of Minnesota the provisions of the act of September 28, 1850 (9 Stat., 519), granted to said State all of the swamp and overflowed lands therein, subject to the proviso:

That the grant hereby made shall not include any lands which the government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act.

In the case of *Wilcox v. Jackson* (13 Pet., 498, 513) it was held that when a tract of land has been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and no subsequent law or proclamation or sale would be construed to embrace it or to operate upon it, "although no reservation were made of it." This rule has been since reaffirmed by the supreme court, especially in the cases of *Leavenworth, Lawrence and Galveston R. R. Co. v. United States* (92 U. S., 733); *Newhall v. Sanger* (*id.*, 761); and in the comparatively recent case of the State of Louisiana (30 L. D., 276), the State's claim to a section sixteen under the swamp land grant of 1850 to the State was denied upon the ground that said section had been reserved for the support of schools therein by the tenth section of the act of March 3, 1811 (2 Stat., 662, 665), and that, although there had never been a substantive grant of school lands to the State, the reservation of the

tract was sufficient to take it out of the swamp grant, notwithstanding it did not come within any exception found in the swamp grant.

Directly in point, too, is the decision of the supreme court in the case of *Beecher v. Wetherby* (95 U. S., 517, 523), wherein was considered the effect of a clause in the act admitting the State of Wisconsin into the Union, similar to that above quoted from the fifth section of the act of February 26, 1857, *supra*. In that case it was said:

It was, therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted.

With better reason, therefore, it should be held that in instances like the present one, arising under the swamp grant of 1860, where lands "reserved" are in terms excepted therefrom, said grant did not embrace them or operate upon them.

The decision of the supreme court in the case of *Minnesota v. Hitchcock* (185 U. S., 373) does not in any sense control the questions here presented, and nothing was said in that case which in any wise contravenes the opinion I have expressed herein. In that case the State of Minnesota was claiming sections sixteen and thirty-six in the Red Lake Indian Reservation as part of its school grant, and commenced a suit in equity in the supreme court of the United States to enjoin the then Secretary of the Interior and the Commissioner of the General Land Office from selling any of said sections lying within the reservation as it existed January 14, 1889. The main contention of the defendants on behalf of the United States was in substance that the tract of country involved was a reservation set apart and appropriated to the uses of the civilization and support of the Indians by the act of January 14, 1889, *supra*, that this was a reservation or disposition of said lands, that the school grant to the State did not attach to any particular lands until surveyed, and that these lands never became "public lands," and so never became subject to the State's school grant. The government's contention was sustained upon the ground, chiefly, that the act of February 26, 1857, did not make a present grant of sections sixteen and thirty-six to the State, but only implied a promise of a future grant, and that before these lands had been surveyed Congress had by said act of 1889 dedicated them, along with other lands, to the civilization, education, and support of the Indians.

The fact that Congress chose by the act of January 14, 1889, to dedi-

cate for the civilization and support of the Indians lands which it had previously reserved for the support of schools, furnishes no argument that it was intended by the act of 1860 to grant such of them as were swamped and overflowed, without regard to their status as school lands. It was within the authority of Congress to do the latter as well as the former; but it can not be presumed that it was the intention to grant to the State for one purpose lands which were then in reservation, under a prior grant to the State, for another purpose, and, as has been seen, lands in reservation for any purpose at the date of the swamp grant were in terms excluded therefrom.

I am of opinion that the swamp and overflowed lands lying within sections sixteen and thirty-six in the townships referred to did not pass to the State under the grant of Congress to that State made by the act of March 12, 1860, *supra*, and advise that no claim thereunder to said lands be recognized, and that the lists submitted be returned without approval.

Approved:

E. A. HITCHCOCK, *Secretary*.

SWAMP LANDS—INDIAN RESERVATION—ACT OF MARCH 12, 1860.

STATE OF MINNESOTA.

Lands swamp and overflowed and rendered thereby unfit for cultivation, not reserved or granted by the United States on March 12, 1860, the date of the act granting swamp lands to the State of Minnesota, passed to the State under said grant, and are therefore excepted from the provisions of the act of January 14, 1889, relating to the disposition of the ceded Chippewa lands.

Assistant Attorney-General Campbell to the Secretary of the Interior,
December 3, 1903. (J. R. W.)

I am in receipt, by reference of November 14, 1903, of the letter of the Acting Commissioner of the General Land Office of November 13, 1903, respecting the claim made by the State of Minnesota that the swamp and overflowed lands within the Mississippi Chippewa Indian Reservation passed to the State under the act of March 12, 1860 (12 Stat., 3), and are not subject to disposal for the benefit of the Indians under the act of January 14, 1889 (25 Stat., 642), with request for my opinion upon the matter therein presented.

It appears from the papers transmitted that the lands in question were ceded to the United States by the treaty of February 22, 1855 (10 Stat., 1165), and remained unreserved public lands of the United States until the treaty of May 7, 1864 (13 Stat., 693). By the act of March 12, 1860 (12 Stat., 3), the provisions of the Arkansas swamp land act of September 28, 1850 (9 Stat., 519), were extended to the States of Minnesota and Oregon.

The uniform holding of the supreme court has been that the swamp land grant was one *in presenti* of all land then of the character granted, lacking only identification to complete the right of the State to the land so granted.

This construction is the one unvaryingly adhered to by the court from its decision in *Railroad Company v. Fremont County* (9 Wall., 89), to the present time, in many fully-considered decisions, and is not longer subject of doubt or question. Upon similar facts, in *State of Minnesota* (27 L. D., 418), the Department held that swamp lands within the White Earth Reservation passed to the State under its grant.

Title having passed to the State by the grant, the subsequent reservation did not affect the State's right, though it might delay the identification of the granted land. When such identification is made, the right of the State becomes complete.

I am therefore of opinion that upon the facts presented lands swamp and overflowed and unfit thereby for cultivation, not reserved or granted by the United States, March 12, 1860, passed to the State by its grant, and as property of the State are excepted from the provisions of the act of January 14, 1889. This does not include sections sixteen and thirty-six (see opinion of this date involving status of the four ceded sections in the White Earth Reservation).

Approved:

E. A. HITCHCOCK, *Secretary*.

CORRECTION OF SURVEY—LANDS OMITTED FROM SURVEY.

GEORGE S. WHITAKER ET AL.

While the government may correct its surveys so as to extend them over lands improperly omitted therefrom, yet when such surveys have been approved, they should not be disturbed, especially after the lands surveyed have been disposed of and after a long lapse of time from the approval of the survey, except upon the clearest proof of an evident mistake or fraudulent conduct on the part of those charged with the execution of such survey.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 5, 1903.* (E. F. B.)

With your letter of October 13, 1903, you transmit the appeal of George S. Whitaker and James A. Graham from the decisions of your office of July 1, and August 8, 1903, rejecting their joint application for the survey of two islands in the Platte river, in Sec. 7, T. 8 N., R. 14 W., and Sec. 12, T. 8 N., R. 15 W., Nebraska.

It is alleged that one of the islands contains about sixty acres and that the other contains about forty acres; that they existed at the date of the township survey in about the same condition as they appear

to-day and were omitted from survey at the time of the survey of the public lands in said township; and that the channels on each side of the islands have never changed their course since the date of the township survey. It is also alleged that an application for the survey of said islands was presented to the land department in 1897, which was allowed, but that no survey was made for the reason that the deputy charged with such survey reported that the conditions as stated in the application did not exist, that the river had changed its course, and that the alleged islands were not in fact islands but were connected with the land previously surveyed and disposed of by the government. The applicants state they have caused said channels to be examined by many persons familiar with the islands and they submit affidavits showing that the channels on either side of said islands have not changed their course in the least and are now just as they were when the township surveys were made. They allege that the report of said deputy was false and fraudulent and that the survey of said lands was not made under the application of 1897 because the land department was misled by the false and fraudulent report of the deputy surveyor. They ask that a hearing be ordered to enable them to show that said report was fraudulent and untrue so far as it tends to show that the river had changed its course with respect to said islands and that said islands are connected with land previously disposed of by the government.

Many other statements are made, under oath, in support of their application, but the foregoing are substantially the material facts upon which the application must depend.

William H. Kilgore, Thomas McBride and Peter McBride have filed affidavits, claiming to be the owners, individually, of lands on the shores opposite said islands, and protest against the granting of said application. Kilgore alleges that he is the owner of lot 5 in said section 7, and of lots 6 and 7 in said section 12. The lands claimed by Kilgore comprise all the land on the north shore opposite said islands. Peter McBride alleges that he is the owner of lots 10 and 11 in said section 7, and Thomas McBride alleges that he is the owner of lot 8 in said section 12. These comprise all the land on the opposite shore, south of the islands. The protestants in their affidavits allege that they are the owners in fee of said islands, by reason of their riparian rights growing out of their ownership, respectively, of the lots on the opposite shores, under patents from the United States; that opposite the above-mentioned lots in said section 12, within the Mosquito channel of the Platte river, is a small island of about eighteen or twenty acres, with "some other tow heads that was not surveyed;" that in said channel opposite the above-mentioned lots in said section 7 is another island, containing twelve or fifteen acres, which is also unsurveyed; that at the time of the survey of the public lands in said township these islands were subject to overflow and were under water at

certain seasons of the year; and that about twelve years ago Kilgore placed a dam across the channel, since which time the islands do not overflow and have gained in size by reason of the recession of the water in the channel.

The island which it is alleged contains about sixty acres is situated in the southeast quarter of said section twelve. Kilgore in his affidavit calls attention to the fact that the government has disposed of 132 acres in said quarter section according to the township plat of survey, leaving a deficiency in the quarter section of only 28 acres, including the beds of the channels. Upon the township plat of survey more than half of that deficiency is reported as water. It is therefore evident that if there is now such an island opposite lots 6 and 7 on the north and lot 8 on the south of the stream in said section 12, it must have been formed since the date of survey by the shifting of the channels, or else the government has sold a great deal more land in said quarter section than actually existed.

The plats of survey of these townships show many islands in the different channels of the Platte river, some of which were surveyed, but by far the greater number were left unsurveyed. The width of the unsurveyed islands is always shown by actual chaining whenever they were crossed by the section line or exterior boundary. It is reasonable to presume that the deputy surveyor did not consider them of sufficient importance to survey, either because of their limited area or because of the character of the island, many of them being mere sand bars, or tow heads.

While the government may correct its surveys so as to extend them over lands improperly omitted therefrom, yet when such surveys have been approved, they should not be disturbed, especially after the lands surveyed have been disposed of and after a long lapse of time from the approval of the survey, except upon the clearest proof of an evident mistake or fraudulent conduct on the part of those charged with the execution of such surveys. The mere fact that a small body of land was left unsurveyed is not of itself a sufficient reason for correcting the survey. The correctness of the survey was recognized when it was approved and none but the government can call it in question.

Upon a full consideration of all matters submitted in connection with the application, there appears to be no reason for granting the same or for ordering the hearing prayed for.

The application is denied.

SOLDIERS' HOMESTEAD—WIDOWS AND MINORS—RESIDENCE.

ANNA BOWES.

The widow or minor orphan children of a deceased soldier or sailor, making homestead entry under section 2307 of the Revised Statutes, must comply with the requirements of the homestead laws as to residence and cultivation to the same extent as a soldier or sailor making entry under section 2304.

The right to make entry under section 2307 is not transferable, and any contract entered into either before or after entry, which contemplates the sale thereof, is in violation of law.

Directions given that all persons having uncompleted homestead entries made under section 2307 be immediately notified, by registered letter to the last known address of the party making the entry, as shown by the records of the local office, that if they desire to retain such entries they will be required to begin actual residence upon the land with six months from the issuance of such notice, or, if they so elect, they will be permitted to relinquish their entries, without prejudice to their homestead rights, by giving notice of such election within the same time.

Secretary Hitchcock to the Commissioner of the General Land Office.
(F. L. C.) *December 7, 1903.* (F. W. C.)

This is the appeal of Anna Bowes from your office decisions of April 13, and June 1, 1903, holding for cancellation her homestead entry, No. 2278, allowed June 6, 1901, under the provisions of section 2307 of the Revised Statutes, for the SW. $\frac{1}{4}$ of Sec. 15, T. 24 N., R. 33 W., Broken Bow land district, Nebraska.

Mrs. Bowes being the widow of a sailor, who was honorably discharged from the navy of the United States after having served therein for more than three months during the war of the rebellion, and who if living would, therefore, be entitled to a homestead under the provisions of section 2304 of the Revised Statutes, he not having in his lifetime exercised such right, she as such widow, being unmarried, was qualified to make the entry in question.

The questions involved in this appeal arose upon the report of a special agent of your office, in substance, that on the same day said entry was allowed, Mrs. Bowes entered into an agreement with the Standard Cattle Company whereby and whereunder, for a nominal consideration, she leased the land covered by her entry for a term of five years, and agreed to renew the lease at the expiration of that time, and further agreed that the cattle company should have the "option of purchasing the premises hereby leased at any time during the continuance of this or a succeeding lease—when said party of the first part [Anna Bowes] shall be able to deed and convey said premises—for the sum of one hundred and twenty-five dollars cash." The special agent's report further showed that it was not the purpose of Mrs. Bowes to reside upon the land covered by her entry; that it was made for the exclusive use and benefit of the Standard Cattle Company; and that it was one of a number of entries made in the interest of that company, which expected to use the land for grazing purposes.

Because of the importance of the question involved and that decision thereon might affect a large number of entries, a request for permission to orally present the matter was granted and the case has been elaborately presented both orally and by printed brief.

There is no question as to the facts. The agreement is confessed, and it is admitted that it is not now and never was the intention of Mrs. Bowes to reside upon the land. But it is argued that under the law and decisions of this Department a person who makes an entry under section 2307 of the Revised Statutes is not required to reside upon the land, and that this being so there is no law or well-considered public policy which prohibits such contracts as evidenced above, in relation thereto.

Section 2307 of the Revised Statutes is as follows:

In case of the death of any person who would be entitled to a homestead under the provisions of section two thousand three hundred and four, his widow, if unmarried, or in case of her death or remarriage, 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; but if such person died during his term of enlistment, the whole term of his enlistment shall be deducted from the time heretofore required to perfect the title.

It is believed that no forceful argument can be advanced to negative the proposition that, in so far as the statute prescribes conditions governing the completion of title after entry under this section, widows and minor orphan children stand on precisely the same footing. They are each a separate and distinct class of beneficiaries, but the clause "subject to all the provisions as to settlement and improvement," by all known rules of statutory construction relates to one with the same force as to the other, and it becomes of the first importance to determine the meaning and import to be given to said clause.

There is no question but that since departmental decision of April 30, 1890, in *Lamb v. Ullery* (10 L. D., 528), residence has not been required in instances where homestead entries have been made under section 2307, Revised Statutes, on behalf of the minor orphan children of a person who had served in the army or navy of the United States during the rebellion, for more than ninety days.

The reasons for such construction, as gathered from the decisions, particularly that of April 30, 1890, in *Lamb v. Ullery*, *supra*, are as follows: First, it would be unreasonable to require of the guardian of the minor orphan children of a soldier or sailor, that *he* take up a residence upon the land, and that if such children are compelled to make actual residence on the land the object of the statute will be defeated in all cases where they are too young to care for themselves; second, that by section 2305 of the Revised Statutes, the soldier or sailor making entry under section 2304, Revised Statutes, was required to reside upon, improve and cultivate the land for the period of at least one year, but that section 2307, Revised Statutes, in extending the rights to the minor orphan children merely exacted a compliance with the general provisions of the homestead laws as to settlement and improvement, omitting any requirement as to residence; and,

third, that an application of the decision made in *Dorame v. Tower* (2 C. L. O., 131), wherein it was held that the heir or devisee of a deceased homesteader was not required to reside upon the land but merely to continue the cultivation thereof for the remainder of the period of residence required of the homesteader, if living, relieved the minor orphan children, when making entry under section 2307, Revised Statutes, from any requirement of residence. For like reasons, and because the minor orphan children and the widow of a deceased soldier or sailor are granted like benefits upon the same conditions by section 2307, Revised Statutes, in *ex parte* Ella I. Dickey (22 L. D., 351), it was held that the widow of a deceased soldier or sailor making entry under said section 2307, Revised Statutes, need not reside upon the land entered, but must identify herself with the tract claimed by some personal act of settlement.

Section 2307, Revised Statutes, is taken from the third section of the act of June 8, 1872 (17 Stat., 333), and a careful reading of the act leads to the conclusion that the purpose of the clause above quoted was to make it clear that the conditions governing the completion of title to be required of the widow or the minor orphan children are the same as those exacted of the soldier or sailor by said act, with the exception that where the soldier or sailor dies during the term of his enlistment, the whole term of his enlistment would be credited on an entry made by his widow or, on her death or remarriage, by his minor orphan children.

Section 1 of that act, which is now known as sections 2304 and 2305, Revised Statutes, required of the soldier or sailor making entry thereunder that he reside upon, improve and cultivate the land entered for at least one year after "he shall commence his improvements as aforesaid." This latter clause refers to a former part of the section requiring of the soldier or sailor that he should, within six months after locating his homestead, "commence his settlement and improvement." These words "settlement and improvement" were not here employed in any limited or restricted sense but rather as the beginning of an actual residence which the section afterwards required should be continued for a period of at least one year before patent should issue upon the entry. It was evidently because of this provision requiring of the soldier or sailor that he "commence his settlement and improvement" within six months after locating his entry, that section three, in extending to the widow or in case of her death or remarriage to the minor orphan children the benefits of the act, made the same "subject to all the provisions as to settlement and improvements therein contained."

This conclusion based alone on the language of the act would be fully confirmed, if confirmation were necessary, by the history of the legislation as disclosed by the proceedings in Congress when considering the soldiers' homestead act of 1872.

The following is taken from the proceedings in the United States Senate, the soldiers' homestead act of 1872 being under consideration, and is found in bound volume No. 174, of the Congressional Globe, 42d Congress, 2d Session, part 3, pages 1885 and 1886:

Mr. MORRISON. The main feature of the bill is to allow the soldier to count as a part of his occupation the time he served in the army. I think that is right, and nobody can object to it. At the same time I think it is important to preserve the feature of actual settlement to guard against speculations. Therefore it is that I ask the Senator from Illinois to state what construction he would give to the third section, which provides that where the soldier is dead the Secretary of the Interior may appoint a guardian—

Mr. POMEROY. No; not appoint.

Mr. MORRISON. That "a guardian duly appointed, and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this act." The question I desire to ask is, whether this guardian thus appointed is required by the law, or expected, himself, to make the actual settlement, to serve out the time that is required beyond that which was served in the army by the person on whose behalf the settlement was made? If the soldier who died, and whose heirs are entitled to the benefit of this settlement, served three years in the army, then there are two years yet to be provided for by actual occupation of the land if he were living. Now, if he is dead, what is the guardian required to do in regard to those two years?

Mr. LOGAN. There is nothing in the section that positively requires that he shall settle on it. The section provides that "a guardian duly appointed, and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this act." He is entitled to all the benefits that are given to others, and nothing more. Therefore, I should say, the distinction here is, the soldier being dead, he cannot occupy and improve the land; but the guardian would be required to have it occupied and improved. That would be my construction of it.

Mr. MORRILL, of Maine. The Senator will perceive that as it now stands it would seem to be implied, as suggested by the Senator from Indiana, that it would then go without any actual settlement at all, that the guardian would succeed to the title to that land, and would be entitled to all the benefits of the act without any actual settlement. Of course, that is not intended by the committee; but it is apparent that the section is susceptible of that construction.

While I am up I will ask the Senator what he understands to be the effect of section five:

"That any soldier, sailor, marine, officer, or other person coming within the provisions of this act may as well by an agent as in person, enter upon said homestead."

The same question might arise there. Is that to be an actual occupation, or, as suggested by the Senator from Indiana, is the actual occupation in that case remitted, and are the parties to succeed to the title to have the same benefits that the soldier would have had without the occupation; in other words, does it dispense with any actual settlement?

Mr. LOGAN. No sir. If the Senator will allow me, I will state to him how I understand it at least. Six months is allowed for the entry; that is, to go and enter the land at the land office, or for whatever arrangement is necessary prior to the settlement. This may be done by an agent. If the Senator will examine this fifth section he will find that it reads:

"That any soldier, sailor, marine, officer, or other person coming within the provisions of this act may, as well by an agent as in person, enter upon said homestead."

"Enter upon;" that is, the entry that takes place under the six months first mentioned.

"*Provided*, That said claimant in person shall within the time prescribed commence settlement and improvements on the same, and thereafter fulfill all the requirements of this act."

That fifth section means that he may employ an agent to make the entry under the first six months' time that is given for the entry to be made; but after that entry is made, within the twelve months, the occupation and improvement of the land must be by the person himself, and not by the agent. That is the meaning of the section, and in fact it is the language of the section.

Mr. MORTON. One word further. According to the provisions of this bill, if a soldier died in the army during the period of his enlistment, or at any time subsequent, five years ago, his heirs through their guardian are entitled to the benefit of this law. This would create a very large number of heirs entitled to the benefit of this law, approaching pretty nearly to the number of the living. But now, under the terms of this bill, would not the guardian, having made the location—

Mr. POMEROY. The guardian cannot make any location.

Mr. MORTON. Would not the guardian be entitled to have the patent issued, so that so far as all heirs are concerned, the title would issue without any actual occupation beyond the mere location by the guardian? The guardian would have to locate but does not the bill practically dispense with any actual occupation beyond that of mere selection upon the part of the heirs? That is the point of difficulty I see.

Mr. POMEROY. If the Senator will allow me, I am glad he has called attention to the third section of the bill. I think I can explain it. This subject has been before the committee for a long time, and there is not a line in the bill that we have not studied. If the Senator will put his eye on the third section, it reads thus:

"That in case of the death of any person who would be entitled to a homestead under the provisions of the first section of this act"—

Who are they? We will go back and see who they are.

Mr. MORRILL, of Maine. Soldiers.

Mr. POMEROY. Yes, but not the guardians of minors. We will see who they are. The first section reads:

"That every private soldier and officer who has served in the army of the United States during the recent rebellion for ninety days or more, and who was honorably discharged, and has remained loyal to the Government, including the troops mustered into the service of the United States by virtue of the third section of an act entitled 'An act making appropriations for completing the defenses of Washington, and for other purposes,' approved February 13, 1862, and every seaman, marine, and officer who has served in the navy of the United States or in the marine corps, during the rebellion, for ninety days, and who was honorably discharged, and has remained loyal to the Government, shall, on compliance with the provisions of an act entitled 'An act to secure homesteads to actual settlers on the public domain,' and the acts amendatory thereof as hereinafter modified, be entitled to enter," &c.

Those are the people who can secure a homestead on the public domain under this bill—no guardian, no agent; and every one must apply in person for it. Now, in that view, take up the third section of the bill, which reads—

"That in the case of the death of any person who would be entitled to a homestead under the provisions of the first section of this act"—

That is, any soldier who has located in person and died after his location. Then the guardian of his children or his widow may take up and complete the settlement. That is the meaning of that.

Mr. WINDOM. In order to remove all doubt on that subject I will submit an amendment to that third section.

Mr. POMEROY. We do not want any.

Mr. WINDOM. Why not?

Mr. LOGAN. It is perfectly clear now. It applies to the first section, and the first section requires settlement.

Mr. CONKLING. Let us hear the amendment.

Mr. WINDOM. I was going to suggest this amendment: to insert after the word "act," in the seventh line, the words "subject to all the provisions as to settlement and improvements therein contained?"

Mr. MORTON and others. That obviates the difficulty.

Mr. LOGAN. There is no objection to that. That is the way it is, anyhow.

The VICE PRESIDENT. If there be no objection this amendment will be regarded as agreed to. The Chair will also suggest that a comma be inserted after the word "appointed," in the fifth line, so as to remove all doubt on that subject.

Mr. MORRILL, of Maine. Let the section be read as it now stands.

The Chief Clerk read as follows:

"SEC. 3. That in case of the death of any person who would be entitled to a homestead under the provisions of the first section of this act, 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 by the Department of the Interior, shall be entitled to all the benefits enumerated in this act, subject to all the provisions as to settlement, and improvement therein contained: *Provided*, That if such person died during his term of enlistment, the whole term of his enlistment shall be deducted from the time heretofore required to perfect his title."

Mr. POMEROY. What the committee have tried to avoid is the assignment of rights or land warrants. There has been a great contest in this country whether soldiers should have something they could assign or sell in the market. The committee decided that that was not expedient, but that every one should be required to locate on the land.

Mr. MORTON. The explanation of the Senator from Kansas, I think, is not satisfactory. He makes this section to apply to any person who, after having made his location, should then die, but that is utterly inconsistent with the proviso in the same section, "provided, that if such person died during the term of enlistment," showing that it applied to those who even died during the war and before the passage of this bill. Therefore it does not refer to those who may make location after the passage of this bill or at any time subsequent to the war, and shows that it refers to soldiers without reference to the time when they died. The amendment offered by the Senator from Minnesota may meet the case, but I am not sure that it does. It says "subject to all the provisions and conditions of this act," but will that make it necessary for the guardian of a child to go and make actual occupation? If so, it will never be complied with.

Mr. FRELINGHUYSEN. I call the attention of the Senator from Indiana to the first section of the bill, which says in terms that no patent shall issue, to any homestead settler who has not resided upon the land one year. Then the third section provides for the case of the death of any person who shall be entitled to a homestead under the provisions of the first section, referring to this very provision.

Mr. MORTON. That would cut it off entirely. The question is, whether in case of a man who died during the war and the guardian of his children now comes in and makes the location, but under the conditions provided in the previous act, it does not mean that that guardian shall go and actually occupy the land? If so, it would be inoperative, and yet that would be the effect of it.

Mr. FRELINGHUYSEN. The act is explicit that no patent shall issue unless they do occupy the land.

Mr. MORTON. That would defeat the bill.

Mr. WINDOM. My understanding of that section is, that the minor children or the orphan children may by their guardian have the benefit of it; that is, settlement must be made by the widow or children, and the guardian is appointed simply as

the instrument through which the act is to be carried out. The settlement is to be made by the widow or children of the soldier who is entitled, but the guardian is simply appointed in order to carry out the act.

These proceedings disclose: First, that the words "settlement" and "occupation" are throughout the entire proceedings used as synonymous with "residence;" and, second, that the insertion of the clause in section 3 of the act of 1872, "subject to all the provisions as to settlement and improvements therein contained," was intended to make it clear that the same conditions required of the soldier or sailor were to be exacted of his widow or minor orphan children, with the exception of the special provision for the deduction, where the soldier or sailor died during his term of enlistment, of the entire term of said enlistment.

This seems to effectually dispose of the second of the reasons before recited, taken from former departmental decisions relieving the widow and minor orphan children of a deceased soldier or sailor from residence when making entry under section 2307, Revised Statutes, viz., that by section 2305 of the Revised Statutes, the soldier or sailor making entry under section 2304, Revised Statutes, was required to reside upon, improve and cultivate the land for the period of at least one year, but that section 2307, Revised Statutes, in extending the rights to the minor orphan children merely required a compliance with the general provisions of the homestead laws as to settlement and improvement, omitting any requirement as to residence.

In this connection it may be added that where the law has required proof of "settlement" this term has been uniformly construed by the land department as the equivalent of residence. *Buchanan v. Minton* (2 L. D., 186); *Samuel M. Frank* (2 L. D., 628); *U. S. v. Atterbery et al.* (8 L. D., 173); *Hessong v. Burgan* (9 L. D., 353); *Ex parte Jones* (10 L. D., 23); *Ex parte Sweeney* (11 L. D., 216); *Wills v. Bachman* (11 L. D., 256); *Deemer v. Tilton* (11 L. D., 302); *James C. Daly* (17 L. D., 498); *Shafer v. Butler* (19 L. D., 486); *Delorme v. Cordeau* (29 L. D., 277).

The first of the reasons assigned is, that it would be unreasonable to require of the guardian of the minor orphan children of the soldier or sailor, that he take up a residence upon the land, and that if the children were compelled to make actual residence on the land the object of the statute would be defeated in all cases where they are too young to care for themselves.

In so far as the guardian of the minor orphan children is concerned, it is clear that he was merely permitted as the accredited representative of the minor children to make the entry, and was not required to reside or settle upon or occupy the land entered. It is true that under the construction requiring residence by the minor orphan children the act would not be immediately available to such of the minor orphan children of a deceased soldier or sailor as are too young to care for

themselves, but it is equally true that it would become available to them at a later period, and that but for this act the homestead laws would not be available to them until they arrived at the age of twenty-one. With regard to the widow, she, like many a deserving soldier or sailor, might not be able to avail herself of the privileges of the act because unable to comply with its conditions, but the act, while open to all included within the classes defined, can not be warped to fit the peculiar circumstances of each individual. Poverty, weakness, inexperience, fear, or other incumbrances of a woman, while considerations that appeal to sympathy, are not sufficient reasons for excusing compliance with law.

With regard to the third and last reason assigned in the former decisions, viz., that an application of the decision made in *Dorame v. Tower* (2 C. L. O., 131), wherein it was held that the heir or devisee of a deceased homesteader was not required to reside upon the land but merely to continue the cultivation thereof for the remainder of the period of residence required of the homesteader, if living, relieved the minor orphan children, when making entry under section 2307, Revised Statutes, from any requirement of residence, it is sufficient to say that the conditions are widely different where, by the death of the homesteader, the care of the claim is immediately cast upon the widow or children, and where such widow or children seek in their own right to initiate a homestead claim, and that the considerations assigned in support of the first are not sufficient to relieve the latter from compliance with the plain provisions of law known to the claimant when initiating claim.

The requirement in the *Dickey* case that the widow do some act to connect herself with the land entered, is fruitless unless such act is with the honest intent of remaining or making the place a home, and results in little less than a scrip right or privilege.

After a most careful consideration of the entire matter this Department refuses to be guided by the decisions relieving the widow or minor orphan children of a deceased soldier or sailor from residence when making homestead entry under section 2307 of the Revised Statutes.

Even should the Department follow the previous decisions relieving those making entry under section 2307 of the Revised Statutes from any requirement of residence, it does not follow, and it is not true, as contended, that a person qualified to make an entry under section 2307 may sell that right or enter into a contract, either before or after entry, which contemplates a sale thereof. Section 2290 of the Revised Statutes, as amended by the act of March 3, 1891 (26 Stat., 1095), provides:

That any person applying to enter land under the preceding section shall first make and subscribe before the proper officer and file in the proper land office an affidavit

that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person, except himself, or herself.

All homestead entries are allowed primarily by virtue of the provisions of section 2289 of the Revised Statutes. Section 2304 does not prescribe any other or different right, except in the matter of qualifications, and in the giving of certain special benefits on account of military service, and such right as is therein given is only "on compliance with the provisions of this chapter," one of which is the execution of the affidavit required by section 2290. This is made more plain by reference to the act of 1872, from which section 2304 was taken, it being therein provided that the benefits thereby accorded to soldiers and sailors may only be exercised "on compliance with the provisions of an act entitled 'an act to secure homesteads to actual settlers on the public domain,' and the acts amendatory thereof, as hereinafter modified." There was no modification in either the act of 1872 or the chapter on homesteads in the Revised Statutes which affects the requirements of the original homestead act of 1862 or section 2290, taken therefrom, that an applicant for the benefits of the homestead law shall first execute the affidavit therein provided for. It results therefore that any person seeking to appropriate these benefits, whether by virtue of qualifications created by section 2307, or otherwise, shall first execute the affidavit required by said section, in so far as it is applicable. Of course, the statements therein that the applicant is the head of a family, or that he or she is over twenty-one of age, are not applicable to persons making an entry under section 2307, because that section by necessary inference does away with those requirements and substitutes other tests of qualification, just as other tests are substituted in case of an application under section 2304. But section 2290, in so far as it requires an affidavit that the applicant has not made a contract or agreement of the kind therein mentioned, is not a test of qualifications, nor is it in any correct sense a restriction upon benefits, but is merely a test of good faith towards the government.

There is nothing in the court's decision in the case of *Webster v. Luther* (163 U. S., 331), that contravenes this view. The court there

had under consideration the provisions of section 2305 of the Revised Statutes, and the important general conclusion therein reached, that it was the intention of Congress by that section to confer a gratuity in the most advantageous form to the donee, necessarily carried with it, as a last analysis, the further conclusion that it was not coupled with conditions that would lessen its value. There are no restrictions in terms found in section 2305, and the court says none may be implied. This is not true of section 2307. This section in terms requires settlement and improvement, and these requirements presuppose that the right granted is a personal one. If it were otherwise the result might and probably would be the absorption in a short time of the whole agricultural public domain by persons, corporations, or syndicates by the pursuance of methods like or similar to those disclosed in this case, in contravention of the long-established policy of the government. The Department can not give its assent to such consummation.

In this case Mrs. Bowes executed the affidavit required by section 2290, and it was and is admittedly false. It is sought to excuse her upon the ground that such affidavit was not required by the statute, and that its execution was a mere *pro forma* proceeding to comply with what are claimed to be the unauthorized requirements of the land department. This will not do. The law requires such an affidavit, but, aside from the question of morals involved, the fact is that Mrs. Bowes had entered into a contract with the Standard Cattle Company in violation of law. For this reason, the decision appealed from is affirmed.

Having determined that a proper construction of the law requires of those making entry under section 2307 of the Revised Statutes, that they comply with the requirements of the homestead laws, both as to settlement and cultivation, as is required of a soldier or sailor making entry under section 2304, it becomes necessary to make some provision for the disposition of entries heretofore made under the previous erroneous decisions of this Department.

Of the existing entries made under section 2307 of the Revised Statutes, it is believed that the greater part, especially those made by widows of deceased soldiers and sailors, were made solely because of the departmental decisions relieving the party making such entry from residence upon the land, and where such persons find that they are unable to comply with the law as herein construed, they should be permitted to relinquish their entries without prejudice to their homestead rights, by giving notice of such intention within the six months' period hereinafter described.

Such of the parties who may desire to retain their entries will be required to begin an actual residence upon the land within six months from the issuance of notice as hereinafter required to be given, but until the expiration of that period the entry will not be subject to

contest for abandonment. Local officers should be directed to immediately give notice of these requirements on all uncompleted entries of this class within their district, the same to be mailed by registered letter to the last known address of the party making entry, as shown by their office records, and evidence of the mailing should be furnished to your office for the files relating to the entry.

RAILROAD GRANT—PATENT—EXCEPTION OF MINERAL LANDS.

NORTHERN PACIFIC RAILWAY CO.

There is no authority for the insertion, in patents issued under railroad land grants, of the clause, "excepting all mineral land, should any such be found in the tracts aforesaid;" and directions are given that in all future railroad land-grant patents said excepting clause be excluded.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 10, 1903.* (F. W. C.)

The Department has considered the request by the Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, that you be instructed to eliminate the following clause from patents issued under its land grant, namely:

yet excluding and excepting all mineral land should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute shall not be held to include iron or coal lands.

In reporting upon said request your office letter of December 11, 1901, states that it is questionable whether there is authority for its insertion, but that—

this excepting clause has always been introduced into the patents issued to the company which now cover millions of acres of its grant, and this has also been done in the patents issued under all other railroad land grants having a like excepting clause.

MINERAL LANDS EXCEPTED.

All mineral lands, other than coal and iron, are excluded from the Northern Pacific land grant, whether known or unknown at the time of the attachment of rights thereunder, either by definite location or selection. *Barden v. Northern Pacific R. R. Co.* (154 U. S., 288.)

WHO SHALL DETERMINE THE CHARACTER OF THE LAND WITHIN THE LIMITS OF A RAILROAD GRANT?

The character of the lands within the limits of railroad land grants must, of necessity, be primarily determined by the land department. In *Litchfield v. Register and Receiver* (9 Wall., 575, 577) it was said:

The very first duty which the register is called on to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry.

This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper department? Has it been granted by any act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion.

In *Steel v. Smelting Company* (106 U. S., 447, 450, 455) it was said:

We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.

In *Burfenning v. Chicago, St. Paul, etc.* (163 U. S., 321, 323) it was said:

Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reexamined. *Johnson v. Towsley*, 13 Wall., 62; *Smelting Company v. Kemp*, 104 U. S., 636; *Steel v. Smelting Company*, 106 U. S., 447; *Wright v. Roseberry*, 121 U. S., 488; *Heath v. Wallace*, 138 U. S., 573; *McCormick v. Hayes*, 159 U. S., 332.

In *Northern Pacific R. R. Co. v. Sanders* (166 U. S., 620, 635) it was said:

Whether the lands sought to be purchased as mineral lands were of that character was a matter for the determination, in the first instance, of the land department; and there was jurisdiction in that department to pass upon every question arising upon applications to purchase them as mineral lands.

In *Barden v. Northern Pacific R. R. Co.*, *supra* (pages 328, 329), it was said:

If the land department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from preemption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent.

These cases clearly establish the jurisdiction of the land department in the premises.

PROCEEDINGS BEFORE THE LAND DEPARTMENT HAD UPON LISTS AND SELECTIONS MADE OF LANDS UNDER A RAILROAD LAND GRANT PRECEDING THE ISSUE OF PATENTS THEREON.

All such lists and selections are required to be filed in the local land office of the district in which the lands are situate and are, by the officers of that district, carefully examined in connection with the plats and records on file in their office. If found satisfactory, they are forwarded to your office, where, under the circular of July 9, 1894 (19 L. D., 21), they are again thoroughly examined in connection with the records and files of your office, and all tracts within a radius of six miles of any mineral entry, claim or location are eliminated therefrom. A supplemental list of these eliminated tracts is then prepared and the railroad company is required to publish the same for a period of sixty days. From such published list is eliminated all lands that have been protested, contested, or claimed to be more valuable for mineral than for agricultural purposes, and hearings are ordered to determine the character of such lands. Those lands that are not protested, contested or claimed as mineral are included in what is known as clear lists and certified to this Department for approval, and, upon such approval, the patent of the United States issues.

ISSUE OF PATENT FOR LANDS UNDER A RAILROAD LAND GRANT DETERMINATIVE OF THE CHARACTER OF THE LANDS PATENTED.

As before shown it is the duty of the land department to determine primarily the character of the lands within the limits of all railroad land grants and the usual rule fixing a time for the attachment of rights under such grants does not estop inquiry into this matter by that department. When, however, the land department, charged with this duty, and after due investigation of the matter as provided for by its rules and regulations, patents lands as falling within the terms of these grants, such action is necessarily determinative of the character of the lands patented.

EFFECT OF SUCH DETERMINATION.

When the law has confined to a special tribunal the authority to hear and determine certain matters, its determination, in the absence of fraud, is conclusive upon all others. *Johnson v. Towsley* (13 Wall., 72, 83).

In the case of *Barden v. Northern Pacific R. R. Co.*, *supra*, the court (pages 330 and 331) states that—

It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter

regard to their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the land department. Until such patent is issued, defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of Congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the land department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and, as we have already said, in the absence of fraud in the officers of the department, would be conclusive proceedings respecting the title.

In certain cases involving the question as to the character of lands claimed under the grant made to the States of swamp and overflowed lands, the courts have permitted the introduction of oral evidence to determine the character of such lands, but these cases are carefully considered in the case of *McCormick v. Hayes*, *supra*, where it is said by the court (page 342 of its opinion):

There is in this case no conflict with what we decide in the present case, but, on the contrary, the strongest implication, that if, in that case, the Secretary *had made any decision*, the evidence would have been excluded.

It follows that, in the absence of fraud, the determination effected by the issue of patent as to the character of the lands patented is conclusive, and that the insertion of the clause hereinbefore referred to is without effect and can serve no good purpose.

EXCEPTIONS CONTAINED IN LETTERS PATENT OF THE UNITED STATES.

It has been shown that it is as much the duty of the land department to determine whether lands are excepted from a railroad land grant because mineral in character, as it is to determine whether they are excluded because embraced in some other term of exception found in the granting act, that the issue of patent under such a grant is a determination that the lands patented are of the character granted, and that in the absence of fraud such determination is conclusive.

Why, then, should one term of exception be carried into the patent when all others are excluded?

In *Davis v. Weibbold* (139 U. S., 507) the question as to the effect to be given to excepting clauses found in patents issued under acts of Congress providing for the disposal of public lands, was fully considered by the court, and on pages 527-528 of its opinion it was said—

But we do not attach any importance to the exception, for the officers of the land department, being merely agents of the government, have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law. The patent of a mining claim carries with it such rights to the land

of the act of February 28, 1891 (26 Stat., 796), be made the base for the selection of indemnity school lands.

In the instance of the list submitted with your letter the State made selection of all of section 8, township 15 north, range 14 east, M. D. M., in lieu of all of section 36, township 14 north, range 6 east, Humboldt meridian, unsurveyed, alleging the latter tract to be mineral in character and for that reason excepted from the school grant. No sufficient showing was submitted in proof of the alleged mineral character of the base lands, but it is claimed by the State that it is otherwise subject to use as a base for an indemnity selection because it was included within the area of lands temporarily withdrawn October 14, 1902, for examination in connection with the proposed Klamath River forest reserve.

These temporary withdrawals, made preliminary to the establishment of a forest reserve, are, from the very nature of things, largely in excess of the amount which may be finally set apart as a forest reservation, and examination thereof is made as fast as is possible with the force available for the purpose. The withdrawal made October 14, 1902, your office letter reports, includes, approximately, 100 townships or 2,304,000 acres. While lands so withdrawn are not subject to disposition under the general land laws, yet they are not within a "reservation" within the meaning of that term as employed in the act of February 28, 1891, *supra*; nor are they within a "reservation" within the meaning of the term as there employed until reserved by the proclamation finally establishing the forest reservation.

The act of 1891 provides indemnity where the school sections so granted "are mineral land or are included within any Indian, military, or other reservation." Indian and military reservations include lands specifically appropriated to a particular use, and the words "other reservation" as employed in the act of 1891 must signify a reservation of like character to those specifically enumerated. Mere temporary or preliminary withdrawals of lands with a view to their investigation and examination to determine what part, if any, should be included within a forest reservation, can not be construed as placing such lands within a reservation of like character to an Indian or military reservation.

It is true that in *ex parte* State of California (20 L. D., 327), it was held that it is not necessary that the reservation of a section 16 be of a permanent character to justify indemnity selection in lieu thereof, but it is equally true that in that case the reservation in question, which was of only one township, was held not to be of a temporary character; further, after careful consideration of said decision the Department refuses to be guided thereby and is of opinion that the mere inclusion of portions of sections 16 and 36 within a withdrawal made for the purpose of permitting investigation and examination of

the lands withdrawn, with a view to their possible inclusion in a forest reserve, does not afford a base for the selection of school indemnity lands under the provisions of the act of February 28, 1891, *supra*.

The list as submitted is here returned without approval.

SOLDIERS' ADDITIONAL HOMESTEAD—SECTION 2, ACT OF JUNE 15, 1880.

JOHN M. LONGYEAR.

The privilege of purchase accorded by the second section of the act of June 15, 1880, and the title obtained thereunder, rest upon and have their inception in the original homestead entry, which is merged in the higher and perfected title obtained by compliance with the provisions of said section, and by a purchase thereunder of land entered under a soldier's certificate of additional right, the original entry is merged in the perfected title received under said act, the certificate of right is thereby satisfied and the certified right of the soldier exhausted.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 10, 1903.* (G. B. G.)

This is the appeal of John M. Longyear from your office decision of July 16, 1903, denying his application for a recertification of the soldiers' additional right of one William J. Frank.

An original certificate of right to enter 120 acres of land under section 2306 of the Revised Statutes issued to the said William J. Frank, June 5, 1878, and was located by him February 18, 1879, on 120 acres of land at the Marquette land office, Michigan. The entry allowed on this location was canceled for alleged illegality, July 20, 1881, but the real party in interest, who was the said John M. Longyear, upon a proper showing of such interest, was permitted to purchase the land under the provisions of section 2 of the act of June 15, 1880 (21 Stat., 237), whereupon cash certificate issued to him, November 26, 1881, and patent issued thereon August 5, 1885.

Thus stated, this case is controlled by the decision of this Department, March 15, 1899, in the case of John M. Rankin (28 L. D., 204). In that case it was held that the privilege of purchase accorded by the second section of the act of June 15, 1880, and the title obtained thereunder, rest upon and have their inception in the original homestead entry, which is merged in the higher and perfected title obtained by compliance with the provisions of said section, and that by a purchase thereunder of land entered under a soldier's certificate of additional right, the original entry is merged in the perfected title received under said act, the certificate of right is thereby satisfied and the certified right of the soldier exhausted. Previous to the rendition of said decision, to wit, on January 18, 1897, the Department had held, in the case of John H. Howell (24 L. D., 35), that in such cases the soldier's additional right was not satisfied, and in view of the strong probability

and fact that claimed soldiers' additional rights had been bought upon the faith of the ruling in the Howell case, the Department under date of May 20, 1903, directed your office to recertify all additional rights purchased between January 18, 1897, and March 15, 1899. Said order was made upon the consideration of a petition asking the Department to vacate its said decision in the Rankin case, and as to this it was said:

Much may be said either way upon the merits of the question involved, but it will not be necessary to reopen the case. Equities arising upon the faith of the Howell decision may be protected without it.

Under this decision several applications were presented and allowed as coming within the purview of said order, but the present case did not come within it and was rejected by your office upon the authority of the Rankin case, *supra*.

It is now insisted, as it was insisted when the order of May 20, 1903, was made, that the decision in the Rankin case is fundamentally wrong and should be vacated. That case was not decided except upon a most careful and painstaking examination of the question presented, and in connection with cases since brought before the Department, it has been elaborately discussed and considered in what seems to be its whole aspect. It is believed that no sufficient reason has been shown for overruling said case, and it is hereby reaffirmed and adhered to.

The case of Longyear is within it and his application is, for the reasons therein stated, denied.

TIMBER AND STONE ENTRY—SPECULATION—ACT OF JUNE 3, 1878.

ANNIE M. DONAHUE ET AL.

A timber and stone cash entry under the act of June 3, 1878, made in good faith for the entryman's own benefit, without any intent or contract that it shall inure to any other person, even though made with the expectation of profiting by a sale of the land, is not an entry for "speculation" within the meaning of that term as used in said act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 10, 1903.* (J. R. W.)

By office letter of September 30, 1903, pursuant to departmental instructions of November 18, 1902, you transmitted to the Department, for its advice, the papers in the several timber and stone cash entries under the act of June 3, 1878 (20 Stat., 89), all east of the Humboldt Meridian, made at Eureka, California, in order of date as follows:

No. 8985, May 17, 1901, Annie M. Donahue, N. $\frac{1}{2}$ SW. $\frac{1}{4}$ and W. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 22, T. 11 N., R. 3.

No. 8896, November 6, 1901, Clarence A. Long, SW. $\frac{1}{4}$, Sec. 11, T. 11 N., R. 3.

No. 8914, November 27, 1901, Julia J. Gall, NW. $\frac{1}{4}$, Sec. 11, T. 11 N., R. 3.

- No. 8920, December 2, 1901, Laura L. Barnum, lots 3 and 4, Sec. 30, and lots 1 and 2, Sec. 31, T. 13 N., R. 3.
- No. 8937, December 28, 1901, Lucy Peterson, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 7, T. 15 N., R. 2.
- No. 8983, January 8, 1902, George K. Coleman, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 9, T. 3 N., R. 2.
- No. 8948, January 10, 1902, Herman A. Lund, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 27, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 28, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 34, T. 12 N., R. 3.
- No. 8950, January 10, 1902, James G. Burkholder, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 33, T. 12 N., R. 3.
- No. 8997, February 3, 1902, Annie M. Sweasy, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 2, T. 4 N., R. 3.
- No. 8998, April 17, 1902, Lena G. Gross, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 1, T. 4 N., R. 2.
- No. 9011, May 5, 1902, Jay L. McLaren, NE. $\frac{1}{4}$, Sec. 15, T. 4 S., R. 2.
- No. 9051, July 9, 1902, Laurania M. Barnum, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 25, T. 13 N., R. 2.
- No. 87, K. R. I. R., August 27, 1902, Albert Van Duzer, lot 1, Sec. 3, T. 12 N., R. 2, and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 34, T. 13 N., R. 2.
- No. 9163, September 22, 1902, Mary G. Hannah, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 21, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 22, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 27, T. 12 N., R. 3.
- No. 9259, November 18, 1902, Olive V. Sawtelle, NE. $\frac{1}{4}$, Sec. 11, T. 10 N., R. 2.

These entries, after final proof at the local office, including cross-examination of the entryman and witnesses, were by your office referred to a special agent for investigation, who made examination of the county records of conveyances, of the local office records, cross-examined each entryman, and reported in each case that no fraud was discovered. Your office after examination of the records found that the entries:

are non-contiguous, except in two instances, and widely separated, being in ten distinct townships; that entrymen are of various occupations and all citizens of the state in which the lands are located; that different persons located the entrymen and that locators are not connected with any company or persons engaged in buying timber lands; that a part of the claims were mortgaged for the purchase money, a part were paid for by entrymen's own funds, and a part have been sold since final proof was made, but in no case was there any agreement to sell prior to final proof nor has any claim been mortgaged or sold to a lumbering company or any one engaged in acquiring vast quantities of timber lands, that the lands are non-mineral and most valuable for the timber thereon; that claimants have acted in good faith in making said entries.

Your office recommended approval of the entries. Examination of the records shows that to the time of the special examiner's reports the land was in nine of the cases (8896 Long, 8914 Gall, 9848 Lund, 8950 Burkholder, 8997 Sweasy, 8998 Gross, 9011 McLaren, 87 Van

Duzer, 9259 Sawtelle) not conveyed by the claimants and no encumbrance existed of record against these lands; in one instance, 8937, Peterson, a mortgage was given to claimant's cousin for \$400 at date of proof, which was still unpaid, and no conveyance had been made of the land. These ten claimants give the motive or purpose of their entries variously—8996 “to hold for increase in value;” 9011, 8997, 87, 8937, and 8996, to hold “or keep” “as an investment,” or “for increase in value;” 8914 took the land as “an investment to make some money;” 8920 “to keep, not to sell, owns adjoining land;” 8950 “to keep for benefit of my family;” 9259 “to hold till something develops,” and 8948, Lund, “as a speculation to better my own condition in the future.” If any of the records in this group of cases is to be condemned and the claimant's purchase money forfeited to the government, that of Lund must be, and if his is not fraudulent nothing in the record indicates that any of the others are. The statute under which these entries are made requires of the entryman to make oath, among other things:

that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; . . . and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void.

What does the statute intend by the words “on speculation?”

Bouvier's Law Dictionary, 1876 and 1897, defines speculation as “the *hope or desire* of making a profit by the purchase and resale of a thing.” Anderson's Law Dictionary, 1893, gives:

Speculation. Gambling is not to be confounded with speculation. Merchants speculate upon the future price of that in which they deal, and buy and sell accordingly. In other words, they think of and weigh, that is speculate upon the probabilities of the coming market and act upon this outlook into the future.

Neither of these is properly a definition. The first merely indicates the motive that induces to purchase of a thing as a speculation, the other is a mere thesis upon the distinction between a speculative contract of purchase and a gambling or wagering contract.

Worcester's Dictionary of 1880 defines speculation as:

“The act of paying out money, or incurring extensive risks with view to more than usual success in trade.” A. Smith.

The Century Dictionary of 1890 defines it:

4. The investing of money at a risk of loss on the chance of unusual gain; specifically buying and selling, not in the ordinary course of commerce for the continuous marketing commodities, but to hold in expectation of selling at a profit upon a change in values or market rates.

Speculate. To invest money for profit upon an uncertainty; take the risk of loss in view of possible gain; make a purchase or purchases, as of something liable to sudden fluctuations in price or to rapid deterioration on the chance of selling at a large advance.

Investment. Expenditure for profit or future benefit, a placing or conversion of capital in a way intended to secure income or profit from its employment; as an investment in active business, or in stocks, land or the like.

Webster's International Dictionary of 1896 and 1903, somewhat changing the definition of the Unabridged Dictionary of 1887, defines speculation:

(*Com.*) The act or practice of buying land, goods, shares, etc., in expectation of selling at a higher price, or of selling with the expectation of repurchasing at a lower price; a trading on anticipated fluctuations in price, as distinguished from trading in which the profit expected is the difference between the retail and wholesale price, or the difference of price in different markets.

Any business venture involving unusual risks, with a chance for large profits.

In all the definitions there is more or less prominent, persistent and common the elements of sudden fluctuation in value, liability of loss by depreciation, and contemplated brevity of time before reconversion and liquidation of the subject matter. Still the definitions do not clearly indicate what Congress intended to inhibit under the term speculation. Following the familiar rule of statutory construction, to seek in the act itself the meaning of particular words by study of the context, it seems that the words immediately following "speculation" explain and define its meaning. If that be accepted, then its meaning is that all the benefit of the title sought to be acquired is in good faith intended to be for the entryman himself, and that there is no intent or contract that it shall inure to any other person, analagous to the requirements in other public land legislation under settlement laws.

There is nothing in the act—other than the word speculation itself—in any way indicating that Congress intended that no one should make such entries except lumber or timber dealers, or those intending themselves to cut and market the timber. If it was intended to so limit these entries, it is obvious that more apt words might have been chosen. If it is not to be so limited, it is an absurdity to prohibit or forfeit an entry because the entryman contemplated profiting by a sale of the land. He would not make the entry and pay money except from a motive in some way to profit himself, and if he does not intend himself to cut and market the timber and is not by the statute required to so intend, he perforce must intend to profit in the only other way possible—namely, by a sale. This is the construction given to the act by the Supreme Court and by the Department heretofore. In *United States v. Budd* (144 U. S., 154, 163), the court says:

All that it [the statute] denounces is a prior agreement, the acting for another in the purchase. If when the title passes from the government no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied. Montgomery might rightfully go or send into that vicinity and make known gener-

ally, or to individuals, a willingness to buy timber land at a price in excess of that which it cost to obtain it from the government; and any person knowing of that offer might rightfully go to the land office and make application and purchase the tract from the government.

In *United States v. Bailey et al.* (17 L. D., 468, 476) the Department held that:

The purpose and intent of the act was to give every citizen of the United States, or one who has declared his intention of becoming such, the opportunity to purchase one hundred and sixty acres of land under said act, if it was unfit for cultivation, but in every case the entryman is required to act in good faith. . . .

This holding in no wise conflicts or interferes with the right of a purchaser in good faith of land under the act, after he acquires title, to sell the land if he desires so to do. Sales made soon after purchase, however, if unexplained, have a tendency to arouse suspicion in the mind that when the entry was made, *it was not for the entryman's own exclusive benefit and use.* And when we find twelve entries made in the manner in which these were made, money furnished by the assignee, engineered by the assignee, deeded to the assignee, and this arrangement made prior to the time the locations were made, I do not see any escape from the conclusion that they were made in violation of the statute, and ought not to stand.

This decision was before the Supreme Court and was approved in *Hawley v. Diller* (178 U. S., 476), which held (p. 490), "there was no misconstruction of the law by the land department."

Such has been the consistent construction of the law (Instructions, 3 L. D., 84, 86; *United States v. Bryan*, 29 L. D., 149; *United States v. Searles*, 19 L. D., 258, 265). It does not invalidate Lund's entry that he used the word speculation, instead of the more appropriate term "investment," to describe the motive for his entry. Nor does the fact that the others of this group admit they made their investments with view to and in hope of it proving profitable, impeach in the least their good faith. It only tends to show that they intelligently exercised a right given them by statute in a way that they hoped would prove to their financial and material advantage, as they had perfect right to do.

The disposal of this group practically disposes of all the cases. None of them come within the rule in *United States v. Bailey*, *supra*. They all but two purchased with their own money, and in a legal sense those two did so in that they borrowed and contracted a personal debt, one of whom has paid it; the entries were not planned, procured, or "engineered" by any one for his profit, using the entrymen as his instruments, compensated for their service in acting in his interest; no prior arrangement or contract, express or implied, is shown to have been made by any one of them for assignment of the interests to be obtained by the entry. Take the more suspicious on the list as an example, Annie M. Donahue, who sold to Christie on the date of her final proof. In *Peasley v. Whiting* (20 L. D., 24), it was held that—

Sale of a timber-land claim after acceptance of final proof and prior to the issuance of final certificate does not in itself warrant an attack on the entry.

A special examination has failed to show any preconcerted arrangement for such a sale, or that any one but the entrywoman herself had any interest or benefit in the entry when it was made. No other instance of immediate transfer occurs and but one other within thirty days, Mary G. Hannah, one ninety days, Laurania M. Barnum, and one ten months, Laura L. Barnum, and one a year after the entry. These were not bought by, nor have they come to the hands of one ownership, nor does anything tend to show any prior arrangement or that the entries were not in the exclusive interest of the entrymen.

Under the rulings of both the Department and the court all the entries should be approved.

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**RIGHT OF WAY—RAILROAD GRANT—SECTION 13, ACT OF FEBRUARY 28,
1902.**

ST. LOUIS AND SAN FRANCISCO R. R. CO.

The general authority for securing railroad rights of way in the Indian Territory, granted by section 13 of the act of February 28, 1902, can not be exercised to secure a right of way across the Sulphur Springs reservation, created under authority of the act of July 1, 1902.

Assistant Attorney-General Campbell to the Secretary of the Interior,
December 11, 1903. (J. R. W.)

I am in receipt by reference of the Acting Secretary, December 8, 1903, of the telegram of L. F. Parker, General Solicitor of the St. Louis and San Francisco Railroad Company, of the same date, that:

Engineers Sulphur Springs railway are locating an extension of that company's line under section thirteen of the act of Congress approved February 28th, 1902. Such extension crossing a portion of Sulphur Springs reservation. Mr. Swords has forbidden them to proceed with such location and is preventing them from so doing. May I request that you direct him to cease from such interference. Please answer—

with request for my opinion whether said railway company has the right to condemn any portion of said reservation under the provisions of the act of February 28, 1902.

The tract in question is reserved under the provisions of the act of July 1, 1902 (32 Stat., 641, 655), which provided for the reservation of a tract of not to exceed six hundred and forty acres—

to embrace all the natural springs in and about said village, and so much of Sulphur Creek; Rock Creek, Buckhorn Creek, and the lands adjacent to said natural springs and creeks as may be deemed necessary by the Secretary of the Interior for the proper utilization and control of said springs and the waters of said creeks, which lands shall be so selected as to cause the least interference with the contemplated town site at that place consistent with the purposes for which said cession is made, and when selected the ceded lands shall be held, owned, and controlled by the United States absolutely and without any restriction, save that no part thereof shall be platted or disposed of for town-site purposes during the existence of the two tribal governments.

. . . . All improvements upon the lands so selected which were lawfully there at the time of the ratification of this agreement by Congress shall be appraised, under the direction of the Secretary of the Interior, at the true value thereof at the time of the selection of said lands, and shall be paid for by warrants drawn by the Secretary of the Interior upon the Treasurer of the United States. Until otherwise provided by law, the Secretary of the Interior may, under rules prescribed for that purpose, regulate and control the use of the water of said springs and creeks and the temporary use and occupation of the lands so ceded. No person shall occupy any portion of the lands so ceded, or carry on any business thereon, except as provided in said rules, and until otherwise provided by Congress the laws of the United States relating to the introduction, possession, sale, and giving away of liquors or intoxicants of any kind within the Indian country or Indian reservations shall be applicable to the lands so ceded, and said lands shall remain within the jurisdiction of the United States court for the southern district of Indian Territory. *Provided, however,* That nothing contained in this section shall be construed or held to commit the government of the United States to any expenditure of money upon said lands or the improvements thereof, except as provided herein, it being the intention of this provision that in the future the lands and improvements herein mentioned shall be conveyed by the United States to such Territorial or State organization as may exist at the time when such conveyance is made.

It is thus clear that what was intended by Congress was an unqualified and absolute withdrawal of said lands, mineral springs, and waters from any appropriation for any purpose, the Secretary of the Interior himself having no power except to permit the "temporary use and occupation of the lands so ceded." The intent of Congress was further indicated to convey such lands to the state or territorial organization that should afterward come into being, absolutely unincumbered of any existing claim, right, or easement.

The rights granted to the railway company are defined by section 13 of the act of February 28, 1902 (32 Stat., 43, 47), which provides:

That the right to locate, construct, own, equip, operate, use, and maintain a railway and telegraph and telephone line or lines into, in, or through the Indian Territory, together with the right to take and condemn lands for right of way, depot grounds, terminals, and other railway purposes, in or through any lands held by any Indian tribe or nation, person, individual, or municipality in said Territory, or in or through any lands in said Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any railway company organized under the laws of the United States, or of any State or Territory, which shall comply with this act.

The rights granted by this section are general and make no specific reference to the sulphur springs and the adjacent tracts reserved by the act of July 1, 1902, so that no rights to enter upon those specific lands were expressly and specifically granted. That Congress had power to withdraw from its general grant of February 28, 1902, any specific tract at any time prior to appropriation of it by the railway company, does not admit of question.

The act of February 28, 1902, was not a grant of lands, but was merely a grant of power of eminent domain to appropriate private, or

unappropriated public lands to its use, for which under other provisions of the act it is required to make compensation. It is a general principle of such grants of powers that they do not authorize the taking of property already dedicated to a public use, as land already occupied by another railroad company, or by a gas or water company, and the like. *Mobile, &c. R. R. Co. v. Alabama Midland R. R. Co.* (87 Ala., 501); *In re City of Buffalo* (68 N. Y., 167); *Providence and Worcester R. R. Co. v. Norwich and Worcester R. R. Co.* (138 Mass., 277); *Lebanon Water Co.* (9 Pa. Co. Ct., 589); *Scranton Gas and W. Co. v. Northern Coal and Iron Co.* (192 Pa. St., 80); *Matter of New York and Brighton Beach R. R. Company* (20 Hun., N. Y., 201). Authorities to this effect, presenting the matter in a great variety of aspects, might be indefinitely extended. It is sufficient to say generally that general powers of this character can not be exercised against property specifically dedicated to a public use, or reserved with intent to make such dedication.

As Congress has specifically reserved the land in question, with clearly expressed intent to preserve and at some future time to convey it absolutely free of any appropriation or incumbrance to the future state or territorial government that may arise having jurisdiction over that locality, I am of opinion that the railway company has not and can not acquire right to enter upon or cross it, and that its request for permission so to do should be denied.

Approved:

E. A. HITCHCOCK,
Secretary.

SOLDIERS' ADDITIONAL HOMESTEAD—SERVICE—SECTION 2304, R. S.

JULIAN D. WHITEHURST.

In computing the period of service of a soldier "who has served in the army of the United States," within the meaning of that phrase as used in section 2304 of the Revised Statutes, the entrance of the soldier into the army will be considered as dating from his muster into the service, and not from his enrollment.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 14, 1903.* (A. S. T.)

On December 30, 1898, Julian D. Whitehurst, as assignee of the minor orphan children of Elijah C. Putman, deceased, applied to make soldiers' additional homestead entry for the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 20, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 29, T. 51 N., R. 11 E., Pueblo land district, Colorado, said application being based on the military service of said Elijah C. Putman in the army of the United States during the war of the rebellion, on homestead entry No. 918 made by said Putman on May 19, 1868, for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of

Sec. 1, T. 5 S., R. 27 W., Washington, Arkansas, and on the assignment of the alleged right of additional entry by the minor heirs of said Putman made by their guardian.

Your office, on December 23, 1902, rendered a decision rejecting said application on the ground that the military service of said Putman in the army of the United States during the war of the rebellion did not constitute a sufficient basis for the allowance of an additional entry under section 2304 of the Revised Statutes of the United States, and on February 9, 1903, your office denied a motion for review of said decision. Whitehurst has appealed to this Department.

Section 2304 of the Revised Statutes provides that:

Every private soldier and officer who has served in the army of the United States during the recent rebellion, for ninety days, . . . shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres.

Section 2306 provides that:

Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

Section 2307 provides that:

In case of the death of any person who would be entitled to a homestead under the provisions of section twenty-three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, . . . shall be entitled to all the benefits enumerated in this chapter.

The rights of the minor orphan children of a deceased soldier, or of their assignee, under section 2307 of the Revised Statutes, must be determined with reference to the qualification of their deceased ancestor under section 2304. If he was qualified to make a homestead entry under said section, and died without exercising the right, his minor orphan children, in case of the death or marriage of his widow, are entitled to all the benefits of said chapter, and it has been held that this includes the right to make an additional entry under section 2306.

The question involved in this case is, whether or not the military service of Elijah C. Putman in the army of the United States during the war of the rebellion was sufficient to entitle him to the benefits of section 2304 of the Revised Statutes, which requires ninety days of such service.

The report furnished by the War Department as to Putman's military service is as follows:

Elijah C. Putman was enrolled November 19, 1863, at Benton, Arkansas, for one year or during the war, and mustered into service as private in Co. "D" 4 Reg't Ark. Cav. (Col. Fishback's Cav.), January 7, 1864, and discharged as a private March 28, 1864, by reason of disbandment of regiment.

If his term of service be computed from the date of enrollment to the date of discharge, it will amount to more than ninety days; but if it be counted from the date of his muster into the service to the date of discharge, it is less than ninety days, and, therefore, since the statute (Sec. 2304, R. S.) requires ninety days' service *in the army* of the United States, it is material to determine whether Putman was *in the army* from the date of his enrollment, or only from the date of his muster into service.

The distinction between the status of one who has been merely enrolled and that of one who has been mustered into service is discussed at length in a decision rendered by Mr. Justice Gray, while Chief Justice of Massachusetts, in the case of *Tyler v. Pomeroy et al.* (8 Allen, 480), wherein it was held that one who has been enrolled, and had signed a paper whereby he agreed to serve for a period of three years from the date of his muster into the service, did not thereby become a soldier, and was not thereby rendered amenable to the military authorities. That case was cited approvingly by the Supreme Court of the United States *In re Grimley* (137 U. S., 147), and also by the Judge Advocate General in his letter to the Assistant Secretary of War, dated October 6, 1900, wherein it was said:

The muster-in is the ordinary means of receiving the volunteer soldier into the service, and when there is a muster-in it marks the date of the beginning of the service. The enrollment of a person for service in the volunteer army is only a proposal to enter such service, a declaration of his readiness to do so. He may or may not carry this out; he may refuse to carry it out, and he does not thereby become a deserter; he has a perfect right to do so . . . and until the person proposing to enlist presents himself to the mustering officer he has not met any one with whom he could enter into a contract which would bind him to the military service of the United States.

Attorney-General Griggs, in his letter to the Secretary of War, dated February 27, 1901 (23 Ops. A. G., 406), said:

The enrollment of a person for service in the volunteer army is only a declaration of his intention to enter such service; he may or may not actually enter the service by formal muster-in; he may refuse to be mustered in after enrollment. . . . Again, if he is willing to enter the service, he may, for various reasons, be rejected by the officer in charge of the muster-in, and if rejected he has never been actually or constructively in the service of the United States army.

It seems to be well settled that the entry of a soldier into the army is marked by his muster-in, and not by his enrollment.

It is argued, in substance, that inasmuch as this Department in construing the act of June 27, 1890 (26 Stat., 182), and similar statutes, in the adjudication of claims for pensions thereunder, holds that the term of the soldier's service extends from the date of his enrollment to the date of his discharge, consistency requires a similar construction of the language found in section 2304 of the Revised Statutes when applied to a claim for additional homestead. Section 2 of the act of

1901, the local officers forwarded all the papers in the case to your office. April 5, 1902, in response to directions from your office, the local officers made report in respect to the statements contained in the protests. April 22, 1902, in view of said report, your office dismissed the protests. September 24, 1902, on appeal to the Department, by protestants, your office decision was reversed, with directions to order a hearing upon the protests.

December 10, 1902, a hearing was had before the local officers, at which the entryman and protestants appeared, and each submitted evidence. December 11, 1902, the local officers found, among other things, that the notice was published "in the paper that would give greatest publicity in the community in which these claims are situated." May 14, 1903, on appeal by protestants, your office held that the register, in designating the Arizona Daily Journal-Miner as the newspaper in which to publish the notice of the application for patent, had not abused the discretion lodged in him by the statute, and affirmed the finding of the local officers. The protestants have appealed to the Department.

Section 2325 of the Revised Statutes provides that when an application for patent to a mining claim is filed—

The register of the land office . . . shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim.

Paragraph No. 52 of the Mining Regulations in force at the time the application for patent was filed (25 L. D., 561, 578), and now in force as paragraph 47 of the Mining Regulations (31 L. D., 474, 482), is as follows:

The register shall publish the notice of application for patent in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land.

The provision of the statute requiring publication of the notice is intended to diffuse information "respecting the application for patent in the vicinity of the claim and among those whose residence or presence in that locality bespeak their interest in the claim or their knowledge thereof." (26 L. D., 145, 147). The primary purpose of said provision, as is plainly manifest, is to bring such notice to the attention of persons who may have adverse interests in the land embraced in the claim applied for, in order that they may have an opportunity to assert and protect such interests.

Congress regarded that by the publication of the notice in a newspaper "nearest to such claim," the intent and purpose of the statute would be best accomplished, but conferred upon the register discretionary power to determine, under the supervision of the Commissioner of the General Land Office and the Secretary of the Interior, what publications are newspapers within the contemplation of the statute,

and to designate the newspaper nearest the claim, in which the notice should be published. This discretionary power should be exercised wisely, and in accordance with the statute and the rules and regulations of the land department, and not arbitrarily or indifferently. It is subject to review, and if abused, to correction by the Commissioner of the General Land Office and by the Secretary of the Interior. It cannot be enlarged or diminished except by Congress.

In construing the provision of the statute which confers this power, the Department in *Condon et al. v. Mammoth Mining Company* (on review, 15 L. D., 330, 331), quoted with approval the following language contained in the circular letter of April 21, 1885, directed to registers and receivers, viz:

You have no discretion under the law to designate any other than the newspaper "nearest the land" for such purpose, when such paper is a "newspaper of general circulation" as defined in said circular.

And in the same case, at page 334, in respect to said provision, it was held as follows:

This means that the register shall publish the notice of such application in a paper to be by him designated as being the newspaper published nearest to such claim, not by actual measurement in a direct line between newspaper offices in the same town or city, but in the nearest town or city in which a paper or papers of established character and general circulation is published. Unquestionably, under this statute, when several newspapers are published in the same town or city, the register may designate whichever, in his judgment, will best subserve the public interests and which will give the widest notice to the public that the entrymen are seeking title to a mine. From these views it follows, that in this matter the register has some discretion in the designation of the newspaper, as to its established character as a newspaper, its stability and general circulation and the like.

The above language was quoted with approval by the Department in its letter of instructions to the Commissioner of the General Land Office of February 3, 1898 (26 L. D., 145, 147). In the same letter (page 146, 26 L. D.) it is stated that—

The statute clearly seems to indicate that the register is given some discretion in the selection of the newspaper. * * * The statute is not simply that the publication shall be in a newspaper "published nearest to such claim," but that the publication shall be "in a newspaper to be by him [the register] designated as published nearest to such claim." There are three elements in this requirement: First, The publication shall be in a newspaper; second, that newspaper shall be one "published nearest to such claim;" and third, the register shall designate and determine what newspaper is "published nearest to such claim." * * * The performance of the register's duty, under the statute, requires the exercise by him of reasonable judgment and discretion, both in determining what is a newspaper, and in determining which of several papers is the one published nearest the claim.

The evidence in this case shows that at the time the application for patent was filed and during the entire period of publication of notice, the *Arizona Daily Journal-Miner* was owned and published by the then receiver of the local land office; that Prescott has a population of about four thousand, is the county seat of Yavapai County, and is

from eighteen to twenty miles distant from the claims, by the usually traveled route; that the Daily Journal-Miner has a daily issue of over one thousand copies, the greater part of which circulates in the town of Prescott, where said paper is printed and published; that said newspaper circulates generally throughout Yavapai County and in the immediate vicinity of the claims, and that from twenty to twenty-five copies daily are distributed through the Jerome post office; that Jerome is from twelve to fourteen miles distant from the claims, and at least six miles nearer thereto, either by an air line, or by the usually traveled route, than Prescott; that according to the census of 1900, Jerome had a population of over twenty-eight hundred; that two *bona fide* newspapers of established character and general circulation in Yavapai County are printed and published weekly in Jerome, and were so printed and published prior to and during the entire period of publication of said notice; that these newspapers at such times circulated and now circulate generally in said county, and in the immediate vicinity of the claims; that one of these papers has a weekly issue of over five hundred copies, the greater part of which circulates in Jerome; and that persons residing in the immediate vicinity of the claims get their mail either at Jerome or Prescott, these being the post-offices nearest to the claims.

The evidence falls short of showing, as found by the local officers, that the publication of the notice in the Prescott newspaper gave greater publicity in the community in which the claims are situated, than would have been given had the notice been published in one of the Jerome newspapers; nor does it show that the register had just cause to believe that the papers printed and published at Jerome were not "newspapers" of "established character and general circulation."

In view of the language of the statute, the intent and purpose of Congress as indicated thereby, and in view of the decisions referred to, it would seem that where, as in this case, it conclusively appears that two newspapers of established character and general circulation are printed and published within twelve to fourteen miles from the claims in question, and which circulate in the immediate vicinity thereof, the register abused the discretion, lodged in him by the statute, by designating a newspaper six miles farther from the claims in which to publish the notice.

Your office decision is reversed, with directions to require new notice to be published by the mineral claimant.

MINING CLAIM—PLACER—FORM OF LOCATION.

WOOD PLACER MINING COMPANY (ON REVIEW).

The requirement of section 2331 of the Revised Statutes, that all placer mining claims shall conform, as nearly as practicable, to the "United States system of public-land surveys, and the rectangular subdivisions of such surveys," applies with equal force whether such claims are located upon surveyed or unsurveyed public lands.

A "gulch" placer claim, which can not, by reason of its environment, practicably be conformed to the system of public-land surveys, and the rectangular subdivisions thereof, may, upon sufficient and satisfactory showing, be entered if in shape and position approximating such system as nearly as the conditions will reasonably permit.

Secretary Hitchcock to the Commissioner of the General Land Office.
(F. L. C.) December 16, 1903. (F. H. B.)

The Wood Placer Mining Company has filed motion for review of departmental decision of July 16, 1903 (32 L. D., 198), wherein its entry, No. 94, for the Discovery and Annex placer mining claims, surveys Nos. 5885 and 6000, respectively, Missoula, Montana, was ordered to be canceled, under the authority of the case of Miller Placer claim (30 L. D., 225) and paragraph 30 of the present mining regulations (31 L. D., 474, 478-9), because the locations in question, made upon unsurveyed lands, did not, upon the showing made by the record, appear to "conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys" (Sec. 2331, R. S.).

The principal objection urged against the decision, briefly stated, is, that the provisions of section 2331 of the Revised Statutes have no application to placer claims located upon the unsurveyed public lands. For convenience, the material portion of that section is here given.

Where placer claims are upon surveyed lands, *and conform to legal subdivisions*, no further survey or plat shall be required, and *all placer mining claims* located after the tenth day of May, eighteen hundred and seventy-two, *shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys*, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands.

(The italics are borrowed.)

It is contended that this section, which, in full, is a substantial reenactment of section 10 of the act of May 10, 1872 (17 Stat., 91, 94), was intended only to relieve against the hard and fast provisions of section 12 added by the amendatory act of July 9, 1870 (16 Stat., 217), to the act of July 26, 1866 (14 Stat., 251), now incorporated into sections 2329 and 2330 of the Revised Statutes (those provisions being here italicized), as follows:

Sec. 2329. Claims usually called "placers," including all forms of deposit excepting veins of quartz or other rock in place, shall be subject to entry and patent,

under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; *but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.*

Sec. 2330 [in part]. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, *which location shall conform to the United States surveys.*

It is argued by counsel for the entryman that, by the employment of the words "as near as practicable," it is to be inferred that the provision of the later statute (now Sec. 2331) was intended as a modification of the requirement, by the earlier (now Secs. 2329 and 2330), of strict conformity to the public survey lines, and that the presence of the further clause of the same section, "where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands," has the effect to strengthen their contention that section 2331 relates solely to placer claims upon surveyed lands. Notwithstanding this, counsel urge that the section, by its terms, invests the land department with a sound discretion to determine the practicability of conformity, by reason of their peculiar situation, of the locations here in question.

If it were correct, as contended, that the section relates exclusively to locations upon surveyed lands, it is certain that none of its provisions could be successfully invoked in favor of these locations, upon unsurveyed lands. But, the Department does not believe it has such limited application. A comparison of the language of sections 2329, 2330, and 2331, which now constitute the body of the mining law upon this subject and by which the land department is governed, leads to another conclusion. Section 2329 provides that where the lands have been surveyed the claim *shall conform to the legal subdivisions*, and section 2330 prescribes conformity with the *United States surveys*. But section 2331 is expressed in terms of wider scope and broader import. It requires "all placer mining claims" to be conformed, "as near as practicable," to the *system* of "public-land surveys, and the rectangular subdivisions of such surveys." Its evident purpose is to supplement the preceding provisions and provide for all cases not otherwise provided for, and among these are to be included claims upon unsurveyed lands.

The first clause of section 2331 dispenses in part, as to placers which "conform to legal subdivisions," with the conditions imposed by section 2329; and the statute continues: *all placer mining claims* located after May 10, 1872, shall conform "as near as practicable" to the *system* of "public-land surveys, and the rectangular subdivisions of such surveys." The inference fairly is that this clause is intended to make

provision for all other placer claims than those provided for in sections 2329 and 2330, *viz.*, those upon surveyed lands which for sufficient reasons can not practicably be conformed "to the United States surveys" and "the legal subdivisions of the public lands," and those upon unsurveyed lands. Specific provision having first been made for those locations upon surveyed lands which may be laid according to the lines of the United States surveys, and the legal subdivisions thereof, the necessity for an adequate provision for placer locations not in that situation became apparent; and it is not to be assumed that Congress intended to supply the omission in part only, if the terms employed are broad enough to cover all cases. The Department is satisfied that the language of section 2331 is ample for this purpose. The requirement that non-conformable locations shall be laid, "as near as practicable," according to the *system* of public-land surveys, and the rectangular subdivisions thereof, is significant and strengthens the view that locations upon unsurveyed lands are within the purview of the statute. Both references in the section to locations upon surveyed lands, mentioned by counsel, are with respect to the requirements as to survey and plat, alone; and the restrictions as to form which Congress early took the precaution to impose in the case of placers upon the surveyed public lands obviously are with equal reason applicable to locations of the same character upon the public lands to which the lines of the surveys have not yet been, but are intended ultimately to be, extended.

It is objected by counsel that the application of the provision to locations upon unsurveyed lands would, in order that they might in "shape and position" approach anything like conformity, require the extension by claimants of the lines of the public-land surveys, from whatever distance. But the Department does not so regard the requirement. It is, that such locations must be laid, as nearly as practicable, in conformity with the *system* of "public-land surveys, and the rectangular subdivisions of such surveys," *i. e.*, rectangular in form, with east and west and north and south lines, and otherwise within the limits of practicability.

Counsel cite the cases of Esperance Mining Company (10 C. L. O., 338), William Rablin (2 L. D., 764), and Pearsall and Freeman (6 L. D., 227), to support the entry made in the case at bar. Each of those cases involved a placer location (familarly known among miners as a "gulch" placer) upon surveyed land, laid upon and along the bed of a stream, whose banks were enclosed or surmounted by precipitous cliffs, barren of mineral, the boundaries of the location embracing and following the opposite shores. It was held that under the conditions which there obtained, the locations could not practicably be conformed to survey lines, and the entries therefor were sustained.

It was not the intention, in the case of Miller Placer Claim, *supra*, and the case under review, to overrule the former decisions. In the

later cases apparently different situations were presented. If the claims here in question are "gulch" claims, within the accepted meaning of the term, and can not, by reason of their environments, practically be conformed to the system of public-land surveys, and the rectangular subdivisions thereof, they may, upon sufficient and satisfactory showing (subject to other objection), be entered if in shape and position approximating such system as nearly as the conditions will reasonably permit.

The Wood company has now endeavored to make such showing as will bring the case within the foregoing principle. In the corroborated affidavit of its president, filed to support the motion for review, it is stated—

that Hughes creek, which flows through said Discovery and Annex claims, runs through a narrow canon surmounted on either side by steep, rugged mountains, valueless for any purpose and of such an altitude as to preclude their use for any purpose, even for grazing. . . .

That said placer claims are located upon unsurveyed public lands and were when located upwards of forty-five miles, over a mountain road, from the nearest surveyed public land. That since said application for patent was made some public-land surveys have been made at a distance of about twenty miles from these claims, and as yet have not been accepted.

That only that portion of the ground included between the foot of either mountain enclosing Hughes creek is of any value for placer mining purposes or containing deposits of auriferous gravel, and if claimant were compelled to conform its locations to the system of public-land surveys or to anything approaching near that system the result would be that in order to obtain two acres of placer ground eighteen acres of absolutely valueless and worthless mountain side would necessarily be included in each claim or mining location of twenty acres. And if an association sought to locate ninety or one hundred acres of mining ground, as in this case along a winding stream like Hughes creek, it would be utterly impossible to conform or even pretend to conform with the system of public-land surveys, especially so where there existed no survey to which the prospector might conform his location.

The showing is hardly sufficient to establish the existence of the conditions necessary to bring the locations within the purview of the qualifying provision of the section. Whilst it is affirmatively alleged that Hughes creek, which flows through the claims, runs through a narrow canon between steep, rugged mountains, devoid of placer mineral deposits and valueless for any purpose, much of the showing with respect to the situation and scope of the claims themselves, the depth and abruptness of the canon or gorge, etc., is more by way of implication than direct averment. Every feature of the conditions relied upon to entitle the locations to pass to entry in their present form and position should be explicitly and directly set forth. If reasonably obtainable, a report, under oath, with respect to the physical conditions should be procured from the deputy mineral surveyor who surveyed the claims. Your office will therefore call upon the entryman, in the usual manner, to submit, within a reasonable time, a further showing in the premises. If the additional showing shall be

submitted within the time allowed, the case will be promptly retransmitted to the Department for its further action; otherwise, the entry will be canceled, as ordered.

The question with respect to the improvements upon the claims, raised by the appeal from your office decision of November 29, 1902, will be considered if the case is resubmitted to the Department upon the showing called for.

MINING LAWS AND REGULATIONS THEREUNDER.

CIRCULAR.

The circular of United States mining laws and regulations thereunder, approved July 26, 1901 (31 L. D., 453), reapproved for reprinting in pamphlet form December 18, 1903, without change except the insertion of the word "public" in the seventh line from the bottom of page 23 thereof, between the words "unoccupied" and "lands" in said line, and the insertion, following page 23 of said circular, of copies of the acts of May 27, 1902 (32 Stat., 263), February 12, 1903 (32 Stat., 825), and March 3, 1903 (32 Stat., 998), this legislation having been enacted since the former approval of said circular.

RAILROAD GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.

NORTHERN PACIFIC RY. CO. *v.* SPARLING.

The completion of a pre-emption filing subsequently to the passage of the act of July 1, 1898, under a declaratory statement filed prior to said act, for land listed by the Northern Pacific Railroad Company within the indemnity limits of its grant, is equivalent to an election by the claimant to retain the land, and the fact that the land department failed to list the land for relinquishment by the company until after the intervention of another claim for the land, will not prevent an adjustment being made under said act on account of the claim pending at the date of the passage of the act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 21, 1903.* (F. W. C.)

The Northern Pacific Railway Company has appealed from your office decision of June 20, last, denying its application for adjustment of conflicting claims to the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 3, T. 30 N., R. 37 E., Spokane land district, Washington, under the provisions of the act of July 1, 1898 (30 Stat., 597, 620).

The tract in question is within the indemnity limits of the grant made in aid of the construction of the Northern Pacific railroad and was included in the list of selections filed on account of said grant May 25, 1885.

June 3, 1895, Mrs. Hephzibah Norman tendered a preemption declaratory statement for this land, alleging settlement thereon September 29, 1884, prior to the railroad indemnity selection. A contest arose upon said application, which was pending undisposed of on July 1, 1898, before this Department on appeal from your office decision in favor of the preemption claimant.

July 12, 1898, the Department affirmed your office decision directing that Mrs. Norman be permitted to complete filing for the land, in which event the company's selection would be canceled. This action was evidently taken without knowledge of the passage of the act of July 1, 1898. Acting thereunder, Byron T. Norman, for himself and the heirs of Hephzibah Norman, deceased, completed preemption declaratory statement for this land August 13, 1898, whereupon the company's indemnity selection was canceled. No further action appears to have been taken toward completing title to the land under said preemption declaratory statement, and on October 11, 1900, the local officers permitted one Richard Sparling to make homestead entry for the land.

Your office decision of June 20, last, considered only the conflicting claims of Sparling and the railway company to this land and denied the application for adjustment under the act of 1898, because of the fact that the claim of Sparling was initiated long after the passage of said act; from which action the company has appealed to the Department.

From the above recitation it is apparent that the departmental decision of July 12, 1898, and all action taken thereunder was in plain violation of the provisions of the act of 1898, which directed the adjustment of conflicting claims similar to those then being asserted to this land thereunder. The railway company accepted the act of 1898, and the action of the heirs of Mrs. Norman, deceased, in completing preemption filing for the land on August 13, 1898, more than a month after the passage of the act, is equivalent to an election on their part to retain the land, and the mere fact that your office has failed to list the land for relinquishment by the railroad company does not prevent an adjustment now being made under said act of 1898. Your office decision of June 20, last, is therefore set aside and vacated and the case is herewith remanded with direction that this tract be listed for relinquishment by the railway company under said act, on account of the individual claim of the heirs of Hephzibah Norman, which was the individual claim that was being asserted to this land at the time of the passage of said act.

July 1, 1898, as to permit of adjustment of the conflicting claims then made to the land, the mere fact that your office failed for more than a year to proceed with the adjustment thereunder, and that the individual claimant who was claiming the land on July 1, 1898, has relinquished his claim to the land so that his son might make claim thereto, should not prevent the adjustment now being made under said act, and the action of the individual claimant should be considered as an election on his part to retain the land, so that it can now be listed on his account for relinquishment by the railway company. Your office decision of June 6, last, is therefore set aside and vacated and the case remanded for your further consideration and action in the light of the ruling here made.

PRIVATE CLAIM—DOUBLE CONFIRMATION—SECTION 4, ACT OF
MARCH 3, 1807.

F. T. LATTIER.

A double confirmation of title to the same land, made under the fourth section of the act of March 3, 1807, by the commissioners appointed for the purpose of ascertaining the rights of persons claiming land in the territories of Orleans and Louisiana under the French or Spanish government, in favor of two different claimants, one claiming under a Spanish patent and the other through such patentee and by right of occupancy, does not have the effect to vest in either of the confirmees a greater estate than was covered by the patent, or to give to either party any right that he could not have acquired under the Spanish government.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 23, 1903.* (E. F. B.)

With your letter of November 18, 1903, you transmit the appeal of F. T. Lattier, curator of the vacant succession of Widow Dartigeaux, from the decision of your office of March 21, 1903, refusing to issue scrip under the act of June 2, 1858 (11 Stat., 294), in satisfaction of an alleged unlocated portion of the private land claim of Widow Dartigeaux, embraced in the report of the old board of commissioners for the Western District of the Territory of Orleans, as claim No. 1676, Class A, American State Papers (Green), Vol. 2, p. 712.

The claim of Widow Dartigeaux was founded upon a Spanish patent for 1415 arpens of land, equivalent to about 1203.74 acres. It was confirmed by the commissioners under authority conferred by the fourth section of the act of March 3, 1807 (2 Stat., 440).

It is alleged in the application that this claim was partially satisfied by location to the extent of 513.26 acres, leaving a deficiency of 690.48 acres; that a further location of 672.37 acres was sought to be made on adjoining lands, but that said location was void and of no effect because of the location of claim 1656 B, in favor of J. J. Paillette,

“assignee of said Dartigeaux,” which was superior in right to claim 1676 A, for the following reasons:

First: Because under an older claim.

Second: Because prior in point of time.

Third: Because said Paillette acquired his rights from said widow Dartigeaux, who therefore could not compete with him for the same land.

The claim of Paillette, No. 1656 of Class B, was embraced in the same report with the claim of Widow Dartigeaux, but was acted upon by the board two days prior to its action upon the latter claim. It was confirmed in favor of Paillette for 947.87 acres, and appears from the report to have been founded on “occupancy ten years,” although the report also shows that his claim and right were derived from one “Dartigeaux,” who was supposed to have held under a Spanish patent, as shown by the following extract from the minutes of the board:

D. R. No. 96. Natchitoches Dartigeaux’s claim for 1120 arpens equal to 947.87/100 acres founded on 10 years occupancy, in favor of Jean Jacques Paillette.

“In the claim of Jean J. Paillette for a tract of land containing fourteen arpens front on each side of Red River, by the ordinary depth, said to have been held under a complete patent which is not found with the claim—John Bte. Latin being sworn, deposed and saith, that the land claimed has been inhabited & cultivated more than thirty years in regular succession immediately preceding this date first by one Dartigeaux and afterwards by those claiming under him.”

Paillette’s claim was finally located so as to cover in part lot 1 of Sec. 42, T. 9 N., R. 6 W., and lot 76, T. 8 N., R. 6 W., containing in the aggregate 522.61 acres. It is alleged by applicant that the land above described is a part of the claim of Widow Dartigeaux as originally surveyed by the Spanish authorities, and as covered by the Spanish patent. It is contended that to the extent of such conflict the claim of Widow Dartigeaux remains unsatisfied, and that her estate is entitled, under the act of June 2, 1858, *supra*, to a certificate of location for a like quantity of land to compensate for such deficiency.

The surveyor-general declined to entertain that view, assigning as a reason therefor that the claim of Paillette, having been derived from Widow Dartigeaux, was identical with and a part of said claim, and that no deficiency existed as to either claim, but, on the contrary, both claims have been located in excess of the area confirmed.

From the facts as presented by the record there would seem to be no doubt that the locus of the claim of Widow Dartigeaux, as fixed by the lines of the Spanish survey upon which the Spanish patent issued, embraced the lands now designated by the United States surveys as lot 2 of Sec. 42, T. 9 N., R. 6 W., and Secs. 7 and 79, T. 8 N., R. 6 W., containing in the aggregate 700.26 acres; also lot 1, Sec. 42, T. 9 N., R. 6 W.; and Sec. 76, T. 8 N., R. 6 W., aggregating 522.61 acres. The first mentioned tract of 700.26 acres is the land embraced in the claim of Widow Dartigeaux, as it now appears on the township plat, and the tract of 522.61 acres is a part of the claim of Paillette as

it was finally located. The two tracts, aggregating 1,222.87 acres, although containing 19.13 acres in excess of the confirmed area of the claim of Widow Dartigeaux, were evidently comprised in the original lines of said claim as surveyed by the Spanish authority and patented to her.

This view accords with the contention of appellant, and, although the claim of Paillette was located to embrace lands outside of the lands of the Dartigeaux claim, the location was extended to embrace a part of the lands covered by the latter claim, for the reason that, although Paillette's claim was reported as a claim founded upon occupancy, it was in fact derived from one Dartigeaux, who held under a Spanish patent, and to the extent of such location the claim of Paillette was identical with the claim of Widow Dartigeaux.

It may therefore be accepted as a settled fact that the land conveyed to Widow Dartigeaux by the Spanish patent and confirmed to her by the board is the land embraced in the tracts above mentioned, aggregating 1222.87 acres, and that 522.61 acres of the land covered by said patent have been patented by the United States to Paillette under his claim No. 1656 of Class B.

It would seem from the report of the board that Paillette presented a claim for 947.87 acres, claiming to hold as transferee under a complete patent, which was not produced, but the witness upon whose testimony the claim was confirmed stated that the land had been occupied for thirty years immediately preceding, "first by one Dartigeaux and afterwards by those claiming under him." Two days later the board acted upon the petition of Widow Dartigeaux, who presented for confirmation a claim under a complete Spanish patent for the full area covered by such patent, and her claim was so confirmed. It is probable the board supposed that the Dartigeaux under whom Paillette claimed was not the Widow Dartigeaux whose claim was confirmed two days later, and that Paillette's claim was not identical with any part of the claim of Widow Dartigeaux. Although the board may have acted under such impression, both claims were confirmed for certain tracts of land, and, if the survey of the claims according to the calls for their respective boundaries show that they are coincident, the only reasonable conclusion would be that the Dartigeaux from whom Paillette's title was derived was the Widow Dartigeaux, who acquired the title to the land under the Spanish patent. The double confirmation of the same land in favor of both claimants did not have the effect to vest in either of the confirmees a greater estate than was covered by the Spanish patent, or to give to either party any right that they could not have acquired under the Spanish government.

It appears from a statement in your letter that your office in 1840, acting upon the theory that the two claims were not identical, attempted to locate the Paillette claim so as not to conflict with the claim of Widow Dartigeaux, and such a location was made, but, upon an investigation

of the question as to the true location of said claim, it was shown that a conflict between the two claims was inevitable, and that a survey of the Paillette claim made in accordance with the calls as confirmed by the commissioners would prove it to be identical with a part of the Dartigeaux claim. Upon satisfactory evidence produced at that time the survey of the Paillette claim, which was executed so as not to conflict with the Widow Dartigeaux claim, was set aside, and a survey and location were then made to agree with the proper calls upon which the patent issued. Such action was evidently taken because of the determination that Paillette's claim was derived from the Spanish patent to Widow Dartigeaux. It therefore does not appear that the United States paid Paillette's claim with the lands of Widow Dartigeaux, as contended by appellant, but on the contrary his claim was located upon lands which she had sold to him before he presented the claim for confirmation.

No evidence of any character has been presented by appellant to impeach such finding, or to show that Paillette did not hold under that patent. The correctness of that decision has furthermore never been questioned, so far as appears from the record, until the appeal was filed from the decision of the surveyor-general in this case. It was admitted in the application that the claim of Paillette was derived from the Widow Dartigeaux, and that his claim to the land was superior to hers. If that be conceded, then it is evident that no part of her claim remains unsatisfied. Such a conclusion is so apparent that the applicant evidently appreciated the untenability of his claim for scrip upon such ground, and he now contends that the claims are not identical, but that both claims were confirmed by the commissioners to the full extent claimed by each petitioner, and that every presumption of law arising from the facts contained in the record supports his contention.

The only ground upon which his contention rests is, that the claim of Widow Dartigeaux was originally vested in and afterwards confirmed to a *woman*, while the testimony of the witness upon which Paillette's claim was confirmed shows that it was derived from a *man*, the witness having referred to the Dartigeaux under whom Paillette claimed as "*him*."

That fact standing alone might afford some presumption, though slight, that the claim of Paillette was derived from a person other than the Widow Dartigeaux, but when it is considered that the calls for the boundaries of his claim show it to be identical with the land confirmed to Widow Dartigeaux under a complete Spanish patent by defined boundaries, and that his claim was in fact derived from "one Dartigeaux," who held under such a patent, the conclusion is irresistible that his claim was derived from the Widow Dartigeaux, as admitted in the application.

Every presumption that Paillette's claim was derived from a Dartigeaux other than the Widow Dartigeaux that might arise from the

use of the pronoun "him" by the witness is thus effectually rebutted by the more important fact of the coincidence of the claims, as shown by the calls for their respective boundaries, and such presumption would necessarily control the action of the Department independently of the fact that the determination of that question was made more than fifty years ago, and the correctness of such determination appears not to have been challenged until the appeal was filed in this case.

Your decision is affirmed.

CEDED NEZ PERCE LANDS—ACT OF JUNE 4, 1897—SECTION 2306,
REVISED STATUTES.

T. H. BARTLETT.

Provision having been made by the act of August 15, 1894, for the disposition of the ceded Nez Percé lands under the mining, townsite, and homestead laws only, said lands are not subject to selection under the exchange provisions of the act of June 4, 1897.

Land occupied as a townsite, whether application to enter the same has been made on behalf of the occupants or not, is not subject to entry under section 2306 of the Revised Statutes.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 23, 1903.* (J. R. W.)

T. H. Bartlett, assignee of William Rhoden, appealed from your office decision of June 15, 1903, rejecting his application and proof, under section 2306 of the Revised Statutes, to enter the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 20, and E. $\frac{1}{2}$ NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 29, T. 32 N., R. 4 E., B. M., Lewiston, Idaho, as additional to Rhoden's original homestead entry at Boonville, Missouri, July 2, 1866.

April 3, 1900, William E. Moses, by his attorney in fact Benjamin F. Morris, filed his application under the act of June 4, 1897 (30 Stat., 36), to select these tracts, in lieu of land relinquished to the United States in the Pecos River Forest Reserve, which your office rejected, October 11, and December 2, 1901, because, among other reasons, the tracts are within the ceded Nez Percé Indian Reservation, and, under the act of August 15, 1894 (28 Stat., 286, 326), were subject to disposal only under the townsite, homestead, and mineral land laws. February 1, 1902, the case was closed.

June 15, 1900, while the above-mentioned matter was pending, T. H. Bartlett, by letter, asked your office for information as to the status of Moses's application, stating that the tracts had been platted as a townsite at the terminus of the Northern Pacific railway, in Idaho county, and that his client, by mesne conveyances, had acquired an interest therein.

February 28, 1902, soon after Moses's case was finally closed, Bartlett, as assignee of Rhoden's additional homestead right, filed his

application for the land. Affidavits of Bartlett of December 21, and August 28, 1902, filed in the case, are to the effect that Joshua Rawton and associates, being desirous to acquire title to said land speedily, were advised by William E. Moses that title thereto could be obtained by its selection under the act of June 4, 1897, *supra*, and they purchased such a right from Moses and caused it to be located by him, and he thereafter, by warranty deed, conveyed the land to Rawton, who conveyed to his associates their several interests; that subsequently, when advised that Moses's application under the act of June 4, 1897, had been rejected, the interested parties employed him (Bartlett) to examine into the matter and procure title for them, and for that purpose, under such employment and in their behalf, he made the additional homestead entry of February 28, 1902, which he desires to be considered to be, as it is in fact, only a continuation of their effort to obtain title under Moses's application, and to be regarded by relation as initiated as of the date of Moses's application under the act of June 4, 1897, viz., April 3, 1900.

The record further discloses that prior to Bartlett's application to locate Rhoden's additional right under section 2306 of the Revised Statutes, the land had been platted, occupied, improved, and built upon as the townsite of Stites, actually used for urban purposes, by a considerable population, and a shipping point of considerable importance, being the terminal of the Clearwater branch of the Northern Pacific railway.

February 25, 1903, your office, upon the foregoing facts, ruled Bartlett within sixty days to show cause why his application should not be rejected, to which he made return, March 31, 1903, not traversing the foregoing facts, and affidavits later filed in support of the return further showing such facts and that the townsite promoters had made a bridge across the Clearwater and other public and private improvements, and the record shows that they platted the land and conveyed lots therein as early as May 25, 1900.

April 4, 1903, before final action by your office on Bartlett's application, Hampton Taylor, as probate judge of Idaho county, filed his application to enter the land as a townsite under sections 2387 to 2389 of the Revised Statutes, as trustee for the inhabitants, and therewith filed the petition of fifty-seven persons, representing themselves to be residents and occupants of the land, requesting him to make such entry, and therewith was filed a blue-print map showing subdivision of the land into lots, blocks, streets, and alleys, as the townsite of Stites. The case thus became substantially a contest between Bartlett and the townspeople asserting right of entry as a townsite.

July 15, 1903, your office held: 1st, that as the land was not subject to selection under the exchange provisions of the act of June 4, 1897, no rights of Rawton and his associates could attach under Moses's application; 2d, that the land by actual urban appropriation prior to

Bartlett's application was excluded from entry under section 2306 of the Revised Statutes, so that no rights were obtained by Rawton and associates under Bartlett's application of February 28, 1902; and, 3d, that whatever rights of entry exist on behalf of the urban community must be exercised by the corporate authorities in case of incorporated towns, or by the probate judge as trustee in case of unincorporated towns, and as Bartlett was neither a village trustee, nor probate judge, and did not claim in such capacity to make entry, your office rejected his application.

Bartlett's appeal contends that each of the three propositions upon which his application was rejected is erroneous.

It is claimed to be error to hold that no rights were initiated by Moses's application under the act of June 4, 1897, "when the record shows that the parties thereto continued without interruption their efforts to secure title to the same." It is an elementary proposition that rights in public lands, property of the United States, can initiate only under and in compliance with some act of Congress authorizing their appropriation. In *Gibson v. Chouteau* (13 Wall., 92, 99) the court held that:

With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made.

This rule is adhered to and reiterated in decisions too numerous to require extended citation. Neither settlement, improvement, payment of consideration, nor any other act not in pursuance of an act of Congress authorizing disposal of the land sought to be appropriated, gives any right to the applicant or claimant. *Hutchings v. Low* (15 Wall., 77); *Burfenning v. Chicago, St. Paul, Minneapolis, and Omaha Railway Company* (163 U. S., 321). When, therefore, Congress provided, by the act of August 15, 1894 (28 Stat., 286, 326), in respect to the ceded Nez Perce lands, that—

The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under the town-site law and under the provisions of the homestead law—

such act was conclusive on all parties, those modes of appropriation are exclusive of any other, and the subsequent act of 1897, applicable to the public domain generally, was not applicable to such lands as to disposal of which specific provision had been made. *William C. Quinlan* (30 L. D., 268).

Nor could Bartlett's additional homestead application give a right, as the urban use of the land then excepted it from such entry. Only unappropriated public land is subject to entry under section 2306 of the Revised Statutes, and there can be no entry if the land is appropriated to urban or public use, whether an entry on behalf of such

public has been applied for or not. *Franceway v. Griffiths* (10 L. D., 691); *Bond's Heirs v. Deming Townsite* (13 L. D., 665); *J. M. Longnecker* (30 L. D., 611).

But it is insisted that Bartlett's application should be considered as having relation to the date of Moses's application under the act of June 4, 1897, and that, as the land was not then appropriated to urban use, Bartlett's application should be permitted, it being in the interest of the same person who from the date of Moses's application continuously sought to acquire title to the land.

It may be conceded, and upon the record appears to be true, that the two applications were in the interest of the same parties, and that the real parties in interest continuously sought in good faith to acquire title to the land, with no fraudulent intent and in the hope and expectation that it would become valuable as the site of a town and a center of population and trade. But, as above shown, Congress had specifically limited the manner by which title to the ceded Nez Perce lands could be acquired, and no rights could be acquired by any other.

The doctrine of relation is a legal fiction, invoked for the conservation of rights in cases where the initiative step for acquiring rights was, or at least was attempted to be taken, and might have been taken, in conformity with law. In such case the final act by which title passes is notionally considered, when dealing with intervening derivative rights, as having been done at the time that the initiative act was done. Speaking of the doctrine of relation the court, in *Johnston v. Jones* (1 Black, 209, 221), held that:

It is a legal fiction, invented to promote the ends of justice. It is a general rule, that it shall do no wrong to strangers. It is applied with vigor between the original parties, when justice so requires; but it is never allowed to defeat the collateral rights of third persons, lawfully acquired.

In *Bear Lake Irrigation Co. v. Garland* (164 U. S., 1, 23), the court held that:

It is indulged in for the purpose of thereby cutting off intervening adverse claims of third parties against the right or title set up and acquired by the first possessor.

Bartlett's application can not have relation to the date of Moses's application, as that was not taken or attempted to be taken in conformity with law, and never could have ripened into a title, and no right was acquired under it. The additional homestead application was distinctly different in character and a new proceeding which must be adjudged upon the conditions existing when it was made.

The applicant cites and relies upon two departmental decisions, neither of which is applicable to the facts of the present case. In *Barbour v. Wilson* (28 L. D., 61), Wilson made soldiers' additional homestead entry of the land there in controversy, October 30, 1894, when it was within an incorporated town, and for that reason was not subject to such entry. In September, 1895, the town was disincorporated, and the land then became subject to entry under the soldiers'

additional homestead law. August 30, 1895, Heywood sought to contest the entry because unauthorized by law, but the entry had not been canceled. Reciting these facts, the Department held (28 L. D., 70) that:

In other words, while the land was not subject to homestead entry when Wilson's entry was allowed, it became subject to homestead entry soon thereafter, and is so now.

In the administration of the public land laws it is uniformly and wisely held that an entry of land held in reservation or for other reason not subject to entry, made and maintained in good faith under color or claim of right will, if the land has since become subject to that class or character of entry, be permitted to remain intact as having attached when the land became subject to entry, if there be no adverse claim [citing authorities]. The facts of this case bring it clearly within this rule.

In this case the land never became subject to selection under the exchange provisions of the act of June 4, 1897, and the adverse right of an actual appropriation of the land by a resident urban settlement has attached. Either such fact alone prevents any right attaching under Moses's application.

In Robeson T. White (30 L.D., 61), cited and relied upon, White had a preference right of entry under the act of May 14, 1880 (21 Stat., 140), as reward for his successful contest of a former entry. The land was subject to entry under section 2306 of the Revised Statutes. In attempted exercise of his preference right he used the right of Carver, which was in fact valid, but question of its validity being raised he tendered as a substitute another right, of Pugh, also valid. The General Land Office held that tender of the Pugh right was a waiver of claim under the Carver right, and that the intervening settlement of Moran defeated entry under the Pugh right. The Department held that the vested preference right of entry was the material and controlling fact; that having claimed and exercised his preference right, (1) rights under location of the Carver certificate were not abandoned by tendering the Pugh certificate when question was raised as to the validity of the Carver certificate; (2) that had the Carver right been in fact invalid, he would be allowed to save his preference right and cure the infirmity of the consideration paid to the government by substituting another that was good; (3) that as he had been led by misprison, of the land department, to give a double consideration for his entry, he might withdraw either. This decision obviously has no bearing on the present case, for no right existed to make the Moses selection, and no antecedent right existed in attempted exercise of which the Moses application was made.

A motion was filed by counsel for the townsite claimants to dismiss Bartlett's appeal as not taken in time, being marked filed August 19th, though filed, as Bartlett claims, Monday, August 17th. Examination of the case upon its merits discloses that it is unnecessary to consider the motion.

Your office decision is affirmed.

SCHOOL INDEMNITY—CERTIFICATION—FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

HENRY FARRADAY.

By the approval and certification of a selection of school land, invalid because of insufficient base, the legal title thereto passes to the State, beyond the jurisdiction or power of the land department to divest it by an order of cancellation, and the only remedy for recovery of title to the United States is by suit for cancellation of the certified list.

Suit for the recovery of title to such lands can not prevail against a *bona fide* purchaser for value; and, where within a forest reserve, such lands may be assigned by such purchaser as a basis for the selection of lieu lands under the exchange provisions of the act of June 4, 1897.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) December 29, 1903. (J. R. W.)

Henry Farraday appealed from your office decision rejecting his application, No. 4450, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 7, T. 24 N., R. 18 W., S. B. M., San Francisco, California, in lieu of the fractional W. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 30, T. 2 N., R. 2 E., San Bernardino Forest Reserve, California.

The only question presented is the validity of title to the land assigned as base for the selection. The abstract of title shows a patent by the State of California to Henry Farraday, July 17, 1900, purporting to convey the land to him, and a deed by him, recorded in the proper county office, August 2, 1900, purporting to convey the land to the United States.

Your office decision states that the records of your office show that the land was—

selected by the State November 12, 1870, in lieu of Sec. 16, Tp. 17 S., R. 3 W., List 5, Los Angeles R. & R. No. 147; canceled January 31, 1881, by office letter "G" (see also letter "G" April 18, 1881), because erroneously granted. Canceled for want of proper basis.

Your office decision held that:

The State of California had therefore no title in said land at the time of granting a patent to Farraday, and it cannot be now used by him as a base for the selection of land under the act of June 4, 1897.

July 23, 1903, the Department, examining the record upon Farraday's appeal, found the record not sufficiently complete to permit its final adjudication, and remanded the case to your office for investigation and report—

in what respect the base assigned for the indemnity list No. 3, Los Angeles, R. & R. 147, Sec. 16, T. 17 S., R. 3 W., was found defective or insufficient; what disposal, if any, has been made by the United States of such base assigned. Your office will also request the proper offices of the State of California to furnish for information of the Department the facts shown by the records of the State land department touching the disposal or claim of ownership by the State of section 16, township 17 south,

range 3 west, assigned as base for the indemnity selection of the land here in question; also to advise your office whether the indemnity list No. 3, Los Angeles, certified to the State, embracing the land in question, remains in the State's possession.

November 20, 1903, your office returned the record with report that fractional T. 17 S., R. 3 W., S. B. M., lies within the claim to the "island or peninsula of San Diego," confirmed and patented June 11, 1869, no subdivisational survey being made, but by protraction from the lines of survey it has been ascertained that the area of section 16 is estimated as 370.5 acres. A map of this fractional township transmitted with the report, protracted from the surveys, also shows that the entire area of the fractional township closely approximates the area of about nine sections, or one-fourth of a township.

It also appears that December 15, 1869, the State of California filed indemnity school selection, Los Angeles, R. & R., No. 70, for all of Sec. 17, T. 1 S., R. 7 W., S. B. M., 640 acres, as indemnity for loss of Sec. 16, T. 17 S., R. 3 W.; November 12, 1870, the state filed another indemnity school selection for all of Sec. 30, T. 2 N., R. 2 E., S. B. M., 638.40 acres, as indemnity for loss of the same Sec. 16, T. 17 S., R. 3 W., S. B. M.; October 26, 1872, Los Angeles clear list No. 3 was certified to the state and to the local office upon its list R. & R. No. 147, *supra*, embracing all of Sec. 30, T. 2 N., R. 2 W.; and September 1, 1874, Los Angeles clear list No. 4 was certified to the state and to the local office September 5, 1874.

As the entire fractional township embraced no more than about one-fourth of a township, the state was entitled, under section 2276 of the Revised Statutes, to no more than a half section, or in any event to no more than the 370.5 acres that existed in place, but it transpires, notwithstanding such fact, that the state has claimed, and by inadvertence has been allowed and certified, 1278.40 acres as indemnity for 370.50 acres lost by the confirmed grant, or slightly more than 3.45 acres of indemnity for each acre lost in place.

October 18, 1880, your office discovering such fact held for cancellation the selection, R. & R. No. 147, of Sec. 30, T. 2 N., R. 2 W., certified to the state by clear list No. 3, October 26, 1872, holding that the state had exhausted her right by her selection, R. & R. No. 70, for Sec. 17, T. 1 S., R. 7 W., certified to the state by clear list No. 4, September 1, 1874. The state was notified of such action and allowed sixty days for appeal. January 31, 1881, due service having been made and no appeal taken, selection No. 147 was canceled by your office, and the local office was directed to note such cancellation upon their record. April 18, 1881, the local office was advised selection No. 147 had been certified in approved list No. 3 and to take no action under the letter of January 31, 1881, for disposal of Sec. 30, T. 2 N., R. 2 W. No disposal of the land by the United States has been made.

June 13, 1900, counsel for Farraday called attention of your office to the selection No. 147, and upon authority of the decision in Hendy

v. Compton (9 L. D., 106), asked that the order of cancellation be recalled and revoked. June 29, 1900, your office suggested that Faraday perfect his title under section 2 of the act of March 1, 1877 (19 Stat., 267), by purchase of the land, at one dollar and twenty-five cents per acre.

October 19, 1903, the Surveyor-General of the State of California, in response to your office request of August 8, 1903, reported that:

Indemnity list No. 3, Los Angeles District, still remains in the State's possession and the State or its grantees claim title to all the land embraced therein.

In *Frasher v. O'Connor* (115 U. S., 102), speaking of the effect of certification of an indemnity school land selection (*ib.*, p. 116), the court held that:

The title to the lands thus became as complete as though transferred by a patent of the United States. The statute of August 3, 1854, now Sec. 2449, R. S., declares that lists of lands granted to the State by a law of Congress, which does not convey the fee simple title or require patents to be issued, "shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress and intended to be granted thereby."

And, speaking on the same subject, in *Williams v. United States* (138 U. S., 514, 516), the court referred to and affirmed this decision, and held that: "It cannot be doubted that the certification operated to transfer the legal title to the State." The same rule has since prevailed in the Department. *Hendy v. Compton* (9 L. D., 106, 113); *Butler v. State of California* (29 L. D., 127, 130); *Todd v. State of Washington* (24 L. D., 106, 108); *Reid v. Mississippi* (30 L. D., 230, 234). The state by the certification of list 3, October 26, 1872, became vested with legal title to said land beyond jurisdiction or power of the land department to divest it by the order of cancellation of January 31, 1881. The state not acquiescing in such order, as in case of a title to land passed by patent inadvertently issued, the only remedy for recovery of title to the United States was by suit for cancellation of the certified list. *Williams v. United States, supra*. It is unnecessary to consider the effect of a concurrence of the state in an adjustment of the error committed by a surrender of the certified list before its record and disclaimer of title under it, as no such facts existed. The state still holds the muniment of title, and, asserting title under it, conveyed the land by patent to Farraday, who thereby got legal title and a better equity than purchasers of Sec. 17, T. 1 S., R. 7 W., could have, as section 30 was first certified to the state and it had better right to that section than to section 17, to which it had no right or equity whatever. But had the reverse been the case, the United States could not prevail in a suit to cancel the title after it came to a *bona fide* purchaser for value. *United States v. California and Oregon Land Company* (148 U. S., 31, 41); *United States v. Burlington, &c. R. R. Company* (98 U. S., 334, 342); *Colorado Coal Company v. United States* (123 U. S., 307, 313).

It follows that the equity of the United States against the State of California can not be asserted against its purchaser and grantee, but must be sought against the state in the adjustment of its school land grant or otherwise.

Your office decision is therefore reversed, and, if no other objection appears, the selection will be approved.

LAND IN POSSESSION OF INDIAN OCCUPANTS.

CIRCULAR.

Circular of October 26, 1887 (6 L. D., 341), relating to land in the possession of Indian occupants, reapproved for reprinting in leaflet form, without change therein, December 30, 1903.

COAL LANDS—PARAGRAPHS 30 AND 31 OF REGULATIONS OF JULY 31, 1882, AMENDED.

CIRCULAR.

Paragraphs 30 and 31 of the coal-land regulations approved July 31, 1882 (1 L. D., 687), amended December 31, 1903, to read as follows:

30. One year from and after the expiration of the period allowed for filing a coal declaratory statement is given within which to make proof and payment; but you will allow no party to make final proof and payment except on notice to all others who appear on your records as claimants to the same tract. No notice will hereafter be given to parties whose coal filings have expired by limitation under the law.

31. A declarant who otherwise complies with the law may enter *after* the expiration of said year, *provided* no valid adverse right shall have intervened, but postpones his entry beyond said year at his own risk. Thereafter, the land is subject to entry by any duly qualified applicant, without notice to the claimant under the expired declaratory statement; and the government can not thereafter protect the latter against another who complies with the law, or give the value of his improvements any weight in his favor.

LUCKY FIND PLACER CLAIM.

Motion for review of departmental decision of July 18, 1903, 32 L. D., 200, denied by Secretary Hitchcock November 21, 1903.

MINING CLAIM—APPLICATION FOR PATENT—NOTICE—SECTION 2325, R. S.

REED *v.* BOWRON.

Until patent has issued the land department has jurisdiction to inquire and determine whether or not a claimant for lands under the public land laws has complied therewith; and, if entry has been made, to inquire and determine whether or not it was properly allowed, and, if found not to have been so allowed, it is the duty of said department to vacate and cancel such entry.

The notice of an application for patent to a mining claim published in a newspaper, in accordance with the requirements of section 2325 of the Revised Statutes, should substantially conform to the notice as posted upon the claim, and should contain sufficient correct data to put persons of ordinary intelligence and prudence interested in the land applied for upon inquiry, and "to enable any one interested to ascertain with accuracy the position of the claim."

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 7, 1904.* (A. C. C.)

The Department, by decision of February 5, 1903 (unreported), held that no good reason appeared why mineral entry No. 535, Sacramento, California, made March 31, 1877, by the St. Patrick Gold Mining Company, to the extent that it embraced the Peachy mill site claim should not pass to patent, thereby reversing your office decision of June 11, 1902, whereby said entry, to the extent that it embraced said claim, was held for cancellation.

March 18, 1903, Charles A. Reed filed a motion for review, which was entertained May 22, 1903, and has since regularly matured.

The facts in the case so far as are necessary to consider in order to pass upon the motion for review are set forth in *Reed v. Bouron* (26 L. D., 66), and in the decision complained of, and need not be restated here.

In a brief filed by Bowron July 21, 1903, he contends, in effect, that Reed has no such interest in the land in question as entitles him to be heard, and that the jurisdiction of the land department over the land ended when the entry was allowed, and for these reasons Reed's protest should be dismissed and the motion for review denied. This contention is not tenable. It is settled law that until patent has issued the land department has jurisdiction to inquire and determine whether or not a claimant for lands, under the public land laws, has complied therewith, and if entry has been made by such claimant, to inquire and determine whether or not said entry was properly allowed, and if

found not to have been properly allowed, it is the duty of such department to vacate and cancel the entry. *Brown v. Hitchcock* (173 U. S., 473, 476); *Hawley v. Diller* (178 Ib., 476, 488, 489, 490); *Cosmos Co. v. Gray Eagle Co.* (190 Ib., 301, 308, 309); *Riverside Oil Co. v. Hitchcock* (Ib., 316, 323, 324); *Harkrader et al. v. Goldstein* (31 L. D., 87, 91, 92).

Whether or not the land entered as the Peachy mill site claim was subject to disposal under the mining laws, and whether or not the statutory requirement in respect to the published notice was complied with, are questions which concern the government. *Adams et al. v. Quijada et al.* (25 L. D., 24, 26). The Secretary of the Interior by reason of his supervisory control over the public lands may pass upon and determine these questions, irrespective of the manner in which they may be brought to his attention. *Knight v. U. S. Land Association* (142 U. S., 161, 177, 178); *Floyd et al. v. Montgomery* (26 L. D., 122, 128); *Lake Superior Ship Canal, Ry. & Iron Co. et al. v. Patterson* (30 Ib., 160, 185).

In the motion for review it is contended, in effect, that the entry, to the extent that it embraces the mill site claim, should be canceled, for the reasons (1) that the published notice in respect to said claim was invalid, and (2) even though it be conceded that the notice was valid, the land embraced in said claim was of known mineral character at the date of the entry.

The notice as published is as follows:

APPLICATION FOR A PATENT TO A MINING CLAIM.

UNITED STATES LAND OFFICE,

Sacramento, Cal., January 22, 1877.

Notice is hereby given that the St. Patrick Gold Mining Company, a corporation existing under the laws of California, whose postoffice is San Francisco, California, has made application for patent for 1772 linear feet of the Peachy Consolidated Quartz mine bearing gold, with surface ground 200 feet in width. Also a mill site, contiguous thereto, situate in Ophir mining district, Placer county, California, and described in the plat and field notes on file in this office as follows, viz: Commencing at post No. 1, marked S. P. G. M. C. (St. Patrick Gold Mining Company), S. E. corner of Spanish Hill Qr. mine, from which the $\frac{1}{4}$ corner between sections 7 and 18, township 12 north, range 8 east, Mount Diablo base and meridian, bears S. 11° E. 11.72 chains dist.; thence var. $16\frac{1}{2}^{\circ}$ E. N. $64\frac{3}{4}^{\circ}$ W., 3.03 chains post No. 2, and NW. corner of mill site; thence N. $25\frac{1}{4}^{\circ}$ E. 2.31 chains, post No. 3, S. E. corner of Peachy quartz mine; thence N. $65\frac{1}{4}^{\circ}$ W. 13.31 chains post No. 4, from which the N. E. corner of Adam Keller's house bears S. 56° W. 37 links; thence N. $24\frac{3}{4}^{\circ}$ E. 3.03 chains, post No. 5, from which a live oak 6 in. dia. bears N. 67° E., 8 links dist.; thence S. $65\frac{1}{4}^{\circ}$ E., 13.31 chains, post No. 6; thence N. $25\frac{1}{4}^{\circ}$ E. 0.34 chains, post No. 7 on W. line of Spanish Hill quartz mine; thence N. $49\frac{1}{2}^{\circ}$ E. 8.60 chains, post No. 8, from which the S. W. corner of Gilmore's garden fence bears N. $82\frac{1}{2}^{\circ}$ E. 5 links dist.; thence S. $40\frac{1}{2}^{\circ}$ E. 3.03 chains, post No. 9, and N. E. corner of Spanish Hill Quartz mine; thence S. $49\frac{1}{2}^{\circ}$ W. 7.98 chains, post No. 10; thence S. $25\frac{1}{4}^{\circ}$ W. 5.00 chains, post No. 1 and place of beginning, containing 8 and $\frac{6}{100}$ acres and designated as lot No. 52 in section 7, township 12 north, range 8 east, Mt. Diablo Base and Meridian.

Said location was made in part many years ago, by parties unknown to applicant, and the remainder in July, 1871, by A. C. Peachy, *et al.*, said last named location being of record in the office of the county recorder, at Auburn. The mill site was located many years ago. The applicant claims by purchase.

The Peter Walter Quartz mine is adjacent to and north of said claim and the Crater Hill Mine adjacent and west, and the Jordan & Gordon Mine, also west, and the Gold Blossom mine south-west.

All persons holding any adverse claims thereto are hereby required to present the same before this office within sixty days from the first day of publishing hereof.

T. B. McFARLAND, *Register*.

In the case of *Reed v. Bouron* (26 L. D., 66, 67), the Department, in passing upon said notice, held that there had "been no publication of the application to enter this mill site." If that holding was correct, the entry, to the extent that it embraced the mill site claim should have been canceled at that time, and the order of your office directing a hearing to be had to determine the character of the land covered by the mill site claim should have been set aside.

Did said notice comply with the statute and the mining regulations in force at the time of the filing of the application for patent? Section 2325 of the Revised Statutes provides, among other things, that prior to the filing of an application for patent to a mining claim, there shall be posted upon the claim a notice "showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground." And when the application is filed—

The register of the land office * * * * shall publish a notice that such application has been made * * * * in a newspaper * * * * and he shall also post such notice in his office.

Paragraph 35 of the Mining Regulations promulgated June 10, 1872, and in force at the time of filing of the application for patent (*Copp's U. S. Mining Dec.*, 270, 283), provided that—

The notices so published and posted must be as full and complete as possible, and embrace all the data given in the notice posted upon the claim.

The primary purpose of the statute which requires notice to be published in a newspaper, is to inform persons who may have conflicting interests in the land applied for that application for patent is pending, to the end that such persons may have an opportunity to assert and protect such interests. (26 L. D., 145, 147); *Hallett and Hamburg Lodes* (27 *Ib.*, 104, 108); *The Tough Nut and other Lode Claims* (32 *Ib.*, 359).

It would seem that to carry out the purpose of the statute the notice published in the newspaper should substantially conform to the notice as posted upon the claim. This has been the uniform holding of the land department, since immediately after the enactment of the statute. See paragraph 35 of the Mining Regulations of June 10, 1872, *supra*; paragraph 35 of the Mining Regulations of December 10, 1891, quoted

in Hallett and Hamburg Lodes (25 L. D., 104, 108); paragraph 51 of the Mining Regulations of December 15, 1897 (25 L. D., 563, 578); paragraph 51 of the Mining Regulations of June 24, 1889 (28 L. D., 579, 603); and paragraph 46 of the Mining Regulations of July 26, 1901 (31 L. D., 453, 482).

In determining whether or not the published notice is in accordance with the statute and the mining regulations made in pursuance thereof, the notice must be taken as a whole. If, when so taken, the notice does not appear to contain sufficient correct data to put persons of ordinary intelligence and prudence interested in the land applied for upon inquiry, and "to enable any one interested to ascertain with accuracy the position of the claim," it fails to comply with the requirement of the statute and the mining regulations. (Hallett and Hamburg Lodes, 27 L. D., 104, 108, 110.)

The notice in question particularly describes the lode claim. It does not describe the mill site claim. It simply states that the latter is contiguous to the former, and that "Post No. 2" of the former is the "N. W. corner" of the latter. To persons of ordinary intelligence and prudence, who might have been interested in the land covered by the mill-site claim, but who were not familiar with said land by the name of the Peachy Mill Site claim, this statement in the published notice, would not, in the opinion of the Department, convey sufficient information to put them upon inquiry and to enable them to ascertain with accuracy the position of the claim upon the ground. Therefore, the decision of the Department complained of in respect to said notice was erroneous.

There having been no published notice of the application for patent, in respect to the mill site claim, such as the statute requires, the entry, to the extent that it embraces the land covered by such claim, was improperly allowed and should be canceled.

In view of the above it is unnecessary to consider the question whether or not the land embraced in the mill site claim was of known mineral character at the date of the entry. It is sufficient to say that the evidence shows that the land in question is now known to be mineral in character, hence such land is not now subject to entry as a mill site claim.

The departmental decision of February 3, 1903, holding "that no good reason appears why the mill site should not be passed to patent," is hereby recalled and vacated, with directions to cancel the entry to the extent that it embraces said mill site claim.

ARID LAND—MINERAL LOCATIONS—TIMBER AND STONE APPLICATIONS—WITHDRAWAL UNDER ACT OF JUNE 17, 1902.

INSTRUCTIONS.

A mineral location founded on actual discovery of a valuable deposit of mineral within the limits of the claim, and maintained in accordance with the mining laws and local regulations applicable thereto, excepts the land covered thereby from the operation of a withdrawal for irrigation purposes made under the provisions of the act of June 17, 1902.

No such vested right is acquired by an application to purchase lands under the timber and stone laws, prior to final proof and payment, as will deprive Congress of the power to make other disposition of such lands.

Withdrawals made by the Secretary of the Interior under authority of the act of June 17, 1902, of lands which in his judgment are required for irrigation works contemplated under the provisions of said act, have the force of legislative withdrawals and are therefore effective to withdraw from other disposition all lands within the designated limits to which a right has not vested.

Secretary Hitchcock to the Director of the Geological Survey, January
(F. L. C.) 13, 1904. (E. F. B.)

Referring to your letter of October 24, 1903, asking to be advised as to the status of mining claims upon lands withdrawn for reservoir sites or permanent works, under the act of June 17, 1902 (32 Stat., 388), providing for the construction of irrigation works for the reclamation of arid lands, I transmit herewith for your information a copy of a report from the Commissioner of the General Land Office, to whom your letter was referred.

As to mineral locations made under the provisions of sections 2320 *et seq.* of the Revised Statutes, the Commissioner concludes that in order to defeat the operation of a withdrawal made under said act the location must have been made prior thereto and be a valid one—that is, founded on an actual discovery by the locator of a valuable deposit of mineral within the limits of the claim and maintained in accordance with the mining laws and local regulations applicable thereto. As to what rights are acquired under applications to purchase lands under the timber and stone laws, which is involved in your inquiry, he expresses the opinion, under authority of the decisions of the Department, that no right is vested under such applications until final proof has been submitted and the purchase money paid; that until such time no right is acquired as against the government which would deprive Congress of the power to dispose of the land.

As a general rule, Congress has the absolute power to withhold from disposition any of the public lands to which a claim has been asserted under the general land laws, but as to which no right has vested, or to dispose of such lands in any manner that it deems proper. The withdrawals made by the Secretary of the Interior under authority of the act of June 17, 1902, of lands which in his judgment are required for

any irrigation works contemplated under the provisions of said act, have the force of legislative withdrawals and are therefore effective to withdraw from other disposition all lands within the designated limits to which a right has not vested. The purpose to confer upon the Secretary of the Interior such power is further manifested by the authority given him to withdraw from entry, except under the homestead law (the only class of entries specially excepted), any public lands believed to be susceptible of irrigation from such works, and directing that such lands shall not be disposed of except under the homestead law and in tracts of such area, by legal subdivisions, as in his opinion may reasonably be required for the support of a family.

To effectually accomplish the purpose of the act, it is necessary that the executive officer charged with the duty of enforcing its provisions should be invested with ample power and authority to obtain control and possession of all lands that may be required for any irrigation works contemplated under said act. To this end, he is authorized to acquire by purchase or condemnation any rights or property which in his judgment may be needed for the purpose of carrying out the provisions of the act. In conferring such power it could not have been intended to withhold from him the power and authority to control and acquire possession of lands needed for such works where the legal and equitable title is in the United States. Therefore, unless a claimant to lands covered by such withdrawals had acquired at the date of such withdrawals a vested interest in the land so as to deprive Congress of the power of disposition and control over the same, it is subject to the operation of such withdrawals.

With reference to the character of rights acquired by claimants to lands under the mineral laws (Secs. 2320 *et seq.*, Revised Statutes) only the general rule can be stated. A safe and comprehensive statement of that rule is found in the decision of the Department in American Hill Quartz Mine (Sickels' Mining Laws, 377, 385), quoted approvingly by the supreme court in *Benson Mining Co. v. Alta Mining Co.* (145 U. S., 428, 430):

At the outset it is proper to remark that by the mining laws of the United States three distinct classes of titles are created, viz.: 1. Title in fee simple. 2. Title by possession. 3. The complete equitable title. The first vests in the grantee of the government an indefeasible title, while the second vests a title in the nature of an easement only. The first, being an absolute grant by purchase and patent without condition, is not defeasible, while the second, being a mere right of possession and enjoyment of profits without purchase and upon condition, may be defeated at any time by the failure of the party in possession to comply with the condition, viz.: to perform the labor or make the annual improvements required by the statute. The equitable title accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued.

After a complete equitable title has vested, the United States can no longer exercise ownership over the property. But it will be seen

that a possessory right may also be acquired under the mining laws, which is a vested right, although the acquisition of title is not contemplated. Such a right, however, is subject to be divested by failure to comply with the law, and the land department has jurisdiction to determine that question and to declare by its judgment whether such right has been divested, so as to restore the land to the control of the government. As to such possessory claims no definite rule can be given for your guidance, in the absence of some particular case.

HOMESTEAD SETTLER—SECTION 2291, R. S.—HEIRS.

TERRY ET AL. *v.* HEIRS OF WILLIAM H. DAVIS.

In the event the widow and immediate heirs of a deceased homestead settler, who has earned title to the land by compliance with law, die without having availed themselves of the right to perfect the settler's claim under the provisions of section 2291 of the Revised Statutes, such right does not lapse or become forfeited, but passes to the next of kin of the decedent, who are his "heirs" within the meaning of said section.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 13, 1904.* (E. J. H.)

This case is before the Department upon the appeal of Delbert S. Terry from your office decision of March 24, 1903, rejecting his homestead application, filed March 8, 1902, for lots 7, 8, 9 and the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 27, T. 5 S., R. 8 E., Bozeman, Montana, land district, and allowing the heirs of William H. Davis, deceased, to make entry of said tracts.

The above-described tracts are within the primary limits of the grant to the Northern Pacific Railroad Company under the act of July 2, 1864, and the map of definite location of the company's line of road opposite thereto was filed July 6, 1882.

On March 13, 1893, William H. Davis tendered homestead application for said tracts which was rejected by the local officers for conflict with the grant to the Northern Pacific Railroad Company. Subsequently Davis filed an affidavit alleging that at the date of the definite location of the road said tracts were settled upon and in the *bona fide* occupation of a person qualified to make entry thereof and had ever since been so occupied, and claiming that on account thereof they were excepted from the grant. Thereupon a hearing was had which resulted in a decision by the local officers in favor of Davis, which action was on appeal affirmed by your office September 28, 1895, and the railroad company appealed therefrom to the Department.

In the meantime, however, Davis had died, in June, 1894, leaving surviving him a widow, Nannie Davis, who in October following gave birth to a child, which died in 1896. Subsequently to the birth of said

child, and while it was living, Mrs. Davis was married to one E. L. Fridley, with whom she lived until her death on August 14, 1897. Fridley likewise died March 7, 1902.

Subsequently to the passage of the act of July 1, 1898, for the adjustment of conflicting claims between settlers and the Northern Pacific Railroad Company, on February 18, 1899, the Department returned the papers to your office with instructions to adjust the case under said act, and under date of May 17, 1899, your office directed that said Nannie Davis be allowed ninety days within which to proceed under said act, not being aware of the fact that she had been married to Fridley and had since died.

In response to said notice Fridley, on August 22, 1899, filed his election, as the representative of the heirs of William H. Davis, to retain the land. This was approved by the Department and the railway company relinquished its claim to the land under said act, the same was accepted and the case closed as to the company by letter of February 13, 1900, in which the local officers were instructed to allow Fridley to make homestead entry as the representative of the heirs of William H. Davis, deceased. Fridley, however, took no action toward perfecting his application for the land.

March 8, 1902, the day after Fridley's death, Delbert S. Terry tendered his homestead application for said tracts, which was rejected by the local officers on the ground that the same were not subject to entry because they were held for the benefit of the heirs of William H. Davis; from which Terry appealed.

Subsequently, the following homestead applications were tendered for said tracts:

March 13, 1902, by George W. McClanahan, as the brother and heir of Nannie Davis, on behalf of her heirs;

March 17, 1902, by Harry W. Dyer, claiming abandonment of the land by Nannie Davis upon her marriage to Fridley;

April 19, 1902, by John Fennigham, alleging continuous residence thereon ever since November, 1898.

These several applications were rejected by the local officers because of the right of Fridley to make entry thereof in the interest of the heirs of William H. Davis; from which appeals were taken by each of said parties.

April 27, 1902, your office, in view of the foregoing claims and allegations, directed that a hearing be had, in order to determine the lawful heirs of William H. Davis, and to permit them to rebut the allegations of abandonment of the land. The hearing was had, commencing September 16, 1902, and resulted in the holding by the local officers, on October 8, 1902, that the charge of abandonment had not been sustained, and that the "heirs" of William H. Davis should be allowed to enter the land, under the homestead application of George O. Davis,

brother of said William H. Davis, deceased, filed in said office on September 15, 1902, on behalf of himself, parents and sisters. From that decision Terry appealed.

On March 24, 1903, your office rendered the decision appealed from, which contains quite a full abstract of the testimony submitted at the hearing as to the alleged abandonment of the land by the heirs or legal representatives of William H. Davis subsequent to his decease, and found that the weight of the evidence was against the allegation of abandonment; that Davis had in his lifetime completed the five years' residence and cultivation required by law, so that when he presented his homestead application he was entitled to make final proof; also that after his death his widow continued her residence on the land for a year and a half, and since her death the land had been in the hands of her administrator who has acted to the best of his ability in preserving the place until the litigation before the land department should end. Said decision held that the heirs of the widow, Nannie Davis, did not have any right to complete the entry, that right being vested in the "heirs" of the deceased homestead applicant, William H. Davis; consequently the application of McClanahan on behalf of the heirs of the widow was rejected. The homestead applications of Terry, Dwyer and Fennigham were also rejected, and the right to make entry was awarded to George O. Davis, the brother of said William H. Davis, on behalf of himself, parents and sisters, as the heirs of said deceased settler and homestead applicant.

From that decision the homestead applicant, Terry, alone has appealed, and it is contended in his behalf that, under section 2291 of the Revised Statutes, there are only two classes of persons who are permitted, after the death of the entryman, to perfect the claim and receive patent—first, his widow, and second, if she be dead, his heirs or devisee; that as Davis died intestate, leaving a widow and unborn child, they were, under the Statutes of Montana, his only "heirs;" that subsequent to the birth of the child, both the said child and its mother having died without having made entry of the land, there are no persons now in existence who are the "heirs" of said Davis and entitled to make entry, submit final proof and receive patent therefor; hence the homestead right of Davis has lapsed and Terry is entitled to make homestead entry thereof. It is also urged that the testimony submitted at the hearing shows that subsequently to the death of Davis the land in controversy was abandoned by his widow and heirs.

Section 2291 of the Revised Statutes of the United States, provides that in case of the death of a homestead entryman before making final proof "his widow, or in case of her death, his heirs or devisees" may make the proof required to complete entry.

As the widow, in this case, died without having availed herself of the right given her by the above statute of completing the entry, it is

necessary to ascertain whether the deceased homestead settler left "heirs" entitled under said section 2291 to complete homestead entry of the land in controversy.

It appears that at the death of the settler, Davis, there were left surviving him, in addition to his wife and child, his father, mother, sisters and brother, the latter of whom, George O. Davis, has applied, on behalf of himself and said last-named parties, to be allowed to complete entry of the land; and that under the laws of Montana, in which State Davis resided at the time of his death, the widow and child were the sole heirs to his estate.

The right to perfect homestead entry of this land is not, however, a property right that passed to Davis's estate upon his decease, but a right under section 2291 of the Revised Statutes of the United States, which is conferred upon the compliance with certain conditions relating to residence, cultivation and the making of improvements on the land.

The Department cannot concur in the contention made on behalf of the plaintiff, Terry, that under said section 2291, in case of the death of a duly qualified homestead settler who had valuable improvements on the land, and who had earned title thereto by compliance with the law, his right to the title thereof would *escheat* to the United States, upon the death of the widow and immediate heirs to the estate of such settler, without having perfected said entry, even though there were parents, brothers and sisters of the decedent living.

It is, on the contrary, the opinion of the Department that upon the death of the homestead settler, Davis, this homestead claim was left in an inchoate state, the widow having under said section 2291 the right to perfect the entry, and that upon her death without having opportunity to avail herself of such right, the same then passed to the next of kin who were the then "heirs" of said decedent within the meaning of the statute.

In the case of *Agnew v. Morton* (13 L. D., 228), the father and mother were the legal heirs of the deceased homestead entryman, but being aliens could not perfect the entry under the homestead laws. The sisters, however, were citizens of this country and were recognized as the "heirs" of the decedent to make the proof. This case would seem to militate strongly against the contention made on behalf of Terry in the case at bar.

It is true that in the case of *Patten v. Katz* (25 L. D., 453), the Department canceled the homestead entry of the decedent, Katz, because he left no widow or heirs in the United States who could complete the entry, but it was said therein that, "the Department is keenly alive to the fact that this entryman had in good faith complied with the homestead law, and left valuable improvements on the land in controversy. It is recognized, too, that all reasonable opportunity should be given and diligence used to discover some one upon whom the fruits of his labor may be cast."

In view of the foregoing decisions, and the evident intention of Congress in passing the statute in question, it would be a very narrow construction to put thereon, as well as inequitable, to hold that the parents, brother and sisters of the decedent in the case at bar, could not reap the fruits of his seven years' labor, but that the same must escheat to the government and one who had expended no time or money thereon be allowed to secure the same.

Upon examination of the testimony adduced at the hearing, the finding of your office decision that the widow and heirs did not abandon the land subsequent to the death of the settler, Davis, is concurred in.

Your office decision rejecting the homestead application of Terry and allowing George O. Davis, the brother of the decedent, to perfect entry of the land on behalf of the heirs, is affirmed.

RAILROAD LANDS—CONFIRMATION—SECTION 3, ACT OF MARCH 2, 1889

ALLEN ET AL. *v.* BROWN.

A pre-emption settlement initiated and maintained with full knowledge of a prior soldiers' additional homestead entry covering the same land is not such a *bona fide* claim as would serve to defeat confirmation of such existing homestead entry by section 3 of the act of March 2, 1889.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 14, 1904.* (E. J. H.)

The Department has considered the appeal by the plaintiff, Nathan F. Allen, and F. H. Van Cleve and Louis Stegmiller, his assignees, from your office decision of September 27, 1902, holding in favor of defendant, Charles T. Brown, in the matter of his petition, filed July 12, 1900, invoking the supervisory authority of the Department in taking such action as would protect him in his possession and give recognition to his rights under the confirmatory provisions of the act of March 2, 1889 (25 Stat., 1008), in and to the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 35, T. 43 N., R. 35 W., Marquette, Michigan, land district, and denying the motion of said Van Cleve and Stegmiller for a rehearing in said case.

The facts in this case, briefly stated, are as follows:

The tract in question was within the common place limits of the grants made to the State of Michigan by act of June 3, 1856 (11 Stat., 21), to aid in the construction of lines of railway from Marquette and Ontonagon to the State line, at or near the mouth of the Brule river, and was certified to the State on account of said grants December 10, 1861. On May 1, 1868, it was relinquished by the State on the change of location of the line of road from Marquette to the State line and thereafter was treated as public land and held subject to homestead

entry. (6 L. D., 451.) Pursuant to such holding, Nathan F. Allen was permitted, on April 7, 1879, to make soldiers' additional homestead entry thereof, upon which the patent of the United States was issued February 15, 1889. March 17, 1885, Charles T. Brown tendered at the local land office his preemption declaratory statement for this tract, alleging settlement the preceding month, which application was rejected for conflict with the entry by Allen; from which action Brown appealed. It thus appears that Brown had actual notice of Allen's homestead entry shortly after, if not before, making settlement upon this land and that all further action taken by him was with full knowledge of such prior claim. Brown's appeal from the rejection of his preemption claim was duly considered and disposed of adversely to his claim long prior to March 2, 1889, on which date Congress passed an act forfeiting the grants appertaining to unconstructed roads in the northern peninsula of Michigan. Prior to said forfeiture there undoubtedly remained in the State a claim to a moiety of the land within the common limits of the two grants before described, on account of the located but unconstructed road from Ontonagon, but, for the purposes of this case, it is unnecessary to determine whether the tract in question was affected by such claim.

The third section of the forfeiture act of March 2, 1889, confirmed all disposals of forfeited lands made by proper officers of the United States, where the consideration received therefor is still retained by the government, but provided—

That nothing herein contained shall be construed to confirm any sales or entries of lands, or any tract in any such state selection, upon which there were *bona fide* preemption or homestead claims on the first day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such preemption and homestead claims are hereby confirmed.

Those claiming under the entry by Allen assert that the Governor of the State of Michigan had the right and was bound to relinquish a moiety of the lands within the conflicting limits of the two grants; that a partition of the lands was necessary in order to make available the government's moiety for disposal; that no partition was actually made because of the departmental holding under which it asserted the right to dispose of all the lands; that disposals made by the United States at least to the extent of one-half of the lands within the conflict was therefore but a legal assertion of the government's rights in the premises, and as the tract in question was the smallest legal subdivision, not capable of division, their title under the patent issued upon said entry is complete; and further, that any question as to such title was removed by the confirmatory provisions of the section above referred to.

Brown claims, however, that since his settlement in February, 1885, he has maintained his claim to this land and that such claim, based

upon actual occupation of the land on and prior to May 1, 1888, defeats any confirmation of Allen's entry.

The proof offered by those claiming under the prior homestead entry, which entry did not require actual occupation of the lands entered because the consideration therefor had been given the government by the soldier under his original entry, is to the effect that in 1884, prior to Brown's settlement, they contracted with one Herman Mitchell, who had been unsuccessful in his attempt in 1883 to make preemption claim to this land because of the existing entry of record, to clear and care for the land, and that Mitchell had a log cabin upon the land in which he lived under such contract until 1886 when he left because of securing more remunerative employment.

From the recitation made it is apparent that at the date of the forfeiture act of March 2, 1889, two claims were being asserted to this land, one under a soldiers' additional right, located and patented in accordance with departmental holding, and another predicated upon a settlement made with full knowledge of such prior homestead entry. Under all the circumstances it seems clear that the latter can not be considered such a *bona fide* claim as would defeat the confirmation of the prior and superior homestead claim asserted to the same land, if, indeed, such confirmation were necessary.

This view of the case renders it unnecessary to further consider whether Brown's connection with the land since 1885 has been such as to maintain a *bona fide* preemption claim; also the question raised as to whether a homestead entry can be permitted for an undivided moiety of the smallest legal subdivision of land as returned by the government surveys.

It is the opinion of this Department, the entire matter considered, that the outstanding title under the patent issued upon Allen's soldiers' additional homestead entry is complete, and the application of Brown, who claims the right to complete homestead entry of this land by reason of the exception found in section three of the forfeiture act, before quoted, will stand rejected.

Your office decision is accordingly reversed.

DESERT LAND ENTRY—CONTEST—PREFERENCE RIGHT—WITHDRAWAL—
ACT OF JUNE 17, 1902.

EMMA H. PIKE.

No application will be received nor any rights recognized as initiated by the tender of an application for land embraced in an entry of record until the cancellation of said entry has been noted on the records of the local office.

An executive order creating a reservation for a public purpose, and embracing land covered by a *prima facie* valid entry, will take effect thereon if the entry is subsequently canceled.

By a successful contest against a desert-land entry the contestant does not acquire such a preference right of entry as will, prior to its exercise, except the land from the operation of a withdrawal for irrigation purposes made under the provisions of the act of June 17, 1902.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 14, 1904.* (C. J. G.)

An appeal has been filed by Emma H. Pike from the decision of your office of February 5, 1903, sustaining the action of the local officers in rejecting her application to make desert land entry for lots 1 and 2, and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 3, T. 10 S., R. 24 W., Tucson, Arizona.

The tract described, with other lands, was formerly covered by a desert land entry made by Charles Yarten January 25, 1897, which entry was subsequently assigned to James D. Glennan, and by him to Hugh Lenox Scott, in December, 1899. The entry was contested by Emma H. Pike August 13, 1900, with the result that it was held for cancellation by your office May 28, 1902. Scott was duly notified but appears to have taken no action. It is alleged that the local officers advised Emma H. Pike that Scott's right of appeal expired August 17, 1902, and that she thereupon made application to enter the land under the desert land law August 21, 1902, which was rejected by the local officers August 23, 1902. The Yarten entry was finally canceled by your office September 10, 1902, and notice thereof given to Emma H. Pike. In the meantime, to wit, June 17, 1902, Congress passed the act of that date (32 Stat., 388), entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands." The Territory of Arizona was specifically named in said act, section 3 of which provides:

That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act.

In a letter from the Geological Survey dated June 27, 1902, it was recommended that certain public lands therein described be withdrawn in accordance with the provisions of, and for the purposes contemplated in, said act of June 17, 1902, among such lands being several townships in the Tucson, Arizona, land district, including T. 10 S.,

R. 24 W. The departmental reference under date of July 2, 1902, indorsed on the back of said letter was as follows:

Respectfully referred to the Commissioner of the General Land Office with instructions to temporarily withdraw from settlement, entry or other disposal under the public land laws the lands herein described.

The local officers at Tucson were directed by your office on July 17, 1902, in accordance with the above order, to withdraw the lands described. The Department on August 26, 1902, amended said order of withdrawal so as to make it conform to the language of the act of June 17, 1902, and your office advised the local officers August 30, 1902, of this amendment.

Desert land application for the land involved herein was filed by Emma H. Pike November 3, 1902, and was rejected by the local officers November 5, 1902, for the reason that said land had been withdrawn from entry by your office letter of August 30, 1902, except under the homestead law, and in accordance with the act of June 17, 1902. The applicant contends that she is entitled, as a successful contestant, to make desert land entry of the tract applied for notwithstanding the fact and terms of the withdrawal made by your office letter of August 30, 1902.

It is plain that Emma H. Pike gained nothing by her application alleged to have been filed August 21, 1902, as at that time the land was covered by the uncanceled desert land entry of Yarten. No application can be received nor are any rights recognized as initiated by the tender of an application for land embraced in an entry of record until the cancellation of said entry has been noted on the records of the local office, which in this case was not done until after September 10, 1902. *Stewart v. Peterson* (28 L.D., 515); *Young v. Peck* (32 L.D., 102). It is well settled that an executive order creating a reservation for a public purpose, and embracing land covered by a *prima facie* valid entry, will take effect thereon if the entry is subsequently canceled. *Charles W. Filkins* (5 L.D., 49); *Staltz v. White Spirit et al.* (10 L.D., 144); *James M. Gilman* (15 L.D., 2); and *Hostrawser v. McSwain* (18 L.D., 523). In the latter case it was held (syllabus):

A contestant who successfully attacks an entry covering a tract of land embraced within the limits of a withdrawal for a public reservation, made after said entry was allowed, does not thereby secure a right that will exclude said tract from the operation of the order creating the reservation.

In the case of *Jefferson E. Davis* (19 L. D., 489), it was said:

The land applied for was included within the reservation referred to, and said reservation took the same beyond the operation of the land laws, and being by authority of law and not containing a provision excepting the rights of successful contestants from the force and effect of the reservation, it destroyed any privilege which the applicant might otherwise have had, had said reservation not been made.

See also case of William H. Schmith (30 L. D., 6), wherein it was held (syllabus):

Whatever preferred right a contestant may have on the cancellation of the entry under attack, is defeated by an intervening proclamation by the President declaring the establishment of a forest reservation that includes the land embraced within the contested entry.

In respect to the force or character of the right secured by Emma H. Pike, under the act of May 14, 1880 (21 Stat., 140), by reason of her contest against the Yarten entry, certain language used in the case of Strader *v.* Goodhue (31 L. D., 137), is referred to and relied upon in her appeal here. That language is as follows:

The preference right is not a vested right until a contestant has "contested, paid the land office fees, and procured the cancellation" of the entry attacked.

But the facts of that case alone negative the suggestion that it was intended to hold, as a proper construction of the act of May 14, 1880, that even where a contestant has performed all the prerequisites imposed by said act he thereby secures a *vested* right. Such a construction would of course imply that the right is of such force and character that it could not be divested even by an act of Congress authorizing the withdrawal of the land involved for some contemplated public purpose. The reverse of this proposition appears in numerous decisions both of the Department, some of which are cited herein, and of the Supreme Court, to which reference will be made.

The facts in the case of Strader *v.* Goodhue, *supra*, were that before trial of the contest against a timber culture entry and before any costs had accrued, the entryman relinquished half the land embraced in his entry. It appeared that he had fully complied with the law as to the remainder of the entry, and the question presented was whether the contestant by the mere filing of his complaint, before judgment, had such a right as would defeat the relinquishment and deprive the entryman of his improvements on the part of the land not subject to attack. The case was distinguished from that class wherein relinquishments were made of the entire tract pending contest, thereby taking the entrymen out of the case as no longer parties in interest, with third parties claiming the right to make entry, and the question determined was as to whether the contestant could be thus defeated of his preference right provided he proved his charges. The language above quoted was used in showing that Strader had not in fact reached such a preferred status, in his contest proceedings, as, under the act of May 14, 1880, would defeat the effect of Goodhue's relinquishment. That language was merely used to show that Strader had not acquired such a right as would prevent Goodhue from saving by way of partial relinquishment before trial the portion of his entry that was beyond attack. This must be so, otherwise the effect would be to overrule by mere implication a long line of well-known decisions.

The real intention of the language used would perhaps have been more aptly and clearly expressed by saying, as was done in other parts of the decision, that "the preference right does not attach until a contestant has 'contested, paid the land-office fees, and procured the cancellation' of the entry attacked." That the purpose of section 2 of the act of May 14, 1880, *supra*, was solely to award to the contestant a preferred right for thirty days to enter the land, *as against every one except the United States*, is well established. The language of that section is as follows:

In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any preemption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands.

In no manner can this language be fairly construed as conferring a vested right upon a successful contestant. The act only confers a privilege on him to enter the land in preference to others. As to other claimants he has a superior right for a limited period to enter the land. But it is a right that may be waived by the contestant; it does not extend to one who is disqualified from entering the land; only after its exercise does it become effective to exclude adverse claims; and even then the contestant must fulfill the requirements of the law under which he makes entry, before securing title. It is not a right that *reserves* the land from other disposal. In the language of the circular of July 4, 1899 (29 L. D., 29):

Thereafter, and until the period accorded a successful contestant has expired, or he has waived his preferred right, applications may be received, entered, and held subject to the rights of the contestant, the same to be disposed of in the order of filing upon the expiration of the period accorded the successful contestant or upon the filing of his waiver of preferred right.

It has been uniformly held that land embraced within a preemption filing may be set apart by executive order, or reserved by act of Congress, at any time prior to proof and payment. That ruling, as well as, by analogy, the principles enunciated herein, has the support of numerous decisions of the Supreme Court, notably the cases of *Rector v. Ashley* (6 Wall., 142); *Frisbie v. Whitney* (9 Wall., 187); *The Yosemite Valley Case* (15 Wall., 77); *Shepley et al. v. Cowan et al.* (91 U. S., 330); *Buxton v. Traver* (130 U. S., 232); *Campbell v. Wade* (132 U. S., 34); *In re Emblen* (161 U. S., 52); and *Gonzales v. French* (164 U. S., 338, 345). In the case of *Shepley et al. v. Cowan et al.*, it was held (syllabus):

Whilst, according to previous decisions of this court, no vested right in the public lands as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property.

The act authorizing the withdrawal, and the order carrying the same into effect, covering the township in which the land here in question is situated, were both made prior to the cancellation of the entry contested by Emma H. Pike. Under the rulings, whatever preferred right she may have had, the same not amounting to a vested right, was defeated by the intervening order of withdrawal which took effect immediately upon the cancellation of the contested entry. It may be stated that the first order of withdrawal was made prior to the expiration of the time for appeal from the decision holding the Yarten entry for cancellation.

It is observed that notice of the cancellation of the Yarten entry was sent to Emma H. Pike September 27, 1902, and the signed registry return receipt is stamped October 1, 1902, which shows that she received said notice not later than that date. Her application to enter was executed October 31, 1902, and filed in the local office November 3, 1902, which was not within the statutory period of thirty days. No particular stress, however, is placed upon this feature as there does not appear to be any one claiming adversely to her.

The discussion herein is along the line of the concession that a contestant of a desert land entry could secure a preference right under the act of May 14, 1880, a question upon which no opinion is intended to be expressed in this case.

The decision of your office refuting the application of Emma H. Pike is, for the reasons stated therein, affirmed.

DOC JIM.

Motion for review of departmental decision of October 27, 1903, 32 L. D., 291, denied by Secretary Hitchcock January 16, 1904.

APPLICATION—HOMESTEAD—ACT OF AUGUST 30, 1890.

INSTRUCTIONS.

The affidavit required to be made by homestead applicants amended so as to state that since August 30, 1890, the applicant has not acquired title to, and is not now claiming under any of the agricultural public land laws, an amount of land which, together with the land applied for, will exceed in the aggregate three hundred and twenty acres.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 18, 1904.* (F. W. C.)

The Department has considered the matters set forth in your office letter of the 7th instant, suggesting a change in the affidavit now

required to be made by homesteaders, particularly that part which reads:

That since August 30, 1890, he has not *entered* under the land laws of the United States, or *filed* upon, a quantity of land agricultural in character and not mineral, which, with the tracts now applied for, would make more than 320 acres.

This requirement seems to be based upon the act of August 30, 1890 (26 Stat., 391), which provides, among other things, that:

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 320 acres in the aggregate under all of said laws.

Attention is also called to the following, found on page 88 of the general circular of July 11, 1899:

In view of this legislation, all applicants to file or enter under any of the land laws of the United States will be required to make 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 320 acres.

After careful consideration of the matters presented the Department is of opinion that a change should be made in the affidavit and also in the general circular, and will be made in the draft thereof now under consideration, so as to require of homesteaders and others, when making entry under the public land laws, to make affidavit to the following effect:

That since August 30, 1890, I have not acquired title to, nor am I now claiming under any of the agricultural public land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres.

The papers forwarded with your office letter of the 7th instant, suggesting the matter for consideration, are herewith returned for your further consideration and action in the light hereof.

MINING CLAIM—"GULCH" PLACER—EXPENDITURE.

WOOD PLACER MINING COMPANY (ON REVIEW).

Directions given that in all cases involving "gulch" placer claims, a full and explicit report, touching the situation and scope of the claim or claims involved and the physical or topographical conditions surrounding them, which are relied upon to bring them within the principle applicable to "gulch" placers, should be required of the deputy mineral surveyor who makes the survey, to be verified under the certificate of the surveyor-general, and that such other evidence should be required as may in any case be deemed necessary to satisfactorily establish the existence of the proper and requisite conditions.

An aggregate expenditure in labor or improvements upon one of several contiguous claims held in common is acceptable in satisfaction of the statutory requirement only when such expenditure actually promotes, or directly tends to promote, the

practically contemporaneous development of all the claims concerned; and a scheme of successive development of such claims, in the absence of an expenditure for the direct benefit of each, is not within the spirit of the privilege accorded by the statute.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 23, 1904.* (F. H. B.)

The Department is in receipt of your office letter of January 12, 1904, wherewith is transmitted, agreeably to the direction contained in departmental decision of December 16, 1903 (32 L. D., 363), for further action here, the record in the case of Wood Placer Mining Company, accompanied by three affidavits, on behalf of the company, whereby a further showing, as required, is made with respect to the situation, etc., of the company's Discovery and Annex placer mining claims, surveys Nos. 5885 and 6000, Missoula, Montana.

By the affidavits in question (one of which is by the deputy mineral surveyor who surveyed the claims), taken in connection with the plat and field notes of survey, it is shown that the claims are situated at the bottom of a canon or gorge, from 200 to 400 feet wide, except at the point of position of the Annex claim, where the width is about 500 feet, surmounted by precipitous cliffs, barren of mineral, from 750 to 1,500 and 2,000 feet high, and that the claims embrace substantially the area between and practically follow the base lines of the enclosing walls or cliffs. It thus appears that, under the circumstances, the claims conform, as nearly as practicable, to the United States system of public-land surveys, and the rectangular subdivisions of such surveys. Without in any manner modifying the doctrine thereof, and of the case of Miller Placer Claim (30 L. D., 225), in its application to appropriate cases, the departmental decision under review (32 L. D., 198), so far as it directs the cancellation of the entry because of the nonconformation of the claims in question, is hereby vacated.

In each future case of this character, a full and explicit report, touching the situation and scope of the claim or claims involved and the physical or topographical conditions surrounding them, which are relied upon to bring them within the principle applicable to "gulch" placers, should be required of the deputy mineral surveyor who makes the survey, to be verified under the certificate of the surveyor-general; and such other evidence should be required as your office may in any case deem necessary to satisfactorily establish the existence of the proper and requisite conditions.

This action makes it necessary to now dispose of the question raised by the appeal taken from your office decision of November 29, 1902. As stated in the decision under review, the Discovery claim is nearly 9,000 feet in length and averages about 500 feet in width. The Annex claim occupies a position 1540.3 feet in length along the side of the

Discovery from the northeasterly end thereof. The expenditure for the extraction of minerals has been made at the lower or southerly end of the Discovery, a long distance from the nearest boundary of the Annex. A brief has also been filed upon the question of the improvements, in which it is argued, in substance, that the logical and practical method of development is to work the deposit, from the lower end of the Discovery claim, up the stream toward and eventually to reach the Annex, thus avoiding the necessity for rehandling at each successive step the tailings or residue which by the reverse process would be cast by the stream upon the mineral-bearing deposits below, so that the process here employed tends to facilitate the extraction of the mineral of the Annex claim. That these operations tend to such facilitation the Department believes to be true only in a remote sense. From its examination of the decisions of the courts and in the course of its own decisions, the Department has regarded, and still regards, the true principle to be, that an aggregate expenditure in labor or improvements upon one of several contiguous claims held in common is acceptable in satisfaction of the statutory requirement only when such expenditure actually promotes, or directly tends to promote, the practically contemporaneous development of all the claims concerned. A scheme of successive development of such claims, in the absence of an expenditure for the direct benefit of each, is not within the spirit of the privilege accorded by the statute, as it does not directly tend to facilitate the extraction of mineral from each claim at the time the expenditure therefor is made. (See case of Elmer F. Cassel, 32 L. D., 85.) It appears from the affidavit of the president of the company, lately filed, that the latter has sought to comply with the requirement in question by the construction of a ditch, "nearly two and one-half miles in length" and which "parallels the said Annex claim." Without here passing upon the sufficiency thereof as an improvement for the benefit of the Annex claim, it may be said that, having been constructed subsequent to the end of the period of publication of notice of the pending application for patent, it can not be considered in this connection.

Your office decision, holding the entry for cancellation to the extent of the Annex claim, is affirmed, and the entry will be canceled accordingly, without prejudice to the right of the applicant to commence patent proceedings anew.

OKLAHOMA LANDS—HOMESTEAD ENTRY—CONTEST—QUALIFICATIONS.

LEROW v. GRANT.

A contest against a homestead entry of lands within the territory opened to entry under the President's proclamation of July 4, 1901, on the ground that the entryman, at the date of his registration, was disqualified to make such entry

because at that time a minor and not the head of a family, will not be sustained where it is shown that he was duly qualified to make homestead entry on the date the entry in question was allowed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 23, 1904.* (C. J. G.)

An appeal has been filed by Oscar A. Lerow from the decision of your office of August 3, 1903, dismissing his contest against the homestead entry of Daniel D. Grant for the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 35, T. 4 N., R. 12 W., Lawton, Oklahoma.

The tract described is a part of the lands ceded by the Comanche, Kiowa and Apache Indians, which were opened to entry August 6, 1901, under the President's proclamation of July 4, 1901 (31 L. D., 1), and the entry in question was made by virtue of a number drawn in accordance with the plan provided for in said proclamation.

In the affidavit of contest which was filed October 9, 1901, it was alleged:

That the said Daniel D. Grant was not twenty-one years of age at the time he registered for the purpose of drawing a number to make a homestead entry; that the affidavit made by the said Daniel D. Grant upon which he was allowed to register was false, and fraudulently made.

That at the time Daniel D. Grant made his affidavit for registration he was a single man and not the head of a family; that he became the head of a family by marriage since he filed his affidavit upon which he was registered to draw the number upon which he gained a right to make a homestead entry.

Defendant made out an application for registration on the regular form provided for the purpose and was registered July 17, 1901, a certificate of registration being issued to him. In due time the drawing was had, he was notified of his number, and September 17, 1901, he made his homestead entry. Some of the provisions of the President's proclamation are as follows:

a registration will be had . . . for the purpose of ascertaining what persons desire to enter, settle upon, and acquire title to any of said lands under the homestead law, and of ascertaining their qualifications so to do. . . . To obtain registration each applicant will be required to show himself duly qualified to make homestead entry of these lands under existing laws. . . . Each applicant who shows himself duly qualified will be registered and given a non-transferable certificate to that effect, which will entitle him to go upon and examine the lands to be opened. . . . Preparatory to these drawings the registration officers will, at the time of registering each applicant who shows himself duly qualified, make out a card, which must be signed by the applicant. . . . To obtain the allowance of a homestead entry, each applicant must personally present the certificate of registration theretofore issued to him, together with a regular homestead application and the necessary accompanying proofs, and with the regular land office fees. . . . If at the time of considering his regular application for entry it appear that any applicant is disqualified from making homestead entry of these lands his application will be rejected notwithstanding his prior registration.

The local officers in their decision rendered upon the evidence adduced at a hearing had in this case found as follows:

It is clear that the applicant when he registered for the drawing contemplated by said proclamation was required to possess the necessary qualifications to enter under existing laws, at the time he registered.

The case under consideration involves the qualifications of the contestee at the date of his registration on July 17, 1901, at El Reno, Oklahoma.

Thereupon they recommended cancellation of the entry. Your office reversed their action on the ground that whether defendant was twenty-one years of age at time of registration or not he became the head of a family before contest was filed against him or any question raised as to his right of entry, and dismissed said contest as hereinbefore stated.

In his application for registration defendant stated that he was "twenty-one years of age (or the head of a family)." On his card of identification his age was given as twenty-one years; also in his application for marriage license, made August 27, 1901, and in the license itself. Defendant testified that he believed at the time of registration, July 17, 1901, he was twenty-one years of age, having been so informed by his father. The court records show that a marriage license was issued to his father and mother June 19, 1880, and that they were married June 20, 1880. The father testified that defendant was born about three weeks after the marriage, but that the mother gave it out that his birthday was March 1, 1881. Several witnesses for contestant testified that defendant was born in 1881, although some of them are not very positive. There is no question that defendant was married on August 27, 1901, and thereby became the head of a family, which was nearly a month prior to the time he made his homestead entry, and nearly a month and a half prior to the initiation of contest. He was served with notice of contest February 21, 1902.

The plan or scheme prescribed in the President's proclamation for the disposal of these ceded Comanche, Kiowa, and Apache lands, was devised in pursuance of the act of March 3, 1901 (31 Stat., 1093, 1094), which provided:

to avoid the contests and conflicting claims which have heretofore resulted from opening similar public lands to settlement and entry, the President's proclamation shall prescribe the manner in which these lands may be settled upon, occupied and entered.

It is well known that the manner of opening similar public lands theretofore in vogue, that is, by permitting a free-for-all race therefor at a certain hour on a day fixed for the purpose, had come to be regarded as unsatisfactory in many respects, and resulted in numerous conflicting claims and consequent contests. It was to correct these evils so far as possible that the method appearing in the President's proclamation opening these lands to settlement and entry, was adopted.

In other words, that method of disposal was intended to take the place of the old one which had proven defective. It, in effect, substituted the chance among competitors of drawing a number which entitled the lucky holder to later make a homestead entry, for the chance of racing for and first "staking" a particular tract of land, the same result being thus achieved by a different mode but at the same time eliminating the possibility of conflicting claims for the same tract. But it was not intended thereby to disturb existing conditions otherwise, the law and practice controlling the adjudication of claims remaining unchanged.

The general rule in cases of similar kind is that while an entry made during disability is of no legal effect, yet if the disability is cured prior to the intervention of an adverse claim, the entry should not be canceled. Thus, though a filing made by a preemptor under the disability of infancy is invalid, such invalidity is cured by the attainment of majority prior to the inception of an adverse claim. *James F. Bright* (6 L. D., 602). A homestead entry made by one who is not a citizen of the United States, and has not at such time declared his intention of becoming a citizen, is not void, but voidable, and his subsequent declaration of intention, made prior to the intervention of an adverse claim, cures the defect. *Vidal v. Bennis* (22 L. D., 124). See also cases of *Kelly v. Quast* (2 L. D., 627); *Mann v. Huk* (3 L. D., 452); *Ole O. Krogstad* (4 L. D., 564); *Jacob H. Edens* (7 L. D., 229); *Phillips v. Sero* (14 L. D., 568); *Bomgardner v. Kittleman* (17 L. D., 207); *Driscoll et al. v. Doherty et al.* (25 L. D., 420). These cases are regarded as analogous to the one under consideration. The fact is not material that in some of these cases a right was asserted under the preemption law, while here it is under the homestead law, and that the others have reference to the question of alienage. The requirements of the preemption and homestead laws in the matters of age and declaration of intention are the same.

It is believed that the question of defendant's qualifications at the time he made entry and not at the date of his application for registration is the determinative feature of this case. There is nothing in the proclamation that could fairly be construed as a warrant for the rejection of an application to register by one who though not at the time of the requisite age or qualifications, if it were shown that he would attain his majority or become otherwise qualified prior to the time he could make entry. The requirement is that the applicant must show himself duly qualified "to make homestead entry." That the vital test of his qualifications is to be applied at the time of making entry is indicated by the language of the proclamation wherein it is said:

If at the time of considering his regular application for entry it appear that any applicant is disqualified from making homestead entry of these lands his application will be rejected notwithstanding his prior registration.

In this case the fact is that defendant was fully qualified to make homestead entry, by reason of his having become the head of a family, not only prior to the intervention of an adverse claim to this particular tract, but also prior to the time he exercised the privilege. That fact, in analogy to the rule laid down in the cases cited herein, is conclusive of the case.

The decision of your office is affirmed.

HOMESTEAD—LEGAL REPRESENTATIVES—SECTION 2305, R. S., AS
AMENDED BY THE ACT OF MARCH 1, 1901.

HEIRS OF ISIDORE DRISCOLL.

In the administration of statutes permitting the heirs of a deceased entryman to prove up and receive final certificate and patent under his claim, such certificate and patent will issue in the name of the deceased entryman in cases where the right to patent accrues prior to his death, and in the name of his heirs generally in cases where the right to patent does not accrue until after he has died, or where the entryman at the time of his death is not competent to take title, although the right thereto may have been fully earned.

Where persons claiming to be the heirs of a settler under the homestead laws, who died while actually engaged in the military service of the United States during the Philippine insurrection, make final proof on his claim in accordance with the provisions of section 2305, Revised Statutes, as amended by the act of March 1, 1901, the final certificate and patent will follow the language of the statute and issue to the "legal representatives" of the deceased entryman.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 25, 1904.* (G. J. H.)

June 11, 1896, Isidore Driscoll made homestead entry for the SW. $\frac{1}{4}$, Sec. 1, T. 151 N., R. 40 W., 5th P. M., Crookston, Minnesota.

August 15, 1902, John C. Driscoll, father of the entryman, made final proof upon said entry under the provisions of the act of March 1, 1901 (31 Stat., 847), the entryman, on April 12, 1899, having been killed in battle while employed in the military service of the United States in the Philippines. Upon the showing made, final certificate, No. 584, Chippewa agricultural series, issued in favor of "The heirs of Isidore Driscoll, deceased."

October 13, 1903, John H. Fraine, attorney for John C. Driscoll, in a communication addressed to your office, requested that said final certificate be changed so as to run to "John C. Driscoll," the father of the entryman, instead of to "The heirs of Isidore Driscoll, deceased," and that the patent issue accordingly.

November 10, 1903, your office rendered decision declining to make the change in the final certificate as requested; from which action an appeal has been taken to the Department.

The act of March 1, 1901, *supra*, amends sections 2304 and 2305, Revised Statutes, by extending their benefits to entrymen under the homestead laws who have served in the United States army, navy, or marine corps during the Spanish war or the Philippine insurrection, and provides that they shall have certain service deducted from the time required to perfect title under the homestead laws. The particular provision in section 2305, as amended, under which this case arises, reads as follows:

That in every case in which a settler on the public lands of the United States under the homestead laws died while actually engaged in the army, navy, or marine corps of the United States as private soldier, officer, seaman, or marine, during the war with Spain or the Philippine insurrection, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, may proceed forthwith to make final proof upon the land so held by the deceased soldier and settler, and that the death of such soldier while so engaged in the service of the United States shall, in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultivation for the full period of five years, and shall entitle his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, to make final proof upon and receive government patent for said land; and that upon proof produced to the officers of the proper local land office by the widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, that the applicant for patent is the widow, if unmarried, or in case of her death or marriage, his orphan children or his or their legal representatives, and that such soldier, sailor, or marine died while in the service of the United States as hereinbefore described, the patent for such land shall issue.

The effect of this provision is to dispense with compliance with the requirements of the homestead law in the matters of residence and cultivation, and to make the homestead claim of a soldier who died while engaged in the military service mentioned, subject to completion at once, by the widow, the minor orphan children or their legal representatives, or the legal representatives of the soldier, as the case may be, without waiting for the expiration of the usual five-year period. Said provision is not intended to change the homestead laws in other respects, but expressly states "that the death of such soldier . . . shall, *in the administration of the homestead laws*, be considered to be equivalent to . . . residence and cultivation for the full period of five years." Evidently Congress intended that this provision should become a part of and be administered in connection with the homestead laws generally, and it must therefore be construed in harmony with the other portions of such laws.

Section 2291 of the Revised Statutes is a part of the general homestead laws, and in the earlier decisions of the Department in cases arising under its provisions it was held that where proof was made by the heirs of the deceased entryman, final certificate and patent should issue to the heirs generally, without naming them, leaving it

to the courts to ascertain the identity and interests of the heirs under the law of the State or Territory in which the land is situated (Clara Huls, 9 L. D., 401; Instructions, July 16, 1891, 13 L. D., 49; Agnew *v.* Morton, 13 L. D., 228); but in the case of Joseph Ellis (21 L. D., 377), the former practice was modified, and it was held, under the authority of section 2448, Revised Statutes, that patent in such a case should issue in the name of the deceased entryman, the title, under said section, inuring to the heirs, devisees, or assigns, as the case might be, of the deceased patentee. In Henry E. Stich (23 L. D., 457), however, it was held that the doctrine announced in the Ellis case applied only to cases where the entryman had complied with the requirements of the law and had earned the right to patent during his lifetime. And in the case of Elizabeth Richter (25 L. D., 1), after finding that the entryman was not competent to take the patent at the time of his death, it was held, citing the Stich case, that "patent will issue in the name of the heirs of William Richter." The Richter case arose under section 2291, Revised Statutes, on an attempt of the mother of the entryman to acquire title as his heir.

In view of the construction placed on the decision in the Ellis case in the later cases of Stich and Richter, it would seem that the earlier practice of issuing the final certificate and patent in the name of the heirs generally was not changed by the decision in the Ellis case as to cases where the right thereto did not become complete during the entryman's lifetime, and that the present practice of the land department, in the administration of statutes permitting the heirs of deceased entrymen to prove up and receive final certificate and patent under his claim, is to issue such certificate and patent in the name of the deceased entryman in cases where the right to patent accrues prior to his death, and to issue the certificate and patent in the name of his heirs generally in cases where the right to patent does not accrue until after he has died, or where the entryman at the time of his death is not competent to take title, although the right thereto may have been fully earned. No decision has been found in which the land department has undertaken to ascertain the identity and interests of the heirs of a deceased entryman and has then issued patent to such heirs by name.

In the present case the right to patent had not accrued at the time of the entryman's death, but by the express terms of the statute his death is regarded as a fulfillment of all the requirements of the law in the matters of residence and cultivation, and the right to submit proof and receive patent could not arise under the statute until after the entryman's death.

As the entryman was a single man, and left no widow or minor orphan children, whatever rights the applicant may have, as the father of the entryman, under section 2305, as amended, must be as the "legal representative" of the entryman. The term "legal represent-

atives" is broader even than the term "heirs," and the decisions of the Department construing the term "heirs" as employed in section 2291, and the reasons therefor, apply with equal or greater force to the term "legal representatives" as employed in the statute under consideration. The Department will no more undertake to decide what particular person or persons may be entitled to take title as the "legal representatives" of a deceased entryman, than it will undertake to ascertain the identity and interests of the "heirs" of such an entryman.

It is observed that the final certificate in question states on its face that it was issued "pursuant to the provisions of section No. 2291, Revised Statutes," and, as before stated, runs to "The heirs of Isidore Driscoll, deceased." It should be amended to show that it is issued pursuant to the provisions of section 2305, Revised Statutes, as amended by the act of March 1, 1901 (31 Stat., 947), and should follow the language of the statute and run to the "legal representatives" of Isidore Driscoll, deceased; and the patent when issued should correspond to the final certificate.

As herein modified your office decision is affirmed.

FOREST RESERVE—LIEU SELECTION—MINERAL LAND—ACT OF JUNE 4,
1897.

H. H. GOETJEN (ON REVIEW).

Land known to be mineral at the time of its attempted relinquishment can not be accepted as base for selections under the exchange provisions of the act of June 4, 1897.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 26, 1904.* (J. R. W.)

H. H. Goetjen filed a motion for review of departmental decision of July 29, 1903 (32 L. D., 209), rejecting his application, number 5775, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 8, T. 13 N., R. 5 E., M. M., and other lands aggregating six hundred and forty acres, Boise, Idaho, in lieu of Sec. 23, T. 5 N., R. 16 W., S. B. M., California, in the Pine Mountain and Zaca Lake Forest Reserve.

The application was rejected for defect of title shown by the abstract, which disclosed Goetjen's title to originate in an entry, January 10, 1900, under section 5 of the act of March 3, 1887 (24 Stat., 556, 557), upon which patent issued October 15, 1901, which title by mesne conveyances came to Goetjen, who prior to his application presented April 4, 1902, duly recorded his deed under the act of June 4, 1897, reconveying his title to the United States.

The abstract of title also showed eight other conveyances of placer mining claims, bearing various dates from December 12, 1886, before origin of the patent title, to May 22, 1900, after the entry and within five months of the date of patent. Upon such facts the Department affirming the action of your office, held that the abstract failed to show a clear and unincumbered title to the land. The motion contends that the allowance of the non-mineral entry and issue of patent are an adjudication that the land was then non-mineral; that as notice of such entry was duly given, and no mineral protest was filed—

it must be assumed that there was no adverse claim to the land, and none has since been asserted by any one claiming under or through the placer mineral locations shown in the abstract of title. It is believed that undue weight and effect has been given to said placer locations. The mere fact that they have been placed of record, in the absence of evidence that they were maintained and kept alive by the performance of the annual assessment work required by the mining laws (R. S. 2324), is not of itself evidence of any subsisting claim or right thereunder.

* * * * *

if, after reconsideration of the matter, the Department should still be of a different opinion, then it is asked that selector be allowed to furnish proof that the land in question was not and is not mineral in character, and that the placer locations, which, as aforesaid, do not appear to have been kept alive by the performance of the required annual labor or expenditures, were and are invalid for any purpose.

It is obvious that land not known to be mineral at the date of entry may become so by subsequent discovery. For the reasons given at length in the decision of July 29, 1903, land known to be mineral at the time of its attempted relinquishment can not be accepted as base for selections under the exchange provisions of the act of June 4, 1897. Jeremiah Collins (32 L. D., 223). It is also true that where lands show such indications or traces of mineral as induce repeated claim of their mineral character by mining locations, claims of mineral discovery and efforts to develop mines, greater caution is suggested in accepting them as basis for an exchange.

It is nevertheless true that if the land so offered does not in fact contain known deposits of valuable mineral, their non-mineral character continues and the owner is entitled to relinquish them to the United States and to claim the benefit of the act. With his motion for review, Goetjen has filed the affidavit of four witnesses claiming to be well acquainted with the land—

That all said land is more valuable for agricultural pursuits than for its minerals.

That, although some placer mining has been done thereon at various times, some years ago, no mineral has been discovered in paying quantities; little or no development work or mining is being done on said land, nor has there been for some years past. It is not considered as mineral land, its only known value being for grazing and, in wet seasons, some grain might be grown.

No error appears in said decision, as no application for a hearing to establish the character of the land had been to that time presented.

connection therewith. This practice does not meet the approval of the Department. It has resulted in confusing the record to such extent as to render impracticable an adjudication of these cases other than upon the most general lines and should hereafter be avoided.

These selections are made by the State because of the alleged mineral character of certain sections sixteen and thirty-six, and your office rejected them upon two general grounds:

1. Because the State had in some instances sold the base lands upon which the selections rested.

2. Because the State had failed to satisfactorily show the mineral character of the base lands involved.

Rule 2 of the rules and regulations prescribed March 6, 1903 (32 L. D., 39), for the adjustment of the grants to the several States and Territories made in aid of the support of common schools, is as follows:

RULE 2. The State will not be permitted to make selection in lieu of land within a school section alleged to be mineral in character and for that reason excepted from its grant, whether returned by the surveyor-general as mineral or otherwise, in the absence of satisfactory proof that the base land was known to be chiefly valuable for mineral at the date when the State's right thereto would have attached, if at all. The proof must show the kind of mineral discovered upon the land and the extent thereof, when and by whom the discoveries were made, as far as practicable, whether any claim to the land was asserted under the mining laws at the date when the State's right thereto attached, if at all, and if so by whom, the nature and extent of the mining improvements placed upon the land by the mineral claimant, and what efforts have been and are being made to develop the land in good faith for mineral purposes. If, in any case, the proof does not clearly show that the base land was known to contain valuable mineral deposits, and to be chiefly valuable on account of such deposits, at the date the State's right would have attached thereto, a selection in lieu thereof will not be permitted. A certificate of the proper authorities that the base lands have not been sold, encumbered or otherwise disposed of must also be furnished.

The showing made in support of these selections falls far short of the requirements of this rule. It is not in a single instance shown by "satisfactory proof," either in a general way or specifically in the manner prescribed by the rule, "that the base land was known to be chiefly valuable for mineral at the date when the State's right thereto would have otherwise attached." Nor is there a certificate of the proper officer of the State that the base lands "have not been sold, encumbered, or otherwise disposed of." On the contrary, it is admitted that many of these base lands have been sold; that the State has received and is receiving the purchase price therefor from its vendees, and that it has executed deeds therefor.

There is no force in the argument of counsel that the State may not be compelled to comply with regulations promulgated since its selections were made. There has never been a time in the history of these grants when the land department did not require the submission of

satisfactory proof in support of the alleged mineral character of base lands, and even now, if the rule in question had not been made, the Department would surely be authorized to reject these selections because of the insufficiency of the proof. The rule does not take the place of the final judgment of the Secretary, but is prescribed only to aid the State in the orderly presentation of its claim. It may be added, that until approved by the Secretary of the Interior there is in reality no selection, the proffer of a list and showing in support thereof being only preliminary proceedings taken for that purpose.

Upon the question of the sale of sections sixteen and thirty-six in place by the State, it is enough to say that while it may be true as contended that such act does not defeat the State's claim to indemnity in instances where the lands sold were known to be mineral at the date when the grant to the State would have otherwise attached thereto, yet, in the absence of a *bona fide* claim asserted thereto under the mining laws, the State will not be heard to question its own title and that of its vendees to the lands in place for the purpose of affording it a base for the selection of indemnity lands elsewhere, and any attempt on the part of the State to establish a failure of its title to lands in place, theretofore disposed of by the State as a part of its grant, should only be submitted after due notice to its vendees, or other person or persons claiming through such vendees by title of record.

The entire matter considered, the Department directs the cancellation of all pending selections where it is shown that the base lands have been disposed of by the State. The balance of the selections are held subject to the submission of a satisfactory showing establishing the character of the base lands, and your office is directed to call the State's attention particularly to the fact that such showing must be specific as to each legal subdivision of the land as shown by the plats of the government survey.

FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

WILLIAM G. GOSSLIN.

The fact that a tract of land within a forest reserve is subject to a right of way to construct and maintain a water pipe line within a narrow strip across the same, segregated from the tract by a survey and clearly defined, will not prevent the acceptance of a relinquishment of the tract and the allowance of a selection of other land, equal to the unincumbered portion, under the exchange provisions of the act of June 4, 1897.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 28, 1904.* (J. R. W.)

William G. Gosslin appealed from your office decision of July 23, 1903, rejecting his application, number 2003, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec.

35, T. 4 N., R. 10 W., W. M., Oregon City, Oregon, in lieu of the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 18, T. 1 N., R. 8 W., S. B. M., 80.94 acres, in the San Gabriel forest reserve, Los Angeles land district, California.

The only question presented by the appeal is the sufficiency of title to the land assigned as base for the selection, as affected by a pipe line easement.

July 16, 1887, Kelleher, then owner of the land, deeded to the San Jose Ranch Company right to lay a water pipe across the land. Your office, September 30, 1902, required Gosslin to remove this encumbrance before the title could be accepted. March 14, 1902, there was filed the relinquishment of the San Jose Ranch Company to the United States of—

all its right, title, and interest to lot 4, and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 18, T. 1 N., R. 8 W., S. B. M., saving and excepting therefrom a right of way 15 feet wide, being 7 $\frac{1}{2}$ feet on either side of the line, beginning at a point 549.2 feet east of the section corner, containing 63/100 acres, and being in Los Angeles county, California.

The selector also filed his relinquishment of excess area, as follows:

I do hereby waive and relinquish to the government of the United States all my right, title and interest to 31/100 acres of land, being excess acreage in lieu selection No. 2003, *said excess* arising from the fact that the base land in said lieu selection comprises 80.94 acres, less a right of way containing 63/100 acres belonging to the San Jose Ranch Company, and the lands selected in lieu of said base land comprise 80 acres, namely, the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 35, T. 4 N., R. 10 W., W. M., leaving a tract of 31/100 acres, as before stated.

Your office, citing departmental decision of September 19, 1902, *in re* Fred W. Kehl, number 2167, your office series, under the act of June 4, 1897 (unreported), and of F. A. Hyde (28 L. D., 284, 290), and Edgar A. Coffin (30 L. D., 15), held the title insufficient, and rejected the selection.

With the ranch company's relinquishment were filed a segregation survey, field-notes, and plat, showing the pipe line right of way to lie wholly in lot 4, otherwise described as the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 18, so that the relinquishment of the ranch company freed the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of any claim or easement.

As to the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ (lot 4), the survey and plat fix definitely what land is affected by the easement and limit the right to maintain a pipe water conduit within a strip fifteen feet in width crossing the tract in a general north and south course, near its middle, definitely fixed with reference to the section corner. Had Gosslin deeded this strip in fee to the San Jose Ranch Company prior to his deed of relinquishment to the United States, and relinquished the fractional remainders, they would constitute good base for a selection. Ricard L. Powell (32 L. D., 121); William F. Baker, decision of August 24, 1903, upon abstract of title of lands in San Francisco Mountains forest reserve (unreported).

Gosslin has relinquished legal title to the entire tract, but claims nothing for the $63/100$ acres, subject to easement and segregated from the tract by a survey. He has conveyed good title to the United States to more land than he seeks in exchange, and the easement affects only the fraction segregated by a survey, for which he makes no claim. No good reason appears why he is in worse case than he would have been had he previously conveyed in fee to the San Jose Ranch Company.

In Kehl's case, referred to by your office, there was an undefined easement of a right of way upon the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 21, not limited or segregated, extending to the whole tract for which Kehl sought to make selection, and the holder of the easement released claim to no part of the tract. In Coffin's case (30 L. D., 15), the easement, for logging and timber roads, was of the same character, attaching to and lying upon all the tract there in question. In Hyde's case (28 L. D., 290), no easement was in question or considered.

The same reasons exist for acceptance of title in the present case as existed in that of Powell, *supra*. The object of the act of 1897, to acquire exclusive title and control to all lands in the forest reserves, is much nearer attained by accepting the legal title to all the 80.94 acres, and exclusive right of control, except for maintenance and repair of a pipe line within a segregated $63/100$ of an acre of it, than it would be to leave the whole tract in private ownership to serve as a base for the operations of depredators, or disorderly and objectionable persons. The title should therefore, in view of the Department, be accepted, recognizing right in Gosslin to claim no more land in exchange than the 80.31 acres of clear land which he relinquished.

Your office decision is therefore vacated and the case is remanded, to be readjudicated, with direction that the selection be approved, if no other objection appear thereto than the easement in question.

ARID LANDS—RESERVOIR LANDS—ACT OF JUNE 17, 1902.

INSTRUCTIONS.

Under the provisions of the act of June 17, 1902, the Secretary of the Interior has full authority to purchase any lands that may be necessary for reservoir purposes, to arrange for the prices and terms of purchase, and to allow the vendor to retain possession until the land may be actually needed by the government, where by so doing the purchase may be more advantageously made; but he has no authority under said act to lease such purchased lands after the government has taken possession thereof.

Secretary Hitchcock to the Director of the Geological Survey, January
(F. L. C.) 28, 1904. (W. C. P.)

By letter of August 31, 1903, you state that under authority theretofore granted by this Department your office was about to make

arrangements for acquiring certain property which will be flooded by the construction of the Salt River reservoir in Arizona; that it will take several years to construct the dam and flood some of the land; that the government will be in possession of several tracts of good farming land for two or three years; that forage growing in that vicinity is very limited, and if it were possible to lease the lands so that a supply of forage may be available in the immediate locality it would afford a great saving to the government; and request "the views of the Department upon the proposition to purchase these lands on terms involving leases as indicated, for one or more years, until the lands shall be needed for the use of the reservoirs. Also whether lands so purchased could be leased to others than the former owners under like conditions."

By section 7 of the act approved June 17, 1902 (32 Stat., 288), it is provided: "That where in carrying out the provisions of this act it becomes necessary to acquire any rights of property the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process and to pay from the reclamation fund the sums which may be needed for that purpose." The discretion of the Secretary of the Interior in making purchase of land under this act is unhampered by any express restrictions or conditions. He would, of course, have no authority to purchase land not required in the execution of the act. He has, however, full authority in the premises as to any land necessary to be used for reservoir purposes under said act, both as to the price and terms of the purchase. If in any case it be found that land can be purchased for a less price if arrangements may be made to allow the vendor to retain possession until the time when the land is actually needed for use by the government, there is full authority under the act to make such arrangements.

The Department does not, however, look with favor upon the proposition to lease such lands after purchase and possession has been taken thereof by the government. As a general rule an executive officer has no authority to use property of the United States for any purpose other than that for which it was acquired. There is no authority under this act to acquire property except for the purpose of constructing and maintaining reservoirs. It is further believed that there is no authority to use property acquired under the provisions of this act in any manner not directly involved in the construction of such reservoirs.

It is probably true that the work could be carried on with less expense if the lands acquired might be leased or rented until actually needed in the course of construction work and that it would be a good business proposition to pursue that course, but these facts do not justify the exercise of powers that are not explicitly given or necessarily

implied by the law. The fact that the securing of revenue from the rental of the land would materially decrease the cost of construction does not carry with it the implication that the Department is authorized to so use such land.

If such a plan were determined upon it would be necessary to designate some officer to execute the leases, to receive the rental accruing thereunder, to deposit the same in the United States treasury or some other depository of government money and to devise some plan by which the money could be withdrawn and applied to the work of construction. In the view now held by the Department it is unnecessary to discuss these details and they are only mentioned to show the difficulties presented. In the face of these difficulties it is scarcely reasonable to say that the act in question by implication authorizes the rental of these lands.

After careful consideration of the matter the Department must refuse to authorize the adoption of the plan of leasing lands acquired for reservoir purposes.

CONTESTANT—PREFERENCE RIGHT—DESERT-LAND ENTRY—SOLDIERS' ADDITIONAL.

KIEHLBAUCH ET AL. *v.* SIMERO.

By contesting and procuring the cancellation of a desert-land entry made under the act of March 3, 1877, as amended by the act of March 3, 1891, the contestant acquires a preference right of entry.

The period of thirty days accorded a successful contestant within which to exercise his preference right of entry does not begin to run until the case arising upon his contest is finally closed.

The assignee of a soldiers' additional right of entry may locate the same without reference to the quantity of land he may own or claim under any of the public land laws.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 28, 1904.* (P. E. W.)

The Department has before it the appeal of John C. Kiehlbauch, on behalf of himself and Frederick W. McReynolds, from your office decision of July 18, 1903, rejecting the homestead application of Kiehlbauch for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 19 and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 20, and the forest lieu selection, filed by Kiehlbauch on behalf of McReynolds for the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 19, all in T. 36 N., R. 1 E., Great Falls, Montana, because of conflict with the soldiers' additional entries made by Frederick W. Simero for the same lands, your said decision being expressly limited in its effects to the question of priority between the parties. There is no dispute as to the facts in the case. It appears that the lands in question were formerly embraced in the desert land entry, No. 3706, of one Andreas Wagner,

against which entry Simero had initiated a contest. Pending Wagner's appeal from the adverse decision of the local officers, there was filed, on June 28, 1902, his relinquishment of the land, and on July 9, 1902, his withdrawal of his appeal, upon which his entry was canceled by the local office.

July 12, 1902, Kiehlbauch made the homestead application and forest lieu selections now under consideration. By your office letter of July 22, 1902, Simero's contest case against Wagner was closed and on August 15, 1902, Simero, claiming a preference right of entry by virtue of his contest, made his application to enter said lands under section 2306 of the Revised Statutes of the United States.

Kiehlbauch bases his appeal upon the contention—

That contestee Simero could not exercise any preference right and is not entitled to a homestead filing as a successful contestant.

By the act of March 3, 1877 (19 Stat., 377), as amended by the act of March 3, 1891 (26 Stat., 1095), it is provided, in section 2, paragraph 7, thereof, that desert land entries "shall be subject to contest, as provided by the law relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law," and in paragraph 14, page 44, of the general circular of your office of July 11, 1899, it is said, with reference to desert land entries:

Contestants will be allowed a preference right of entry for thirty days after notice of the cancellation of the contested entry in the same manner as in homestead and preemption cases.

The appellant contends that Simero's preference right of entry terminated with the expiration of thirty days after June 28, 1902, on which date Wagner's relinquishment was filed. The date on which Simero received official notice of the cancellation of Wagner's entry, and of his own preference right of entry, is not shown by the record, but it is not claimed or shown that such notice was issued prior to July 22, 1902, when the contest case was closed by your office. Moreover, the local officers in their rejection of appellant's applications, indicated that they would not issue such notice or proceed farther until the contest case had been "finally closed by the Department." Simero's applications having been presented within thirty days from the last mentioned date were seasonably filed.

The appellant contends further that Simero's said applications for soldiers' additional entries are not excepted from the limitation of 320 acres prescribed in the act of August 30, 1890 (26 Stat., 391), and that Simero had previous filings of record aggregating 320 acres, and questions:

Has he now preference right to file soldiers' additional upon the land in question or upon any land whatever?

In the case of *Webster v. Luther* (163 U. S., 331) it was held that a soldiers' additional right is transferable without restriction. It would seem to follow that the assignee of such a right may locate the same without reference to his ownership of, or claim to, other lands under any statutes whatever.

In the case of *Robeson T. White* (30 L. D., 61), the successful contestant in exercising his preference right, located a soldiers' additional homestead certificate upon the land formerly covered by the contested entry, and his right to do so was recognized.

Your said office decision is accordingly hereby affirmed.

REPAYMENT—DESERT-LAND ENTRY—COMPACTNESS.

MANUEL AMADO.

The right to repayment of the purchase money paid on a desert land entry made of unsurveyed land will be recognized where the entry as allowed is in form *prima facie* non-compact, and it is not shown that it was as nearly in compact form "as the situation of the land and its relation to other lands will admit of," and was for that reason, and the further reason that the entry embraced lands on both sides of a river, erroneously allowed and could not have been confirmed.

Assistant Attorney-General Campbell to the Secretary of the Interior,
January 30, 1904. (C. J. G.)

The case of *Manuel Amado*, involving his application for repayment of the purchase money paid on a desert land entry made by him at Florence, Arizona, has been referred to me "for an opinion as to whether or not this application for repayment can be allowed; also as to the applicability thereto of the case of *Julia B. Keeler* (31 L. D., 354)."

The entry was made May 23, 1879, being for a tract of unsurveyed land, and was canceled upon relinquishment September 7, 1887. Repayment is claimed under section 2 of the act of June 16, 1880 (21 Stat., 287), on the ground that the entry was erroneously allowed and could not be confirmed, within the contemplation of said act, because the land embraced therein was not in compact form. The land office, under date of May 12, 1903, made up and submitted the claim with favorable recommendation, it being stated:

The above described entry was in form *prima facie* non-compact, and the land being unsurveyed the record furnishes no evidence overcoming the applicant's contention that his entry was illegal. It is held, therefore, to have been erroneously allowed and insusceptible of confirmation.

Under date of June 3, 1903, the Department (L. and R. Div.) returned the claim to the land office without approval, on the ground that "there is no affirmative evidence that non-compactness was not excusable because of topography of surrounding lands or prior entry

thereof." That office resubmitted the claim June 10, 1903, under departmental decision in the case of Julia B. Keeler, the syllabus of which is:

The right to repayment of the purchase money paid on a desert land entry will be recognized where the entry as allowed is in form *prima facie* non-compact, and it does not appear from the record that it was as nearly in compact form "as the situation of the land and its relation to other lands will admit of," and was for that reason erroneously allowed and could not have been confirmed.

The land office stated, referring to the case now under consideration:

In this case the entry is *prima facie* non-compact, and as the tract was unsurveyed the record is silent as to the surrounding lands. There is therefore no evidence in this office contradicting the assertion of claimant that his entry was erroneously allowed and unsusceptible of confirmation because it was not in compact form as required by law, and it would appear that he must be held to have established his claim.

In the Keeler case the land was surveyed and the plats of survey and field notes failed to disclose any valid reason why the entry might not have been made more nearly in compact form, nor was any reason otherwise shown. Under these circumstances, and as upon its face the entry showed a gross departure from any reasonable requirement of compactness, it was held that the case came within the terms of the repayment statute.

The requirement of compactness in the matter of desert land entries is statutory (act of March 3, 1877, 19 Stat., 377). The regulations of September 3, 1880 (2 C. L. L., 1378), issued under said act, declared among other things:

The requirement of compactness of form will be held to be complied with on surveyed lands when a section, or part thereof, is described by legal subdivisions compact with each other, as nearly in the form of a technical section as the situation of the land and its relation to other lands will admit of, although parts of two or more sections be taken to make up the quantity or equivalent of one section. But entries which show upon their face an absolute departure from all reasonable requirements of compactness, and being merely contiguous by the joining of ends to each other, will not be admitted, whether on surveyed or unsurveyed lands.

On unsurveyed lands the degree of compactness required will be such as, upon the adjustment of the lines after survey, will bring the lands within the limits and general form of a technical section, or part thereof, as may be.

These regulations apply to entries made before as well as after their promulgation. Joseph Shineberger (on review, 9 L. D., 379). The entry in question was relinquished prior to the time the lands embraced therein were surveyed. Said entry comes within the prohibition contained in the above regulations, as upon its face it departs from what may fairly be regarded as a reasonable requirement of compactness. The land being at the time unsurveyed, however, there is nothing in the way of plats or field notes to show whether the entry was made in as compact form "as the situation of the land and its relation to other lands" would admit of, nor is such fact otherwise shown. It has been

the practice of the land office in cases where desert land entries are *prima facie* non-compact, to call upon the entrymen to adjust the same, and in the event of their failure to do so, or to show cause why they should not be required to do so, to cancel the entries. It does not appear that any such call was made by the land office in this case, nor does it appear that the local officers laid any such requirement upon the entryman. In the case of Julia B. Keeler, *supra*, it was said:

In the cases cited by your office the entries were allowed to stand though irregular in shape, because it was conclusively shown to be impossible for the entrymen to adjust their entries, without sacrificing a portion thereof, owing to the presence of adjacent or surrounding entries, precipitous mountains, or such elevation of the land as to render it non-irrigable. So far as the record here discloses there never has been any evidence of this character in the present case. It is too violent a presumption to assume that the local officers were in possession of such evidence when they allowed this entry, especially as it appears to have been the practice at the time to receive applications to enter like the present one without objection.

The entry in question evidencing upon its face a violation of a reasonable requirement of compactness under the statute, the local officers were fully justified, without some showing that the entryman ought not to be required for recognized reasons to amend his entry, in rejecting the application therefor, and in the absence of such showing it was error to allow the same.

There is another reason why an error was apparently committed in allowing this entry to stand as made. The regulations referred to also declare:

Entries heretofore made, whether by legal subdivisions on surveyed lands, or of an irregular form on unsurveyed lands, running along the margins or including both sides of streams, and not being compact in any true sense, will be suspended by this office, and the parties will be called upon to amend their entries so as to conform to the law; failing to do which after proper notice, such entries will be held for cancellation.

In describing the tract of land embraced in this entry, by metes and bounds, the applicant specifically stated that it "covers land on both sides of the river." Yet there is nothing to indicate that the entryman was ever called upon to amend his entry in accordance with the regulations. The entry was finally canceled upon relinquishment and not because it was irregular in shape or because it covered land on both sides of a river.

While this entry differs from that in the Keeler case, in that the land in that case had been surveyed at date of entry, plats of survey and field notes consequently being accessible, while in this case such was not the fact, yet the principles announced in the Keeler case are deemed equally applicable here. I am therefore of opinion that this case comes within the terms of the repayment statute and that the money applied for should be refunded.

Approved:

E. A. HITCHCOCK, *Secretary.*

or subject to the claim of any third party, under any law or permission of the State. Within three months after the filing of a list of selections the State must file a certificate from the Recorder of Deeds, or official custodian of the records of transfers of real estate in the proper county, that no instruments purporting to convey or in any way encumber the title to any of said lands is of record, or on file in his office.

REGULATIONS CONCERNING HOMESTEADS, RIGHTS OF WAY, TIMBER,
MISSION CLAIMS, ETC., IN ALASKA.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 13, 1904.

The following instructions issued under the act of Congress approved May 14, 1898 (30 Stat., 409), entitled "An act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes," as amended by the act of March 3, 1903 (32 Stat., 1028), are for the guidance of the local officers in their administration of the law and for the information of those concerned in its provisions.

Section 1 of said act of 1898 relates to

HOMESTEAD RIGHTS IN ALASKA,

and provides:

SEC. 1. That the homestead land laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights, are hereby extended to the district of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu lands pertaining to any land grant whatsoever originating outside of said district of Alaska shall be located within or taken from lands in said district: *Provided*, That no entry shall be allowed extending more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims, and that nothing herein contained shall be so construed as to authorize entries to be made, or title to be acquired, to the shore of any navigable waters within said district: *And it is further provided*, That no homestead shall exceed eighty acres in extent.

This section may be summarized as—

First. Extending the homestead laws and the rights incident thereto to the district of Alaska;

Second. Extending to such district the right to enter surveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights;

Third. Granting the right to enter unsurveyed lands in said district under provisions of law relating to the acquisition of title through soldiers' additional homestead rights;

Fourth. Prohibiting the location in said district of any indemnity, deficiency, or lieu lands pertaining to any land grant whatsoever originating outside of said district;

Fifth. Limiting each entry under this section to 80 rods along the shore of any navigable water, and reserving along such shore a space of at least 80 rods between all such claims, and prohibiting the entry or disposal of the shore (meaning land lying between high and low water mark) of any navigable waters within said district; and,

Sixth. Limiting each homestead in said district, whether soldiers' additional or otherwise, to 80 acres in extent.

This section was amended by the act of March 3, 1903, and reads as follows:

AN ACT to amend section one of the act of Congress approved May fourteenth, eighteen hundred and ninety-eight, entitled "An act extending the homestead laws and providing for a right of way for railroads in the district of Alaska."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the provisions of the homestead laws of the United States not in conflict with the provisions of this act, and all rights incident thereto, are hereby extended to the district of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu-land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district except as now provided by law: *And provided further,* That no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right: *And provided further,* That no location of scrip, selection or right along any navigable or other waters shall be made within the distance of eighty rods of any lands, along such waters, theretofore located by means of any such scrip or otherwise: *And provided further,* That no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof: *Provided,* That no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims; and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district; and no patent shall issue hereunder until all the requirements of sections twenty-two hundred and ninety-one, twenty-two hundred and ninety-two, and twenty-three hundred and five of the Revised Statutes of the United States have been fully complied with as to residence, improvements, cultivation, and proof, except as to commuted lands as herein provided: *And it is further provided,* That every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or who shall hereafter settle upon any of the public lands of the United States situated in the district of Alaska, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall, subject to the provisions and limitations hereof, be entitled to enter three hundred and twenty acres or a less quantity of unappropriated public land in said district of Alaska. If any of the land so settled upon, or to be settled upon, is unsurveyed, then the land settled upon, or to be settled upon, must be located in a rectangular form, not more than one mile in length, and located by north and south lines run according to the true meridian; that the location so made shall be marked upon the ground by permanent monuments at each of the four corners of the said location, so that the boundaries of the same may be readily and easily traced; that the record of said location shall, within ninety days from the date of settlement, be filed for-record in the recording district in which the land is situated. Said record shall contain the name of the settler, the date of the settlement, and such a description of the land settled upon,

by reference to some natural object or permanent monument, as will identify the same; and if, after the expiration of the said period of five years, or at such date as the settler may desire to commute, the public surveys of the United States have not been extended over the land located, a patent shall nevertheless issue for the land included within the boundaries of said location as thus recorded, upon proof to be submitted to the register and receiver of the proper land office, upon proof that he is a citizen of the United States, and upon the further proof required by section twenty-two hundred and ninety-one of the Revised Statutes of the United States as heretofore and herein amended, and under the procedure in the obtaining of patents to the unsurveyed lands of the United States, as provided for by section ten of the act hereby amended, and under such rules and regulations as shall be prescribed by the Secretary of the Interior as hereinbefore provided, without the payment of any purchase price or other charges, except the ordinary office fees and commissions of the register and receiver, except one dollar and twenty-five cents per acre on land commuted: *And provided always*, That no title shall be obtained hereunder to any of the mineral or coal lands of the district of Alaska: *And it is further provided*, That the right of any homestead settler to transfer any portion of the land so settled upon, as provided by section twenty-two hundred and eighty-eight of the Revised Statutes of the United States, shall be restricted and limited within the district of Alaska as follows: For church, cemetery, or school purposes to five acres, and for the right of railroads across such homestead to one hundred feet in width on either side of the center line of said railroad; and all contracts by the settler made before his receipt of patent from the Government, for the conveyance of the land homesteaded by him or her, except as herein provided, shall be held null and void.

Approved, March 3, 1903.

The amendatory act does not specifically reenact that portion of the act of 1898 which granted the right to enter *unsurveyed* lands in the district of Alaska under the provisions of law relating to the acquisition of title through soldiers' additional rights, but it is provided thereby "that no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right," which seems to negative any intention to modify or repeal the existing law with regard to the exercise of such rights in the district of Alaska further than to limit the amount which may be entered in a single body to 160 acres. Further, that portion of the amendatory act which provides that "no indemnity, deficiency, or lieu-land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district, except as now provided by law," seems to recognize that there are some such outstanding rights; but, unless soldiers' additional homestead rights are thereby considered as scrip rights, this Department is not advised as to any other law permitting the exercise of any such rights in the district of Alaska. You will therefore continue to receive soldiers' additional homestead applications under sections 2306 and 2307, Revised Statutes, as heretofore, bearing in mind the limitation that not more than 160 acres can be taken in a single body.

The act of 1898 is amended so as to increase the amount of land which may be entered as a homestead in the district of Alaska to 320 acres, and in providing therefor grants such right to "any person who

is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon, or who shall hereafter settle upon, any of the public lands of the United States situated in the district of Alaska, whether surveyed or unsurveyed." If a person be qualified, therefore, to make homestead entry under existing laws, he may enter not to exceed 320 acres, upon which he may have settled, in the district of Alaska, and without regard to the amount he might be authorized to make homestead entry of elsewhere; but the right to locate a soldiers' additional homestead right in the district of Alaska, without settlement, is not thereby enlarged.

No entry of any kind in the district of Alaska can, however, be allowed for land extending more than 160 rods along the shore of any navigable water, which is twice the extent originally permitted by the act of 1898, and along such shore a space of at least 80 rods is reserved between all claims, being the same as originally provided in the act of 1898. -

Full instructions with reference to the general homestead law and soldiers' additional homestead rights will be found in the general circular of January 25, 1904, and will, so far as applicable, govern the making of entries under this section.

Existing homestead laws, while recognizing settlement upon unsurveyed public lands, do not authorize the entry or the patenting thereof until the public surveys have been regularly extended over them. This section as amended, however, in terms authorizes the entry of unsurveyed lands in Alaska and makes provision for a private survey for the purpose of patenting the claim, if the public surveys have not been extended thereto at the time it is desired to submit proof, as is hereinafter referred to.

In executing surveys for homestead applications the instructions now prevailing will be followed, and the limit of 160 rods as to frontage will be measured along the meandered line of said frontage.

The form of the tract sought to be entered, if upon *unsurveyed* land, is prescribed in the act as follows:

If any of the land . . . is unsurveyed, then the land . . . must be in rectangular form not more than a mile in length, and located upon north and south lines run according to the true meridian.

The above is construed to mean that the boundary lines of each entry must be run in cardinal directions, i. e., true north and south and east and west lines by reference to a true meridian (not magnetic), with the exception of the meander lines on meanderable streams and navigable waters forming a part of the boundary lines of the entry. Thus a frontage meander line, and other meander lines which form part of the boundary of a claim, will be run according to the directions in the Manual of Surveying Instructions, but *other* boundary lines will be run in true east and west and north and south

directions, thus forming rectangles, except at intersections with meander lines.

The limit of 1 mile in length for each entry is held to be 80 chains in aggregate easting and westing, or 80 chains in aggregate northing and southing.

In other respects the rules previously adopted to govern surveys of claims under the act of May 14, 1898, will continue to be followed, of course taking into consideration the limitations as to area of claims.

Every person who is qualified under existing laws to make a homestead entry of the public lands of the United States, who settles or has settled upon any of the unsurveyed public lands of the United States in the district of Alaska, with the intention of taking the same under the homestead law, shall, within ninety days from date of settlement, or prior to the intervention of an adverse claim, file the record of his location for record in the recording district in which the land is situated, as provided by sections 13 to 16 of the act of June 6, 1900 (31 Stat. L., 326 to 328).

Said record shall contain the name of the settler, the date of settlement, and such description of the land settled upon, by reference to some natural object or permanent monument, as will identify the same.

If at the expiration of the time required under section 2291 and 2292, Revised Statutes, and as modified by section 2305, Revised Statutes, or at such date as the settler desires to commute under section 2301, Revised Statutes, the public surveys have not been extended over the land located, the locator may secure a patent for the land located by procuring, at his own expense, a survey of the land, which must be made by a deputy surveyor who has been duly appointed by the surveyor-general, in accordance with section 10 of the act of May 14, 1898 (30 Stat. L., 409), and the provisions of the act of March 3, 1903, as herein set forth.

When the survey, either public or private, as herein provided for, is approved by the surveyor-general under authority of this office, the same rules should be followed as heretofore established governing the location of soldiers' additional homestead rights; in addition to which the settler must furnish the required proof of residence and cultivation.

When a settler desires to commute, the survey and homestead application must cover his entire claim, but only 160 acres, or less, thereof may be commuted, in which event the entry will stand intact as to the portion not commuted, subject to future compliance with the requirements of law within the statutory period of seven years.

Entrymen who commute will be required to pay, in addition to the price of \$1.25 per acre, the same fees and commissions as in final homesteads.

Sections 2 to 9, inclusive, of the act of May 14, 1898, relate to—

RIGHT OF WAY FOR RAILROADS, WAGON ROADS, AND TRAMWAYS IN
THE DISTRICT OF ALASKA.

These sections provide :

SEC. 2. That the right of way through the lands of the United States in the district of Alaska is hereby granted to any railroad company, duly organized under the laws of any State or Territory or by the Congress of the United States, which may hereafter file for record with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the center line of said road; also the right to take from the lands of the United States adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also the right to take for railroad uses, subject to the reservation of all minerals and coal therein, public lands adjacent to said right of way for station buildings, depots, machine shops, side tracks, turn-outs, water stations, and terminals, and other legitimate railroad purposes, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road, excepting at terminals and junction points, which may include additional forty acres, to be limited on navigable waters to eighty rods on the shore line, and with the right to use such additional ground as may in the opinion of the Secretary of the Interior be necessary where there are heavy cuts or fills: *Provided*, That nothing herein contained shall be so construed as to give to such railroad company, its lessees, grantees, or assigns the ownership or use of minerals, including coal, within the limits of its right of way, or of the lands hereby granted: *Provided further*, That all mining operations prosecuted or undertaken within the limits of such right of way or of the lands hereby granted shall, under rules and regulations to be prescribed by the Secretary of the Interior, be so conducted as not to injure or interfere with the property or operations of the road over its said lands or right of way. And when such railway shall connect with any navigable stream or tide water such company shall have power to construct and maintain necessary piers and wharves for connection with water transportation, subject to the supervision of the Secretary of the Treasury: *Provided*, That nothing in this act contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of said district, or any part thereof, to tide lands and beds of any of its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said district. The term "navigable waters," as herein used, shall be held to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary high-water mark. That all charges for the transportation of freight and passengers on railroads in the district of Alaska shall be printed and posted as required by section six of an act to regulate commerce as amended on March second, eighteen hundred and eighty-nine, and such rates shall be subject to revision and modification by the Secretary of the Interior.

SEC. 3. That any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile shall not prevent any other railroad company from the use and occupancy of said canyon, pass, or defile for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade; and the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any tramway, wagon road, or other public highway now located therein, nor prevent the location through the same of any such tramway, wagon road, or highway where such tramway, wagon road, or highway may be necessary for the public accommodation; and where any

change in the location of such tramway, wagon road, or highway is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such tramway, wagon road, or highway, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road or tramway: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile, and that where the space is limited the United States district court shall require the road first constructed to allow any other railroad or tramway to pass over its track or tracks through such canyon, pass, or defile on such equitable basis as the said court may prescribe; and all shippers shall be entitled to equal accommodations as to the movement of their freight and without discrimination in favor of any person or corporation: *Provided*, That nothing herein shall be construed as depriving Congress of the right to regulate the charges for freight, passengers, and wharfage.

Sec. 4. That where any company, the right of way to which is hereby granted, shall in the course of construction find it necessary to pass over private lands or possessory claims on lands of the United States, condemnation of a right of way across the same may be made in accordance with section three of the act entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,'" approved July second, eighteen hundred and sixty-four: *Provided further*, That any such company, by filing with the Secretary of the Interior a preliminary actual survey and plat of its proposed route, shall have the right at any time within one year thereafter to file the map and profile of definite location provided for in this act, and such preliminary survey and plat shall, during the said period of one year from the time of filing the same, have the effect to render all the lands on which said preliminary survey and plat shall pass subject to such right of way.

Sec. 5. That any company desiring to secure the benefits of this act shall, within twelve months after filing the preliminary map of location of its road as hereinbefore prescribed, whether upon surveyed or unsurveyed lands, file with the register of the land office for the district where such land is located a map and profile of at least a twenty-mile section of its road or a profile of its entire road if less than twenty miles, as definitely fixed, and shall thereafter each year definitely locate and file a map of such location as aforesaid of not less than twenty miles additional of its line of road until the entire road has been thus definitely located, and upon approval thereof by the Secretary of the Interior the same shall be noted upon the records of said office and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within one year after the definite location of said section so approved, or if the map of definite location be not filed within one year as herein required, or if the entire road shall not be completed within four years from the filing of the map of definite location, the rights herein granted shall be forfeited as to any such uncompleted section of said road, and thereupon shall revert to the United States without further action or declaration, the notation of such uncompleted section upon the records of the land office shall be canceled, and the reservations of such lands for the purposes of said right of way, stations, and terminals shall cease and become null and void without further action.

Sec. 6. That the Secretary of the Interior is hereby authorized to issue a permit, by instrument in writing, in conformity with and subject to the restrictions herein contained, unto any responsible person, company, or corporation, for a right of way over the public domain in said district, not to exceed one hundred feet in width, and ground for station and other necessary purposes, not to exceed five acres for each

station for each five miles of road, to construct wagon roads and wire rope, aerial, or other tramways, and the privilege of taking all necessary material from the public domain in said district for the construction of said wagon roads or tramways, together with the right, subject to supervision and at rates to be approved by said Secretary, to levy and collect toll or freight and passenger charges on passengers, animals, freight, or vehicles passing over the same for a period not exceeding twenty years, and said Secretary is also authorized to sell to the owner or owners of any such wagon road or tramway, upon the completion thereof, not to exceed twenty acres of public land at each terminus at one dollar and twenty-five cents per acre, such lands when located at or near tide water not to extend more than forty rods in width along the shore line and the title thereto to be upon such expressed conditions as in his judgment may be necessary to protect the public interest, and all minerals, including coal, in such right of way or station grounds shall be reserved to the United States: *Provided*, That such lands may be located concurrently with the line of such road or tramway, and the plat of preliminary survey and the map of definite location shall be filed as in the case of railroads and subject to the same conditions and limitations: *Provided further*, That such rights of way and privileges shall only be enjoyed by or granted to citizens of the United States or companies or corporations organized under the laws of a State or Territory; and such rights and privileges shall be held subject to the right of Congress to alter, amend, repeal, or grant equal rights to others on contiguous or parallel routes. And no right to construct a wagon road on which toll may be collected shall be granted unless it shall first be made to appear to the satisfaction of the Secretary of the Interior that the public convenience requires the construction of such proposed road, and that the expense of making the same available and convenient for public travel will not be less on an average than five hundred dollars per mile: *Provided*, That if the proposed line of road in any case shall be located over any road or trail in common use for public travel, the Secretary of the Interior shall decline to grant such right of way if, in his opinion, the interests of the public would be injuriously affected thereby. Nor shall any right to collect toll upon any wagon road in said district be granted or inure to any person, corporation, or company until it shall be made to appear to the satisfaction of said Secretary that at least an average of five hundred dollars per mile has been actually expended in constructing such road; and all persons are prohibited from collecting or attempting to collect toll over any wagon road in said district, unless such person or the company or person for whom he acts shall at the time and place the collection is made or attempted to be made possess written authority, signed by the Secretary of the Interior, authorizing the collection and specifying the rates of toll: *Provided*, That accurate printed copies of said written authority from the Secretary of the Interior, including toll, freight, and passenger charges thereby approved, shall be kept constantly and conspicuously posted at each station where toll is demanded or collected. And any person, corporation, or company collecting or attempting to collect toll without such written authority from the Secretary of the Interior, or failing to keep the same posted as herein required, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined for each offense not less than fifty dollars nor more than five hundred dollars, and in default of payment of such fine and costs of prosecution shall be imprisoned in jail not exceeding ninety days, or until such fine and costs of prosecution shall have been paid.

That any person, corporation, or company qualified to construct a wagon road or tramway under the provisions of this act that may heretofore have constructed not less than one mile of road, at a cost of not less than five hundred dollars per mile, or one-half mile of tramway at a cost of not less than five hundred dollars, shall have the prior right to apply for such right of way and for lands at stations and terminals and to obtain the same pursuant to the provisions of this act over and along the line hitherto constructed or actually being improved by the applicant, including wharves

connected therewith. That if any party to whom license has been granted to construct such wagon road or tramway shall, for the period of one year, fail, neglect, or refuse to complete the same, the rights herein granted shall be forfeited as to any such uncompleted section of said wagon road or tramway, and thereupon shall revert to the United States without further action or declaration, the notation of such uncompleted section upon the records of the land office shall be canceled, and the reservations of such lands for the purposes of said right of way shall cease and become null and void without further action. And if such road or tramway shall not be kept in good condition for use, the Secretary of the Interior may prohibit the collection of toll thereon pending the making of necessary repairs.

That all mortgages executed by any company acquiring a right of way under this act, upon any portion of its road that may be constructed in said district of Alaska, shall be recorded with the Secretary of the Interior, and the record thereof shall be notice of their execution, and shall be a lien upon all the rights and property of said company as therein expressed, and such mortgage shall also be recorded in the office of the secretary of the district of Alaska and in the office of the secretary of the State or Territory wherein such company is organized: *Provided*, That all lawful claims of laborers, contractors, subcontractors, or material men, for labor performed or material furnished in the construction of the railroad, tramway, or wagon road shall be a first lien thereon and take precedence of any mortgage or other lien.

SEC. 7. That this act shall not apply to any lands within the limits of any military, park, Indian, or other reservation unless such right of way shall be provided for by act of Congress.

SEC. 8. That Congress hereby reserves the right at any time to alter, amend, or repeal this act or any part thereof; and the right of way herein and hereby authorized shall not be assigned or transferred in any form whatever prior to the construction and completion of at least one-fourth of the proposed mileage of such railroad, wagon road, or tramway, as indicated by the map of definite location, except by mortgages or other lines that may be given or secured thereon to aid in the construction thereof: *Provided*, That where within ninety days after the approval of this act proof is made to the satisfaction of the Secretary of the Interior that actual surveys, evidenced by designated monuments, were made, and the line of a railroad, wagon road, or tramway located thereby, or that actual construction was commenced on the line of any railroad, wagon road, or tramway, prior to January twenty-first, eighteen hundred and ninety-eight, the rights to inure hereunder shall, if the terms of this act are complied with as to such railroad, wagon road, or tramway, relate back to the date when such survey or construction was commenced; and in all conflicts relative to the right of way or other privilege of this act the person, company, or corporation having been first in time in actual survey or construction, as the case may be, shall be deemed first in right.

SEC. 9. That the map and profile of definite location of such railroad, wagon road, or tramway, to be filed as hereinbefore provided, shall, when the line passes over surveyed lands, indicate the location of the road by reference to section or other established survey corners, and where such line passes over unsurveyed lands the location thereon shall be indicated by courses and distances and by references to natural objects and permanent monuments in such manner that the location of the road may be readily determined by reference to descriptions given in connection with said profile map.

1. The grant made by these sections does not convey an estate in fee in the lands used for right of way or lands used for station and terminal facilities. The grant is merely of a right of use for the necessary and legitimate purposes of the roads, the fee remaining in the United States, except as to lands authorized to be sold under section 6 by the

Secretary of the Interior, "upon such expressed conditions as in his judgment may be necessary to protect the public interests." The nature of these conditions will depend upon the public necessities and will be governed by the particular circumstances of each case.

2. All persons entering public lands, to part of which a right of way has attached, take the same subject to such right of way, the latter being computed as a part of the area of the tract entered.

3. Whenever any right of way shall pass over private land or possessory claims on lands of the United States, condemnation of the right of way across the same may be made in accordance with the provisions of section 4.

INCORPORATED COMPANIES.

4. Any incorporated company desiring to obtain the benefits of these sections is required to file the following papers and maps:

First. A copy of its articles of incorporation duly certified to by the proper officer of the company under its corporate seal, or by the secretary of the State or Territory where organized.

Second. A copy of the State or Territorial law under which the company was organized, with the certificate of the governor or secretary of the State or Territory that the same is the existing law.

Third. When said law directs that the articles of association or other papers connected with the organization be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

Fourth. A certificate from the secretary of the district of Alaska showing that the company has complied with chapter 23, title 3, act of June 6, 1900 (31 Stat. L., 528), providing a civil code for the district of Alaska.

No forms are prescribed for the above portion of the proofs required, as each case must be governed to some extent by the laws of the State or Territory.

Fifth. The official statement, under seal of the proper officer, that the organization has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing law of the State or Territory where organized. (Form 1, Appendix.)

Sixth. A certificate by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs. (Form 2, Appendix.)

Seventh. If certified copies of the existing laws regarding such corporations, and of new laws as passed from time to time, be forwarded to this office by the governor or secretary of any State or Territory, a company organized in such State or Territory may file, in lieu of the requirements of the second subdivision of this paragraph, a certificate of the governor or secretary of the State or Territory that no change

has been made since a given date, not later than that of the laws last forwarded.

Eighth. Maps, field notes, and other papers as hereinafter required.

INDIVIDUALS OR ASSOCIATIONS OF INDIVIDUALS.

5. Individuals or associations of individuals making applications for a permit, under section 6, for tramways or wagon roads, are required to file evidence of citizenship. In the case of associations an affidavit must be filed by the principal officer thereof, giving a list of the members, and stating that the list includes all the members. Evidence of citizenship must be furnished for each member of the association. Individuals and associations will also be required to file the maps, field notes, and other papers hereinafter required.

6. All maps and plats must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey thereof, wherever such surveys have been made. The word profile as used in the act is understood to intend a map of alignment. No profile of grades will be required.

7. The maps should show any other road crossed or with which connection is made, and whenever possible the station number on the survey thereof at the point of intersection. All such intersecting roads must be represented in ink of a different color from that used for the line for which the applicant asks right of way. Field notes of the surveys should be written along the line on the map. If the map should be too much crowded to be easily read, then duplicate field notes should be filed separate from the map, and in such form that they may be folded for filing. In such case it will be necessary to place on the map only a sufficient number of station numbers to make it convenient to follow the field notes on the map. Station numbers should also be given on the map in all cases where changes of numbering occur and where known lines of survey, public or otherwise, are crossed, with distance to the nearest permanent monument or other mark on such line. The map must also show the lines of reference of initial, terminal, and intermediate points, with their courses and distances.

8. Typewritten field notes, with clear carbon copies, are preferred, as they expedite the examination of applications. All monuments and other marks with which connections are made should be fully described, so that they may be easily found. The field notes must be so complete that the line may be retraced on the ground. On account of the conditions existing in Alaska, surveys based wholly on the magnetic needle will not be accepted. In that case a true meridian should be established, as accurately as possible, at the initial point. It should be permanently marked and fully described. The survey should be based thereon and checked by a meridian similarly fixed at the terminal point and, when the line is a long one, by intermediate meridians at proper intervals. On account of the rapid convergence of the meridians in

these latitudes, such intermediate meridians should be established at such intervals as to avoid large discrepancies in bearings. It will probably be found preferable to run by transit deflections from a permanently established line, with frequent and readily recoverable reference lines permanently marked; and in such surveys occasional true bearings should be stated, at least approximately. On all lines of railroad the 10-mile sections should be indicated and numbered, and on maps of tramways and wagon roads the 5-mile sections shall likewise be indicated and numbered.

9. The maps, field notes, and accompanying papers should be filed in the local land office for the district where the proposed right of way is located.

10. Connections should be made with other surveys, public or private, whenever possible; also with mineral monuments and other known and established marks. When a sufficient number of such points are not available to make such connections at least every 6 miles, the surveyor must make connection with natural objects or permanent monuments.

11. Along the line of survey, at least once in every mile, permanent and easily recoverable monuments or marks must be set and connected therewith, in such positions that the construction of the road will not interfere with them. The locations thereof must be indicated on the maps. All reference points must be fully described in the field notes, so that they may be relocated, and the exact point used for reference indicated.

12. The termini of a line of road should be fixed by reference of course and distance to a permanent monument or other definite mark. The initial point of the survey and of station, terminal, and junction grounds should be similarly referred. The maps, field notes, engineer's affidavit, and applicant's certificate (Forms 3 and 4, Appendix) should each show these connections.

13. The engineer's affidavit and applicant's certificate must be written on the map, and must both designate by termini (as in the preceding paragraph) and length in miles and decimals the line of route for which right of way application is made (see Forms 3 and 4, Appendix). Station, terminal, or junction grounds must be described by initial point (as in the preceding paragraph) and area in acres (see Forms 7 and 8 Appendix), when they are located on surveyed land, and the smallest legal subdivision in which they are located should be stated. No changes or additions are allowable in the substance of any forms, except when the essential facts differ from those assumed therein. When the applicant is an individual the word "applicant" should be used instead of "company," and such other changes made as are necessary on this account.

14. Where additional width is desired for railroad right of way on account of heavy cuts or fills, the additional right of way desired should be stated, the reason therefor fully shown, the limits of the

additional right of way exactly designated, and any other information furnished that may be necessary to enable the Secretary of the Interior to consider the case before giving it his approval.

15. The preliminary map authorized by the proviso of section 4 will not be required to comply so strictly with the foregoing instructions as maps of definite location; but it is to be observed that they must be based upon an actual survey, and that the more fully they comply with these regulations the better they will serve their object, which is to indicate the lands to be crossed by the final line and to preserve the company's prior right until the approval of its maps of definite location. Unless the preliminary map and field notes are such that the line of survey can be retraced from them on the ground, they will be valueless for the purpose of preserving the company's rights. The preliminary map and field notes should be in duplicate, and should be filed in the local land office in order that proper notations may be made on the records as notice to intending settlers and subsequent applicants for the right of way.

16. The scale of maps showing the line of route should be 2,000 feet to an inch. The maps may, however, be drawn to a larger scale when necessary; but the scale must not be so greatly increased as to make the map inconveniently large for handling. In most cases, by furnishing separate field notes, an increase of scale can be avoided. Plats of station, terminal, and junction grounds, etc., should be drawn on a scale of 400 feet to an inch, and must be filed separately from the line of route. Such plats should show enough of the line of route to indicate the position of the tract with reference thereto.

17. Plats of station, terminal, and junction grounds must be prepared in accordance with the directions for maps of lines of routes. Whenever they are located on or near navigable waters the shore line must be shown, and also the boundaries of any other railroad grounds or other claims located on or near navigable waters within a distance of 80 rods from any point of the tract applied for.

18. All applications for permits made under section six of this act should state whether it is proposed to collect toll on the proposed wagon road or tramway; and, in case of wagon roads, the application must be accompanied by satisfactory evidence, corroborated by affidavit, tending to show that the public convenience requires the construction of the proposed road, and that the expense of making the same available and convenient for public travel will not be less, on an average, than \$500 per mile. In all cases, if the proposed line of road shall be located over any road or trail in common use for public travel, a satisfactory statement, corroborated by affidavit, must be submitted with the application, showing that the interests of the public will not be injuriously affected thereby.

19. When maps are filed the local officers will make such pencil notations on their records as will indicate the location of the proposed right of way as nearly as possible. They should note that the application is pending, giving the date of filing and name of applicant. They must also indorse on each map and other paper the date of filing, over their written signature, transmitting them promptly to the General Land Office.

20. Upon the approval of a map of definite location or station plat by the Secretary of the Interior the duplicate copy will be sent to the local officers, who will make such notations of the approval on their records, in ink, as will indicate the location of the right of way as accurately as possible.

21. When the road is constructed, an affidavit of the engineer and certificate of the applicant (Forms 5 and 6, Appendix) should be filed in the local land office in duplicate, for transmission to the General Land Office. In case of deviations from the map previously approved, whether before or after construction, there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case; and the location must be described in the forms as the *amended* survey and the *amended* definite location. In such cases the applicant must file a relinquishment, under seal, of all rights under the former approval as to the portions amended; said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior.

22. Unless the proper evidence of construction is filed within the time prescribed by the act for the construction of each section of the road, appropriate steps will be taken looking to the cancellation of the approval of the right of way and the notation thereof on the records.

CHARGES FOR TRANSPORTATION OF PASSENGERS AND FREIGHT.

23. A printed copy of all charges for the transportation of freight and passengers on right-of-way railroads in Alaska shall be forwarded to the Commissioner of the General Land Office for submission to the Secretary of the Interior for his consideration and approval.

In the case of a wagon road or tramway built under permit issued under section 6 of this act, upon which it is proposed to collect toll, a printed schedule of the rates for freight and passengers should also be filed with the Commissioner of the General Land Office for submission to the Secretary of the Interior for his consideration and approval at least sixty days before the road is to be opened to traffic, in order to allow a sufficient time for consideration, inasmuch as by section 6 it is made a misdemeanor to collect toll without written authority from the Secretary of the Interior. In the case of a wagon road satisfactory evidence, corroborated by affidavit, must be submitted with said sched-

ule, showing that at least an average of \$500 per mile has been actually expended in constructing such road. These schedules must be submitted in duplicate, one copy of which, bearing the approval of the Secretary of the Interior, will be returned to the applicant if found satisfactory. Said schedules shall be plainly printed in large type.

Section 10 relates to

ENTRIES FOR TRADE, MANUFACTURE, OR OTHER PRODUCTIVE INDUSTRY, IN THE DISTRICT
OF ALASKA,

and provides—

SEC. 10. That any citizen of the United States twenty-one years of age, or any association of such citizens, or any corporation incorporated under the laws of the United States or of any State or Territory now authorized by law to hold lands in the Territories, hereafter in the possession of and occupying public lands in the district of Alaska in good faith for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding eighty acres of such land for any one person, association, or corporation, at two dollars and fifty cents per acre, upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry, such tract of land not to include mineral or coal lands, and ingress and egress shall be reserved to the public on the waters of all streams, whether navigable or otherwise: *Provided*, That no entry shall be allowed under this act on lands abutting on navigable water of more than eighty rods: *Provided further*, That there shall be reserved by the United States a space of eighty rods in width between tracts sold or entered under the provisions of this act on lands abutting on any navigable stream, inlet, gulf, bay, or seashore, and that the Secretary of the Interior may grant the use of such reserved lands abutting on the water front to any citizen or association of citizens, or to any corporation incorporated under the laws of the United States or under the laws of any State or Territory, for landings, and wharves, with the provision that the public shall have access to and proper use of such wharves, and landings, at reasonable rates of toll to be prescribed by said Secretary, and a roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway: *Provided further*, That in case more than one person, association, or corporation shall claim the same tract of land, the person, association, or corporation having the prior claim, by reason of actual possession and continued occupation in good faith, shall be entitled to purchase the same, but where several persons are or may be so possessed of parts of the tract applied for the same shall be awarded to them according to their respective interests: *Provided further*, That all claims substantially square in form and lawfully initiated, prior to January twenty-first, eighteen hundred and ninety-eight, by survey or otherwise, under sections twelve and thirteen of the act approved March third, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, chapter five hundred and sixty-one), may be perfected and patented upon compliance with the provisions of said act, but subject to the requirements and provisions of this act, except as to area, but in no case shall such entry extend along the water front for more than one hundred and sixty rods: *And provided further*, That the Secretary of the Interior shall reserve for the use of the natives of Alaska suitable tracts of land along the water front of any stream, inlet, bay, or seashore for landing places for canoes and other craft used by such natives: *Provided*, That the Annette, Pribilof Islands, and the islands leased or occupied for the propagation of foxes be excepted from the operation of this act.

That all affidavits, testimony, proofs, and other papers provided for by this act and by said act of March third, eighteen hundred and ninety-one, or by any depart-

mental or Executive regulation thereunder, by depositions or otherwise, under commission from the register and receiver of the land office, which may have been or may hereafter be taken and sworn to anywhere in the United States, before any court, judge, or other officer authorized by law to administer an oath, shall be admitted in evidence as if taken before the register and receiver of the proper local land office. And thereafter such proof, together with a certified copy of the field notes and plat of the survey of the claim, shall be filed in the office of the surveyor-general of the District of Alaska, and if such survey and plat shall be approved by him, certified copies thereof, together with the claimant's application to purchase, shall be filed in the United States land office in the land district in which the claim is situated, whereupon, at the expense of the claimant, the register of such land office shall cause notice of such application to be published for at least sixty days in a newspaper of general circulation published nearest the claim within the district of Alaska, and the applicant shall at the time of filing such field notes, plat, and application to purchase in the land office, as aforesaid, cause a copy of such plat, together with the application to purchase, to be posted upon the claim, and such plat and application shall be kept posted in a conspicuous place on such claim continuously for at least sixty days, and during such period of posting and publication or within thirty days thereafter any person, corporation, or association, having or asserting any adverse interest in, or claim to, the tract of land or any part thereof sought to be purchased, may file in the land office where such application is pending, under oath, an adverse claim setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of the court.

A somewhat similar right of purchase was granted by sections 12 and 13 of the act of March 3, 1891, and the section now under consideration gives recognition to claims lawfully initiated under that act prior to January 21, 1898, and provides for perfecting and patenting them upon compliance with the provisions of that act, but subject to the requirements and provisions of this act, except as to area, and also subject to a limitation of 160 rods in extent along a water front.

The provisions of section 10 of this act being largely in conflict with sections 12 and 13 of the act of March 3, 1891, and it being apparent that section 10 of this act was intended to fully cover with new legislation the field theretofore occupied by sections 12 and 13 of the former act, it follows that section 10 of this act must be treated as repealing those sections, subject only to the saving clause respecting claims initiated thereunder before January 21, 1898.

Under the law of 1891 the record claim was initiated by an application made to the surveyor-general for a survey of the tract occupied and used. An estimate was prepared by said officer of the cost of such survey, and upon deposit of that amount the survey was ordered to be made by a deputy surveyor, and was required to be approved by the surveyor-general and the Commissioner of the General Land Office before purchase could be allowed. Under the present law the claimant, at his own expense, can procure the making of the survey without

first making application to the surveyor-general, but the survey when made is to be submitted to and approved by the surveyor-general.

The statute does not directly state by whom the survey is to be made, but to insure official responsibility for the work, and the better to protect the interests of all concerned, the surveys must be made by deputy surveyors, who will be appointed in sufficient number by the surveyor-general on satisfactory showing of their fitness, and who will each be required to enter into a bond in the penal sum of \$5,000 for the faithful execution, according to law and instructions, of all surveys made in pursuance of his appointment as deputy surveyor. Upon appointment the deputy must take the oath of office required by section 2223, Revised Statutes.

Upon completion of the survey the deputy should certify to the field notes and plat, which must then be filed with the surveyor-general, together with proof, which may consist of affidavits duly corroborated by two witnesses, showing:

First. The actual use and occupancy of the land applied for for the purposes of trade, manufacturing, or other productive industry, that it embraces the applicant's improvements and is needed in the prosecution of the enterprise.

Second. The date when the land was first so occupied.

Third. The character and value of improvements thereon, and the nature of the trade, business, or productive industry conducted thereon.

Fourth. That the tract applied for does not include mineral or coal lands, and is essentially nonmineral in character.

Fifth. That no portion of said land is occupied or reserved for any purpose by the United States, or occupied or claimed by any natives of Alaska, or occupied as a town site or missionary station, or reserved from sale, and that the tract does not include improvements made by or in possession of another person, association, or corporation.

Sixth. If the land abuts on any navigable stream, inlet, gulf, bay, or seashore, that it is not within 80 rods of any tract sold or entered under the provisions of this act. Lands patented or to which a right to patent had fully accrued under the act of March 3, 1891, are not "tracts sold or entered under the provisions of this act" within the meaning of this provision.

In the completion under this act of entries initiated prior to January 21, 1898, under the act of March 3, 1891, this showing will not be required.

The deputy surveyor in certifying each survey abutting upon navigable waters must state the name and location of every claim within 80 rods of the claim surveyed.

Seventh. If the application is made for the benefit of an individual, he must prove his citizenship and age.

Eighth. If the application is made for the benefit of an association

it must so appear, and the citizenship and age of each member thereof be shown.

Ninth. If the application is made for the benefit of a corporation, the incorporation must be established by the certificate of the secretary of the State or Territory or other officer having custody of the record of incorporation, and it must be further shown that such corporation is authorized by the law under which it is incorporated to hold lands in the Territories.

All affidavits may be made before the register or receiver of the land office in the district in which the land is situated, or anywhere in the United States before any court judge or other officer authorized by law to administer an oath.

If the survey is approved by the surveyor-general, certified copies of the field notes and plat, together with the original proof filed by applicant to establish his claim, must be filed in the local land office with his application to purchase. Thereupon, at the expense of the claimant (who must furnish the agreement of the publisher to hold the applicant for patent alone responsible for charges of publication), the register of such local land office shall cause notice of the application to purchase to be published for a period of at least sixty days in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land. Whether published in a weekly, semiweekly, or daily newspaper, the notice must appear in each and every issue of the paper for a period of sixty days, excluding the day of the first publication in computing the period of sixty days; the applicant must also, during the period of publication, cause a copy of the plat, duly authenticated, together with a copy of the application to purchase, to be posted in a conspicuous place upon the claim for at least sixty days. The register shall cause a copy of the application to purchase to be posted in his office during the period of publication.

During the period of posting and publication, or within thirty days thereafter, any person, corporation, or association having or asserting an adverse interest in or claim to the tract of land, or any part thereof, sought to be purchased, may file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof; and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin action to quiet title in a court of competent jurisdiction within the district of Alaska; in which event no further action will be taken in the local office upon the application to purchase until the final adjudication of the rights of the parties in the court.

If at the expiration of the period prescribed therefor no adverse claim is filed, and no other sufficient objection appears to the proposed purchase, cash certificate will issue for the land in the name of the

applicant upon his furnishing proof of publication and posting of the notice as required and making due payment for the land. This proof shall consist of the affidavit of the publisher or foreman of the newspaper employed that the notice (a copy of which must be attached to the affidavit) was published for the required period in the regular and entire issue of every number of the paper during the period of publication, in the newspaper proper and not in the supplement. Proof of posting on the claim will consist of the affidavits of the applicant and two witnesses, who of their own knowledge know that the plat of survey and application to purchase were posted as required and remained so posted during the required period. The register should certify to the posting of the notice in a conspicuous place in his office during the period of publication.

A failure to make due payment for the land for a period of three months after the final adjudication of the rights of the parties by the court, or after the period for filing an adverse claim shall have expired, without any such claim being filed, will be deemed an abandonment of the application to purchase.

Upon a proper showing, duly corroborated, that any claim does not conform to the requirement of the law, a hearing will be ordered in the premises.

A roadway 60 feet in width, parallel to the shore line as near as may be practicable, is reserved for the use of the public as a highway. "Shore line" here means high-water line. This reservation occurs in the proviso relating to the reservation between claims abutting on navigable waters; but since it is its purpose to reserve a roadway for public use as a highway along the shore line of navigable waters, it is held to relate to the lands entered or purchased under this act, as well as to the reserved lands; otherwise it would serve little or no purpose. This reservation will not, however, prevent the location and survey of a claim up to the shore line, for in such case the claim will be subject to this servitude, and the area in the highway will be computed as a part of the area entered and purchased.

It is not deemed advisable at this time to prescribe any fixed form of application for the use of any of the reserved lands between claims entered or purchased under this act, excepting that—

(1) The citizenship of the applicants or association of applicants must be shown, and in the case of a corporation the same showing must be made as is required by paragraph under section two, granting right of way for railroads.

(2) The location of the landings or wharves must be accurately described on a map or diagram with reference to claims on either side.

(3) The use of such lands is limited to landings and wharves, and all rates of toll to be paid by the public must be submitted for approval by the Secretary of the Interior.

Section 11, act of May 14, 1898, relates to—

THE TIMBER ON PUBLIC LANDS IN THE DISTRICT OF ALASKA,

and provides:

SEC. 11. That the Secretary of the Interior, under such rules and regulations as he may prescribe, may cause to be appraised the timber or any part thereof upon public lands in the district of Alaska, and may from time to time sell so much thereof as he may deem proper, for not less than the appraised value thereof, in such quantities to each purchaser as he shall prescribe, to be used in the district of Alaska, but not for export therefrom. And such sales shall at all times be limited to actual necessities for consumption in the district from year to year; and payments for such timber shall be made to the receiver of public moneys of the local land office of the land district in which said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe, and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office in a separate account, and shall be covered into the Treasury. The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber found upon the public lands in said district of Alaska by actual settlers, residents, individual miners, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes, as may actually be needed by such persons for such purposes.

While sales of timber are optional, and the Secretary of the Interior may exercise his discretion at all times as to the necessity or advisability of any sale, petitions from responsible persons for the sale of timber in particular localities will be received by this Department for consideration.

Such petitions must describe the land upon which the timber stands, as definitely as possible by natural landmarks; the character of the country, whether rough, steep, or mountainous, agricultural or mineral, or valuable chiefly for its forest growth; and state whether or not the removal of the timber would injuriously affect the public interests. If any of the timber is dead, estimate the quantity in feet, board measure, with the value, and state whether killed by fire or other cause. Of the live timber, state the different kinds and estimate the quantity of each kind in trees per acre. Estimate the average diameter of each kind of timber, and estimate the number of trees of each kind per acre above the average diameter. State the number of trees of each kind it is desired to have offered for sale, with an estimate of the number of feet, board measure, therein, and an estimate of the value of the timber as it stands.

Before any sale is authorized the timber will be examined and appraised. Notice thereof will be given by publication by the Commissioner of the General Land Office.

The time and place of filing bids and other information for a correct understanding of the terms of each sale will be given by published notices or otherwise. Timber is not to be sold for less than the appraised value. The Commissioner of the General Land Office must approve all sales, and he may make allotment of quantity to any bid-

der or bidders if he deems proper. The right is also reserved to reject any or all bids. A reasonable cash deposit, to accompany each bid, will be required.

Within thirty days after notice to a bidder of an award of timber to him payment must be made in full to the receiver for the timber so awarded; or equal payments therefor may be made in thirty, sixty, and ninety days from date of such notice, at the option of the purchaser. The purchaser must have in hand the receipt of the receiver for each payment before he will be allowed to cut, remove, or otherwise dispose of the timber covered by that payment. The timber must all be cut and removed within one year from the date of payment therefor; failing to so do, the purchaser will forfeit his right to the timber left standing or unremoved and to his purchase money: *Provided*, That the limit of one year herein named may be extended by the Commissioner of the General Land Office, in his discretion, upon good and sufficient reasons being shown.

Notice must be given by the purchaser to the Commissioner of the General Land Office of the proposed date of cutting and removal of the timber, so that, if practicable, an official may be designated to supervise such cutting and removal. Upon application of purchasers, permits to erect temporary sawmills for the purpose of cutting or manufacturing timber purchased under this act may be granted by the Commissioner of the General Land Office, if not incompatible with the public interests.

No timber taken from the public lands and sold as above prescribed may be exported from the district of Alaska.

Special instructions will be issued for the guidance of officials designated to examine and appraise timber, to supervise its cutting and removal, and for carrying out other requirements connected therewith.

Actual settlers, residents, individual miners, and prospectors for minerals may procure, free of charge, from unoccupied unreserved public lands in Alaska, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes, so much timber as may be actually needed by such persons, for individual use, to an extent not exceeding, in stumpage valuation, \$100 in any one year. It is not necessary to secure permission from the Department to take timber from public lands as allowed in this paragraph. The exercise of such privilege is, however, subject at all times to supervision by the Department, with a view to restriction or prohibition if deemed necessary. The uses specified in this paragraph constitute the only purposes for which timber may be taken, free of charge, from public lands in Alaska.

In cases arising under the preceding paragraph in which the parties needing the timber are not in a position to procure it from the public lands themselves, it is allowable for them to secure the cutting, removing, sawing, or other manufacture of the timber through the medium

of others, agreeing with the parties thus acting as their *agents direct* in taking or otherwise handling the timber that they shall be paid a reasonable amount to cover their time and labor expended and all legitimate expenses incurred in connection therewith *exclusive of any charge for the timber itself.*

Section 2461, United States Revised Statutes, is in force in the district of Alaska, and its provisions may be enforced against any person or persons who cut or remove, or cause or procure to be cut or removed, or aid or assist or are employed in cutting or removing, any timber from public lands therein, except as allowed by law.

Section 12 authorizes the establishment of—

LAND DISTRICTS WITHIN THE DISTRICT OF ALASKA,

and provides:

SEC. 12. That the President is authorized and empowered, in his discretion, by Executive order from time to time to establish or discontinue land districts in the district of Alaska, and to define, modify or change the boundaries thereof, and designate or change the location of any land office therein; and he is also authorized and empowered to appoint, by and with the advice and consent of the Senate, a register for each land district he may establish and a receiver of public moneys therefor; and the register and receiver appointed for such district shall, during their respective terms of office, reside at the place designated for the land office. That the registers and receivers of public moneys in the land districts of Alaska shall each receive an annual salary of one thousand five hundred dollars and the fees provided by law for like officers in the State of Oregon, not to exceed, including such salary and fees, a total annual compensation of three thousand dollars for each of said officers.

The district of Alaska is comprised in one land district, with the office at Juneau. (Executive order of April 2, 1902, under act of Congress of February 14, 1902.)

The system of public-land surveys was extended to the district of Alaska by the act of March 3, 1899. (30 Stat., 1098.)

MINERAL LANDS.

The laws of the United States relating to mining claims, and the rights incident thereto, were extended to the district of Alaska by act of Congress approved May 17, 1884 (23 Stat. L., 24, 26).

Section 13, act of May 14, 1898, according to native-born citizens of Canada, "the same mining rights and privileges" in the district of Alaska as are accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada is not now and never has been operative, for the reason that the only mining rights and privileges granted to any person by the laws of the Dominion of Canada are those of leasing mineral lands upon the payment of a stated royalty, and the mining laws of the United States make no provision for such leases.

The act of June 6, 1900, making further provision for a civil government for Alaska, provides for the establishment of recording districts and the recording of mining locations; for the making of rules and regulations by the miners and for the legalization of mining records; for the extension of the mining laws to the district of Alaska, and for the exploration and mining of tide lands and lands below low tide.

COAL LANDS.

The coal-land laws were extended to the district of Alaska by act of Congress approved June 6, 1900.

Under the coal-land law, sections 2347 to 2352, inclusive, of the Revised Statutes, and the regulations thereunder issued July 31, 1882, coal-land filings and entries must be *by legal subdivisions* as made by the regular United States survey. Under said section 2401, as amended, persons and associations lawfully possessed of coal claims upon unsurveyed lands may have such claims surveyed, provided the township so proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for township and subdivisional surveys.

Although the system of public-land surveys was extended to the district of Alaska by a provision contained in the act of Congress approved March 3, 1899 (30 Stat., 1098), no township or subdivisional surveys have been made, nor have any standard lines or bases for township and subdivisional surveys been established within the district.

MISSION CLAIMS IN THE DISTRICT OF ALASKA.

The act of June 6, 1900 (31 Stat. L., 330), section 27, provides:

The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use and occupation, and the land at any station not exceeding 640 acres, occupied as mission stations among the Indian tribes in the section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which the missionary stations respectively belong, and the Secretary of the Interior is hereby directed to have such lands surveyed in compact form as nearly as practicable and patents issued for the same to the several societies to which they belong, but nothing contained in this act shall be construed to put in force in the district the general land laws of the United States.

Under the terms of said act any organized religious society that was maintaining a missionary station in the district of Alaska on June 6, 1900, may apply to the surveyor-general of Alaska for the survey of the land so occupied.

The application should be made by the duly authorized representative of the society, whose authority to act should appear.

If the society is incorporated, evidence of the incorporation should be furnished; and application should be made in the corporate name of the society; if not incorporated, the nature of the association and its formation and purpose should be set out, and the application should

be made in the name of three or more trustees, as such, all of whom must be members of the association or organization.

The application for survey must describe as specifically as possible the location of the claim, in connection with surrounding monuments or objects, so that it may be readily identified and must be accompanied with proof, which may consist of affidavits duly corroborated by two witnesses, showing:

1. The actual use of the land for missionary purposes and that it embraces the improvements of the applicant society or organization.
2. The date when the land was first so occupied and the extent and character of the occupation.
3. The character and value of the improvements.
4. That no portion of the land is held adversely to the society under rights of prior inception.

The survey will include only such lands, taken in a compact form, as were actually used and occupied for missionary purposes June 6, 1900, not to exceed in any instance 640 acres, and the area will not be extended to embrace lands taken after that date.

When the survey has been made and accepted, in accordance with existing practice governing the survey of sites for trade and manufacturing purposes, certified copies of the field notes and plat with the original proof must be filed in the local land office, and the register will thereupon issue the proper certificate.

In the event applications for surveys have heretofore been filed with the surveyor-general without the required proof, such proof must be furnished before the issuance of patent.

W. A. RICHARDS,
Commissioner.

Approved.

E. A. HITCHCOCK,
Secretary.

APPENDIX.

AN ACT to amend section one of the act of Congress approved May fourteenth, eighteen hundred and ninety-eight, entitled "An act extending the homestead laws and providing for a right of way for railroads in the district of Alaska."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the provisions of the homestead laws of the United States not in conflict with the provisions of this act, and all rights incident thereto, are hereby extended to the district of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no idenity, deficiency, or lieu land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district except as now provided by law: And provided further, That no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right: And provided further, That no location of scrip, selection, or right along any navigable or

other waters shall be made within the distance of eighty rods of any lands, along such waters, theretofore located by means of any such scrip or otherwise: *And provided further*, That no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof: *Provided*, That no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims; and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district; and no patent shall issue hereunder until all the requirements of sections twenty-two hundred and ninety-one, twenty-two hundred and ninety-two, and twenty-three hundred and five of the Revised Statutes of the United States have been fully complied with as to residence, improvements, cultivation, and proof, except as to commuted lands as herein provided: *And it is further provided*, That every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or who shall hereafter settle upon any of the public lands of the United States situated in the district of Alaska, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall, subject to the provisions and limitations hereof, be entitled to enter three hundred and twenty acres or a less quantity of unappropriated public land in said district of Alaska. If any of the land so settled upon, or to be settled upon, is unsurveyed, then the land settled upon, or to be settled upon, must be located in a rectangular form, not more than one mile in length, and located by north and south lines run according to the true meridian; that the location so made shall be marked upon the ground by permanent monuments at each of the four corners of the said location, so that the boundaries of the same may be readily and easily traced; that the record of said location shall, within ninety days from the date of settlement, be filed for record in the recording district in which the land is situated. Said record shall contain the name of the settler, the date of the settlement, and such a description of the land settled upon, by reference to some natural object or permanent monument, as will identify the same; and if, after the expiration of the said period of five years or at such date as the settler may desire to commute the public surveys of the United States have not been extended over the land located, a patent shall nevertheless issue for the land included within the boundaries of said location as thus recorded, upon proof to be submitted to the register and receiver of the proper land office, upon proof that he is a citizen of the United States, and upon the further proof required by section twenty-two hundred and ninety-one of the Revised Statutes of the United States, as heretofore and herein amended, and under the procedure in the obtaining of patents to the unsurveyed lands of the United States, as provided for by section ten of the act hereby amended, and under such rules and regulations as shall be prescribed by the Secretary of the Interior as hereinbefore provided, without the payment of any purchase price or other charges except the ordinary office fees and commissions of the register and receiver except one dollar and twenty-five cents per acre on land commuted: *And provided always*, That no title shall be obtained hereunder to any of the mineral or coal lands of the district of Alaska: *And it is further provided*, That the right of any homestead settler to transfer any portion of the land so settled upon, as provided by section twenty-two hundred and eighty-eight of the Revised Statutes of the United States, shall be restricted and limited within the district of Alaska as follows: For church, cemetery, or school purposes to five acres, and for the right of railroads across such homestead to one hundred feet in width on either side of the center line of said railroad; and all contracts by the settler made before his receipt of patent from the Government, for the conveyance of the land homesteaded by him or her, except as herein provided, shall be held null and void.

Approved March 3, 1903. [32 Stat. L., 1028.]

FORMS FOR DUE PROOFS AND VERIFICATION OF MAPS OF RIGHT OF WAY
FOR RAILROADS, TRAMWAYS, WAGON ROADS, ETC.

FORM 1.

I, _____, secretary (or president) of the _____ company do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with construction according to the existing laws of the State (or Territory) of _____; and that the copy of the articles of association (or incorporation) of the company filed in the Department of the Interior under the act of May 14, 1898 (30 Stat. L., 409), is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company.

[SEAL OF COMPANY.]

_____,
_____ of the _____ Company.

FORM 2.

STATE OF _____,
County of _____, ss:

I, _____, do certify that I am the president of the _____ Company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: (Here insert the full name and official designation of each officer.)

[SEAL OF COMPANY.]

_____,
President of Company.

FORM 3.

STATE OF _____,
County of _____, ss:

_____, being duly sworn, says he is the chief engineer of (or is the person employed to make the survey by) the _____ company; that the survey of the said company's line of (railroad, tramway, or wagon road) described as follows: (Here describe the line of route as required by paragraph 12), a length of _____ miles, was made by him (or under his direction) as chief engineer of (or as surveyor employed by) the company and under its authority, commencing on the _____ day of _____, 19—, and ending on the _____ day of _____, 19—; that the survey of the said land is accurately represented on this map and by the accompanying field notes; and that this proposed right of way does not lie within 4 rods of the shore of any navigable waters, except as shown on this map. (In the case of a tramway or wagon road, add the following: The said line of road does not lie upon nor cross any road or trail in common use for public travel except as shown on this map.)

Sworn and subscribed to before me this _____ day of _____, 19—.

[SEAL.]

_____,
Notary Public.

FORM 4.

I, _____, do hereby certify that I am president of the _____ company; that _____, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of

the said (railroad, tramway, or wagon road), as accurately represented on this map and by the accompanying field notes, was made under authority of the company; that the company is duly authorized by its articles of incorporation to construct the said (railroad, tramway, or wagon road) upon the location shown upon this map; that the said survey as represented on this map and by said field notes was adopted by resolution of its board of directors on the _____ day of _____, 19—, as the definite location of the said (railroad, tramway, or wagon road) described as follows: (describe as in Form 3); that this proposed right of way does not lie within 4 rods of the shore of any navigable waters, except as shown on this map, and that this map has been prepared to be filed in order to obtain the benefits of sections 2 to 9, inclusive, of the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes." "I further certify that the said (railroad or tramway) is to be used as a common carrier of freight and passengers.

Attest:

[SEAL OF COMPANY.]

_____,
President of the _____ Company._____,
Secretary.

FORM 5.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says that he is the chief engineer of (or was employed to construct the railroad, tramway, or wagon road of) the _____ company; that said (railroad, tramway, or wagon road) has been constructed under his supervision, as follows: (describe as in paragraph 12) a total length of _____ miles; that construction was commenced on the _____ day of _____, 19—, and completed on the _____ day of _____, 19—; that the constructed (railroad, tramway, or wagon road) conforms to the map and field notes which received the approval of the Secretary of the Interior on the _____ day of _____, 19—.

Sworn and subscribed to before me this _____ day of _____, 19—.

[SEAL.]

_____,
Notary Public.

FORM 6.

I, _____, do hereby certify that I am the president of the _____ company; that the (railroad, tramway, or wagon road) described as follows: (describe as in Form 5) was actually constructed as set forth in the accompanying affidavit of _____, chief engineer (or the person employed by the company in the premises); that the location of the constructed (railroad, tramway, or wagon road) conforms to the map and field notes approved by the Secretary of the Interior on the _____ day of _____, 19—; and that the company has in all things complied with the requirements of sections 2 to 9, inclusive, of the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes."

Attest:

[SEAL OF COMPANY.]

_____,
President of the _____ Company._____,
Secretary.

^a The last sentence to be omitted from applications for wagon-road right of way.

FORM 7.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says he is the chief engineer of (or is the person employed to make the survey by) the _____ company; that the survey of the tract described as follows: (here describe as required by paragraph 12) an area of _____ acres, and no more, was made by him (or under his direction) as chief engineer of the company (or as surveyor employed by the company), and under its authority, commencing on the _____ day of _____, 19—, and ending on the _____ day of _____, 19—; that the survey of the said tract is accurately represented on this plat and by the accompanying field notes; ^a(that the company has occupied no other grounds for similar purposes upon public lands within the section of [5 or 10] miles, from the _____ mile to the _____ mile, for which this selection is made); that, in his belief, the said grounds are actually and to their entire extent required by the company for the necessary uses contemplated by the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes;" that the said tract does not lie within 4 rods of the shore of any navigable waters except as shown on this map, and that to the best of my knowledge and belief there is no settlement or other claim along the shore of any navigable waters upon land within 80 rods of any point of this tract except as shown on this map.

Subscribed and sworn to before me this _____ day of _____, 19—.

[SEAL.]

Notary Public.

FORM 8.

I, _____, do hereby certify that I am president of the _____ company; that _____, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the tract described as follows: (here describe as in Form 7) an area of _____ acres, and no more, was made by him as chief engineer of (or as surveyor employed to make the survey by) the said company; that the said survey, as accurately represented on this map and by the accompanying field notes, was made under authority of the company; that the said survey, as represented on this map and by said field notes, was adopted by resolution of its board on the _____ day of _____, 19—, as the definite location of said tract for (station, terminal, or junction grounds); ^a(that the company has occupied no other grounds for similar purposes upon public lands within the section of [5 or 10] miles, from the _____ mile to the _____ mile, for which this selection is made); that, in his belief, the said grounds are actually and to their entire extent required by the company for the necessary uses contemplated by the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes;" that the said tract does not lie within 4 rods of the shore of any navigable waters except as shown on this map, and that, to the best of my knowledge and belief, there is no settlement or other claim along the shore of any navigable waters upon land within 80 rods of any point of this tract except as shown on this map.

Attest:

[SEAL OF COMPANY.]

President of the _____ Company._____

Secretary.^a This clause is to be omitted in applications for terminal or junction grounds.

GOLDEN CROWN LODE.

Motion for review of departmental decision of August 7, 1903, 32 L. D., 217, denied by Secretary Hitchcock February 5, 1904.

RIGHT OF WAY—RAILROAD—RESERVOIR SITE—ACT OF MARCH 3, 1891.

DENVER, NORTHWESTERN AND PACIFIC RY. CO. *v.* HYDRO-ELECTRIC POWER CO.

The act of March 3, 1891, grants a right of way through the public lands and reservations of the United States to any canal or ditch company "formed for the purpose of irrigation" only, and has no application to a company formed for other purposes.

Where a railroad company files an application intended to be for right of way for a railroad through a canyon or narrow defile, but by mistake the map of its proposed road shows the line of route to be some distance from the canyon and running through an impassable mountain range, it will be allowed to amend its application to conform to the original intention, to the exclusion of an intervening conflicting application for a reservoir site in the same canyon or defile.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 11, 1904.* (G. B. G.)

This proceeding involves certain applications and amended applications for rights of way through the Grand River canyon (familarly known as Gore canyon), in the State of Colorado, as follows:

1. The application of the Hydro-Electric Power Company under the act of February 15, 1901 (31 Stat., 790), for right of way for a pipe line and power house site to be used in the generation and distribution of electricity, filed October 16, 1902.

2. The application of the Denver, Northwestern and Pacific Railway Company under the act of March 3, 1875 (18 Stat., 482), for a right of way, 5.72 miles, as part of its projected line of railway from Denver, Colorado, to Salt Lake City, Utah, filed January 7, 1903.

3. The application of the New Century Light and Power Company, successor in interest to the Hydro-Electric Power Company, under the acts of March 3, 1891 (26 Stat., 1095, 1101-1102), and February 15, 1901, *supra*, for a reservoir site, filed February 19, 1903.

4. The application of the said railway company to amend its map of January 7, 1903, filed March 2, 1903, together with an amended map filed pursuant thereto July 17, 1903.

The alleged conflicting interests of the power company and the railway company being made the basis of protest by each against the other, your office, considering these protests, by decision of June 15, 1903, dismissed them, apparently upon the ground that each of these company's maps should be approved in the order of their presentation,

leaving all questions of priorities and conflicting interests thereunder to be settled by the courts. The railway company has appealed.

There is no such conflict of interests between the railway company, and the electric power company under its application of October 16, 1902, as to offer a sufficient basis for protest by either of these companies against the other. There is room in Gore canyon for both the railroad and the pipe line. It is manifest, however, that either the application of the New Century Light and Power Company for a reservoir site, or that of the railway company to amend its map, should be denied. Gore canyon is a narrow defile in the mountains, and the reservoir proposition involves the building of a dam across it of such proportions as would render its use for railroad right of way impracticable. The only question therefore is, which of these companies, under the law and the facts presented, has the better claim to it.

The map filed by the railway company, January 7, 1903, shows the line of road one mile from Gore canyon and running parallel to it through an impassable mountain range. This company says that it was its intention to project its line of road through Gore canyon, and that the mistake in the map was due to the erroneous markings of a corner stone of the government surveys, and it is this mistake of the map which the application to amend of March 2, 1903, is designed to correct. It is claimed by the power company that it was not the intention of the railway company at the date of the filing of its map, January 7, 1903, to construct its line through Gore canyon; that the power company had the right to rely upon the railway company's map, and that the amendatory application should not be allowed if the effect of it shall be to defeat the power company's intervening application for a reservoir site.

There can be no sort of doubt from this record that whatever may have been the intentions of the railway company prior to the filing of its map as to its line of route, it was intended at the date of the filing of the map, January 7, 1903, to construct the road through Gore canyon. This conclusion is reached without any reference to the confusing data submitted on the one hand in regard to the alleged improper marking of a corner of the government surveys, or on the other hand the trial lines of survey and railroad prospectus, tending to show that the railway company for some time contemplated running its line on a route which did not take Gore canyon into consideration. There is nothing to show or tending to show that it was ever the intention of the company to build a road on the line indicated by the map filed January 7, 1903. No survey was ever made by the railway company upon that line, while, on the other hand, it had but a short time before filing its map surveyed and staked a line through the canyon. The line indicated by the map was a seemingly impracticable route, and the entire matter considered the Department is of opinion that the

company could not reasonably have had any intention other than to build through Gore canyon. This being so, the amendment proposed by it should be allowed.

The contention of the power company that its intervening adverse claim for a reservoir site should be allowed can not be admitted. It has no standing whatever under the act of March 3, 1891, *supra*. That act grants a right of way through the public lands and reservations of the United States to any canal or ditch company "formed for the purpose of irrigation" only, and the New Century Light and Power Company was not formed for that purpose, and there is nothing in its articles of incorporation which justifies the assumption that it ever contemplated, or that under the laws of Colorado it can ever engage in the irrigation business. Considered as an application under the act of February 15, 1901, *supra*, it is without effect, unless, acting thereon, the Secretary of the Interior by his approval grants the permission for use as applied for. As a subsequent disposition of the land would terminate the right of use theretofore granted, surely an application for use of the same land filed prior to the granting of the right should be considered when determining whether the use should be permitted.

The benefits to the public generally derived through the construction of a railroad in this canyon are clearly superior to any claimed right of use in the power company, and, aside from the question of priority, which seems to be with the railway company, the Department declines to give its approval to the application for the use of this canyon in connection with a reservoir enterprise which will destroy its utility for railway purposes.

Unless objections other than those here considered appear, your office will forward for approval the railway company's amended map and the power company's map for pipe line and power house site. The power company's application for reservoir site will be rejected.

STATE OF CALIFORNIA.

Motion for review of departmental decision of December 10, 1903, 32 L.D., 346, denied by Secretary Hitchcock February 13, 1904.

SURVEY—HOMESTEAD CLAIM IN BLACK HILLS FOREST RESERVE—ACT OF MARCH 3, 1899.

WILLIAM D. VESTAL.

The survey of a homestead claim in the Black Hills forest reserve, by metes and bounds, under the provisions of the act of March 3, 1899, will not be made where the claim is not as nearly as practicable in square form and parts thereof are of less width than the smallest legal subdivision.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 17, 1904.* (E. F. B.)

This appeal is filed by William D. Vestal from the decision of your office of November 25, 1903 affirming the action of the Surveyor General of South Dakota rejecting his application for a "metes and bounds" survey of his homestead claim in sections 31, T. 2 S., R. 4 E., and sections 5, 6, 7 and 8 in T. 3 S., R. 4 E., B. H. Meridian, within the Black Hills forest reserve, Huron, South Dakota.

Said application is made under the provisions of the act of March 3, 1899 (30 Stat., 1074, 1095), which provides for a survey of homestead claims within the Black Hills forest reserve by metes and bounds, at the expense of the claimants, where the lands are so situated that the entry of a legal subdivision will not embrace the improvements of such settler or claimant, with the proviso—

That in any case where upon investigation by a special agent of the Interior Department and after due and proper hearing, it shall be established that an entry interfered with the general water supply, or was detrimental in any way to the public interests, or infringed upon the rights and privileges of other citizens, the Secretary of the Interior shall have authority to cause said entry to be modified or amended, or in his discretion to finally cancel the same.

In the instructions for the carrying out of the provisions of this act it is said that the intention of the act is not to permit any settler to take long and narrow strips of land on both sides of a stream, but that they shall be taken as nearly as practicable in square form and in no case of less width than the smallest legal subdivision (twenty chains). That if the claim is in such shape as appears to the surveyor general to be detrimental to the public interests, or to infringe upon the possible rights of other citizens, or if the surveyor general has doubt as to the propriety of making the survey in the shape applied for, he is required to submit it to your office, stating his reasons why the survey should not be allowed as applied for.

The surveyor general, in reporting adversely to the application of this claimant, says that—

The survey as applied for spreads out, like the fingers of a hand, into 26 legal subdivisions, along the various narrow drains, a total distance of over 4½ miles, with an average width of less than five chains; and it is thought that such a portion of the public domain and such a system of segregation lottings, as this proposed survey

would impose, cannot but be detrimental to the public interests in the near future, if not at present, as the public lands become diminished in quantity, tracts heretofore and at present deemed relatively undesirable, will be in demand, and it is best for such tracts that the regular system be departed from as little as possible, rather than burden them with the extensive irregularities the proposed survey would cause, at least until later conditions for them are known. In another respect also, a survey in the form proposed is detrimental to public interest, namely, in practically conferring on homesteaders within the reserve, privileges in the selection of good lands and rejection of relatively poor land not enjoyed by settlers heretofore or elsewhere. It is not thought that such discrimination is the purpose of the stated act, and it would appear that it should not be accomplished under cover of the plea of including improvements. The 20-chain limit admirably tends to avoid the abuse of this statute.

As the metes and bounds of the claim of Vestal do not conform to the law and the regulations, your decision rejecting the application is affirmed.

DESERT LAND—CULTIVATION—FINAL PROOF.

INSTRUCTIONS.

Final proof under a desert-land entry, which shows that because of irrigation there is on the land "a marked increase in the growth of grass," or that "grass sufficient to support stock has been produced on all the land," will not be accepted as showing a compliance with the provision of the act of March 3, 1891, "that proof be further required of the cultivation of one-eighth of the land."

In addition to proof of cultivation, it must be clearly shown, in all cases, that the entryman has an absolute right to sufficient water to successfully irrigate the land; that the system of ditches to conduct the water to and distribute it over the land is adequate for those purposes; and that the land has been actually irrigated for a sufficient period of time to demonstrate the sufficiency of the water supply and the effectiveness of the system.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 17, 1904.* (W. C. P.)

By decision of July 23, 1903 (32 L. D., 207), the Department accepted the final proof of John Cunningham under his desert land entry for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 21, the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 22, T. 43 N., R. 108 W., Lander, Wyoming, land district.

It is possible that some expressions in that decision may be taken as indicating a purpose to encourage the offer and sanction the acceptance of final proofs in desert land entries that do not clearly establish a strict compliance with all the requirements of law. Such a result was not contemplated when that decision was rendered nor does the Department intend that there shall be any relaxation in the enforcement of the requirement that such proofs shall conclusively demonstrate the law and regulations governing such matters have been complied with in every essential particular.

Possibly the proof in that case was not so clear and explicit as such proofs should be, yet it is not deemed necessary or advisable to recall the decision accepting it, for further consideration, for the purpose of laying down with greater exactness the proper rule to be observed in passing upon final proofs in desert land entries.

Proof which shows that because of irrigation, there is on the land "a marked increase in the growth of grass" or that "grass sufficient to support stock has been produced on all the land," will not be accepted as showing a compliance with that provision of the amendatory act of 1891 (26 Stat., 1095), "that proof be further required of the cultivation of one-eighth of the land." Actual tillage must as a rule be shown. If, however, it be shown, and it must be made to conclusively so appear, that because of climatic conditions, crops other than grass can not be successfully produced, or that actual tillage of the soil will destroy or injure its productive qualities, the actual production of a crop of hay of merchantable value, as a result of actual irrigation, may be accepted as sufficient compliance with the requirement as to cultivation.

That the entryman has an absolute right to sufficient water to successfully irrigate the land; that the system of ditches to conduct the water to and distribute it over the land is adequate for those purposes; and that the land has been actually irrigated for a sufficient period of time to demonstrate the sufficiency of the water supply and the effectiveness of the system are essential facts which must in all cases be clearly established by the proofs.

You will take such measures as may be proper to bring these matters to the attention of the local land officers.

SCHOOL LANDS—INDEMNITY—KLAMATH INDIAN RESERVATION.

STATE OF OREGON.

Selections of indemnity school lands in lieu of lands in sections sixteen and thirty-six assumed to have been lost to the State on account of the Klamath Indian reservation, will not be approved by the Department where the base lands are without the existing boundaries of said reservation as established by the survey made in 1888.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 17, 1904.* (F. W. C.)

Your office letter of the 11th ultimo transmitted for the consideration of this Department what is known as clear list No. 21, State of Oregon, embracing 6912.44 acres within The Dalles land district, selected in lieu of an equal quantity of land in sections 16 and 36, specifically described in the list, assumed to have been lost to the State on

account of the Klamath Indian reservation, or, at least, to be within the boundaries of said reservation as established by treaty.

It is noted that said letter, in submitting the list, does not specifically recommend departmental approval thereof, but the certificate attached to the list does make such recommendation and it is assumed that it was the intention of your office to recommend the approval of the list as submitted.

The facts with regard to said reservation appear to be as follows:

By treaty of October 14, 1864 (16 Stat., 770), concluded with the Klamath and Modoc tribes and Wyhooskin band of Snake Indians, a certain described tract of country claimed by said Indians was ceded to the United States, there being excepted from the cession certain described lands to be set apart as a permanent reservation, until otherwise directed by the President, for the residence of said Indians. In 1871 this Department undertook to and did mark the boundaries of said reservation. In 1888, the Indians claiming that the boundaries had been incorrectly marked, a new survey was made which gave the Indians additional lands on the west, north and south of the survey made in 1871. The Indians still maintaining that the lines established by this Department did not conform to the treaty boundaries, Congress, by act of June 10, 1896 (29 Stat., 321, 342), authorized and directed the President to appoint a commission to—

thoroughly investigate and determine as to the correct location of the boundary lines of the Klamath Indian reservation, in the State of Oregon, the location of said boundary lines to be according to the terms of the treaties heretofore made with said Indians establishing said reservation; and when the correct location of said treaty boundaries of said reservation shall have been so ascertained and determined, said commission shall ascertain and determine, as nearly as practicable, the number of acres, if any, of the land, the character thereof, and also the value thereof, in a state of nature, that have been excluded from said treaty reservation by the erroneous survey of its out-boundaries, as now existing and as shown and reported to have been made in reports of the Commissioner of Indian Affairs and of the Commissioner of the General Land Office, submitted to the Senate by the Secretary of the Interior, and as set out in Senate executive documents numbered one hundred and twenty-nine, fifty-third Congress, second session, and numbered sixty-two, fifty-third Congress, third session.

And said commission shall make report of the facts ascertained and of their conclusions and recommendations upon the matters hereby committed to them to the Secretary of the Interior, who is hereby directed to report the facts found and reported by said commission and their conclusions and recommendations in the matter, together with his recommendations thereon, to the next regular session of Congress for its action.

It appears that the commission provided for was duly appointed and made its report to the Secretary of the Interior, accompanying the same by its recommendation in the premises and said report was duly forwarded with the report and recommendation of the Secretary of the Interior to Congress, as provided for, but that no further action has been taken by Congress in the premises, except that an appropria-

tion was made for the resurvey of the exterior boundaries of this reservation in the Indian appropriation act of July 1, 1898 (30 Stat., 571, 592).

The report of the commission appointed under the act of 1896 was in favor of an enlarged area for this reservation and the resurvey made under the act of 1898 followed the recommendation of said commission. The lands sought to be made a basis for the selections included in the list under consideration are between the boundary line established by this Department in 1888 and that indicated by said commission and shown in the survey made under the act of 1898.

An agreement was concluded with the Indians for release of its claim to these additional lands and was submitted to Congress in 1901, but it has not been approved and ratified.

Even since the survey of 1900, made under the act of 1898, no additional lands have been recognized as actually reserved, the new survey being evidently considered merely as a guide for fixing the amount of compensation to be paid the Indians because of alleged error in the boundaries of this reserve as established in 1888 and since recognized, and as the legislation with regard to this matter found in the acts of 1896 and 1898 is in *pari materia*, until Congress takes affirmative action, as contemplated by the act of 1896, this Department will not give its approval to an indemnity school land selection on account of the Klamath Indian reserve where the base lands are without the existing boundaries of said reservation, as established in 1888.

The list submitted is therefore herewith returned without departmental approval.

ARID LAND—IRRIGATION—ACT OF JUNE 17, 1902.

OPINION.

The Secretary of the Interior has no authority to permit the owner of lands that are needed for a reservoir to be constructed under the act of June 17, 1902, to select other lands of the same area within the district that may be made susceptible of irrigation from the proposed reservoir, in exchange for the lands so needed for reservoir purposes.

Assistant Attorney-General Campbell to the Secretary of the Interior,
February 20, 1904. (E. F. B.)

I am in receipt by reference of a communication from the Director of the Geological Survey dated January 26, 1904, requesting to be advised as to whether lands that are needed for a reservoir to be constructed under the act of June 17, 1902 (32 Stat., 388), may be exchanged for other lands of the same area within the district that may be made susceptible of irrigation from the proposed reservoir.

The inquiry is suggested from information contained in a letter from the engineer in charge of the Urton Lake project in New Mexico, who states that Mr. W. C. Urton, who is the owner of 160 acres embraced within the Urton Lake reservoir site, asks "if it would be possible, in the event of the construction of the reservoir and his land being needed for the same, for him to be allowed to select another piece of land of the same size, situated within the irrigated district of this system, the same to be patented to him in lieu of the land which he now owns."

The Director of the Geological Survey states that if such arrangement were possible it would simplify some of the difficulties met in negotiating for the purchase of property needed in connection with the reclamation systems.

The letter is submitted to me for an opinion upon the question presented.

The fourth section of the act of June 17, 1902, provides that when the Secretary of the Interior shall determine that an irrigation project is practicable, he may take steps for the construction of the work and shall thereupon "give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question."

In the letter of the Department of February 11, 1903, the Director of the Geological Survey was advised that the limit of area of any entry should not be determined until after the giving of such notice and that such limit must be determined from the conditions peculiar to the particular locality.

Also in the instructions of August 21, 1903 (32 L. D., 237), it was said that "the determination of what quantity of land may reasonably be required for the support of a family can not be intelligently arrived at in the absence of information as to the productive capacity of every subdivision." To enable the Secretary to determine the limit of area that should be allowed for each entry under a particular project the Geological Survey was instructed to cause a report to be made in connection with the classification surveys, designating the areas that shall be taken for each entry and the particular subdivisions that shall constitute an entry, with regard to equalizing the value of the entries as far as possible.

To allow a person to select an equal quantity of land in the irrigated district in exchange for a tract to be used for reclamation purposes would, to the extent of such transaction, militate against that provision of the act requiring each entry to be limited to such area as may be reasonably required for the support of a family, and would not only be inconsistent with the instructions heretofore given but might result in inequality of entries by giving to such persons the right to make

entry of a tract of land of greater area than the maximum area that might be allowed to each entry under the proposed system.

But a more serious objection is that the land that may be irrigated by the contemplated works is not subject to such exchange and the Secretary has no authority to create or allow any preference right whatever to any person to enter such lands, except such as may be given by law, no matter what the consideration may be. The lands to be irrigated by any contemplated works are expressly declared by the act to be "subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres," subject to the limitations, charges, terms and conditions of the act.

Ample provision has been made by the act for the acquisition of any rights or property that it may be necessary to acquire in the construction of the works and it can not be seen how the proposed arrangement can simplify any difficulties that may be met in negotiating for the purchase of such rights or property. On the contrary, it would probably create many issues that would finally be found embarrassing in the administration of the act.

I have to advise that such exchanges can not be allowed.

Approved:

E. A. HITCHCOCK,

Secretary.

RIGHT OF WAY—ACTS OF MARCH 3, 1891, AND MAY 11, 1898.

TOWN OF DELTA.

The act of March 3, 1891, grants a right of way through the public lands and reservations of the United States to any canal or ditch company "formed for the purpose of irrigation" only, and the amendatory act of May 11, 1898, permits the use of a right of way secured under the act of 1891 for "purposes of a public nature," but does not authorize the approval of an application under the act of 1891 where the use of the right of way is not desired for irrigation.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 20, 1904.* (F. W. C.)

With your office letter of the 6th instant was transmitted, with favorable recommendation, a certain map and field notes of survey of a conduit line located within the Battle Mesa forest reservation, in the Montrose land district, Colorado, together with other papers comprising an application for right of way on the part of the corporation of the town of Delta, in the State of Colorado, under the provisions of the act of March 3, 1891 (26 Stat., 1095), as amended by the act of May 11, 1898 (30 Stat., 404), the purpose being to convey water to the town for domestic and other public purposes.

While it is true that the second section of the act of May 11, 1898, *supra*, provides—

that the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections 18, 19, 20 and 21, of the act entitled "An act to repeal timber culture laws and for other purposes," approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature—

the controlling idea was after the passage of said act, as in the act of 1891, that the right of way secured should be for purposes of irrigation. The grantees named in the act of 1891 are described as "any canal or ditch company formed for the purpose of irrigation," and the amendatory act of 1898 does not enlarge the class of grantees. (See 28 L. D., 474.) Said amendatory act permits the use of a right of way secured under the act of 1891 for "purposes of a public nature" but does not authorize the approval of an application under the act of 1891 where the use of the right of way is not desired for irrigation.

In the case of the Denver, Northwestern and Pacific Railway Co. *v.* Hydro-Electric Power Co. (32 L. D., 452), this Department held that—

The contention of the power company that its intervening adverse claim for a reservoir site should be allowed can not be admitted. It has no standing whatever under the act of March 3, 1891, *supra*. That act grants a right of way through the public lands and reservations of the United States to any canal or ditch company "formed for the purpose of irrigation" only, and the New Century Light and Power Company was not formed for that purpose, and there is nothing in its articles of incorporation which justifies the assumption that it ever contemplated, or that under the laws of Colorado it can ever engage in the irrigation business.

The Delta townsite corporation was not formed for the purpose of irrigation, neither is it its purpose in making this application to use the right of way for irrigation purposes.

A mere permission or license to use the right of way might be granted the town under the provisions of the act of February 15, 1901 (31 Stat., 790), if desired, but in that event the application would have to be amended accordingly.

In submitting the application under consideration your office letter states that—

Surely a municipal corporation applying for right of way to supply its town with water is entitled to as much consideration as an individual or association of individuals applying for right of way for irrigation purposes; and as the estate granted by the said acts of March 3, 1891, and May 11, 1898, is of a more permanent character than that granted by the said act of February 15, 1901, it would seem as though municipal corporations might properly invoke the superior protection of the former acts.

This Department is of opinion that there should be legislation permitting the granting of a right of way in the nature of an easement where the right of way is desired for a public purpose such as that disclosed in the application under consideration, and to that end, on April 4, 1902, in a letter addressed to the Senate Committee on forest

reserves and the protection of game, reporting on Senate bills 3374 and 3731, of that session of Congress, recommended the passage of a bill drafted by this Department authorizing the Secretary of the Interior, in granting a right of way for irrigation and other purposes through the public lands and reservations of the United States, to determine the nature of the grant, that is, whether the same should constitute a permanent easement or should be enjoyed only for a limited time fixed by him. No action was taken upon this bill, however, and this Department is, under the law as it now stands, powerless to grant the application here under consideration.

The papers are returned herewith without approval.

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RIGHT OF WAY—RESERVOIR SITE—SECTION 2339, R. S.—ACT OF MARCH
1, 1891.

LINCOLN COUNTY WATER SUPPLY AND LAND CO. *v.* BIG SANDY
RESERVOIR CO.

The land department has no power to declare a forfeiture of a right of way acquired under section 2339 of the Revised Statutes.

While the act of March 3, 1891, provides for the filing of maps showing the construction of canals, ditches and reservoirs under section 2339 of the Revised Statutes, the provisions of that act do not operate to make the continued enjoyment of rights conferred by said section dependent upon the filing of such maps.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 23, 1904.* (G. B. G.)

This is the appeal of the Lincoln County Water Supply and Land Company, successor in interest to the Lincoln County Ditch, Reservoir and Land Company, from your office decision of September 8, 1902, dismissing its protest against the application of the Big Sandy Reservoir Company, under sections 18 to 21 of the act of March 3, 1891 (26 Stat., 1095, 1101-1102), for right of way for a reservoir site in sections 26 and 35, township 9 south, and sections 1, 3, 11, and 12, township 10 south, range 56 west, Hugo land district, Colorado.

The said application of the Big Sandy Reservoir Company was filed in the local land office, May 2, 1899, and the Lincoln County Water Supply and Land Company protested against its allowance substantially upon the ground that the land involved had long before been appropriated, and that the protestants were entitled to the exclusive use and occupation thereof by virtue of the provisions of section 2339 of the Revised Statutes.

The answer of the applicant company, in response to the protest, was, in substance, that the protestant company had lost whatever rights it may have once had in the premises by reason of non-user for the purposes of its appropriation and by reason of its failure to place its claim of record in the General Land Office.

Your office ordered a hearing, which was had. The local officers found in favor of the protestant company, but your office, by its said decision of September 8, 1902, reversed the local officers and dismissed the protest, seemingly upon the ground that the protestant company having failed to put its claim of record in the General Land Office, the lands involved were subject to an application filed under the act of March 3, 1891, *supra*. At the hearing it was satisfactorily shown that the grantor of the protestant, a corporation duly organized under the laws of Colorado, entered upon the premises in dispute in the year 1889 and constructed dams, ditches, and a reservoir for the conservation of the storm-waters of Big Sandy Creek, at an expense of about \$10,000. In the spring of 1890 a portion of the main dam was washed out by a flood, and in April of that year all right, title, and interest of the company were sold, assigned, and conveyed to the protestant company, who entered into the possession of the premises and expended, then and subsequently, more than ten thousand dollars in repairs, improvements, and extensions. The waters conserved by these works were put to the beneficial use of irrigation, at proper seasons, for a number of years, and the works were being maintained and operated to a limited extent when the application of the Big Sandy Reservoir Company was filed, and until April, 1900, when the main dam was again partially washed away, since which time it has not been rebuilt.

The allegation of abandonment was clearly not proven. The fact that the protestant has failed to rebuild its dam, washed out since the filing of the application under consideration, can not be considered an abandonment. The protestant asserts, and stockholders of the company swear, that it is the intention of the company to rebuild the dam, and laches may not be imputed to it under the circumstances. They could hardly be expected to expend any considerable sum of money so long as the pending application remains undisposed of. Moreover, while the land department might upon a clearly and satisfactory showing of abandonment be justified in approving an application filed under the act of 1891 embracing the same property formerly used, leaving the question of forfeiture for non-user for the courts, it is clearly beyond the power of the land department to declare a forfeiture of a right of way acquired under section 2339 of the Revised Statutes.

That section is as follows:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

This section was taken from the act of July 26, 1866 (14 Stat., 251), which was "an unequivocal grant of the right of way." *Broder v. Water Company* (101 U. S., 274, 275). But it is contended that while section 2339 of the Revised Statutes did not require, preliminary to the acquirement of rights thereunder, that formal claims should be placed on record in the land department, yet the act of March 3, 1891, *supra*, does require such record to be made, in that section 20 thereof provides that the provisions of the act shall apply to "all canals, ditches, or reservoirs, *heretofore* or hereafter constructed."

This contention is not sound. While the clause above quoted from section 20 of the act of March 3, 1891, extends the benefits of that act to all canals, ditches, or reservoirs theretofore constructed upon the public domain, among which is the right to file in that behalf with the land department a map of such canals, ditches, and reservoirs, and secure the approval of the Secretary of the Interior thereof, yet the rights of claimants under section 2339 of the Revised Statutes are in nowise dependent upon said act or upon an approval of such maps. See *Santa Fe Pacific R. R. Company* (29 L. D., 213). The purpose of the act of March 3, 1891, in respect to this, was primarily to extend to such claimants the right to place their claims of record with the land department for their better protection. It may be, too, that it enlarged the privileges conferred by section 2339 of the Revised Statutes, in that it gave the right to the use of fifty feet of land on each side of the marginal limits of canals, ditches, and reservoirs—a privilege not carried by said section—but, however this may be, it surely did not operate to make the continued enjoyment of rights conferred by said section dependent upon the filing of the maps provided for in the act.

It satisfactorily appearing that the right of way occupied by the ditches, canals, and reservoirs of the protestant company is acknowledged and confirmed by section 2339 of the Revised Statutes (see also section 2340), and it being contrary to the well settled policy of the land department to approve an application for right of way involving premises already appropriated, the decision of your office is reversed and the application of the Big Sandy Reservoir Company denied.

CONTESTANT—PREFERENCE RIGHT—SELECTION UNDER ACT OF JUNE 4, 1897.

SCHELLING *v.* FULLER.

The preference right of entry accorded a successful contestant is personal and can not be assigned, or waived in favor of another, and where, during the period allowed him within which to exercise such right, he applies to select the land, in the name of and as the attorney in fact for another, under the act of June 4, 1897, without making an application to enter in his own behalf during such period, he thereby waives his right, and the land becomes subject to entry by the first legal applicant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) February 25, 1904. (J. R. W.)

Frederick A. Fuller appealed from your office decision rejecting L. C. Black's application, number 7470, your office series, under the act of June 4, 1897 (30 Stat., 36), made by Frederick A. Fuller, as attorney in fact, to locate for Black the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 15, T. 158 N., R. 4 W., 5th P. M., Minot, North Dakota, in lieu of land conveyed to the United States, and allowing Frank Schelling's homestead entry for the land.

December 10, 1901, Fuller contested Hausen's timber culture entry for the tract. December 26, 1902, no hearing of the contest having been had, Schelling applied to intervene. No action having been taken upon the application, April 29, 1903, Hausen's entry was canceled by relinquishment, and Schelling applied for homestead entry for the land, which was held to await Fuller's preference right.

May 23, 1903, Fuller, as attorney in fact for Black, applied under the act of June 4, 1897, *supra*, to select the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 15, which the local office allowed, and Schelling's homestead application was rejected. Schelling appealed, and your office held, September 3, 1903, that Fuller had a preference right which he was entitled to exercise within proper time, but that—

the selection was not made by Fuller in his own right as a successful contestant, but by Fuller as attorney in fact for a stranger to the record in the contest case, one L. C. Black. The preference right of a successful contestant is not assignable, but is purely a personal right that can not be transferred to another (see 7 L. D., 186; 10 L. D., 560; 15 L. D., 394). . . . since the real lieu selector, L. C. Black, appearing simply as the transferee of the preferred rights of the contestant, Fuller, has acquired no rights as against the prior applicant Frank Schelling, since the land applied for . . . was not subject to his selection under the said act of June 4, 1897 (30 Stat., 36), I have this day rejected L. S. No. 7470 of the said L. C. Black.

The appellant contends that this ruling is erroneous. The argument states that—

May 23, 1903, Fuller, in good faith, and honestly believing that he was properly exercising the said preference right accorded him, which belief was beyond a doubt fully shared by the local officers, offered for location on the said SE. $\frac{1}{4}$ of Sec. 15,

158, 84, four 40-acre pieces of forest reserve lieu scrip, which had been conveyed to him for a valuable consideration by one L. C. Black, with two powers of attorney, coupled with an interest. Knowing himself to be the *bona fide* owner and holder thereof under said powers of attorney, and entitled to the benefits of a location therewith, he offered them as an exercise of his said preference right. . . .

Upon being advised of his preference right of entry for 30 days from June 29, 1903, Fuller elected to avail himself thereof by using forest reserve lieu scrip to enter the land. He accordingly purchased, as before stated, from a dealer in said scrip—one L. C. Black, of Cincinnati, Ohio—four 40-acre pieces, which was transferred to him in the usual form, with two powers of attorney from Black to him; one to locate and the other to sell. This scrip was delivered to Fuller just prior to his offering the same at the local office, May 23d. When the said scrip reached him he found it was conveyed in the manner described; but Fuller, knowing the right to receive the benefits of a location therewith was in him, Fuller, saw no reason why he should not exercise his right by an offer of the same in view of the manner it was conveyed to him, as attorney in fact for L. C. Black, which he did, knowing full well Mr. Black had no further interest in the said scrip, nor in the land to which it was applied, because of his purchase of the scrip for a valuable consideration, and of his right as indicated by the powers of attorney from Mr. Black to receive all benefits from a location therewith. . . .

We then contend, that should this said application by Fuller, as attorney in fact for L. C. Black, which was clearly made in his (Fuller's) own interest, in an honest attempt to comply with the law, be found, legally, to be an entry by a stranger, Black, then Fuller's right was clearly violated—within the time allowed him in which to exercise the said preference right of entry—by a stranger, Black, and should be restored to him, Fuller, which action we pray may be taken by your office, should you agree with the Honorable Commissioner's finding that Fuller's exercise of his preference right was not a legal one. This we think improbable in view of your office holding, in the case of Robeson T. White, 30 L. D., 61, *supra*, and we therefore ask that the Honorable Commissioner's decision be reversed, allowing Schelling a right to enter the land, and holding that he is entitled to be recognized herein, in view of the undoubted legal attempt by Fuller to exercise his preference right of entry within the prescribed time.

The first of these contentions—that Fuller was the real party in interest making the selection—is not borne out by the record. The only power of attorney shown is one executed May 5, 1902, at Hamilton county, Ohio, by Black to Fuller—

for me and in my name, place and stead to locate and select either in whole or in part in any United States land office or land offices, the full amount or any portion of (40) acres of public land subject to such selection, to which I am entitled under the provisions of the act of Congress of June 4, 1897, in lieu of and in exchange for the following described land [described] . . . surrendered by me to the United States in accordance with the provisions of said act, and for the purpose of making an exchange for other lands.

Giving and granting unto my said attorney, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue of these presents.

There is nothing here indicating the power to be irrevocable or to be coupled with an interest, nor is there any other power of such character, or to make any conveyance of the land selected. The argu-

ment upon such alleged character of the transaction has no basis in the record, and the Department is not called upon to decide upon such alleged facts not before it. The only facts presented by the record here are, that Fuller, having a preference right of entry, made no attempt in any manner to exercise it, but instead of so doing himself presented Black's application to make a selection under the act of June 4, 1897, *supra*. Instead of an attempt to exercise his own right, the acts done amounted to a waiver of that right in favor of Black, for whom he acted. This being the essential nature of the transaction, Schelling's application should have been allowed, as the rule is so settled as to need no citation of authority that the contestant's preference right is personal and can not be assigned, or be waived in favor of another, but that on failure of the contestant to exercise his preference right within the time limited, the entry of the first legal applicant must be allowed.

Nor is there any basis in the record for the alternative contention that Fuller is entitled by the mistake of the local office to be restored to his preference right. He made no application on his own behalf and no advice, act, or error of the local office appears preventing his doing so. All that appears is that he impliedly waived his right and presented an application by another. The waiver of his right is the necessary legal conclusion from his own act.

Your office decision is affirmed.

INDIAN LANDS—BITTER ROOT VALLEY—ACTS OF JUNE 5, 1872, AND
FEBRUARY 11, 1874.

TYLER B. THOMPSON.

The declaration by Congress, in the acts of June 5, 1872, and February 11, 1874, that the lands in the Bitter Root Valley above Lolo Fork should be disposed of only by sale to actual settlers or by homestead entry, did not take them out of the category of "public lands" so as to prevent the land department from withdrawing said lands for forestry purposes prior to their disposal under said acts.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 25, 1904.* (V. B.)

On February 20, 1903, Tyler B. Thompson made application to purchase, under the act of June 5, 1872 (17 Stat., 226), the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 20, T. 4 N., R. 21 W., M. M., in the land district of Missoula, Montana, which application was rejected by the register and receiver. He appealed to your office, where that action was approved, and he has further appealed to this Department.

The tract in question is situated in the Bitter Root Valley above the Lolo fork of the Bitter Root river in Montana, and is a part of the lands which were ceded to the United States by treaty with the Flat-head and other Indians, ratified March 8, 1859 (12 Stat., 975); and is

within one of the fifteen townships which were directed by the act of 1872, *supra*, to be surveyed "as other public lands," and sold to "actual settlers only," otherwise qualified, at one dollar and twenty-five cents per acre, and to which, by the act of February 11, 1874 (18 Stat., 15), the benefit of the homestead act was extended as to all "settlers on said lands who may desire to take advantage of the same."

By section 24 of the act of March 3, 1891 (26 Stat., 1095, 1103), the President was authorized to set apart "public lands" wholly or in part covered with timber or undergrowth, as public reservations and declare by proclamation the establishment and limits thereof.

To promote and effectuate the purposes of this last act, on July 14, 1899, your office directed the register and receiver at the Missoula land office "to withdraw from settlement, entry, sale or other disposition" the lands involved herein, with other lands, "pending the determination of the question of the advisability of including certain additional lands in the Bitter Root forest reserve."

It was because of this withdrawal that the application of Thompson to purchase the described tract was rejected, and the question presented by his appeal is whether the withdrawal is a bar to his purchase.

It is contended in behalf of the applicant that Congress having declared that the lands in question should be disposed of only to actual settlers by purchase or under the homestead law, the lands were thereby taken out of the category of "public lands," and, therefore, could not be reserved by the President for forestry purposes, under the act of 1891, *supra*, because that act only authorized the reservation of "public lands."

The authority of Congress over the public lands is absolute under the constitution. That body may dispose of them or set them apart for a particular purpose. Its action in that behalf may be by express legislative mandate, becoming operative *proprio vigore*, or by a delegation of the necessary authority to be thereafter exercised opportunistically.

In the administration of the land system, the power of the officers of the land department, independently of any express statute, to withdraw public lands from ordinary disposal has long been recognized as necessary to that administration and to effectuate its purposes, and, therefore, as delegated by Congress to those officers, by necessary implication.

In this case, however, there is an express statutory authority given to the Executive to make withdrawals and establish reservations for forestry purposes. So that a withdrawal made by the Executive, for the stated purpose, is of equal force and dignity with one made by legislative mandate, both having the same source of power, Congress.

The only question open in this case is whether the lands in question are in the category of lands which might be withdrawn from disposal

by the Executive under the delegated authority of Congress; or, in other words, were the lands in question "public lands?"

The definition of this term most generally accepted is the one given by Mr. Justice Davis in *Newhall v. Sanger* (92 U. S., 761, 763), as follows:

The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.

The absolute title to the lands in question is vested in the United States and they are undoubtedly a part of the public domain. By the treaty with the Indians, the right of "settlers" to go upon them is given. By the act of June 5, 1872, *supra*, the particular lands in question are directed to be surveyed "as other public lands" of the United States; to be opened to settlement and sold to actual settlers only; and by the act of February, 1874, *supra*, settlers thereon were authorized to make entry under the homestead laws.

Thus we have the declaration of Congress that they are "public lands" because they are to be surveyed as "other" lands of that kind; they are to be sold or disposed of under the homestead law—one of the general laws—as only public lands are disposed of.

Undoubtedly these provisions bring these lands within the definition of "public lands" given by Mr. Justice Davis.

It seems to be thought that because Congress has directed these lands shall only be disposed of in the two prescribed methods, instead of under all the general laws, that they have been placed in a *quasi* reservation and have ceased to be public lands. This contention is not sound in principle and research has failed to find authority therefor.

It is true that a direction by Congress for the disposal of lands in a particular manner is exclusive, and they may not be disposed of in any other way. But if they are directed to be disposed of to the public under a public general law, they certainly have all the essentials of public lands, and to hold otherwise would be to adopt a technicality rather than to look to the substance of the matter.

It is therefore held that the fact that Congress has directed that the lands in Bitter Root Valley above Lolo Fork, when disposed of, shall be disposed of only by sale to actual settlers or homestead entry, does not prevent the land department from withdrawing said lands for forestry purposes, before disposal.

The questions herein have heretofore been considered and decided by the Department, as will be seen by reference to the McCaslin case (31 L. D., 243) and cases therein cited.

Your decision is affirmed.

REPAYMENT—DESERT LAND ENTRY—COMPACTNESS.

CHESTER CALL.

Repayment of the purchase money paid on a desert land entry will not be allowed where the entry upon its face does not show such a departure from a reasonable requirement of compactness as would necessarily preclude its confirmation, and it is not shown by the record, or otherwise disclosed, that said entry was not as nearly in the form of a technical section as the situation of the land and its relation to other lands would admit of.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 29, 1904.* (C. J. G.)

A motion has been filed by Chester Call for review of departmental decision of June 27, 1903 (not reported), denying his application for repayment of the purchase money paid by him on desert land entry for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 30, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, and SW. $\frac{1}{4}$, Sec. 29, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 32, T. 6 S., R. 39 E., Oxford, Idaho.

Repayment is claimed on the ground that the entry as made was erroneously allowed and could not be confirmed, within the meaning of section 2362 of the Revised Statutes and section 2 of the act of June 16, 1880 (21 Stat., 287), because the tract of land embraced therein was not in compact form as required by the desert land act of March 3, 1877 (19 Stat., 377).

The regulations issued under the last-named act September 3, 1880 (2 C. L. L., 1378), and which have remained substantially in force since, are in part as follows:

The requirement of compactness of form will be held to be complied with on surveyed lands when a section, or part thereof, is described by legal subdivisions compact with each other, as nearly in the form of a technical section as the situation of the land and its relation to other lands will admit of, although parts of two or more sections be taken to make up the quantity or equivalent of one section. But entries which show upon their face an absolute departure from all reasonable requirements of compactness, and being merely contiguous by the joining of ends to each other, will not be admitted, whether on surveyed or unsurveyed lands.

This case is clearly distinguishable from those cited in support of the motion for review. In *Julia B. Keeler* (31 L. D., 354), which is one of the latest decisions on the subject, and relied on in the motion, it was held (syllabus):

The right to repayment of the purchase money paid on a desert land entry will be recognized where the entry as allowed is in form *prima facie* non-compact, and it does not appear from the record that it was as nearly in compact form "as the situation of the land and its relation to other lands will admit of," and was for that reason erroneously allowed and could not have been confirmed.

With respect to the facts in that case it was said:

As stated, the plats and field notes fail to disclose any valid reason why the entry might not have been made more nearly in the form of a technical section, nor is any

December 30, 1901, the local officers ordered a hearing on the protest, fixing February 4, 1902, as the date for the hearing.

February 1, 1902, by order of the Secretary of the Interior, the tract, with others, was suspended from disposition and sale, which order of suspension was in force on April 20, 1903, at which time, by order of the Secretary of the Interior, said tract, with others, was withdrawn from entry under the provisions of section 3 of the act of June 17, 1902 (32 Stat., 388, 389), entitled—

An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works, for the reclamation of arid lands.

February 3, 1902, in accordance with the notice previously given, the applicant appeared at the local land office with his witnesses and offered to submit his final proof. The protestant also appeared. The testimony of the applicant and his witnesses was taken, and he and they were cross-examined by the attorney for protestant, whereupon the applicant tendered payment for the tract and made request that entry be allowed. The local officers declined the tender and refused the request, because of the pending protest. February 4, 1902, the hearing was postponed until March 3, 1902, and thereafter continued from time to time until June 16, 1902, when all parties appeared and some testimony was offered by the protestant. The hearing was then continued until June 24, 1902, at which time it was again continued and thereafter from time to time continued until November 19, 1902, when the testimony of one witness was submitted. The hearing was resumed November 24, 1902, all parties appearing, and ended November 25, 1902.

April 9, 1903, the local officers, from the evidence submitted, found, in effect, that the tract was chiefly valuable for its timber, and recommended that the protest be dismissed.

Protestant appealed. June 11, 1903, by decision of your office the application was held for rejection because of the order of suspension of February 1, 1902, and in view of such holding, decided that it was not necessary to pass upon the issues raised by the protest.

The applicant has appealed to the Department. He contends, in effect, (1) that the order of suspension of February 1, 1902, was illegal in so far as it applied to the tract in question, because in violation of the rights of applicant to said tract under the timber and stone act; and (2) that your office should have considered and passed upon the issues raised by the protest, in determining his right to make entry on his application.

In respect to the first contention, the Department has held that no right vests under the so-called timber and stone act until the applicant has, in due form, submitted his final proofs; paid the purchase price for the land and the necessary fees to the local officers. See instructions to the Director of the Geological Survey of January 13, 1904 (32 L. D.,

387). And it would seem that unless and until such proofs have been passed upon and approved by the land department, no vested rights can attach to land applied for under said act. See *Cosmos Co. v. Gray Eagle Co.* (190 U. S., 301, 311, 312). Until a vested right does attach to a tract of public land, the same may be suspended from disposition and sale under the public land laws by the order or with the approval of the Secretary of the Interior. See *Leaming v. McKenna* (31 L. D., 318, 320, and authorities there cited). The tract in question was suspended from disposition and sale prior to the time fixed by the notice for the submission of final proofs, hence no rights to the tract were vested in the applicant at the date of the order of suspension. It follows that the order of suspension of February 1, 1902, in so far as it affected the tract in question, was within the power of the Secretary of the Interior to make. But, independently of this order of suspension, the order of withdrawal of April 20, 1903, was sufficient to defeat the application, as the applicant at that time had not acquired any vested right to the tract, inasmuch as his final proofs had not been approved or accepted by any officer of the land department. See instructions to the Director of the Geological Survey, *supra*, wherein it was held that:

Withdrawals made by the Secretary of the Interior under authority of the act of June 17, 1902, of lands which, in his judgment, are required for any irrigation works contemplated under the provisions of said act, have the force of legislative withdrawals and are therefore effective to withdraw from other disposition all lands within the designated limits to which a right has not vested.

In respect to the second contention of the applicant, in view of the above holdings, the consideration and determination by your office of the issues raised by the protest could have served no good purpose and therefore were unnecessary.

Your office decision is accordingly affirmed.

SURVEY—ISLANDS—NOTICE.

ROBERT L. SHEPPARD.

Notice of applications for the survey of islands not designated upon the township plats of survey must be served on the owners of the opposite shores and upon the authorities of the State within which such islands are situated.

The approval of a township survey which purports to show that all public lands within the limits of such township have been surveyed, raises such a strong presumption in favor of the correctness of such survey that no additional surveys should be made, except upon clear proof of evident mistake or fraudulent conduct on the part of those charged with the execution of the surveys.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 2, 1904.* (E. F. B.)

With your letter of April 15, 1903, you transmit the application of Robert L. Sheppard for the survey of several islands in the State of Wisconsin.

The matter originally came before your office upon the application of said Sheppard to locate Valentine scrip upon certain described islands, to wit:

Five islands in Crab Lake and two islands in Armour Lake, located in T. 43 N., R. 6 E.

Five islands in Ox Bow Lake, which lies partly in townships 44 north, ranges 6 and 7 east, and township 43, R. 6 E.

One island in Lynx Lake in T. 43 N., R. 7 E.

Three islands in Tenderfoot Lake, and three islands in Big Lake, in T. 43 N., R. 8 E.

One island in Lake Mamie in T. 43 N., R. 9 E.

Upon receipt of said application your office, by letter of March 7, 1903, notified the applicant that the Department had previously approved an application for the survey of three of said islands in Crab Lake, filed by J. W. Whiteside, of Bessemer, Michigan, and that before action could be taken upon his application to locate the scrip he must file an application for the survey of the islands not embraced in Whiteside's application, and that in the meantime his application to locate the scrip would be suspended. Sheppard thereupon filed an application for the survey of all of said islands, except the three embraced in Whiteside's application, but he did not serve it upon the owners of the lands on the opposite shores and upon the State authorities. Because of such failure you refused to recommend it for approval.

While Sheppard's application was pending before your office Will T. Walter filed eleven applications for the survey of islands in said townships 43 north, ranges 6 and 7 east, including four islands in Crab Lake and two islands in Lynx Lake, which you state may possibly be different from the islands in those lakes described in Sheppard's application. Walter also failed to serve notice of his application upon the owners of the lands on the opposite shores and upon the State authorities, both applicants giving as a reason for their failure to serve such notice that under the decision of the Department in *Patrick Brazil et al.* (17 L. D., 326) it is not required.

Townships 43 north, ranges 6, 7, 8 and 9 east, and 44 north, 6 and 7 east, were all surveyed as early as 1865. Most of them in 1862. The islands described in the applications are not designated upon the township plats of survey, but from the character of the land as described in the affidavits filed in support of the application there is at least a fair *prima facie* showing that the islands were in existence at the date of the township surveys.

The only question now presented is simply whether these and similar applications will be disposed of upon an *ex parte* showing, without service upon any one, or whether the applicant will be required in all cases to serve notice of his intention to apply for such surveys upon the owners of lands on the opposite shores and upon the State, in

order that they may have opportunity to present any sufficient reason why the survey should not be made.

In the Brazil case it was stated that in Wisconsin the rule is that the proprietor of lands on navigable streams takes to the middle thread of the current, subject to the public easement, or right of navigation, but that as to lakes which are navigable or adapted to the transportation by boats of the products of the country, the water's edge is the boundary of the title of the riparian proprietor, these rights resting upon title to the bank of the water, and not upon title to the soil under the water.

Upon the *ex parte* and *prima facie* showing made in that case (the application not having been served on any one), it was determined that the islands involved therein were in existence at the date of the survey of the township in substantially the same form as they were at the time of the filing of the application. That being the condition of the land the State would not be entitled to them under any condition, and, as the title of the shore proprietors did not extend to any land that was not in fact an accretion to the natural shore of the lake, it was immaterial as to them whether the islands existed at the date of survey or were formed afterwards. Upon this principle it was held that such owners were not entitled to notice, as they could have no interest that would be affected by the survey and disposal of the land.

If the statements contained in the application and accompanying papers as to the existing condition of the islands, and as to the alleged facts upon which applicants predicate their contention that the islands were in existence at the date of survey, be accepted as true without further investigation, as was done in the Brazil case, it would be unnecessary to serve any one with notice of the intention to apply for a survey of such islands, but, as the actual condition may be shown to be vastly different by the owners of the shores, or as the State might present facts showing that the islands did not exist at the date of survey, the safest rule in all cases as a matter of practice would be to require notice of all applications for surveys to be served on the owners of the opposite shores and upon the State authorities, not only in the State of Wisconsin, but in all the States. It merely prescribes a rule of practice to aid the land department in determining whether any further surveys shall be made in a township where the field-notes and township plats show that no public lands were left unsurveyed.

Touching upon the merits of the applications, it is sufficient to say that while the government may always correct its surveys, or make additional surveys in any township, of lands left unsurveyed, where such surveys or resurveys will not affect the rights of others, yet where an approved township survey purports to show that all public lands within the limits of such township have been surveyed, it raises such a strong presumption in favor of the correctness of such survey

that no additional surveys should be made, except upon clear proof of evident mistake or fraudulent conduct on the part of those charged with the execution of the surveys. *George S. Whitaker et al.* (32 L. D., 329).

Evidently the purpose of the applicants is to utilize these small islands for summer homes. The greater number of them are of too limited an area for any practical agricultural use, but in the aggregate they constitute a considerable quantity of land in each of the lakes.

If the true condition of the islands is as stated in the application, a condition is presented which would justify the survey of these numerous islands as tracts or parcels of the public domain, if after all persons whose rights might be affected thereby have been given an opportunity to be heard, and no objection is made thereto.

You will therefore notify the applicants that they must serve notice of their application upon the owners of the opposite shores and upon the State authorities, and if no objection be filed against the granting of such application you may have the survey made by a surveyor detailed from your office, in the manner as suggested in your letter.

It is not intended by any expression herein to indicate how the land will be disposed of. That question will be determined at the proper time.

MINING CLAIM—LOCATION—INVALID ENTRY.

ADAMS ET AL. *v.* POLGLASE ET AL.

A location under the mining laws made upon land covered by a subsisting mineral entry becomes effective upon the cancellation of such entry, if rights thereunder are then being and are thereafter asserted according to such laws.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 5, 1904.* (G. J. H.)

December 29, 1887, Joseph Ramsdell made mineral entry No. 1636, for the Maud S. lode claim, survey No. 2125, Helena, Montana.

January 24, 1888, Thomas Polglase, sr., *et al.* filed a protest against said entry, alleging, among other things, that not over \$250 in labor and improvements had ever been expended upon or for the benefit of the Maud S. claim. Hearing upon said protest was ordered by your office and duly had, at which both parties appeared and submitted testimony. From the testimony so submitted the local officers found that not more than \$250 in labor and improvements had been expended upon or for the benefit of the Maud S. claim and recommended cancellation of the entry. Upon appeal, your office by decision of July 29, 1891, affirmed said finding and held the entry for cancellation. Upon further appeal, your office decision was affirmed by departmental decision of June 1, 1892 (not reported), and the entry was canceled June 29, 1892.

September 17, 1892, Polglase *et al.* made application for patent for the Ramsdell lode mining claim, covering the same ground embraced in the Maud S. entry, based upon a location alleged to have been made January 1, 1888. Notice of said application was duly published and posted. During the period of publication an adverse claim was filed in the local office by the Maud S. claimants and suit was timely brought thereon in court.

December 30, 1899, Walter W. Adams *et al.*, claiming the ground in controversy under an alleged relocation thereof January 31, 1894, as the Adverse lode mining claim, filed a protest against the Ramsdell application for patent, on the ground that the alleged location by the Ramsdell lode claimants was void because at the time made the ground covered thereby was embraced in the Maud S. entry.

Such proceedings were had upon the suit brought by the Maud S. claimants that it was dismissed by them October 15, 1901.

March 8, 1902, the local officers, considering the protest by Adams *et al.*, recommended the rejection of the application for patent, on the ground that at the time of the alleged location by the Ramsdell lode claimants the ground embraced therein was segregated from the public domain by the Maud S. entry. On appeal, your office, by decision of February 6, 1903, reversed the action of the local officers and dismissed the protest. A motion for review was made and subsequently denied. The case is before the Department on appeal by the protestants.

It is contended by the protestants, in substance, that the location upon which the Ramsdell application is based is absolutely void because made upon land at that time segregated from the public domain by the then-subsisting Maud S. entry.

The Maud S. entry was canceled by the land department, as the result of the proceedings had on the protest filed by the Ramsdell lode claimants, on the ground that an expenditure of the value of \$500 in labor or improvements had never been made upon or for the benefit of the Maud S. claim, as required by section 2325 of the Revised Statutes. Compliance with this requirement of the statute prior to the expiration of the period of publication is an indispensable prerequisite to entry and patent, and without such compliance there can be no valid entry. It may be conceded, however, that while the Maud S. entry stood uncanceled of record, the lands covered thereby were not properly subject to location. But when that entry was canceled, the lands from such date became subject to location, and the prior location by the Ramsdell lode claimants became from such time effective, if rights thereunder were then being, and were thereafter asserted according to the mining law. On this question there does not seem to be any doubt. See Noonan *v.* The Caledonia Gold Mining Company (121 U. S., 393).

The protestants allege a relocation of the ground in question after the expiration of the period of publication of notice of the application

for patent, thus setting up a claim adverse to that of the applicants, and raising a question which, under the statute, could only be determined by the courts in an adverse proceeding. It becomes necessary to inquire, therefore, whether or not the applicants have been so far negligent in carrying their patent proceedings to completion as to necessitate remitting them to their original situation, in order that opportunity may be afforded, upon the institution of new patent proceedings, for the determination, by "a court of competent jurisdiction," of the newly-asserted adverse right of possession. (Lucky Find Placer Claim, 32 L. D., 200, 202.)

As a result of the filing of the adverse claim by the Maud S. claimants, and the timely institution of suit thereon, all further proceedings upon the application for patent, with the exception of the publication of notice and the filing of proof thereof, were stayed by the statute (Sec. 2326, R. S.) until the termination of the adverse suit, which was dismissed October 15, 1901. On that date the present protest was pending, and has since prevented the applicants from carrying their patent proceedings to completion. At no time since the expiration of the period of publication of notice of the application for patent have the conditions been such that the applicants could have paid for the land and made entry of their claim. They can not therefore be charged with negligence. (Marburg Lode Mining Claim, 30 L. D., 202, 209.)

Your office decision dismissing the protest is affirmed, and, unless other objection appear, entry under the Ramsdell application will be allowed.

SCHOOL LAND—INDEMNITY—MINERAL LAND—NOTICE.

STATE OF COLORADO.

If at any time prior to the approval of a selection of indemnity school lands a mining location, claim, or entry, be made within the township in which the lands sought to be selected are located, publication of notice of such selection will be required, although at the time when the selection was proffered there was no mining location or claim in such township.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 5, 1904.* (F. W. C.)

The State of Colorado has appealed from your office decision of June 29, 1903, requiring a publication in accordance with rule 102 of the mining circular of July 26, 1901 (31 L. D., 453), of a certain list of indemnity school land selections known as list 7, Glenwood Springs, Colorado, land office series.

It appears that a notice of the selection of a portion of the lands included in said list was published in the Routt County Sentinel but not for the required period of sixty days, and that no proof was fur-

nished of the posting of the publication in the local land office for the full period of sixty days, as required by said rule. Further, certain tracts included in said list and described in your office decision were not included in the publication. You therefore required a republication and posting and that the publication include all of the lands selected.

The paragraph of the mining regulations referred to is as follows:

Where a railroad company seeks to select lands not returned as mineral, but within six miles of any mining location, claim, or entry, or where in the case of a selection by a State, the lands sought to be selected are within a township in which there is a mining location, claim, or entry, publication must be made of the lands selected at the expense of the railroad company or State for a period of sixty days, with posting for the same period in the land office for the district in which the lands are situated, during which period of publication the local land officers will receive protests or contests for any of said tracts or subdivisions of lands claimed to be more valuable for mining than for agricultural purposes.

In the circular of March 6, 1903 (32 L. D., 39), it is provided by rule 5:

Where land sought to be selected has not been returned as mineral but is within a township in which there is a mining location, claim or entry, publication thereof must be made, at the expense of the State, for a period of sixty days, with posting for the same period in the district local land office, and during such period of publication the local land officers may receive protests or contests as to any of the tracts claimed to be more valuable for mining than agricultural purposes.

In its appeal the State urges that it should not be required to make publication as to certain described tracts, for the reason that when its application to select was made there was no mineral claim of record of any kind in the township, and that the subsequent discovery of mineral within the township would not bring such selection within the rule requiring publication.

Until the selection is approved by the Secretary of the Interior there is, in fact, no selection, only preliminary proceedings looking to that end, and if it appear at any time prior to such approval that there has been a mining location, claim or entry made within the township in which the lands are sought to be selected, publication will be required under the circular before referred to. With regard to the publication heretofore made of a portion of the lands included in said list 7, by the State, as the publication was not for the full period, your office rightly required a new publication.

Upon consideration of the entire matter, therefore, the decision of your office is affirmed.

TOWN-SITE PROOF UNDER SECTIONS 2387 TO 2389, REVISED STATUTES.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 6, 1904.

Registers and Receivers, United States Land Offices.

GENTLEMEN: I herewith submit for your guidance the following instructions:

When town-site proof has been submitted, under sections 2387 to 2389, inclusive, of the United States Revised Statutes, you will, if you approve the same, forward it to this office, with your recommendation, without collecting the purchase money and without issuing the final papers. If the proof submitted to this office is found satisfactory and no objections exist in your office, you will, upon payment of the purchase price, issue the final papers.

J. H. FIMPLE, *Acting Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

REGULATIONS CONCERNING RAILROAD RIGHT OF WAY OVER THE PUBLIC LANDS.

The following is a copy of an act of Congress approved ^{Act March 3, 1875.} March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States:"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also, ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

SEC. 2. That any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any

Right of way granted through public lands.

Width of right of way.

Station buildings, etc.

Joint use of canyon, pass, or defile.

wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

Condemnation
over private
lands and pos-
sessory claims.

SEC. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and, where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act [to amend an act entitled an act] to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

Filing of map.

SEC. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and, upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

Surveyed and
unsurveyed
lands.

Approval.

Forfeiture.

Not to apply to
reservations.

SEC. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed.

SEC. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Approved, March 3, 1875. (18 Stat., p. 482.)

Act March 3,
1899.

By the act of Congress, approved March 3, 1899 (30 Stat., 1233), it is provided:

Right of way
over forest re-
serves or reser-
voir sites.

That *in the form provided by existing law* the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby.

Nature of grant.

1. The act of March 3, 1875, is not in the nature of a grant of lands; but it is a base or qualified fee, giving the possession and right of use of the land for the purposes contemplated by the law, a reversionary interest remain-

ing in the United States, to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the grantee of the right of way. All persons settling on a tract of public land, to part of which right of way has attached, take the same subject to such right of way, and at the full area of the subdivision entered, there being no authority to make deduction in such cases. If a settler has a valid claim to land existing at the date of the filing of the map of definite location, his right is superior, and he is entitled to such reasonable measure of damages for right of way as may be determined upon by agreement or in the courts, the question being one that does not fall within the jurisdiction of this Department.

No deduction for right of way.

Rights of prior settler.

Damages.

2. Whenever a right of way is located upon a forest or timber-land reserve the applicant must file a stipulation under seal incorporating the following:

Right of way upon forest reserves, stipulations.

(1) That the proposed right of way is not so located as to interfere with the proper occupation of the reservation by the Government.

Interference.

(2) That the applicant will cut no timber from the reserve outside the right of way.

Cutting timber.

(3) That the applicant will remove no timber within the right of way, except only such as is rendered necessary by the proper use and enjoyment of the privilege for which application is made, and that he will also remove from the reservation, or destroy, under proper safeguards, as determined by this office, all standing, fallen, and dead timber, as well as all tops, lops, brush, and refuse cuttings on the right of way, for such distance on each side of the central line as may be determined by the General Land Office to be essential to protect the forest from fire to the fullest extent possible.

Removing brush, etc.

(4) That the applicant will furnish free of charge such assistance in men and material for fighting fires as may be spared without serious injury to the applicant's business. (Acting Secretary, September 2, 1902.)

Assistance in fighting fires.

The applicant will also be required to give bond to the Government of the United States, to be approved by the Commissioner of the General Land Office, such bond stipulating that the makers thereof will pay to the United States "for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regard-

Bond.

less of the cause or circumstances under which such damage may occur." A bond furnished by any surety company that has complied with the provisions of the act of August 13, 1894 (28 Stat., 279), will be accepted, and must run in the terms of the stipulation above quoted. The amount of the bond can not be fixed until the application has been submitted to the General Land Office, when a form of bond will be furnished and the amount thereof fixed.

No construction on reserve in advance of approval or special permission.

No construction can be allowed on a reservation until an application for right of way has been regularly filed in accordance with the laws of the United States and has been approved by the Department, or has been considered by this office or the Department, and permission for such construction has been specifically given.

Acquiring right of way over private land, etc.

3. Whenever any right of way shall pass over private land or possessory claims on lands of the United States, condemnation of the right of way across the same may be made in accordance with the provisions of section 3 of the act, or the right can be purchased as provided by section 2288 of the Revised Statutes, as amended by section 3 of the act of March 3, 1891 (26 Stat., 1095).

Sec. 2288, U. S. R. S., as amended by sec. 3, act Mar. 3, 1891.

Right of way partly on unsurveyed land.

4. Lines of route or station grounds lying partly upon unsurveyed land can be approved if the application and accompanying maps and papers conform to these regulations, but the approval will only relate to that portion traversing the surveyed lands. (For right of way wholly on unsurveyed land; see paragraphs 16 and 17.)

5. Any railroad company desiring to obtain the benefits of the law is required to file, through this office, or they may be filed with the register of the land district in which the principal terminus of the road is to be located, who will forward them to this office—

Articles of incorporation.

First. A copy of its articles of incorporation, duly certified to by the proper officer of the company under its corporate seal, or by the secretary of the State or Territory where organized.

State laws.

Second. A copy of the State or Territorial law under which the company was organized, with the certificate of the governor or secretary of the State or Territory that the same is the existing law.

Evidence of filing with State officer.

Third. When said law directs that the articles of association or other papers connected with the organization be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

Fourth. When a company is operating in a State or Territory other than that in which it is incorporated, the certificate of the proper officer of that State or Territory is required that it has complied with the laws of such State or Territory governing foreign corporations, to the extent required to entitle the company to operate in such State or Territory.

Operating in State other than that in which incorporated.

No forms are prescribed for the above portion of the proofs required, as each case must be governed to some extent by the laws of the State or Territory.

Fifth. The official statement, under seal of the proper officer, that the organization has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing law of the State or Territory in which it is incorporated. (Form 1, p. 489.)

Completion of organization.
Form 1.

Sixth. A certificate by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs. (Form 2, p. 490.)

List of officers.
Form 2.

Seventh. If certified copies of the existing laws regarding such corporations, and of new laws as passed from time to time, be forwarded to this office by the governor or secretary of any State or Territory, a company organized in such State or Territory may file, in lieu of the requirements of the second subdivision of this paragraph, a certificate of the governor or secretary of the State or Territory that no change has been made since a given date, not later than that of the laws last forwarded.

Certificate in lieu of State laws.

6. The word profile as used in this act is understood to intend a map of alignment. All such maps and plats of station grounds are required by the act to be filed with the register of the land office for the district where the land is located. If located in more than one district, duplicate maps and field notes need be filed in but one district, and single sets in the others. The maps must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey of the line of route or of the station grounds.

Profile understood to be map of alignment.
Filing in local office.

Location in more than one land district.

Preparation of maps.

7. The maps should show any other road crossed, or with which connection is made; and whenever possible the station number on the survey thereof at the point of intersection. All such intersecting roads must be represented in ink of a different color from that used for the line for which applicant asks right of way. Field notes of the surveys should be written along the line on the map. If the map would thereby be too much crowded to be easily

Connection with other roads.

Field notes.

read, then duplicate field notes should be filed separate from the map, and in such form that they may be folded for filing. In such case it will be necessary to place on the map only a sufficient number of station numbers to make it convenient to follow the field notes on the map. In all cases station numbers should be given on the map where changes of numbering occur and where the lines of the public surveys are crossed, with distances to the nearest existing corner. The map must also show the lines of reference of initial and terminal points, with their courses and distances.

Station num-
bers.

Reference to
initial and ter-
minal points.

Typewritten
field notes.

True or mag-
netic bearings.

Ten-mile sec-
tions.

Scale.

Public-land
subdivisions.

Initial and ter-
minal points.

8. Typewritten field notes, with clear carbon copies, are preferred whenever separate field notes are necessary, as they expedite the examination of applications. The field notes, whether given on the map or filed separately, must be so complete that the line may be retraced from them on the ground. They should show whether lines were run on true or magnetic bearings; and in the latter case the variation of the needle and date of determination must be stated. One or more bearings (or angular connections with public-survey lines) must be given. The 10-mile sections must be indicated and numbered on all lines of road submitted.

9. The scale of maps showing the line of route should be 2,000 feet to an inch ordinarily, but when absolutely necessary the scale may be increased to 1,000 feet to an inch. These scales are fixed so that maps may be readily handled and filed. In most cases, by furnishing separate field notes an increase of scale may be avoided. Plats of station grounds should be drawn on a scale of 500 feet to an inch, and must be filed separately from the map of the line of route. Such plats should show enough of the line of route to indicate the position of the tract with reference thereto.

10. All subdivisions of the public surveys represented on the map should have their entire boundaries drawn, and on all lands affected by the right of way the smallest legal subdivisions (40-acre tracts and lots) must be shown.

11. The termini of the line of road should be fixed by reference of course and distance to the nearest existing corner of the public survey. The map, field notes, engineer's affidavit, and president's certificate (Forms 3 and 4, p. 490) should each show these connections. The company must certify in Form 4 that the road is to be operated as a common carrier of passengers and freight. A

tract for station grounds must be similarly referenced and described on the plat and in Forms 7 and 8 (p. 491), except when the tract conforms to the subdivisions of the public surveys, in which case it may be described in the forms according to the subdivisions.

12. When either terminal of the line of route is upon unsurveyed land, it must be connected by traverse with an established corner of the public survey, if not more than 6 miles distant from it, and the single bearing and distance from the terminal point to the corner computed and noted on the map; in the engineer's affidavit, and in the president's certificate (Forms 3 and 4). The notes and all data for the computation of the traverse must be given.

13. When the distance to an established corner of the public survey is more than 6 miles, this connection will be made with a natural object or a permanent monument which can be readily found and recognized, and which will fix and perpetuate the position of the terminal point. The map must show the position of such mark, and course and distance to the terminus. There must be given an accurate description of the mark and full data of the traverse, as required above. The engineer's affidavit and president's certificate (Forms 3 and 4) must state the connections. These monuments are of great importance.

14. When the line of route lies partly on unsurveyed land, each portion lying within surveyed and unsurveyed land will be separately stated in Forms 3 and 4, by connection of termini and length, as though each portion were independent.

15. When lands desired for station grounds lie partly on unsurveyed land, the areas of the several parts on surveyed and unsurveyed land must be separately stated on the map and in Forms 7 and 8.

16. Maps or plats of lines of route or station grounds lying wholly on unsurveyed lands may be received and placed on file in the General Land Office and the local land office of the district in which the same is situated, for general information, and the date of filing will be noted thereon; but the same will not be submitted to nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps or plats will not dispense with the filing of maps or plats after the survey of the lands and within the time limited in the act granting the right of

Connections
on unsurveyed
land.

Connections
with natural ob-
jects or perma-
nent monu-
ments.

Line of route on
surveyed and un-
surveyed land
separately stat-
ed.

Station grounds
ditto.

Maps of right
of way on un-
surveyed land
filed for infor-
mation.

way, which map or plat, if in all respects regular when filed, will receive the Secretary's approval.

Initial and terminal points.

17. In filing such maps or plats the initial and terminal points will be fixed as indicated in paragraphs 12 and 13.

Crossing of public survey lines.

18. Whenever the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner should be ascertained and noted. The map or plat should show these distances and the station numbers at the points of intersection. When field notes are submitted, they should also contain these distances and station numbers.

Forms 3 and 4.

19. The engineer's affidavit and president's certificate must be written on the map, and must both designate by termini and length, in miles and decimals, the line of route for which right of way application is made. (See Forms 3 and 4, p. 490.) Station grounds must be described by

Forms 7 and 8.

initial point and area in acres (see Forms 7 and 8, p. 491); and when they are on surveyed land the smallest legal subdivision in which they are located should be stated. No changes or additions are allowable in the substance of any forms, except when the essential facts differ from those assumed therein. (See paragraph 11.)

Spurs, etc.

20. Where right of way is desired for spurs or short branch lines which will not greatly enlarge the size of the map, they may be shown on the same map with the main line, and should be separately described in the forms by termini and length. For longer branch lines separate maps should be filed.

Notation of filing.

21. When maps are filed, the register will note on each the name of the land office and the date of filing, over his written signature. Notations will also be made on the records of the local land office, as to each *unpatented* tract affected, that application for right of way is pending, giving date of filing and name of applicant. The register will certify on each map, over his written signature, that *unpatented* land is affected by the proposed right of way. The maps and field notes in duplicate, and any other papers filed in connection with the application, will then be promptly transmitted to the General Land Office with report that the required notations have been made on the records of the local land office. Any valid right existing at the date of the filing of the right of way application will not be affected by the filing or approval thereof. (See paragraph 1.) If no *unpatented* land is involved in the application, the local officers will reject it, allowing the usual right of appeal.

Certificate as to *unpatented* lands.

Transmission and report to General Land Office.

Existing valid rights.

22. Upon the approval of a map of location by the Secretary of the Interior the duplicate copy will be sent to the local officers, who will mark upon the township plats the line of the railroad or location of station grounds, as laid down on the map or plat. They will also note, in ink, on the tract books, opposite each tract marked as required by paragraph 21, that the same is to be disposed of subject to the right of way for the railroad company's line of road or station grounds.

Notation of approval.

23. When the railroad is constructed, an affidavit of the engineer and certificate of the president (Forms 5 and 6, p. 490) must be filed in the local office, in duplicate, for transmission to this office. No new map will be required, except in case of deviations from the right of way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended, or bear a statement describing them, and the location must be described in the forms as the *amended* survey and the *amended* definite location. In such cases the company must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the honorable Secretary.

Evidence of construction.

Amended location.

Relinquishment.

W. A. RICHARDS,

Commissioner of the General Land Office.

Approved, February 11, 1904.

E. A. HITCHCOCK,

Secretary of the Interior.

FORMS FOR DUE PROOFS, AND VERIFICATION OF MAPS OF RIGHT OF WAY FOR RAILROADS.

FORM 1.

I, _____, secretary (or president) of the _____ company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with construction according to the existing laws of the State (or Territory) of _____; and that the copy of the articles of association (or incorporation) of the company filed in the Department of the Interior is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company.

[SEAL OF COMPANY.]

_____,
_____, of the _____ Company.

FORM 2.

STATE OF _____,
County of _____, ss:

I, _____, do certify that I am the president of the _____ company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: (here insert the full name and official designation of each officer.)

[SEAL OF COMPANY.]

_____,
President of Company.

FORM 3.

STATE OF _____,
County of _____, ss:

_____, being duly sworn, says he is the chief engineer of (or is the person employed to make the survey by) the _____ company; that the survey of the said company's line of railroad described as follows: (here describe the line of route as required by paragraph 11), a length of _____ miles, was made by him (or under his direction) as chief engineer of (or as surveyor employed by) the company and under its authority, commencing on the _____ day of _____, 190—, and ending on the _____ day of _____, 190—; and that the survey of the said line is accurately represented on this map and by the accompanying field notes.

Sworn and subscribed to before me this _____ day of _____, 190—.

[SEAL.]

_____,
Notary Public.

FORM 4.

I, _____, do hereby certify that I am president of the _____ company; that _____, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the said railroad, as accurately represented on this map and by the accompanying field notes, was made under authority of the company; that the company is duly authorized by its articles of incorporation to construct the said railroad upon the location shown upon this map; that the said survey as represented on this map and by said field notes was adopted by resolution of its board of directors on the _____ day of _____, 190—, as the definite location of the said railroad, described as follows: (describe as in Form 3); and that this map has been prepared to be filed in order to obtain the benefits of the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." I further certify that the said railroad is to be operated as a common carrier of passengers and freight.

_____,
President of the _____ Company.

Attest:

[SEAL OF COMPANY.]

_____,
Secretary.

FORM 5.

STATE OF _____,
County of _____, ss:

_____, being duly sworn, says that he is the chief engineer of (or was employed to construct) the railroad of the _____ company; that said railroad has been constructed under his supervision, as follows: (describe as in paragraph 12),

a total length of ——— miles; that construction was commenced on the ——— day of ———, 190—, and completed on the ——— day ———, 190—; and that the constructed railroad conforms to the map and field notes which received the approval of the Secretary of the Interior on the ——— day of ———, 190—.

Sworn and subscribed to before me this ——— day of ———, 190—.

[SEAL.]

—————,
—————,
Notary Public.

—
FORM 6.

I, ———, do hereby certify that I am the president of the ——— company; that the railroad described as follows: (describe as in Form 5) was actually constructed as set forth in the accompanying affidavit of ———, chief engineer (or the person employed by the company in the premises); that the location of the constructed railroad conforms to the map and field notes approved by the Secretary of the Interior on the ——— day of ———, 190—; and that the company has in all things complied with the requirements of the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

—————,
President of the ——— Company.

Attest:

[SEAL OF COMPANY.]

—————,
Secretary.

—
FORM 7.

STATE OF ———,

County of ———, ss:

—————, being duly sworn, says he is the chief engineer of (or is the person employed to make the survey by) the ——— company; that the survey of the tract described as follows: (here describe as required by paragraph 11) an area of ——— acres, and no more, was made by him (or under his direction) as chief engineer of the company (or as surveyor employed by the company), and under its authority, commencing on the ——— day of ———, 190—, and ending on the ——— day of ———, 190—; that the survey of the said tract is accurately represented on this plat and by the accompanying field notes; that the company has occupied no other grounds for similar purposes upon public lands within the section of 10 miles, from the ——— mile to the ——— mile, for which this selection is made; that, in his belief, the said grounds are actually and to their entire extent required by the company for the necessary uses contemplated by the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

Subscribed and sworn to before me this ——— day of ———, 190—.

[SEAL.]

—————,
—————,
Notary Public.

—
FORM 8.

I, ———, do hereby certify that I am president of the ——— company; that ———, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of

the tract described as follows: (here describe as in Form 7) an area of ——— acres, and no more, was made under authority of the company; that the said survey, as represented on this map and by said field notes, was adopted by resolution of its board on the ——— day of ———, 190—, as the definite location of said tract for station grounds; that the company has occupied no other grounds for similar purposes upon public lands within the section of 10 miles, from the ——— mile to the ——— mile, for which this selection is made; that, in his belief, the said grounds are actually and to their entire extent required by the company for the necessary uses contemplated by the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

_____,
President of the _____ Company.

Attest:

[SEAL OF COMPANY.]

_____,
Secretary.

INDIAN LANDS—BITTER ROOT VALLEY—PATENT UNDER TIMBER AND
STONE ACT.

HARRY DORMAN.

Lands in the Bitter Root Valley above Lolo Fork, opened to settlement by the act of June 5, 1872, are not subject to disposal under the timber and stone act; but where such lands have been sold under the latter act, and patents have issued therefor, no rights will be recognized as initiated against such lands by an application to purchase the same under the act of June 5, 1872, while the patents therefor are outstanding.

The land department will take no action looking to the disposal of public lands pending congressional consideration of questions before it for its special order.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 9, 1904.* (J. R. W.)

Harry Dorman appealed from your office decision of March 13, 1903, rejecting his declaratory statement and application, under the act of June 5, 1872 (17 Stat., 226), to purchase the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 4 N., R. 21 W., M. M., Missoula, Montana.

Part of these lands July 9, 1895, and October 27, 1899, the remainder, were patented upon cash, timber and stone entries, made under the act of June 3, 1878 (20 Stat., 89). For that reason the local office deemed itself without jurisdiction to allow the entry, and rejected the application. Your office affirmed that action.

The lands lie in the Bitter Root Valley, above the Lolo Fork, and are part of those opened to settlement under the act of June 5, 1872, which directed that they be sold at a dollar and twenty-five cents per acre to actual settlers only, who were heads of families, or twenty-one years of age, citizens of the United States, or who had declared their intention to become such, and forbade their disposal under the pre-emption or homestead laws. February 11, 1874 (18 Stat., 15), the benefits of the homestead acts were extended to settlers upon these lands. These

acts are the only authority for disposal of these lands, and they were not subject to entry under the act of June 3, 1878, *supra*, under which they were patented. Webb McCaslin (31 L. D., 243).

The ground of appeal is, that jurisdiction of the land department is not lost by issuance of a patent upon an entry not authorized by law, but continues until a patent has issued under some law authorizing the granting of title.

The patents to these lands have been issued in regular course of practice by the land department, under the law as then construed, for valuable considerations paid. Some of the patents involved in the series of cases now before the Department have stood unquestioned for more than ten years, having been issued July 19, 1893. What is asked is that the former action of the land department be disregarded and that the entrymen, who years ago paid two dollars and fifty cents per acre for the lands, supposing they were getting title, should be held to be without title and relegated to the remedy of presenting their claims for repayment, and that the government should again sell the land for one dollar and twenty-five cents per acre in disregard of its former attempted grant.

No precedent is cited by the appellants for such a proceeding. While the courts have decided that patents issued by the land department without authority of law are void, no decision is cited that the land department may consider its former grant to be a void act and again grant the land to others. On the contrary, the court, in *United States v. Stone* (2 Wall., 525, 535), held:

In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.

This holding was quoted and approved in *Mullan et al. v. United States* (118 U. S., 271, 278). In *Bicknell v. Comstock* (113 U. S., 149), the land department had issued to Bicknell a patent for lands which had by act of Congress been previously granted to the State of Iowa. The patent after being sent to the local office for delivery was before delivery recalled and attempted to be canceled. The court held (*ib.*, 151):

That this action was utterly nugatory and left the patent of 1869 to Bicknell in as full force as if no such attempt to destroy or nullify it had been made, is a necessary inference from the principles established by the court in the case of *United States v. Schurz*, 102 U. S. 378. That principle is that when the patent has been executed by the President and recorded in the General Land Office, all power of the executive department over it has ceased.

It is not necessary to decide whether this patent conveyed a valid title or not. It divested the title of the United States if it had not been divested before, so that Bicknell, or his grantees, being in possession under claim and color of title, the statute of limitation began to run in their favor.

In Schurz's case, cited by the court, a homestead entry had been erroneously allowed for land which was not subject to such entry because it lay within the limits of an incorporated town. The entry had been consummated, patent was issued, and sent to the local office for delivery, and before delivery was recalled by the General Land Office to be canceled. The patentee brought a proceeding for a writ of mandamus to compel the Secretary of the Interior, as head of the land department, to deliver the patent.

Under the principles governing this form of remedy the question was presented in the most favorable aspect for the defense, whether the executive department could ever disregard and overrule its own final action in attempt to convey title to public lands by issue of a patent. The court commanded the Secretary to deliver the patent, though its delivery was also held to be unnecessary to vest title, and held (*ib.*, 396) that:

when, by the action of these officers and of the President of the United States, in issuing a patent to a citizen, the title to the lands has passed from the government, the question as to the real ownership of them is open in the proper courts to all the considerations appropriate to the case. And this is so, whether the suit is by the United States to set aside the patent and recover back the title so conveyed, as in *United States v. Stone* (2 Wall., 525), or by an individual to cause the title conveyed by the patent to be held in trust for him by the patentee on account of equitable circumstances which entitle the complainant to such relief. *Johnson v. Towsley* (13 *id.*, 72) and other cases.

While there are remarks and reservations by way of caution made by the court in this case, in *Burfenning v. Chicago, St. Paul, Minneapolis and Omaha Railway Company* (163 U. S., 321), and other cases that give color to the contention that a case might be imagined, or circumstances might arise, that would justify the land department in regarding a patent to be an absolute nullity, yet no case is cited and none has been found wherein such action has been judicially approved. It may therefore be too much to say that it is not within the power of the Department in any case to disregard its patent. But the trend of authority and the better principle certainly is to refuse to do so. The evil of such a course by the executive department is sufficiently indicated by the court in *Moore v. Robbins* (96 U. S., 530, 534) and *Smelting Company v. Kemp* (104 U. S., 636). Granting, for argument, that such power exists, the stability of property and public faith in the integrity of the acts and purpose of the land department require that such course should be taken only in the clearest case of necessity for protection of the public interest or of private right, or where a judicial decision upon the identical facts has held the patent in a like case to be a nullity, as was the fact in *Charles H. Moore* (27 L. D., 481), which merely followed *Fee v. Brown* (162 U. S., 602). No such decision has been made applicable to the present case.

The principles governing in such case are well established. "It

does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it" (*Smelting Company v. Kemp*, 104 U. S., 647). The individual complaining of it must show a right antecedent to the issue of the patent before he can invoke the aid of equity for its cancellation. The government itself can obtain relief only on recognized equitable principles. Where the transaction leading up to the issuance of patent is free of actual fraud, was done in good faith, and the infirmity is due to innocent mistake of the powers of the land department, the government constantly recognizes its moral obligation to cure the infirmity of title by legislation. Such remedy is now sought by the patentees, and the Department is advised that a bill to confirm and validate these patents (H. R. 6787, 58th Congress) is under consideration of Congress, and, February 27, 1904, was passed by the House of Representatives, in which it originated. Any future cases that may arise involving the validity of these and similar patents within the scope of the pending bill, will be suspended by your office until final action on said bill by Congress. Charles H. Moore (27 L. D., 481, 493). Congress having plenary power over disposals of the public lands, the executive department will take no action looking to disposal of lands pending congressional consideration of questions before it for its special order.

Suspension of action is not necessary in the cases now before the Department. In none of them is any right asserted antecedent to the outstanding patents. As shown, the circumstances are not such as authorize the Department to regard the outstanding patents to be void and to make another disposal of the land. Many of the patents have been outstanding more than six years, and if their judicial cancellation be necessary, the United States is barred of remedy by the act of March 3, 1891 (26 Stat., 1095, 1099). No right will be recognized to initiate to land for which a patent is outstanding.

Your office decision is affirmed.

ARID LAND—TIMBER CUTTING—ACT OF JUNE 17, 1902.

OPINION.

The Secretary of the Interior has no authority, under existing legislation, to permit the cutting of timber from the public lands for use in the construction of irrigation works under the provisions of the act of June 17, 1902.

Assistant Attorney-General Campbell to the Secretary of the Interior,
March 12, 1904. (W. C. P.)

The Director of the Geological Survey addressed a letter to this Department saying:

It is necessary in the construction of the preliminary and auxiliary works connected with the Salt River reservoir to use a large quantity of lumber; as freights are very high this can be most cheaply obtained by sawing it in the neighboring mountains

which have been set aside by the government with the idea of forming a forestry reserve.

In view of these facts, permission is respectfully requested to cut such lumber as may be required by the Reclamation Service, and that the Division of Forestry of the Agricultural Department be requested to provide proper instructions, or the services of an expert to supervise the cutting, in order this [sic] it may be done in such manner as not to interfere with the preservation of the forest.

This letter was referred to the Commissioner of the General Land Office for report, who, after stating that the lands from which it is desired to cut timber were temporarily withdrawn under departmental authority of December 5, and December 14, 1901, for the proposed Rio Verde forest reserve, concluded his report as follows:

Inasmuch as the Secretary of the Interior is authorized under the reclamation act (Sec. 10) "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect," it would seem that the Department is clothed with authority to permit the cutting of such timber from the lands in question as may be required for the "Reclamation Service."

The matter has been referred to me for opinion.

The temporary withdrawal of these lands does not place them in any different category from other public lands as to the authority of the Secretary of the Interior to permit the cutting of timber thereon. If there were such authority in respect of public lands, the same authority might be exercised in respect of these lands notwithstanding the temporary withdrawal. The same officer who made the withdrawal might modify it. The only law on the statute books in any degree approaching a general authorization to the Secretary of the Interior to permit the cutting of timber upon the public lands is found in the act of March 3, 1891 (26 Stat., 1093), which provides that, in the States and Territory named, in any criminal or civil proceedings by the United States, for trespass on the public timber lands, it shall be a defense if the defendant shall show that the timber was cut or removed "for use in such State or Territory, by a resident thereof, for agricultural, mining, manufacturing or domestic purposes, under rules and regulations prescribed by the Secretary of the Interior provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut." The cutting of timber by the reclamation service for construction of reservoirs under the act of June 17, 1902, does not come within the purview of that act. Laws like that of 1891, conferring special privileges or benefits in derogation of the public interest, may not be enlarged or extended by construction to embrace matters not clearly within the intendment of the law.

The provision in section 10 of the act of June 17, 1902 (32 Stat., 388), authorizing the Secretary of the Interior "to perform any and all acts

and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect," does not in any manner enlarge his authority, but merely affirmatively declares the existence thereof (Instructions, 32 L. D., 237, 240). When a law devolves upon an executive officer of the government the performance of certain duties, it impliedly and necessarily vests him with authority to do any and all acts that may be proper and necessary to accomplish the purpose intended. Without this declaration in section 10 of said act, the Secretary of the Interior would have had ample power to do and perform all acts and to make rules and regulations necessary and proper for the purpose of carrying the provisions of the act into force and effect. The reason given by the land office for the conclusion reached there is not sufficient.

The control of the public lands rests primarily with Congress and the authority of the Secretary of the Interior to dispose of them in any particular manner must rest upon some law of Congress which directly or by necessary implication confers that authority. The same is true also as to the timber thereon. There being no general authority for disposing of timber on the public domain, and there being no provision in the act of June 17, 1902, or any other law, which can be construed as conferring upon the Secretary of the Interior authority to permit the cutting of timber from the public lands for the construction of irrigation works, such cutting can not be allowed. The fact that lumber for such purpose might be more cheaply obtained by taking it from the government lands in the vicinity of the irrigation works, does not afford sufficient reason for holding that the act of 1902 impliedly confers authority to cut such timber for that purpose. Congress alone can exercise or confer such power.

I am of opinion, and so advise you, that the permission asked by the Director of the Geological Survey can not be lawfully granted under existing law.

Approved:

E. A. HITCHCOCK, *Secretary.*

SWAMP GRANT—CHARACTER OF LAND—FIELD NOTES OF SURVEY.

STATE OF MINNESOTA.

The rule adopted by the land department, that all contests or controversies thereafter begun, respecting the swampy or non-swampy character of lands in Minnesota, must be determined by the field notes of survey, does not inhibit an examination in the field as to the swampy or non-swampy character of lands shown by the field notes to be swamp and overflowed, for the purpose of determining the truth of allegations that the field notes are false and fraudulent or grossly incorrect.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 12, 1904.* (G. B. G.)

The Department is in receipt of your office communication of the 15th ultimo reporting, under departmental reference, upon certain suggestions as to the character of some of the lands, not particularly described, within the former Chippewa Indian reservation, in the State of Minnesota, with reference to their status under the act of March 12, 1860 (12 Stat., 3), granting swamp and overflowed lands to that State.

The matter arose upon a communication to the Commissioner of Indian Affairs from Major G. L. Scott, Indian agent at the Leech Lake agency, protesting on behalf of the Indians, in substance, that the lands involved, although shown by the field-notes of survey to be swamp and overflowed lands, are in truth and in fact high and dry pine lands; that the selections thereof on behalf of the State under its swamp grant were made by the same man who surveyed the lines and made the field-notes; that these field-notes are full of errors; and that these same lands have, by three estimators and classifiers, been classified as pine lands.

This was followed by a protest, signed by forty-six Chippewa Indians, against the patenting of these lands to the State. A letter to the Commissioner of Indian Affairs from the "Supt. of Logging," at Cass Lake, characterizes the claim of the State as "a steal from the Chippewa Indians."

Your office reports that the lands referred to appear from the field-notes of survey to be swamp and overflowed lands, and that they were embraced within Minnesota swamp lists, Nos. 153, special, and 154, special, as having passed to the State under the grant of March 12, 1860, *supra*, which lists were approved by the Department January 4, 1904, but, in view of the representations and disclosures made, recommends an investigation in the field.

Departmental decision of March 16, 1903 (32 L. D., 65), reviewed the history of the swamp land grant to the State of Minnesota, and gave directions for the future adjustment of that grant, among other things, that:

All contests or controversies hereafter begun respecting the swampy or non-swampy character of lands in Minnesota, whether heretofore or hereafter surveyed, must be determined by the field-notes of survey.

The Department is not disposed to depart in any respect from the rule of adjustment so recently laid down. The whole subject was most carefully considered, and, while the rule quoted, as any rule that might be devised, may work inequitably in particular instances, it is not perceived how such consequence may be avoided, without reverting to a practice which promised interminable controversy.

While this is true, there is nothing in the reason and spirit of the rule which inhibits the field examination recommended by your office, or which denies the consequences that may result from such examination. The "field-notes" of survey adverted to in the rule are not such as may have resulted from gross error or fraud, but field-notes of a fairly accurate and honest survey, and the government is under no sort of obligation, either by reason of the rule, or otherwise, to patent lands to the State upon the returns of a fraudulent survey. Of course, it is not the intention of the land department to give ear to every allegation of error and fraud in surveys, but where, as in this instance, it appears that a large area of country is involved, an investigation should be made.

Your office will direct an exhaustive examination of the surveys involved by an examiner of surveys in the field, with special reference to the swampy or non-swampy character of said lands, and report the result of such examination to the Department, with a further recommendation in the premises.

Final action on the lists in question will be suspended until further orders.

ADJUSTMENT OF SWAMP-LAND GRANT TO STATE OF MINNESOTA.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., March 12, 1904.

Registers and Receivers, United States Land Offices,

State of Minnesota.

SIRS: For the protection of *bona fide* settlers, who allege settlement prior to the issuance of Minnesota swamp land circular, dated April 4, 1903 [32 L. D., 88], direction numbered (1), page 6, of the said circular [32 L. D., 70], may be so construed as to class such cases among existing controversies between the State and an actual and *bona fide* homestead settler; provided such settler, within ninety days after the filing of the plat, made proper homestead application for the land involved; accompanied with proper swamp land affidavit, respecting such of the tracts involved as the plats show to be swamp.

Very respectfully,

J. H. FIMPLE, *Acting Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

HOMESTEAD—SOLDIERS' ADDITIONAL—SECTIONS 2304 AND 2306, R. S.

GEORGE C. HAZELET.

To entitle a soldier to the benefit of sections 2304 and 2306 of the Revised Statutes, it is necessary that he should have served in the army of the United States for at least ninety days from the date of his muster into the service.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 12, 1904.* (A. S. T.)

George C. Hazelet has filed a motion for review of departmental decision of December 14, 1903 (not reported), in the case of George C. Hazelet, assignee of Charles S. Prince, *ex parte*, rejecting his application, as assignee of said Prince, to make soldiers' additional homestead entry for a tract of land containing eighty acres embraced in survey No. 639, Juneau, Alaska.

Said application was rejected on the ground that the military service of said Prince, as shown by a report from the War Department, did not constitute a sufficient basis for such additional entry. Said report is as follows:

Charles S. Prince, Co. K, 24th Regt., Maine Inf., was mustered into service for 9 mos. October 13, 1862, and discharged as a corporal Dec. 23, 1862.

In the case of Julian D. Whitehurst (32 L. D., 356), which was held to control the case at bar, it was held that "muster into the service" and not "enrollment" marked the date of the soldier's entry into the army, and in support of this holding the Department cited the cases of Tyler *v.* Pomeroy *et al.* (8th Allen, 480); *In re Grimley* (137 U. S., 147); letter of the Judge Advocate General to the Assistant Secretary of War, dated October 6, 1900, and letter of Attorney-General Griggs to the Secretary of War, dated February 27, 1901 (23 Ops. A. G., 408). And, because it was argued that pensions were allowed to persons who had served in the "military service of the United States," and that consistency required that homestead entries should be allowed to the same class of persons, the case of Edgar A. Coffin (32 L. D., 44) was cited as showing the distinction between being in the "army of the United States" and being in the "military service of the United States."

It is argued in support of the present motion that there is no distinction between the status of one who is in the "military service of the United States" and one who is in the "army of the United States," and it is stated that the theory of the case of Edgar A. Coffin, *supra*, is that "an 'enrolled' man enters the military service of the United States when he is 'enrolled,' but that he does not enter the army until he is mustered in."

What the Department held in that case was, that one might be in the military service and yet not be in the army of the United States,

and it was not held that one who had been enrolled was therefore in the military service. Enrollment was not held to be a necessary prerequisite to military service, but muster into service was held to be necessary to service "in the army of the United States."

It is also argued that there is a distinction between "enlistment" and "enrollment," and that one who is regularly enlisted is in the army, whether he has been mustered into service or not.

This Department has not been called upon to decide what constitutes either enrollment, enlistment, or muster into service, the question presented being how long the alleged soldier served in the army of the United States, and, following the authorities above referred to, it has been held that the term of service began with the muster into service, whatever may be held to constitute muster into service.

In the Grimley case, *supra*, it was held that when one did that which changed his status from that of a civilian to that of a soldier, he became amenable to the military law and liable to the penalties prescribed for desertion, disobedience of military orders, &c., and that one who signed and swore to a written statement to the effect that he had enlisted for a specified period, and that he would bear true faith and allegiance to the United States, and obey the orders of the President and of his superior officers, had made such change of his status and was liable to the penalties prescribed for desertion.

It is said in argument that the soldier in this case signed and swore to such a paper on September 10, 1862, but no evidence of such fact is found in the record. The War Department, when called upon by your office for a report as to the military service of Charles S. Prince, reported that he was mustered into service for nine months on October 13, 1862, and was discharged as a corporal on December 23, 1862, and said report does not show that he had any connection with the army by enrollment, enlistment, or otherwise, prior to October 13, 1862. There is in the record, however, a report from the Commissioner of Pensions, dated December 30, 1902, wherein it is stated that: "The period of this soldier's service, as shown by report from the War Department, was from September 10, 1862, to December 23, 1862." It is stated, in argument, that there is on file in the War Department a paper, signed and sworn to by the soldier, showing that he was duly enlisted on September 10, 1862, but it appears that he was not mustered into service till October 13, 1862. The question is: Was he in the army of the United States from the date of his enlistment, conceding that to have been on September 10, 1862, or only from the date of his muster, which is shown to have been on October 13, 1862?

In the administration of the pension laws the period of service has been uniformly held to commence at the date of enlistment, and the War Department allows pay from that date; but, although the soldier may have signed a paper agreeing to serve for a specified time, and

may have taken the oath of allegiance, something further seems to be necessary to give him the full status of a soldier *in the army*, and until he has been regularly mustered into service he has not been accepted into the army, though he may have been in the military service from the date of his enlistment.

The "muster in" seems to be the act whereby the soldier is regularly accepted into the army, and thenceforth he is in the army of the United States. To entitle one to the benefits of sections 2304 and 2306 of the Revised Statutes, it is necessary that he should have served at least ninety days *in the army* of the United States. He could not perform service in the army till he was mustered into service. The period of his service in the army must date from his muster into service.

There appears, therefore, no reason for disturbing said departmental decision, and said motion is therefore denied.

OKLAHOMA LANDS—TOWNSITE—ACTS OF MAY 2, 1890, AND JUNE 6, 1900.

TOWNSITE OF CACHE.

The provision of section 22 of the act of May 2, 1890, that not less than ten acres shall be reserved for public purposes in every townsite in the Territory of Oklahoma, is a general provision applicable to all lands in said Territory open to settlement and entry at the time of the passage of the act, except those expressly withheld from its operation, and to all lands in said Territory thereafter opened to settlement and entry; and there is nothing in the act of June 6, 1900, to except the lands thereby opened to settlement and entry from the force and effect of said provision.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 15, 1904.* (E. F. B.)

The Department has considered the appeal of W. H. Hussey, probate judge of Comanche county, Oklahoma, from so much of the decision of your office as requires him to file in support of his application to make townsite entry of the SW. $\frac{1}{4}$, Sec. 24, T. 2 N., R. 14 W., Lawton, Oklahoma, triplicate plats showing a reservation for public purposes of not less than ten acres of the land applied for.

The application was filed by the probate judge, in behalf of the occupants of lots in said townsite, under sections 2387 to 2389, Revised Statutes, and proofs were submitted in compliance with the requirements of said sections and the regulations thereunder, which the local officers found to be sufficient in form and substance and held that the law had been substantially complied with. They recommended that a patent be issued to the probate judge as trustee for the occupants and inhabitants according to their respective interests.

Your office found that the proof was defective in several particulars, which were specifically pointed out, and the local officers were

instructed to notify the probate judge that he would be allowed sixty days in which to file the required proofs.

In his appeal from said decision appellant states that he has complied with all of said requirements except as to that part of your decision requiring him to file triplicate townsite plats showing a reservation of not less than ten acres of the townsite for public purposes, as provided in section 22 of the act of May 2, 1890 (26 Stat., 81), providing for a temporary government for the Territory of Oklahoma. He contends that the lands which were acquired from the Kiowa, Comanche and Apache Indians, were opened to settlement and entry by the act of June 6, 1900 (31 Stat., 672, 676, 679), which provides that they shall be disposed of "under the general provisions of the homestead and townsite laws of the United States;" that the only laws applicable are the general homestead and townsite laws and that no special law applies to said lands; that the Department has held that the provision of section 22 of the act of May 2, 1890, authorizing the commutation of homestead entries for townsite purposes, did not apply to lands opened to settlement and entry by said act of June 6, 1900; and that an enabling act was passed March 11, 1902 (32 Stat., 63), extending the provisions of said section 22 to said lands, but that said act only provides for the commutation of homestead entries thereof for townsite purposes, and does not apply to townsites to which title is sought to be acquired under sections 2388 and 2389, Revised Statutes.

The sections of the Revised Statutes under which this application is made are embodied in Chapter 8, Title 32. The provisions of that chapter were, by the express terms of section 22 of the act of May 2, 1890, made applicable to "the lands open, or to be opened to settlement in the Territory of Oklahoma," except the lands opened by proclamation of April 22, 1889, with this proviso—

That hereafter all surveys for townsites in said Territory shall contain 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; and patents for such reservations, to be maintained for such purposes, shall be issued to the towns respectively when organized as municipalities.

That is a general provision applicable to all lands in said Territory that were open to settlement and entry at the time of the passage of the act, except those expressly withheld from its operation, and to all lands in said Territory that were thereafter opened to settlement and entry. It has not been expressly repealed and it is therefore applicable to the lands opened to settlement and entry by the act of June 6, 1900, unless there is some provision in that act providing for the disposal of those lands inconsistent with the provisions of said section 22.

The substance of appellant's contention is that the provision of the act of June 6, 1900, that these lands shall be "disposed of under the general provisions of the homestead and townsite laws of the United

States," is inconsistent with a reservation of any part of the townsite as provided by section 22 of the act of May 2, 1890, and that the general townsite laws contain no provision for the reservation of any part of the townsite, nor is such provision found in the circular.

The general provisions of the "townsite laws of the United States" as contained in sections 2387 to 2389, Revised Statutes, are that lands actually settled upon and occupied as a townsite may be entered, at the minimum price, by a trustee for the use and benefit of the actual occupants and inhabitants, according to their respective interests, and that the quantity of land that may be entered in any particular case must be determined by the number of inhabitants, according to the rule prescribed in said section 2389. These general provisions are not inconsistent with the provision of the act of May 2, 1890, section 22, that there shall be reserved a part of every townsite in said Territory which shall be devoted to public uses for the benefit of the occupants of said townsite collectively and that the patents for such reservations shall be issued to the town. Every settlement and occupancy of lands in said Territory that may be entered as a townsite under the general townsite laws is subject to that provision. There is ample scope for the operation of both acts even though the reservation for public purposes may conflict with the settlement right of one or more of the occupants.

Every presumption is against an implied repeal of a law. A statute will not be construed as repealing a prior act upon the same subject unless there is such repugnancy or conflict between the provisions of the two acts as to be irreconcilable by any fair and reasonable construction of the act. No such difficulty is found in construing these acts. In the earlier act Congress by a general provision withholds part of every townsite in the Territory of Oklahoma from acquisition by individual ownership. The general provisions of the townsite laws which were made to apply to the lands in controversy by the act of June 6, 1900, merely provide a mode by which the lands may be entered and the title of the United States divested for the use and benefit of the occupants and inhabitants of the townsite. That provision of section 22 requiring the reservation of a part of the townsite for public purposes, is entirely independent of that provision of the section allowing the commutation of homestead entries for townsites, and it is therefore immaterial to the question now under consideration whether the provision last mentioned was originally applicable to lands open to settlement and entry by the act of June 6, 1900, and it need not be discussed.

Your decision is affirmed.

SECOND HOMESTEAD—ACT OF MAY 22, 1902.

OTTO HANSEN.

The act of May 22, 1902, conferred a new and independent right of homestead entry upon every person who, prior to the passage of the act of May 17, 1900, had perfected a homestead entry and acquired title to the land by payment of the price provided in the law opening the land to settlement; and this right is in no wise affected by the fact that the perfected entry was for less than 160 acres and that an additional entry was subsequently made, under the sixth section of the act of March 2, 1889, and not carried to completion until after the passage of said act of May 22, 1902.

Secretary Hitchcock to the Commissioner of the General Land Office
(F. L. C.) *March 23, 1904.* (E. F. B.)

August 19, 1892, Otto Hansen made homestead entry of 160 acres of Sioux Indian lands, eighty acres of which he subsequently relinquished, and on December 29, 1898, he made final entry of the remaining eighty acres and received final certificate upon the payment of \$100, as required by the act authorizing entry of said lands.

November 23, 1901, Hansen made additional homestead entry of eighty acres of land under the sixth section of the act of March 2, 1889 (25 Stat., 854), and commuted it to cash entry, March 17, 1903.

July 6, 1903, Hansen made homestead entry of the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 27, T. 104 N., R. 72 W., Chamberlain, South Dakota, as a second homestead entry under the act of May 22, 1902 (32 Stat., 203), which you held for cancellation for the reason that his additional homestead entry, having been commuted subsequent to the act of May 22, 1902 (32 Stat., 203), exhausted his homestead right.

All of the lands entered by Hansen under his original and additional entries, as well as the lands embraced in the entry now under consideration, were part of the former Sioux Indian reservation which was opened to settlement and entry under the provisions of the homestead law, except under the commutation provisions of section 2301, Revised Statutes, by the act of March 2, 1889 (25 Stat., 888), and are contiguous. The provisions of said section 2301 were afterwards extended to these lands by subsequent legislation, but as those acts have no bearing upon the question, it is unnecessary to refer to them.

To clearly understand the scope of the act of May 22, 1902, *supra*, it is necessary to refer to preceding acts upon the same subject illustrating its purpose.

The act of May 17, 1900 (31 Stat., 179), known as the free homestead law, abolished the payments required to be made by settlers upon lands acquired from the Indians under various acts and treaties, and provided that such settlers should be entitled to patents for the land entered upon payment of the usual fees and commissions, without other

or further charge, provided that the right to commute any such entry and pay for the lands, in the time and at the price fixed by existing laws, shall remain in full force and effect.

Following this came the act of June 5, 1900 (31 Stat., 267, 269), the second section of which provides that any person who had theretofore made homestead entry and had commuted it under the provisions of section 2301, Revised Statutes, shall be entitled to the benefits of the homestead law as if the former entry had not been made. The same benefit was extended by the third section of the act to every person who had theretofore made homestead entry and had lost or forfeited it from any cause whatever. In either case, the entry can only be completed by complying with the homestead law as to residence and cultivation for the full period of five years. The evident purpose of the act was to give the right of free homestead to every qualified person who had failed to obtain a homestead or who had previously secured title under the homestead law to 160 acres or less by payment of the government price for the land under the commutation provisions of section 2301, Revised Statutes.

The spirit and purpose of these acts to confer such rights upon every person who had theretofore received the benefit of the homestead law, by paying for the land, was further manifested by the act of May 22, 1902, *supra*, for the relief of settlers upon lands acquired from the various Indian tribes, who had completed their entry prior to the passage of the act of May 17, 1900, and had paid for the land. That act provides—

That any person who, prior to the passage of an act entitled "An act providing for free homesteads on the public lands for actual and *bona fide* settlers, and reserving the public lands for that purpose," approved May seventeenth, nineteen hundred, having made a homestead entry and perfected the same and acquired title to the land by final entry by having paid the price provided in the law opening the land to settlement, and who would have been entitled to the provisions of the act before cited had final entry not been made prior to the passage of said act, may make another homestead entry of not exceeding one hundred and sixty acres of any of the public lands in any State or Territory subject to homestead entry.

It will be observed that Hansen at the date of the act of May 17, 1900, had made final entry, in 1898, by having paid the price provided in the law opening the land, and would have been entitled to the provisions of that act had final entry not been made prior to its passage. If he had made no other entry, he would unquestionably have had the right to make another homestead entry of not exceeding 160 acres under the act of May 22, 1902, and to complete the same by residing upon and cultivating the land for the full period of five years. Did he forfeit that right or deprive himself of the benefits of the act by making his additional entry, or has the right so given been satisfied, either in whole or in part by such entry?

Hansen's original entry having been made for eighty acres only, he

was at the date of the act of May 17, 1900, entitled under the general land laws to make an additional entry of 80 acres. As the law then stood he had no other right and his entire homestead right was exhausted by the additional entry made November 23, 1901. There was then no law that authorized him to make any other or further entry, but before he completed that entry the act of May 22, 1902, was passed. He then had the right to complete his additional entry, either as a free homestead or by commuting it to cash, and he also had the right to relinquish his additional entry, and to make an original entry of 160 acres which he could complete as a free homestead by residing upon and cultivating the land for the full period of five years. Was the consummation of one the extinguishment of the other?

A similar question was presented in the case of Thomas L. Bowdon (32 L. D., 135). In that case Bowdon made final entry for 80 acres of Indian lands and completed his entry by paying the Indian price for the lands prior to May 17, 1900. He then made additional entry for 80 acres under the act of March 2, 1889, and in 1902 he applied to amend his additional entry so as to embrace another 80 acres, claiming a right to such entry under the act of June 5, 1900, *supra*. Your office denied his application to amend for the reason that he did not commute his original entry. When his case came before the Department, he invoked in support of his application the act of May 22, 1902. The Department held that Bowdon, having perfected his original entry prior to May 17, 1900, was entitled to the benefits of the act of May 22, 1902, but that his application to amend was properly rejected for the reason that the entry, if amended as applied for, would make the original and additional entry exceed 160 acres. It held, however, that the act of May 22, 1902, gave a new and independent right to make homestead entry, for not exceeding 160 acres, to the class of persons therein specified and that Bowdon appeared to be clearly included therein. He was permitted to relinquish his additional entry and make a new entry under the act of May 22, 1902, for the land embraced in his additional entry, together with the 80 acres which he asked to have added by amendment.

The question as to whether Bowdon would have had the right to complete his additional entry by commutation and also to make entry of 160 acres and complete the same as a free homestead under the new and independent right given by the act of May 22, 1902, was not passed upon, but it does not appear from any expression in the decision that a relinquishment of the additional entry was required of him as a condition upon which he was permitted to make a new entry for 160 acres. He was only seeking to enter that particular 160 acres, 80 of which was covered by his additional entry.

Is it necessary that Hansen should relinquish the additional entry to entitle him to the benefits of the act of May 22, 1902? As before stated,

when Hansen made his additional entry he exhausted his homestead right under the laws then existing. It is not the completion of the entry, but the making of it that exhausts the right, provided the entry was made of land intended to be entered and there was nothing to prevent the completion of the entry. Hence both Bowdon and Hansen had exhausted their homestead right prior to the passage of the act of May 22, 1902, and the completion of the entry prior to that date would not have been more effectual to deprive them of any other or further right under the homestead laws. But the act of May 22, 1902, conferred a new and independent right upon every person who, prior to the passage of the act of May 17, 1900, had completed a final entry of Indian lands by payment of the price provided in the law opening the land to entry. The quantity of land entered was not material. A person who had acquired title to one hundred and sixty acres has the same right to the full benefit of the act as a person who had only acquired title to eighty acres or forty acres. The right to a free homestead of the full quantity of 160 acres is just the same whether the homestead right had been exhausted by taking the full quantity of Indian lands under the special acts, or by completing the quota under additional entries.

If Hansen had completed his additional entry prior to the passage of the act of May 22, 1902, he would undoubtedly have been entitled to enter 160 acres under that act as a free homestead, irrespective of the manner by which it was completed. There seems to be no valid reason why the completion of that entry after the passage of the act should deprive him of the benefits of the act unless the right to a free homestead thereby conferred is conditioned upon the surrender of inchoate rights acquired prior to its passage under existing laws. Hansen had cultivated and resided and made valuable improvements upon the land embraced in his additional entry and was entitled to receive a patent for the land so entered, by reason of such compliance with the law, upon making proof thereof. Having such right at the date of the passage of the act, he had also all the qualifications prescribed by the act to entitle him to the full quantity of 160 acres as a free homestead, without condition, qualification or restriction other than such as is prescribed by the act. It cannot be doubted that the controlling purpose of Congress in passing the acts of June 5, 1900, and May 22, 1902, was to confer upon every person who had acquired title to their homestead by payment of money, the right to a free homestead for the full quantity of 160 acres, as if the former entry or entries had not been made. In view of such evident purpose and spirit, the only reasonable construction that can be given to the act is that the benefits intended to be conferred were not made to depend upon the forfeiture or surrender of existing independent inchoate rights.

Your decision is reversed and the entry of Hansen, if proper in all other respects, will be allowed.

RAILROAD RIGHT OF WAY—INDIAN LANDS—ACT OF MARCH 3, 1899.

FORT SMITH AND WESTERN RAILROAD COMPANY.

The Commissioner of Indian Affairs has full authority to receive, for disbursement to the Indians, the moneys due individual Indian occupants, under section 3 of the act of March 3, 1899, as compensation for property taken or damage done by reason of the construction of the line of railroad provided for by said act.

The payment to be made to the Secretary of the Interior for the benefit of the Choctaw and Creek nations, under section 7 of the act of March 3, 1899, is intended as compensation for any and all damages of whatever nature said nations may have suffered by reason of the construction of the line of railway through those nations; and the actual number of miles of road within said nations furnishes the basis for determining the amount of compensation due them under said section, irrespective of the character of the occupation of the individual occupants, for whom compensation is to be made in accordance with section 3 of said act.

Secretary Hitchcock to the Commissioner of Indian Affairs, March 23,
(F. L. C.) 1904. (F. W. C.)

The Department is in receipt of your office letter of the 27th ultimo, inclosing certain correspondence with the auditor and general manager of the Fort Smith and Western Railroad Company, relating to the compensation to be paid the Creek nation on account of the building of the line of said road through said nation.

By act of March 3, 1899 (30 Stat., 1368), said company was authorized to construct and operate a railway through the Choctaw and Creek nations in the Indian Territory. The third section of said act made provision for compensating the individual occupants for all property taken or damage done by reason of the construction of said railway, and under this section settlement has been made with all of the individual occupants along the right of way except in six cases, and in these the amount of compensation has been fixed in each instance but the payment has not been made because of inability to locate the individuals.

February 4, last, your office requested of the company that it remit the amount due in these six cases by six separate drafts, and that an effort would be made on the part of your office to locate the individual claimants, when payments would be made and receipts taken. February 11, last, responding thereto, the company claimed that it was directly liable to the individuals and that while it would be pleased to get rid of the matter by paying the money to your office, it was unable to find any provision of law that would authorize it in making such payment, and that in the absence of such law it did not see how it could do otherwise than hold the money to be paid to the proper parties on demand.

This Department has uniformly held that the Secretary of the Interior is charged with the supervision of public business relating to the Indians just as he is with that relating to public lands. The man-

agement of public business relating to Indian affairs is committed primarily to the Commissioner of Indian Affairs, while the management of those relating to the public lands is committed primarily to the Commissioner of the General Land Office. In the case of the Catholic Bishop of Nesqually *v. Gibbon* (158 U. S., 155), the supreme court had under consideration an act of Congress which confirmed to missionary societies land then occupied by them not to exceed 640 acres. No plan was provided for determining what societies were entitled to land under that provision, nor for ascertaining the quantity to which any such society should receive title. The court held that these duties devolved upon the Interior Department, saying:

It may be laid down as a general rule that in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express declaration to the contrary.

Applying this principle of supervisory control and authority for the best welfare of the Indian, this Department might have required that the amount due each of the individual Indian occupants be paid directly to the Secretary of the Interior for disbursement. There would seem, therefore, to be full authority for depositing with your office the amount due these individual Indian occupants and that by such payment the company would be relieved of any further charge on account of claim for damages by such occupants.

The next matter submitted for consideration relates to the amount of compensation due the Creek nation by reason of the construction of the line of this road through that nation. By the seventh section of the act of March 3, 1899, *supra*, it is provided—

that said railway company shall pay to the Secretary of the Interior for the benefit of the Choctaw and Creek nation, respectively, the sum of fifty dollars in addition to the compensation provided for in this act, for property taken and damage done the individual occupants by the construction of the railway for each mile of railway that it may construct in said nations, said payments to be made in installments of five hundred dollars as each ten miles of road is graded.

It transpires that along and crossed by the line of road as located, were lands held by different members of the Creek nation under the customs and usages of the nation. At the time of the passage of the act of 1899, granting this right of way, there was provision of law for allotment of lands in severalty to the individual members of the Creek nation (see act of June 28, 1898, 30 Stat., 495), and under the act of March 1, 1901 (Creek agreement), allotments made in the Creek nation prior to the ratification of said act were confirmed and recognized to the same extent as were allotments thereafter made. It is claimed on behalf of the railroad company that in the settlements made with the

individual occupants under section 3 of the granting act, payment was made for the land included in the right of way, and as the individual occupants became, under the act of 1901, the owners of the land allotted them, that the portion of the road within said allotments should be excluded from the length of road within the Creek nation when calculating the amount of compensation due the nation under the statutory provision of \$50 per mile as provided in section 7 of the granting act, before quoted from. Until the nation's deed was issued to the individual and the same approved by the Secretary of the Interior, the individual did not become possessed of full title to the lands allotted, and it may be questioned whether prior to this time, or indeed for five years thereafter, the individual could lawfully convey away any part of the land allotted him. This is, however, immaterial in the consideration of the question as to the compensation due the nation by reason of the construction of the railway through said nation.

After a most careful consideration of the matters submitted in support of the company's contention the Department is unable to accede thereto.

February 18, 1902, in considering a schedule submitted of damages for the right of way of this company through the Creek nation, it was said by this Department, in regard to the manner of fixing the compensation to be paid the nation, that—

the granting act to said company clearly indicates, in my judgment, that the provision in section 7 requires the company to pay the amount stated, fifty dollars per mile, for all of the line, irrespective of the character of the occupation of the individual occupants, for whom compensation is to be made in accordance with section 3 of said act. [See Press Book No. 58, Ind. Ter. Div., page, 323.]

And, in the opinion of the Department, this is the proper rule for fixing the compensation due this nation, for the following reasons:

First, it will be noted that section 7 of the act of March 3, 1899, provides that the compensation to be paid the Choctaw and Creek nations is "in addition to the compensation provided for in this act for property taken and damages done the individual occupants by the construction of the railway;" so that there is to be no deduction because of payment made to the individual occupant. Second, that the payment to the nations is a fixed sum of "fifty dollars . . . for each mile of railway that it may construct in said nations." This could only be avoided by holding that the allotted lands were, by reason of the allotments, taken without the nation, a position clearly untenable. And third, payment is to be made "in installments of five hundred dollars as each ten miles of road is graded," there being no provision for deduction on account of occupancy or otherwise.

Attention is called to the latter part of the section, in which it is provided that in case of dissent all compensation to be made said nations under the provisions of this act shall be determined as pro-

vided in section 3 for the determination of the compensation to be made to the individual occupant of lands, with the right of appeal to the courts upon the same terms, conditions, and requirements as therein provided, and it is contended that in the event of a disagreement the compensation to be awarded the dissenting nation would necessarily be determined by ascertaining, in the manner provided, the actual value of the land taken, thus, in effect, contending that only land to which the nation had full title would be considered in determining the compensation due the nation. In the case of the Creek nation no dissent was filed, so the statutory provision controls.

In the opinion of this Department the payment to be made to the Secretary of the Interior for the benefit of the Choctaw and Creek nations, under section 7 of this act, is intended as compensation for any and all damages of whatever nature the nations may have suffered by reason of the construction of the line of railway through those nations. The measure of damages is fixed by the plain letter of the statute at \$50 per mile for each mile of railway that this company may construct in said nations, and in case there had been a dissent, making the appointment of referees necessary, as provided in section 3 of said act, it would seem that the duties of such referees would be limited to fixing the amount per mile due the dissenting nation, and that such referees would not be empowered to consider and determine questions affecting the length of the line of road as constructed within said nation or whether deductions should be made therefrom on account of claims to the land traversed because of occupancy or otherwise.

As shown by the affidavit of the chief engineer of said company, the line of the Fort Smith and Western Railroad Company within the Creek nation is 58.69 miles. In the opinion of this Department this furnishes the base for the calculation in determining the amount of compensation due the Creek nation under the provisions of section 7 of said act, which is at the rate of \$50 per mile.

You will advise the company fully hereof and request that it make payment in accordance herewith.

ENTRIES OF PUBLIC LAND FOR PARK AND CEMETERY PURPOSES.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 29, 1904.

Registers and Receivers, United States Land Offices.

GENTLEMEN: I herewith submit for your guidance and instruction the following amendment to the regulations (32 L. D., 172) under the

act of Congress for entries of public land for park and cemetery purposes, approved September 30, 1890 (26 Stat., 502), to wit:

Strike out paragraph one thereof and insert in lieu of the same the following:

1. The right of entry under said act is restricted to *incorporated* cities and towns, and each of such cities and towns shall be allowed to make entries of tracts of unreserved and unappropriated public land, by government subdivisions, not exceeding, in all entries hereunder by such city or town, a quarter section in area, all of which must lie within three miles of the corporate limits of the city or town for which the entries are made.

J. H. FIMPLE,
Acting Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

MINING CLAIM—LODE WITHIN PLACER—SECTION 2333, REVISED
STATUTES.

DAPHNE LODE CLAIM.

The lateral surface area reserved under section 2333, Revised Statutes, from the grant by a placer patent, together with a vein or lode known to exist within the boundaries of the placer claim at the date of and not included in the placer application, is limited to twenty-five feet on each side of the center of the vein or lode.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 30, 1904.* (F. H. B.)

This case is before the Department on *certiorari* to your office for review of its decision of January 6, 1903, and presents the following state of material facts:

The Mt. Rosa placer mining claim, situate in the Pueblo, Colorado, land district, was located September 19, 1891. Application for patent therefor was filed, August 5, 1892, by the Mt. Rosa Mining, Milling and Land Company, by whom, November 7, 1892, entry (No. 259) was made. During the period of publication no adverse claim was filed. The claim passed to patent April 24, 1893.

October 9, 1891, a lode or vein was discovered within the exterior limits of the previously located placer, and location thereon by certain other persons, as the Providence lode mining claim, 1500 feet in length and 300 feet in width, was made November 26, 1891. This lode was not included by the Mt. Rosa company in its subsequent application for patent to the placer claim.

October 8, 1892 (pending the aforesaid application for patent), the Mt. Rosa company entered into an agreement with the grantee of the

Providence claim, whereby, in consideration of the latter's forbearance to file an adverse claim against the application for placer patent or oppose entry thereunder, it (the Mt. Rosa company) granted to the Providence claimant surface rights within said placer and along the Providence vein or lode, as follows: 200 feet in width along the first 500 feet of the lode from the north end thereof, 50 feet in width for the next 500 feet in length, and 150 feet in width for the remaining 500 feet (more or less) of the lode; and it was further agreed by the Mt. Rosa company that when it should secure patent for its said placer claim it would convey the above-mentioned territory by warranty deed.

January 27, 1892, another lode location was made, by others, within the exterior limits of the previously located Mt. Rosa placer, as the St. Patrick lode claim, 1500 feet in length and 300 feet in width. This lode was not included by the Mt. Rosa company in its subsequent application for patent to said placer claim.

October 13, 1892 (pending the application for placer patent), the Mt. Rosa company also entered into a contract with the owners of the St. Patrick claim, whereby, in consideration of the latter's forbearance to resist the application for placer patent, the former agreed to convey, upon receipt of the patent, the lode and certain adjacent territory, as therein provided.

January 26, 1893 (prior to the issuance of placer patent), the Mt. Rosa company executed quit-claim deed, in favor of the owner of the Providence claim, for the lode and adjacent ground specified in the before-mentioned agreement of October 8, 1892.

December 8, 1897 (subsequent to the issuance of the placer patent), as it appears from the abstract of title which accompanies the record, the Mt. Rosa company, pursuant to the agreement of October 13, 1892, executed a conveyance, according to its terms, to the owners of the St. Patrick claim, of all the part thereof within the limits of the Mt. Rosa placer not in conflict with any prior lode location, with certain reservations as to surface ground and placer dirt. In the record it is stated that the tract described in the conveyance is 1492.10 feet in length and 296 feet in width.

January 1, 1899, James Doyle made relocation, as the Daphne lode claim, of the ground embraced within the exterior limits of the original Providence location, 1499.11 feet in length along said lode and 150 feet on each side of the center of the vein or lode in width.

March 31, 1899, Doyle filed application for patent to the Daphne claim as located, survey No. 12,989, which was rejected by the local officers because of the outstanding placer patent. On appeal by the applicant, your office ordered a hearing to be had before the local officers at Pueblo, to determine whether the Providence (relocated as the Daphne) lode was known to exist at the date of the Mt. Rosa placer application, to wit, August 5, 1892. The hearing, duly had

between the lode and placer claimants, resulted in a finding by the local officers, dated September 18, 1900, and promulgated April 28, 1902, that the Providence lode (identical with the Daphne) was a known lode prior to August 5, 1892; and the local officers recommended that the application for patent to the Daphne claim be accepted and allowed to proceed in the regular manner. The existence of this lode within the knowledge of all concerned is nowhere disputed, but is admitted, in the record.

May 29, 1902, the Mt. Rosa company, pursuant to the terms of a compromise, waived its right of appeal; and, June 5, 1902, publication and posting of notice of the Daphne lode application began and continued for sixty days, during which period no adverse claim was filed. Several protests were filed and various proceedings were had in the progress of the case, which it is wholly unnecessary to here consider in detail. It is sufficient to say that, among the other incidents, the St. Patrick Gold Mine Syndicate, Limited, claiming as the grantee of the St. Patrick lode claim, filed, July 25, 1902, a protest (its second) against the allowance of the Daphne application, seeking to restrict the applicant to the Daphne vein or lode and fifty feet of lateral surface ground, being twenty-five feet on each side of the middle of the vein, and alleging conflict between the excess of such surface width, as claimed under the Daphne application; and the superficial area of the St. Patrick lode claim "so owned in fee by the protestant."

By the aforesaid decision of January 6, 1903, your office, in passing upon the questions raised by the several protests, held, among other things not necessary to be here considered, in substance and effect, as follows:

1. That no application for patent to the St. Patrick lode claim appears ever to have been filed, but that title thereto is claimed by virtue of the aforesaid conveyance by the Mt. Rosa company; and if the St. Patrick lode was known to exist at the date of, and was not included in, the application for placer patent, it was, by operation of law, excluded therefrom and continued a part of the public domain at the time of the Daphne application, held at most under a possessory title, so that to protect its claimed rights the St. Patrick claimant should have resisted the Daphne application by an adverse claim and suit under section 2326, Revised Statutes, and by failure so to do has lost its rights;

2. That as the Mt. Rosa company has parted with its interest in the ground relocated as the Daphne lode, and no adverse claim was filed against the Daphne application for patent, the question as to the width of that lode claim is one resting entirely between the United States and the applicant, Doyle;

3. That no sufficient reason appears why the Daphne application, as it stands, should not be allowed to proceed, "especially in the face of

the acquiescence of the Mt. Rosa placer patentees, who appear to be the only parties whose rights could in any manner be abridged thereby;"

4. That the Daphne lode claim may embrace three hundred feet in width as applied for, and can not be limited to twenty-five feet on each side of the center of the vein, inasmuch as "it is manifest that section 2333, R. S., in its limitation of 25 feet on each side of the center of a vein refers to a lode lying within the limits of a placer claim which was known and applied for as such by the placer applicant" (citing Pike's Peak Lode, 10 L. D., 200, and cases therein cited);

5. That the several protestants, as such, have no standing before the land department.

Your office therefore dismissed the protests.

April 28, 1903, your office denied to the St. Patrick Gold Mine Syndicate, Limited, among others, the right of appeal; whereupon it filed petition for certification of the record to the Department, with the result first above stated.

The protest of the St. Patrick syndicate (which, alone, it is sufficient to recognize here) is resisted by the Mt. Rosa company on behalf of the parties to the before-mentioned compromise. The question directly presented by the record is, the width or lateral surface which may be embraced in the Daphne application for patent.

The provisions of the mining laws applicable to the case are contained in section 2333 of the Revised Statutes, which is as follows:

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

The Daphne lode being claimed by another than the placer applicant, the case falls within the provisions of the later clause of the section, which does not in terms prescribe the superficial area which shall be reserved, together with the lode, from a grant of placer ground, as does the first clause of the section.

The question presented was fully considered and passed upon by the Department, April 1, 1902, in a letter addressed to the Attorney General, in which it was recommended that a suit be instituted to cancel a

patent, issued by inadvertence and mistake, for the Three Kings lode claim, in part within the exterior limits of the Emma Palmer placer claim, Pueblo, Colorado, land district, to the extent of the conflict. The facts were, that the lode claim was located prior to the date of the application for placer patent; that the placer application antedated the lode application and proceeded without adverse on behalf of the lode claim; that various adverse claims were filed against the placer application by claimants of other lodes, during the pendency of which patent, to the full width applied for, was, by inadvertence and mistake so far as concerned its conflict with the placer, issued for the Three Kings lode claim; and that the application for lode patent was allowed, and the patent by inadvertence thus issued—for the full width of the claim throughout—in the absence of a determination that the lode was known to exist at the date of the application for placer patent. That the lost jurisdiction to determine that and other questions might be restored to the land department, suit looking to the vacation of the lode patent to the full extent of the conflict was recommended. Discussing the question as to the surface area within the placer which might properly have been allowed and patented to the Three Kings claimant if the lode was known to exist as above stated, it was remarked:

The question has been several times before the land department, and varying decisions have been rendered upon it. In the case of Elda Mining and Milling Co. *v.* Mayflower Gold Mining Co. (26 L. D., 573-4) these varying decisions are referred to. See also Cape May Mining and Leasing Co. *v.* Wallace (27 L. D., 676, 679) and North Star Lode (28 L. D., 41, 44).

Proceeding, the Department cited the case of Mt. Rosa Mining, Milling and Land Co. *v.* Palmer (26 Colo., 56; 56 Pac. Rep., 176), which involved the placer claim here involved and in which the question was squarely presented to and decided by the Supreme Court of the State of Colorado, and expressed its sanction of the doctrine of that case. Copy of the aforesaid letter was transmitted to your office, and the views therein expressed are stated in Lindley on Mines, 2nd Ed., Vol. I, Sec. 415, and accepted by the author of that treatise as determinative.

The Mt. Rosa-Palmer case was an action brought by Palmer against the Mt. Rosa company to quiet title in himself to two unpatented lode claims situate within the exterior boundaries of the patented Mt. Rosa placer claim. It was admitted that the location of the placer preceded the lode location, and that the latter in turn preceded the application for placer patent; and it was established at the trial that the lodes had in fact been discovered and were known to exist prior to the date of the placer application. It was contended by the lode claimant that he was entitled, as against the placer patentee, to the entire surface area of his claims as located (300 feet in width, each). The court decided adversely to this contention, and held that under section 2333 the lode

claimant's right to surface area was limited to twenty-five feet on each side of the center of each lode, by analogy to the first clause of the section. After determining certain preliminary questions presented in the case, the court said:

Another, and more serious, question is presented, and that is as to the amount of surface ground appellee is entitled to, if any, under and by virtue of his lode locations. The court below awarded him the full amount claimed, to wit, 300 by 1,500 feet, in each of the claims. It is insisted by counsel for appellant that he is entitled to only the mineral lodes, and not to any of the surface of the placer ground. This precise question has never, to our knowledge, been discussed or determined by a court of final resort. It has, however, been passed upon by the land department; but its rulings are not uniform.

The question was also involved in the case of *Campbell v. Mining Co.*, in the circuit court of the United States, for this district, Judge Riner presiding. He entertained the view, and instructed the jury to the effect, that a lode claimant, in case of a recovery, was entitled to no more than the vein or lode, and 50 feet of ground, extending 1,500 feet in length. We think this instruction correctly defines the amount of surface ground to which a lode located within the boundaries of a placer is entitled, under the provisions of section 2533. As was said in *Reynolds v. Mining Co.*, *supra*: "[This section] made provision for three distinct classes of cases: (1) When the applicant for a placer patent is at the time in possession of a vein or lode included within the boundaries of his placer claim, he shall state that fact, and, on payment of the sum required for a vein claim and twenty-five feet on each side of it, at \$5 per acre, and \$2.50 for the remainder of the placer claim, his patent shall cover both. (2) It enacted that, where no such vein or lode is known to exist at the time the patent is applied for, the patent for a placer claim shall carry all valuable mineral and other deposits which may be found within the boundaries thereof. (3) But, in case where the applicant for the placer is not in possession of such lode or vein within the boundaries of his claim, but such vein is known to exist, and it is not referred to or mentioned in the claim or patent, then the application shall be construed as a conclusive declaration that the claimant of the placer mine has no right to the possession of the vein or lode claim." We think it is manifest that the lode or vein referred to in the first and third provisions is the same thing, and that whatever a placer claimant would acquire by availing himself of the privilege accorded him by the first provision of the section, is reserved by virtue of the third provision; in other words, that the same extent of surface ground that is incident to such lode or vein, if located and patented by the placer claimant, is reserved from the placer patent in case of his failure to claim and patent the same. If he elects to patent the lode, he is required to take 25 feet on each side of the center of the vein, and pay therefor at the rate of \$5 per acre. This is a privilege accorded to him, which he may avail himself of, or not, as he sees fit. If he elects to waive this privilege, he may do so in one of two ways, either by expressly excepting the lode from his placer location and application for patent, or remaining silent in regard to it. If silent, then by implication he declares that he makes no claim to such lode, and by such silence is bound to the same extent, and in the same manner, but no further, that he would have been by an express declaration. By electing to make no claim to a known lode, or express declaration in regard to it, he must be understood as claiming, for placer purposes, the greatest possible area within the boundaries of his placer claim, and should be held to have relinquished only that which he might have taken, which is the lode, with the amount of surface ground provided. Why should there be any difference between the rights of claimants of known lodes within the boundaries of a placer? We know of none. The object of excepting known lodes from placer locations was to prevent titles to such lodes being obtained

under the guise of a placer; at the same time, in order to protect claimants to each character of mineral locations to the greatest extent, and preserve to each that which was most valuable for particular purposes in connection with each class of claims. The lode, for convenient working, could not be limited to less than 25 feet on each side of the center of the vein; and the placer, which would be valueless without such surface rights, is permitted to take title to the remaining area accordingly. Those who controvert this view base their contention upon the provisions of section 2320, which it is said governs the length and width of all lode claims, whether made within the boundaries of a placer claim or not. An act on a particular subject must be construed as a whole. Section 2320 refers to the location of lodes not conflicting with any other class of mineral locations; while by section 2333 special conditions with reference to conflicts between the two classes of mineral claims are specially provided for, and, to that extent, construing the act as a whole, is a limitation or qualification of the provisions of section 2320, which relates, as stated, to the width of lode claims generally, and regulates the width of lode claims when made upon lodes within the boundaries of a placer, whether such lodes are located by the owner of the placer or strangers to that title. By this construction; full force and effect is given to both of these sections, and the purpose of the statute is carried out. The government receives for its mineral lands the price fixed for lodes and placers, respectively, and the superior right to the surface area of the placer claimant, acquired by his prior location or patent, is protected. It is the conclusion of a majority of the court that the limitation of the width of a lode claim in section 2333 is not only applicable to the placer claimant, but applies as well to others who locate a lode within the boundaries of his previously located placer.

It was stated in the before-mentioned letter that the decision referred to, having been rendered by the court of last resort of one of the principal mining States, was entitled to great weight; and, upon careful consideration of the reasons assigned by the court for the conclusion reached, the Department accepted and followed the decision as the correct exposition of the law. To the position taken in that communication the Department adheres.

The quit-claim conveyance, to the owner of the original Providence lode, of the Mt. Rosa company's right or title to the irregular tract hereinbefore mentioned, which was not taken into account in issuing the placer patent, is at most but a matter between the parties, or assigns; and it is certain that the fact of the relocation has not altered the situation here presented. The placer application having proceeded without adverse by the Daphne claimant, and the placer claim having passed to patent without express exclusion in that instrument of surface width on either side of the lode, there remains available to the Daphne claimant, in connection with his lode, only such superficies as the law itself has reserved from conveyance by the placer patent. That, in accordance with the foregoing views, is held to be fifty feet in width along the lode within the boundaries of the placer, being twenty-five feet on each side of the center of the vein or lode. The Daphne application will, to the extent of the excess of that width therein claimed, be rejected, and your office decision holding to the contrary is reversed.

It may be remarked, in this connection, that the St. Patrick claim, located upon a lode asserted, and apparently conceded by the Mt. Rosa company, also to have been known to exist at the date of the placer application, and not as such included therein, is governed by the same principles; so that, if the facts be as they appear, it follows that the aforesaid conveyance, by the placer patentee, to the original St. Patrick claimants was in fact of so much of the superficial area therein described and which passed under the placer patent as exceeds the width of twenty-five feet on either side of the center of the St. Patrick vein or lode.

No other portion of your office decision need be considered and passed upon.

FOREST RESERVE--LIEU SELECTION--PROCLAMATION OF MAY 22, 1902.

ZACHARY T. HEDGES.

Lands embraced in an application to make lieu selection under the provisions of the act of June 4, 1897, which had not, at the date of the proclamation of May 22, 1902, establishing the Medicine Bow forest reserve, been shown, by proper proofs, to be of the class and character subject to such selection, do not come within the excepting clause of said proclamation.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 31, 1904.* (W. C. P.)

Zachary T. Hedges appealed from your office decision of December 26, 1903, rejecting his application No. 2252, your office series, under act of June 4, 1897 (30 Stat., 36), to select the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 22, and W. $\frac{1}{2}$ SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 15, T. 16 N., R. 81 W., Cheyenne, Wyoming, land district, in lieu of land relinquished to the United States in the Plum Creek forest reserve, Colorado.

Hedges presented his application at the local office April 3, 1900, but did not submit therewith proof of the non-mineral character or unoccupied condition of the land.

By executive proclamation of May 22, 1902 (32 Stat., 2003), the Medicine Bow forest reserve was established, the land applied for being included within its boundaries.

January 7, 1903, your office, having examined Hedges's application, discovered that no non-mineral and non-occupancy affidavits had been filed and required him within sixty days to present such proofs and to cure certain defects in the abstract of title of the relinquished tracts. By letter of March 7, 1903, he was required to publish and post notice of his selection, the land being found to be within six miles of a mining claim. Hedges complied with these requirements, but by letter of November 6, 1903, your office pointed out yet other imperfections in the abstract of title and returned it for further corrections.

Up to this time your office had apparently failed to note the fact that the land applied for had been included in a forest reserve. When the matter came up for final consideration that fact was noticed and by decision of December 26, 1903, the application was rejected, that action being based on departmental decisions in *Kern Oil Co. v. Clarke* (30 L. D., 550), *Gray Eagle Oil Co. v. Clarke* (30 L. D., 570), and *Alvin E. Lake*, November 7, 1902 (unreported), holding that until selections are perfected by submitting the required proofs the selector acquires no rights thereunder as against the government or adverse claimants.

It is contended on appeal that the lands embraced in Hedges's application come within the excepting clause of the proclamation of May 22, 1902, which reads:

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: *Provided*, that this exception shall not continue to apply to any tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing or settlement was made.

This contention can be sustained only upon the hypothesis, assumed in the appeal, that Hedges's imperfect and incomplete application effected a segregation of the land. This premise is unsound. The same proposition was advanced and insisted upon in the motion for review of the decision in *Kern Oil Co. v. Clarke*, *supra*, and in respect thereto the Department, in the decision denying that motion (31 L. D., 288, 301), said:

The proposition can not be sustained. It is contrary to the established doctrine that, under proceedings in the land department to acquire title to public land, no equitable rights in the land are to be regarded as having become vested in the party seeking title until he shall have performed all the conditions and fulfilled all the requirements necessary to establish his right to a patent. It is opposed to the principle that as long as anything remains to be done by the party seeking title, which it is essential should be done before patent can be issued, the right thereto does not vest. The land department is not authorized to accept selections under the act of lands not shown, by proper proofs, to be of the class and character subject to selection. Certainly no right can vest in the selector until there arises the duty on the part of the land department to accept the selection.

The Department has adhered to the position then taken and finds no good reason for a different one now. Hedges's incomplete application did not bring the land covered thereby within the excepting clause of the proclamation establishing the Medicine Bow forest reserve and did not vest in him any right that would prevent the inclusion of such land within the forest reserve.

Your office decision so holding and rejecting his application is affirmed.

HOMESTEAD CLAIM IN BLACK HILLS FOREST RESERVE—INSANE
SETTLER—ACT OF MARCH 3, 1899.

JOHN T. WRIGHT.

The act of March 3, 1899, does not confer upon settlers in the Black Hills forest reserve the right to make entry of irregular-shaped tracts, except where the improvements of the settler can not be saved and protected by making entry according to legal subdivisions, and in such case he may designate what portions of the tracts he desires to have surveyed and may omit any part of his improvements, even though it be his residence, provided the entry be made as nearly as practicable in square form and the tracts are contiguous.

A placer mining claim so located as to interpose between different parts of a legal subdivision of land does not render a settlement claim embracing such legal subdivision noncontiguous.

Where a settler, by his settlement and residence upon and improvement of a tract of land, has "regularly initiated" a claim thereto with the intention of entering the same under the homestead law, and becomes insane before the expiration of the time during which his residence, cultivation and improvement are required by law to be continued in order to entitle him to make proper proof and perfect his claim, the person legally authorized to act for him may, under the provisions of the act of June 8, 1880, make the required proofs and perfect the claim for the benefit of the settler.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 31, 1904.* (E. F. B.)

With your letter of March 7, 1904, you transmit the appeal of Patrick Wright, guardian of John T. Wright, an insane person, from the decision of your office of January 15, 1904, affirming the action of the surveyor general denying his application for a metes and bounds survey, under the provisions of the act of March 3, 1899 (30 Stat., 1074, 1095), of the homestead claim of the said John T. Wright, situate in sections 8 and 17, T. 3 S., R. 4 E., and within the Black Hills forest reserve, South Dakota.

The surveyor general refused to grant the application for the following reasons:

1. It does not appear that said John T. Wright has established residence on the tract proposed for survey.
2. The components of the tract are not contiguous.
3. There is no law or ruling whereby it is provided that a guardian of an insane person may initiate homestead proceedings for him.

The application shows that said John T. Wright is a citizen of the United States, a single man fifty years of age, and is qualified to make homestead entry; that he first went upon the land in 1884, before the survey thereof, and reserved a part of the tract embraced in the original inclosure, but which is not a part of the land now applied for; that in the fall and winter of 1884 and 1885 he left the land on account of sickness and returned to it in September, 1886, when he bought the improvements of an occupant, including a house, which were situated

on what is now shown by the township survey to be the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said section 8 (lot 2), a part of which is included in the application, but not that part on which the house was situated; that he resided there permanently, without intermission, until February 28, 1900, when he was adjudged insane and was confined in the hospital for the insane at Yankton, South Dakota, where he now is; that he improved and cultivated the lands applied for, built irrigation ditches, substantial fences, barn and stable, and otherwise improved the tract to the value of \$6,000; and that applicant is the duly appointed and qualified guardian of the person and property of the said John T. Wright.

A plat exhibited with the application shows that the land applied for is composed of portions of the following legal subdivisions of said section 8: The SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, the four legal subdivisions of the SW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$. Also the N. $\frac{1}{2}$ N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 17.

It also shows that there is a patented placer claim within the SW. $\frac{1}{4}$ of said section 8, lying across the center of said quarter section from east to west and interposed between those portions of the quarter section included in the application. It is alleged in a supplementary statement that the placer is the property of the said John T. Wright, that there are no buildings on the tracts embraced in the application, and that the object in having the land surveyed in the manner as applied for is to make the entry more compact. These are substantially the material facts relied upon in support of the application.

The act of March 3, 1899, *supra*, provides that every person who has made actual *bona fide* settlement and improvement upon lands within the Black Hills forest reservation and established a residence thereon in good faith for the purpose of acquiring a home, prior to September 19, 1898, may enter such lands under the provisions of the homestead law—

and if the lands are so situated that the entry of a legal subdivision, according to existing law, will not embrace the improvements of such settler or claimant, he or she may make application to the surveyor general of the State of South Dakota to have said tract surveyed at the expense of the claimant by metes and bounds and a plat made of the same and filed in the local land office, showing the land embraced in his original settlement which he desires to enter, not to exceed one hundred and sixty acres, and thereupon he shall be allowed to enter said land, as per said plat and survey as a homestead.

It was not intended by that provision to confer upon settlers an arbitrary right to make entry of irregular shaped tracts in said reservation, except in cases where the improvements of the settler cannot for all practical purposes be saved and protected by making entry according to legal subdivisions, and in no case can an entry be allowed of non-contiguous tracts. But if the improvements of the settler cannot be embraced in a legal subdivision or subdivisions, and if they cannot all be embraced within the limits of 160 acres by a segregation survey, the settler may designate portions of the tracts he desires to

have surveyed and may omit any part of his improvements, even though it be his residence, provided his entry is made in square form as nearly as it is practicable to do so.

The residence of John T. Wright was upon that part of his claim which was subsequently shown by the townsite survey to be the NE. $\frac{1}{4}$ SE, $\frac{1}{4}$ of said section 8, but the entire quarter section was within his enclosure together with the portions of the adjoining subdivisions embraced in his application. His residence upon the technical quarter section extended to every part of it and he would now be entitled to make entry of the whole of it by virtue of his residence upon a part thereof except as to the portion covered by the patented placer claim. If the entire quarter section was subject to entry, his settlement claim might be limited to that technical quarter as his improvements cover every legal subdivision thereof, notwithstanding he has improvements upon other lands adjoining, but as part of the section has been disposed of and there is not sufficient land remaining to satisfy his homestead right, his settlement claim was properly extended to other contiguous lands, and his residence upon any part of the claim improved by him or embraced within his inclosure was residence upon the whole and extended to every part of it.

It does not appear when the placer claim was patented, but both the mineral claim and the settlement claim of Wright were initiated while the lands were unsurveyed. The plat submitted with the application shows that the placer claim is located within the technical quarter section on which Wright resided and which he settled upon and improved. As his residence upon that quarter section extended to every part of it, especially since the entire subdivision was within his enclosure, it must be considered as one body or subdivision so far at least as to protect the integrity of his settlement claim. The mere fact that the placer claim has been so located within that subdivision as to interpose between different parts of the quarter section, does not render the settlement claim non-contiguous. The placer claim is merely a segregation of a part of that legal subdivision over which the settlement and residence of Wright extended, as to every part thereof undisposed of by virtue of his residence thereon as one subdivision.

The tract applied for, so far as shown by the plat, appears to be as compact as possible. It embraces three entire legal subdivisions except that portion included in the placer patent and which are contiguous to the other portions of the entry. So that the claim is in square form as near as practicable, in which particular it conforms to the instructions.

It is not intended by this decision to preclude your office from making such investigation hereafter by a special agent or by a hearing before the local officers, as the act contemplates may be done after the entry has been allowed. As no entry can be allowed until after a

survey of the claim, it was the purpose of the act to allow such survey to be made at the expense of the claimant upon a *prima facie* showing, but the act also provides:

That in any case where, upon investigation by a special agent of the Interior Department and after due and proper hearing, it shall be established that an entry interfered with the general water supply, or was detrimental in any way to the public interests, or infringed upon the rights and privileges of other citizens, the Secretary of the Interior shall have authority to cause said entry to be modified or amended, or in his discretion to finally cancel the same.

The other ground upon which the application was denied is that the only way in which a homestead claim can be initiated so as to bring it within the operation of the act of June 8, 1880 (21 Stat., 166), is by an entry of record made prior to the insanity of the entryman. The Commissioner's decision in the case of Eben Bugbee (2 L. D., 102) is cited in support of that ruling.

The act of June 8, 1880, is as follows:

That in all cases in which parties who regularly initiated claims to public lands as settlers thereon according to the provisions of the preemption or homestead laws, have become insane or shall hereafter become insane before the expiration of the time during which their residence, cultivation, or improvement of the land claimed by them is required by law to be continued in order to entitle them to make the proper proof and perfect their claims, it shall be lawful for the required proof and payment to be made for their benefit by any person who may be legally authorized to act for them during their disability, and thereupon their claims shall be perfected and patented, provided it shall be shown by proof satisfactory to the Commissioner of the General Land Office that the parties complied in good faith with the legal requirements up to the time of their becoming insane, and the requirements in homestead entries of an affidavit of allegiance by the applicant in certain cases as a prerequisite to the issuing of the patents shall be dispensed with so far as regards such insane parties.

The act of May 14, 1880 (21 Stat., 140), provided that anyone who settled upon public land, whether surveyed or unsurveyed, with the intention of entering it under the homestead law, shall be allowed the same time to file his homestead application as was allowed to settlers under the preemption law. Under the act a homestead claim may be initiated by settlement, and when such claim is made of record, the right of the settler relates back to the date of settlement the same as if he had settled under the preemption law; that is, to the date when his claim was initiated.

The only right that a settler acquires to public lands under the homestead law prior to the issuance of the final certificate, is an inchoate right. That right can be initiated as effectively by settlement as by entry, and as to unsurveyed lands, it is the only manner by which it can be initiated.

In this case, the settler, by his settlement and residence upon and improvement of the tracts of unsurveyed lands, had, within both the letter and spirit of the act of May 14, 1880, "regularly initiated" a

claim to such lands and had by such settlement evinced a purpose and intention of claiming the same under the homestead law. As against every one but the government he had acquired as complete a right to the land then unsurveyed by such acts of settlement as could have been acquired by an entry of record if the land had been surveyed. He had therefore within the strict letter of the act of June 8, 1880, regularly initiated his claim to said land, and having become insane before the expiration of the time during which his residence, cultivation or improvement of the land claimed by him is required by law to be continued in order to entitle him to make proper proof and to perfect his claim, the act expressly confers upon the person legally authorized to act for him authority to make the required proofs and to perfect such claim for the benefit of the settler.

A sufficient *prima facie* showing having been made by the application, you will instruct the surveyor general to have the survey made, at the expense of appellant, and filed in the local land office, and you will allow the appellant, as guardian of the settler, John T. Wright, to make entry according to said plat and survey, if a proper application is presented to the local office, with all the necessary preliminary proofs.

Your decision is reversed.

OKLAHOMA LANDS—SETTLEMENT—ACT OF JUNE 6, 1900.

KINMAN *v.* APPLEBY (ON REVIEW).

Possessory rights to public lands, acquired by settlement, may be the subject of lease; and the lessee in such case can establish no claim in his own right as a settler adverse to his lessor.

One who at the date of the act of June 6, 1900, was by force and fraud deprived of the possession of a tract of land within the "neutral strip" upon which he had theretofore settled and made improvements, was nevertheless a settler upon said tract within the meaning of that act and entitled to the benefits of its provisions.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 2, 1904.* (J. R. W.)

William Kinman filed a motion for review of departmental decision of July 14, 1903 (32 L. D., 190), dismissing his contest against James M. Appleby's homestead entry for the NE. $\frac{1}{4}$ of Sec. 4, T. 7 N., R. 14 W., Elreno, Oklahoma. Said motion was entertained October 3, 1903. Briefs have been served and filed, and the case is now here for final action.

August 6, 1901, Appleby made homestead entry for the land, claiming right under the act of June 6, 1900 (31 Stat., 672, 680), under the provision:

That the settlers who located on that part of said lands called and known as the "neutral strip" shall have preference right for thirty days on the lands upon which they have located and improved.

On the same day Kinman filed a contest affidavit that he—

was a settler on said tract prior to the issuance of the President's proclamation of July 4, 1901, and was entitled to exercise the preference right of entry for such land as provided in such proclamation; that this affiant has the superior right to said tract of land for the reason that this affiant settled on said land prior to any settlement by the said entryman.

August 29, 1901, the Department ordered a hearing, which was held, both parties fully participating. The local office found that Kinman settled on the land in 1897 and resided there till January, 1899, and made numerous attempts to get a homestead entry on it, when he leased the land and improvements to one Easterwood, and removed elsewhere;

that Mr. Kinman had abandoned this land and was not an actual settler nor in possession of the land after January, 1899. . . . June 6, 1900, . . . Easterwood brothers were in actual possession of this land, and in our judgment were the owners at that time, and were the ones who would come within the meaning of that act. It is claimed that they were the tenants of Kinman, and as such could not assert any claim as against him, their landlord. . . . Kinman could not acquire any rights, nor exercise any control over the land because it was public domain and had not yet become subject to settlement, nor to the exercise of any individual rights of any person. . . . Therefore the relation of landlord and tenant had not existed between Kinman and the Easterwoods.

Your office affirmed this action, and that decision was affirmed by the Department. The motion for review is based on two grounds—viz: error in holding that Kinman lost his rights as a settler, and error in holding Appleby's qualification was immaterial.

Few of the facts in the case are disputed. In 1897 plaintiff bought the rights and improvements of a former occupant and with his wife settled on the land. He built a dugout, cleared, fenced, and cultivated part of it each year, and maintained actual residence to January, 1899. This was with intent to make it his home and to acquire title by entry, as his correspondence with your office in 1897, claiming right and applying to make homestead entry, indubitably shows. In January, 1899, he leased the land for twelve months to two brothers, Easterwood, but reserved some rights of control as to cutting timber, the use of a garden patch, and left there some personal property. Kinman at this time moved from his place to a proposed townsite, several miles away, where his wife was appointed postmaster, and afterward they moved with the post-office to Hardin, about twenty-five miles away. While Kinman was on the land he was arrested and imprisoned for cutting timber on government land (this claim), and after leaving was arrested and imprisoned for taking whisky into an Indian reservation. The two imprisonments included about seven and a half months of the time from August 28, 1900, to June 20, 1901, of which about two and a half months were in 1900. It does not appear that he was ever tried or convicted on either charge. Until after Appleby's entry Kinman had not re-established residence on the land.

The conflict of testimony is as to facts after January 1, 1900. Kinman testified that he was prevented by Easterwood's threats of violence from resuming possession at expiration of the lease. One of the brothers, H. J. Easterwood, at expiration of the lease, which he said was made to his brother, set up a settlement claim to the premises. When the lease expired, early in February, 1900, Mrs. Kinman attempted to go on the premises, and the two Easterwoods seeing her coming met her at the entrance, one having a cane or club and, as H. J. Easterwood testified, forcibly prevented her entrance. She testifies that they threatened to kill Kinman if he attempted to return. Easterwood's testimony is evasive to a degree, much impairing his credibility. He denies threats to do violence to Kinman, but admits that from July, 1899, his relations to Kinman have not been friendly, especially after January, or February, 1900. He says he "would have objected" to Kinman's return; that at the time the lease was made he expected Kinman to return to the place. He can not fix the time when he conceived the purpose of excluding Kinman and claiming the place himself, but his conduct shows that it was before Mrs. Kinman's attempted return in February, 1900.

Kinman testifies that he was informed by several persons he names of threats made by Easterwood. One of these witnesses testified that he asked why Kinman did not come back to his farm, and Easterwood replied: "He knows better than to come back here. I will winchester him in a holy minute if he comes back here until he pays me the \$900 he owes me." The witness says he did not want Kinman hurt and so told him the threat. The evidence shows that after getting possession of the place by a lease, the Easterwoods determined to hold possession in violation to their obligation to Kinman; that by force they excluded Mrs. Kinman from going upon it; and further indicates strongly that they threatened violence to Kinman should he attempt to return. Holding the place by this means, the Easterwoods in the fall of 1900 sold the improvements and possessory right to one Sandifer, who took possession from them and remained to August, 1901, making considerable improvement. He testified that he did not know until about July 1, 1901, that Kinman claimed the land. About May 1, 1901, Sandifer sold to Appleby, who moved onto the place June 15, 1901, Sandifer staying with him until August, 1901.

July, 1901, Kinman being afraid to return, Mrs. Kinman got a team and driver to take her and a load of household goods to the land. They arrived about midnight, July 3, and she began to erect a tent in which to live. While they were unloading the goods, Sandifer and Appleby came with shotguns, demanding an explanation of her intention. Mrs. Kinman told them she was there to resume possession. They ordered her to leave and to take her property. Sandifer began to reload the things, and she threw them out as fast as he put them in. He seized the reins to drive the team out, she took hold of the reins

to prevent it. His strength prevailed, he jerked the reins from her, and drove the team out into the road, leaving her, with some things, on the land. The driver, at Sandifer's order, took the team and things in the wagon back to whence they started.

The driver and Mrs. Kinman testify that Sandifer cursed and threatened violence, and laid violent hands upon her, and that Appleby pointed a shotgun at them. While much of this is denied by Sandifer and Appleby, acts of violence are admitted. Mrs. Kinman hid under a log in a briar patch, and remained till the morning of July 5, when she went away. Sandifer loaded and returned her goods. Their conduct shows that they used violence enough to accomplish their purpose, and would have used more had that been necessary.

Appleby claims that he bought out Sandifer without knowledge of Kinman's claim; that Kinman did not settle with intent to make the land his home, but only to appropriate the timber. His effort in 1897 to get a homestead entry negatives this claim, and the clearing of timber was necessary to bring the land into cultivation.

The controlling question is, whether Kinman was June 6, 1900, and before, a settler on the land, and has not since abandoned the right given by the act. As Appleby admits he was not a settler on the land till June 15, 1901, he must yield to Kinman, if Kinman was a settler June 6, 1900, and has not abandoned his right. It is therefore not a question of priority, but one of existence of Kinman's right.

Appleby's right is asserted as purchaser from Sandifer, who purchased from H. J. Easterwood, who, alone or with his brother, had actual possession June 6, 1900. It is immaterial whether H. J. Easterwood was party to the lease or not, as he entered with his brother under the lease and with notice of it. Whatever obligation rested on his brother rested on him to restore possession to Kinman, the lessor. Though Kinman at the time of his lease, January, 1899, being a settler on reserved lands, had no right as against the government or the reservees, his right was good against all the world, except the government and the reservees, and such person as should derive a better right from the government under some law. Of these naked possessory rights the court, in *Lamb v. Davenport* (18 Wall., 307, 314), held:

They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid. . . . parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where Congress had imposed restrictions on such contracts.

Quoting this language, the court went further in *Tarpey v. Madsen* (178 U. S., 215, 221), and speaking of mere temporary occupation with intent to acquire title held that:

Such occupation is often accompanied by buildings and enclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh

vegetables. These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their occupation, or compel them to leave. Their possessory rights are recognized as of value and made the subjects of barter and sale.

A lease is but one of the lesser estates that may be carved out of a fee, and it is the necessary deduction from these decisions that, except in cases where Congress has imposed restrictions on such contracts, possessory rights upon public lands may be the subject of lease, as well as of barter and sale. When such rights are made the subject of lease, the contract is valid between the parties, and the rights of the parties are governed by the law of landlord and tenant. To hold otherwise would invite fraud, violence, and anarchy in the public land localities, and necessitate a rewriting of the law in the states and territories where the public lands are situated. The Department has never so held, but on the contrary that one having the relation of tenant to another can establish no claim in his own right as settler on such land adverse to his lessor. *Franklin v. Murch* (10 L. D., 582, 583); *McDonald v. Jaramilla* (10 L. D., 276); *Downing v. Chapman* (18 L. D., 361); *Atkins v. Macy et al.* (28 L. D., 395). Among the obligations of a tenant of prime importance to the peace of society and the security of property is the duty to restore the possession to him from whom he received it. No decision of the Department holding the contrary has been found, and, it is believed, none exists. If any such does exist, it is manifestly erroneous, and is not entitled to be regarded as authority.

It follows that when Easterwood's lease expired, he was bound to restore the possession to his lessor. His determination to hold the land for himself and enforcement of that unlawful purpose by threats and actual violence, with the means and disposition to use whatever force was necessary to accomplish that unlawful purpose, excused Kinman's failure to return to the land. *Dorgan v. Pitt* (6 L. D., 616); *Underwood v. Eves* (2 L. D., 600, 602); *Kelso v. Hickman* (26 L. D., 616); *Vaughn et al. v. Gammon* (27 L. D., 438); *Johnston v. Harris* (20 L. D., 183); *Reid v. Plummer's Heirs* (12 L. D., 562); *Parsons v. Hughes* (8 L. D., 593); *Platt et al. v. Graham* (7 L. D., 249). Kinman having the right of possession June 6, 1900, and being prevented only by the fraud and violence of Easterwood from actual possession, must be regarded as in possession and to be entitled to the benefit of the act. As he claimed the right on the first day that there was opportunity to exercise it, he has been guilty of no laches, and has never given room for a presumption of abandonment.

It is not necessary in the case to decide whether Appleby's entry, based on a settlement admittedly made after June 6, 1900, could stand if attacked by a contest based on that ground alone. As Kinman was a settler long prior to June 6, 1900, the controlling question is, had Kinman lost that right.

Nor is it a question of Appleby's good faith, notice to him, or innocence of violence. As shown above, the record does not show him to be innocent. He participated in acts of violence excluding the Kinmans. But had he not done so, he was merely the receiver of what his predecessor claimants had obtained possession by fraud and force. Estoppel arises only by act or laches of the party, not due to coercion. A tenant forcibly holding over can not convey the improvements of his lessor, and has no agency for such purpose. Appleby can not hold Kinman's property so obtained against the rightful claimant.

Departmental decision of July 14, 1903, is recalled and vacated. The decisions of your office and the local office are reversed. Appleby's entry will be canceled and Kinman's entry will be allowed.

SWAMP GRANT—ADJUSTMENT—FIELD NOTES OF SURVEY.

STATE OF MINNESOTA.

Report to the President of the United States relative to departmental decision of March 16, 1903, prescribing certain rules governing the adjustment of the grant of swamp and overflowed lands made to the State of Minnesota by the act of March 12, 1860.

Secretary Hitchcock to the President of the United States, March 19,
(F. L. C.) 1904. (G. B. G.)

By Executive reference of the 8th instant, I am asked for a report upon the matter of a decision of this Department, dated March 16, 1903, in the case of the State of Minnesota (32 L. D., 65), prescribing certain rules governing the adjustment of the grant of swamp and overflowed lands made to that State by the act of March 12, 1860 (12 Stat., 3).

The matter arose upon a communication to you from Representative J. Adam Bede, submitting for your consideration a petition, numerous signed by citizens of Northern Minnesota, setting forth their objections to said decision and praying "that you may have this matter carefully investigated by your Attorney-General, and that pending his report you order that the issue of patents to the State of Minnesota for swamp lands be suspended."

The petition recites, in substance:

(1) That on March 16, 1903, the Secretary of the Interior by his said decision of that date instructed the Commissioner of the General Land Office that the claim of the State of Minnesota to swamp lands would be determined by the field-notes of survey, "which field notes were thereafter to be taken as conclusive evidence of the swampy and non-swampy character of said lands," whereas for many years prior to said instructions the field-notes of survey were only admitted by the

Department as *prima facie* evidence of the swampy or non-swampy character of said lands.

(2) That these instructions were given upon the theory that an agreement had been entered into by the State and the land department that the swamp land selections should be made by the State from the field-notes of survey, instead of by examinations in the field, and that such an agreement was and is without authority of law.

(3) That this new rule of the land department is impracticable and unjust, in that under the present system of public surveys the field notes thereof afford but imperfect data from which to determine the character of any of the land, and no data whatever from which to determine the character of the four inside forty-acre tracts within each section of six hundred and forty acres.

(4) That the rule of adjustment applies to all future surveys, and that inasmuch as the State of Minnesota has long ago granted the greater part of her swamp and overflowed lands in Northern Minnesota to railroads, the method adopted by the Department opens the door and offers a premium for fraudulent surveys, "placing unlimited power in the hands of the deputy or contract surveyor," and: "That under this rule no opportunity is given to even assail a fraudulent survey, and the Department undertakes to establish a rule of evidence for the courts which must inevitably lead to a long and vexatious litigation to determine the title to vast areas of public lands."

The history of the past partial adjustment of the grant of swamp and overflowed lands to the State of Minnesota and the reasons which induced the change in methods of adjustment are fully set out in the decision complained of, and need not be repeated here.

Upon the subject-matter of the petition it may be said that most of the statements of fact therein made are open to objection, and that the deductions therefrom by the petitioners are wholly unwarranted.

(1) In the first place, the rule of adjustment complained of does not contemplate that all claims of the State for swamp and overflowed lands shall be determined by the field-notes of survey alone, it being specifically provided that all existing contests and controversies between the State and an actual *bona fide* settler as to the character of lands claimed by such settler should be determined upon evidence produced by the parties at a hearing to be held for that purpose, and, in a letter of instructions by the Commissioner of the General Land Office to the local land officers in the State of Minnesota, which was approved by the Secretary of the Interior, those officers were instructed that in instances where a person had prior to the decision complained of settled upon lands, whether then surveyed or thereafter surveyed, which may upon survey be returned as swamp and overflowed lands, such settler shall, if he make timely assertion of his claim by filing his application in the local land office, be treated as having an existing contest or con-

troversy within the meaning of these instructions. See direction No. 1, at page 70, of the decision.

(2) It is not true, as stated in the petition, that the plan of adjustment complained of was made "upon the theory that an agreement had been entered into by the State and the Department that the swamp-land selections should be made by the State from the field-notes of survey, instead of by examination in the field," if by this it is meant to state that the Department recognized that any agreement having the force and effect of a contract was ever entered into between the parties. Such idea is expressly disclaimed in the decision itself. At page 69 of the decision, referring to the question of identification of lands granted to the several States as swamp and overflowed lands, it was said:

with a view to the selection of the best and most practicable plan, but not to obligate himself or his successors by any agreement partaking of the nature of a contract, the Secretary of the Interior, through the Commissioner of the General Land Office, submitted to the several States two methods of identifying the swamp lands, and suggested as the more practicable method that of identifying them by the field notes of the public surveys. The lands had to be surveyed, and observations and notes of their character in this respect could then be made with but little difficulty and with no additional expense. This method was a fair one for the United States, because the surveyors were to be selected and paid under the direction of the Secretary of the Interior. Their work was to be done under his direction and to the satisfaction of the Commissioner of the General Land Office. The State of Minnesota assented to this plan of identification or adjustment, not by way of contract, but because the Secretary of the Interior, the Commissioner of the General Land Office, the Governor of the State and the legislature of the State concurred in the opinion that it was the best and most suitable method. They agreed upon it in the sense that they all concurred in the view that it was the best thing to do. It was uniformly followed for a quarter of a century, and during that time operated quite generally to the satisfaction of the United States and the State.

(3) Upon the question of the reliability of field-notes of survey as evidencing the character of lands in the State of Minnesota, with reference to their swampy or non-swampy character, it will be enough to say that there is no plan which has ever been suggested for the identification of these lands that is not open to some objection, and the field-note plan would seem to be of all the least objectionable and a great saving to the government over any plan which contemplates an examination in the field. The question of the State's right to these lands depends, not upon their present character, but upon their character at the date of the grant, March 12, 1860. More than forty years have elapsed since that time, and the testimony of witnesses as to their character then must of necessity be of little value. It is true that the interior lines of a section are not staked upon the ground by the surveyor, and the field-notes of the exterior lines may in some cases be misleading as to the inside forty-acre tracts of such sections and may lead to an erroneous judgment as to their character; but it is believed

that as between the government and the State these errors will equalize themselves in such manner that substantial justice will result from the field-note plan of adjustment, and where the rights of citizens antedating these regulations are involved a liberal plan of protection has been incorporated into the scheme.

(4) It is true that the plan of adjustment complained of applies to lands to be hereafter surveyed, but it can not be admitted, and is not true, that such plan opens the door and offers a premium for fraudulent surveys, that it places "unlimited power in the hands of the deputy or contract surveyor," or that under this plan "no opportunity is given to even assail a fraudulent survey." On the contrary, it is calculated to induce greater care and more correct returns in the making of these surveys. The decision complained of directed that "the best energies of the proper division of your office (the General Land Office) should be devoted to obtaining such accurate surveys and notations of the character of the lands which may be hereafter surveyed in this State as will obviate the existing cause of contest and controversy."

The men who make these surveys are officers of the United States, and the presumption is that they will do their duty. Moreover, under the present system, their work is checked up and verified by an examiner of surveys in the field, so that the chances of either fraud or serious error are very remote. If it should result that fraud or gross error be perpetrated, instead of its being true, as alleged, that no opportunity is given to assail such survey, on the contrary any sufficient *prima facie* showing of such fraud or gross error, from any source, would be entertained and an investigation ordered in the field, and if, upon such investigation, such fraud or gross error were shown it would be the duty of this Department to either set aside the survey or disregard it in the adjustment of the grant. Indeed, since the present plan of adjustment was adopted an investigation of an old survey in the State of Minnesota has been directed to be made in the field upon the complaint of the Chippewa Indians, who urged that they were being deprived of a large body of pine lands because of fraudulent or grossly erroneous returns of the surveyor designating them as swamp and overflowed lands.

In conclusion, I beg to submit that the grant of swamp and overflowed lands made to the several States by the act of September 28, 1850 (9 Stat., 519), made it the duty of the Secretary of the Interior "to make out accurate lists and plats" of such lands, to "transmit the same" to the governors of such States, and "cause a patent to be issued to the State therefor." The said act of March 12, 1860, in making the grant to the State of Minnesota, extended these provisions to that State. One of the first, if not the very first, acts of the land department in the administration of the act of 1850 was the designation of

the surveyors-general of the several States as the representative in the field of the Secretary of the Interior to prepare lists and plats of swamp and overflowed lands, and these officers were on November 21, 1850, instructed to prepare the same from "the field notes of surveys" on file in their respective offices, upon condition that "the authorities of the State are willing to adopt these as the basis of these lists." Most of the States agreed to this plan of adjustment, and where it has been adhered to the adjustment has proceeded with satisfaction to all parties concerned. In instances where it has been departed from great confusion has resulted, the final adjustment of the grant has been delayed, and both the government and State have been put to great trouble and expense. The field-note plan of adjustment had been in force in the State of Minnesota for about twenty-six years when, on April 7, 1886, this Department rendered a decision (4 L. D., 479), which was made the basis of the practice which followed and obtained until the rendition of the decision now complained of by the petitioners, of permitting either a settler, an applicant to enter under the public land laws, or the United States to question the return of the United States surveyor-general as to the character of lands in that State, but at the same time denying the State the right to question such return. As was said in the decision complained of: "The practical operation of the scheme . . . has been to deny to the State title to some lands which were returned by the surveyor as swamp, and at the same time permit the United States to retain all lands returned by the surveyor as not swamp land, without regard to the fact whether they were swamp or not." It is not known what induced this Department to depart from the field-note plan of adjustment so long in force in the State of Minnesota, unless it was because of alleged fraud in the public surveys of that State. This would seem to be the ground upon which its said decision of April 7, 1886, was based. However this may be, the practice which followed was not justified by anything said in that decision, and it has been found to be a prolific source of fraud and perjury, and, as said in the decision complained of, "cumbersome, expensive, slow, litigious, and generally unsatisfactory."

It should be added that in the matter of the swamp-land grant to the State of California, the Congress of the United States, in view of the chaotic conditions existing in that State because of the plan of adjustment there in force, expressly provided by the act of July 23, 1866 (14 Stat., 218), that that grant should be adjusted upon the field-notes of survey, showing in this instance congressional recognition of the field-note plan of adjustment.

No method of identification of swamp and overflowed lands in the State of Minnesota has been prescribed by Congress, but, as has been said, the duty of identifying them is cast upon the Secretary of the Interior for the time being, and that officer is left to his own devices

in determining the questions of fact involved in such identification. These questions are within his exclusive jurisdiction and cannot be reviewed by the courts.

As bearing upon the question of public sentiment in the State of Minnesota, and the aims and purposes of the petitioners and their aiders and abettors, I transmit herewith for your consideration copy of a letter recently received by this Department from Hon. Knute Nelson, United States Senator from that State. A copy of the decision involved is also transmitted.

ARID LAND—DESERT-LAND ENTRY—ACT OF JUNE 17, 1902.

JAMES PAGE.

Lands withdrawn from entry, except under the homestead laws, in accordance with the provisions of the act of June 17, 1902, are not, during the continuance of such withdrawal, subject to entry under the desert-land laws.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 30, 1904.* (A. S. T.)

On December 2, 1903, the register of the land office at Montrose, Colorado, forwarded to your office a paper purporting to be the application of James Page to make desert land entry for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 33, T. 1 S., and lots 1, 2, 3, and 4 of Sec. 4, T. 2 S., R. 1 E., Montrose land district, Colorado.

An examination of said application shows that it was not signed by said Page, nor any one else, but Walter S. Sullivan, county judge of Mesa county, Colorado, certifies that it was sworn to before him on September 8, 1903.

The local officers rejected the application for the reason that the lands applied for were withdrawn from entry, except under the homestead law, by your office letter "E" of June 17, 1902.

Page appealed from the action of the local officers to your office, where, on October 28, 1903, a decision was rendered affirming the action of the local officers and rejecting the application, and from that decision he has appealed to this Department by a petition, wherein he alleges, in substance, that the lands in question were withdrawn, together with other lands in the same locality, with a view of ascertaining by a survey whether or not they were susceptible of irrigation by a proposed scheme of irrigation by the government; that said survey has been made and that it is found that the lands in question can not be irrigated by means of the proposed government plan, for the reason that said lands are situated about one hundred feet higher than the proposed irrigation ditch. He therefore prays that said lands be restored to entry, as provided in the third section of the act of

June 17, 1902 (32 Stat., 388), and that his said application be allowed. He alleges that he and certain other persons associated with him have commenced a system of irrigation whereby he believes said lands can be successfully irrigated, and that having filed said application and commenced an expensive system of irrigation for the reclamation of said lands he has acquired equitable rights in the land which are entitled to consideration by this Department.

Your office properly held that the lands having been withdrawn from entry, except under the homestead laws, Page acquired no rights by filing his application, and the fact that he may have commenced a system of irrigation for the reclamation of land to which he had no valid claim gave him no interest in or right to the land.

It is noted that the register of the local office, in his letter transmitting the application, reports that the applications of Page and others, filed on October 9, 1903, embrace about two thousand acres of land, and that since said applications were filed homestead applications have been filed for about fourteen hundred acres of this same land, which homestead applications have been suspended to await final action on said desert land applications: Therefore, if the land in question is covered by said homestead applications, it would not benefit Page to have said lands restored to entry, since he has acquired no rights by filing his application, and the homestead applications would have priority over any application he might hereafter file.

Your said decision is correct and is affirmed.

WITHDRAWAL OF LANDS UNDER THE RECLAMATION ACT OF JUNE
17, 1902.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
UNITED STATES GEOLOGICAL SURVEY.

1. The withdrawal of lands under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), is principally for the purpose of making the extensive surveys and careful engineering investigations necessary to determine the feasibility of any particular irrigation project. Even if the project is feasible, only a portion of the lands withdrawn will be irrigated. The mere fact that surveys are in progress is no indication whatever that the works will be built. Until the surveys have been completed, it will be impossible to state how much water will be available, what lands will be watered, or whether the cost will be too great to justify the undertaking.

2. The fourth section of said act provides that the Secretary of the Interior "shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the

acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence."

3. Until this public notice has been issued by the Secretary of the Interior, it will be impossible to give information concerning any particular tract or any of the details required by the public notice.

4. Homestead entries may be made for the lands withdrawn as irrigable under this act in accordance with the general laws and regulations relating to this class of entries. All the public lands under an irrigation project will be divided into farm units containing such area of irrigable land as, in the opinion of the Secretary of the Interior, will be necessary for the support of a family. These areas may vary in any one project from 40 acres to 160 acres, in accordance with the character of the soil and the relation of the lands to the irrigation system. Each farm unit will contain as nearly as possible the same average amount of irrigable land suitably situated for irrigation, and, if necessary, for drainage.

5. The entries are not subject to the commutation provisions of the homestead laws.

6. Actual and continuous residence on the land is required, in accordance with the homestead laws.

7. The entryman will be required to take water from the Government irrigation system and to pay in annual installments, not exceeding ten, the proportionate amount charged against the land included in his entry.

8. Before being entitled to a patent for the land, the entryman must pay the entire charges for the water, and must show that he has reclaimed at least one-half the total irrigable area of his entry for agricultural purposes.

9. A failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under the act, as well as all money paid thereon.

10. Until the construction of the irrigation system has advanced to such an extent that water can be furnished for the irrigation of the lands, it will be difficult, if not impossible, to make a living upon them; but those filing will not, on that account, be excused from residing thereon, the homestead laws requiring that actual bona fide residence be established within six months from the date of the filing of the applications, and continuously maintained.

11. Failure to comply in good faith with the provisions of the law concerning residence will render the entry subject to cancellation.

12. No specific rulings have been made concerning the modification of the homestead laws as applicable to entries under the Reclamation Act. Except where modified by the terms of this act the entries will be made in accordance with the general rulings concerning the homestead laws. Information concerning them can be obtained from the circulars issued by the General Land Office.

CHAS. D. WALCOTT,
Director.

Approved, March 31, 1904.

E. A. HITCHCOCK, *Secretary.*

AFFIDAVITS, PROOFS AND OATHS—SECTION 2294, R. S.—ACT OF MARCH
4, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April 1, 1904.*

Registers and Receivers, U. S. Land Offices.

GENTLEMEN: Your attention is called to the provisions of an act of Congress entitled "An act to amend the act of Congress of March eleventh, nineteen hundred and two, relating to homesteads," approved March 4, 1904 (Public No. 37), a copy of which is hereto attached.

Under its provisions section 2294, R. S., as amended by the act of March 11, 1902 (32 Stat., 63), is again amended so that all proofs, affidavits, and oaths of any kind made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated.

In case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located, the applicant must show by affidavit that it was taken before the nearest or most accessible officer qualified to take such affidavits, proofs, and oaths in the land districts in which the lands applied for are located.

Such showing by affidavit need not be made, however, in making *final proof* if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed.

Proofs, affidavits, and oaths which have heretofore been so made are also validated by the act.

You will observe that by this act the only changes made in the act of March 11, 1902 (32 Stat., 63), amending section 2294, R. S., circular

of instructions, March 26, 1902 [31 L. D., 274], are that proofs, affidavits, and oaths of any kind required to be made by applicants and entrymen under the various land laws named in the act may, in consequence of this act of March 4, 1904, be made in the county or parish in which the land is situated, although the place of making same may be outside the proper land district, and such act also validates all such proofs or affidavits which have heretofore been so made and duly subscribed.

Very respectfully,

W. A. RICHARDS,
Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

[PUBLIC—No. 37.]

AN ACT to amend the Act of Congress of March eleventh, nineteen hundred and two, relating to homesteads.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An act to amend section twenty-two hundred and ninety-four of the Revised Statutes of the United States," approved March eleventh, nineteen hundred and two, be, and the same is hereby, amended to read as follows:

"That section twenty-two hundred and ninety-four of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

"SEC. 2294. That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, pre-emption, timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated: *Provided,* That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, or which have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law. That if any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, willfully, or corruptly swear falsely to any material matter contained in said proofs, affidavits, or oaths he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register. That the fees for entries and for final proofs, when made before any other officer than the register and receiver, shall be as follows:

"For each affidavit, twenty-five cents.

"For each deposition of claimant or witness, when not prepared by the officer, twenty-five cents.

“For each deposition of claimant or witness, prepared by the officer, one dollar.

“Any officer demanding or receiving a greater sum for such service shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by a fine not exceeding one hundred dollars.”

Approved, March 4, 1904.

AFFIDAVITS AND PROOFS MADE OUTSIDE OF LAND DISTRICT—ACT OF
MARCH 9, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 1, 1904.

Registers and Receivers, U. S. Land Offices.

GENTLEMEN: Your attention is called to the provisions of an act of Congress entitled “An act relating to applications, declaratory statements, entries, and final proofs under the homestead and other land laws, and to confirm the same in certain cases when made outside the land district within which the land is situated,” approved March 9, 1904 (Public No. 43), a copy of which is hereto attached.

Under its provisions all affidavits in connection with applications and entries, and all final proofs under the various land laws of the United States, which have been received by you prior to the passage of the act, but which were made outside the land district contrary to the provisions of the act of March 11, 1902 [32 Stat., 63], are confirmed, provided no fraud has been practiced by the entryman, and that there are no prior adverse claimants to the land described in the entry, and that no other reason exists why the title should not vest in the entryman.

You will, therefore, proceed to consider all cases that are pending before your respective offices, which come under the provisions of the act.

In cases where no action has been taken by your office, and in which full payment has been made and no fraud is found, and to which there is no prior adverse claim and no objection thereto appears, except that they were made outside the land district, you will issue final papers and transmit them to this office, the same as in other cases. Where you have taken action and advised the entryman of the rejection of his application, affidavits, or proofs, and the case is still pending in your office, you will at once advise the party or parties in interest of the relief afforded them by the act and that their cases will be relieved from suspension upon payment of any amounts that may be due. Upon receipt of all proper payments, no other objection appearing, you will examine and dispose of each case in the manner applicable thereto.

In any case in which you are satisfied that fraud has been practiced by the entryman, or that there is a prior adverse claim, or that some

other reason exists why the title should not vest in the entryman, you will reject the application, declaratory statement, entry, or final proof, giving your reasons for such action and giving the usual notice to the entryman, notifying him of his right to appeal from your decision in the usual way.

Very respectfully,

W. A. RICHARDS, *Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

[PUBLIC—No. 43.]

AN ACT relating to applications, declaratory statements, entries, and final proofs under the homestead and other land laws, and to confirm the same in certain cases when made outside of the land district within which the land is situated.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving an application, declaratory statement, entry, or final proof under the homestead or other land laws, and that there was no fraud practiced by the entryman, and that there are no prior adverse claimants to the land described in the entry, and that no other reason why the title should not vest in the entryman exists, except that said application, declaratory statement, entry, or proof was not made within the land district in which the lands applied for are situated, as provided by the act of March eleventh, nineteen hundred and two, such entry or proof shall be confirmed.

SEC. 2. That this act shall be in force from and after its passage and approval.

Approved, March 9, 1904.

APPLICATION FOR SURVEY—CORRECTION OF SURVEY.

J. CALLANAN.

Where a meandered lake is shown on the township plat, the land department would not be justified in concluding that such lake did not exist at the time of survey, and in assuming jurisdiction to survey the lands embraced within the meander lines, on the mere showing that within such lines there are ridges and knobs that were not covered with water at the time of the survey, in the absence of proof that the topography and configuration of the adjacent lands is such that no basin could have existed substantially in the form and to the extent indicated by the survey.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 1, 1904.* (E. F. B.)

This petition is filed by J. Callanan, grantee of Monona county, Iowa, for a rehearing of his application for the survey of alleged swamp lands in township 83 N., R. 45 W., and in townships 83 and 84 N., R. 46 W., consisting of about 1,200 acres. The area embraced within the limits described in the application is designated on the

township plat as a meandered lake known as Blue Lake. Callanan's application was rejected by decision of the Department of May 11, 1901, and a motion for review of said decision was denied October 22, 1901.

In his application he alleges:

That there is not now and never was a lake of water upon said land except a small body of water running along the section line between sections 1 and 2, township 83, range 46, and extending up into section 35, twp. 84, range 46, but that all of the other portion of the land embraced within the meander lines as run by the government surveyor *is not now* covered with water and has never been except in times of exceeding high water; that there are some places on said unsurveyed land that is low, wet and marshy and covered with bogs, reeds and pond grass; that the greater portion of said land is fit for cultivation and many acres of it has been cultivated for many years past.

* * * * *

That there is not now and was not at the time of the government survey any reason or facts that could possibly be construed as justifying the meander lines as established by the government survey and that said lines so run and said survey are wholly and unqualifiedly wrong and are so purely wrong as to leave no doubt but what a fraud has been perpetrated upon the government by the failure to survey a portion of the public domain, thus depriving the government of a part of her revenue and depriving her citizens from acquiring title to her public lands.

The application was rejected because the evidence submitted in support of it did not show that there was not a body of water at the time of the survey as would justify the meandered line, although the land may now be fit for cultivation and is not covered with water except at times of exceeding high water.

Additional evidence has since been filed, consisting of the affidavit of L. F. Wakefield, a surveyor, who took elevations inside of the meander line of Blue Lake, and prepared a plat showing the different stations, which is exhibited with his affidavit. The stations indicated upon said plat are all within sections 1 and 12 of township 83 N., R. 46 W. It is shown by this testimony that within the meander line there is a ridge lying across the line between sections 1 and 12 about a half a mile long. Station 2 on this ridge is 11.4 feet above the water level. Stations 3 and 5 on the same ridge are 6.5 and 7.8 feet, respectively, above the level. Station 4, just outside of the meander line, is 6.7 feet above the level. Stations 8 and 9 within the meander line are 7.0 and 14.3 feet above the level. The last-mentioned station is near the foot of the ridge. These stations are along the east meander line. On the west meander the surveyor established station 7 in a grove of cottonwood trees. This station is 7.3 feet above the level. The level referred to is the level of the lake at the time of the survey, but it was stated by the surveyor that the water in the lake was five feet higher than it had been at any time for several years past. The general topography of the surveyed land at and beyond the rim of the lake is not given, and there is no evidence showing that the configura-

tion of the surveyed lands adjacent to the rim of the lake is such that the meander could not be possibly justified. Nothing is shown by the levels taken by the witness except that within the meander line there was a ridge and high places that probably were not covered with water, but it furnishes no evidence that the configuration of the shore could not possibly justify the meander line.

Turning to the field notes of the survey of this township we find that along that part of the east meander line where the levels were taken, the deputy surveyor described the rim of the lake as "Low Willow Banks." The banks along the meander line in this township are generally described as low and muddy. In the general description of the township the deputy says: "The lake was at one time not far from the bed of the Missouri river. Water clear and deep and fish abundant."

If no other fact should be developed by an examination in the field except what is shown by the testimony of Wakefield, there would not be sufficient proof of error in the meander to justify a resurvey. There is no evidence that the level of the meander line as run by the surveyor is not substantially the same throughout, or that the topography and configuration of the adjacent surveyed lands is such that no basin could have existed substantially in the form and to the extent indicated by the survey. In the absence of such proof it must be presumed that the existing conditions were such as to justify the meander, and that fact is not inconsistent with the fact that within the limits of the meander there were ridges and knobs that were not covered with water.

In the McClennen case (29 L. D., 514) the evidence showed that the configuration of the shore was such as to leave no doubt that a fraud was perpetrated in making the survey, and that the meander line, which in some places ran over the tops of hills, made it impossible that such land was ever covered by water. The same condition as to the land over which the meander line was run was shown in the Hemphill case. (26 L. D., 319.)

If the original survey properly delineated the boundaries of the lake, the jurisdiction of this Department in the premises ceased with the approval of that survey. Under the rule which obtains in Iowa, the title to the bed of the lake vested in the State as the sovereign. While this Department might, upon a proper showing, make an investigation to ascertain whether a mistake had been made in the survey of the township, it would take such action only in those cases where the evidence of mistake was clear and convincing. No such showing has been made in support of this application. The State is still asserting her title to the tract involved here, by virtue of her sovereignty.

Upon further consideration, the Department is of opinion that the showing presented does not justify the conclusion that a mistake was

made in the original survey and does not furnish any excuse for assumption of jurisdiction to survey the tract embraced in the meander lines of this lake as established by the original survey of the township. The application is denied.

APPLICATION FOR SURVEY—CORRECTION OF SURVEY.

PALO ALTO COUNTY (STATE OF IOWA).

The land department has authority to examine into the correctness of the public surveys and to cause a resurvey to be made of any public lands that were erroneously or improperly omitted from survey when it is clearly shown that such lands were erroneously or improperly omitted and that no sufficient reason then existed for not extending the public surveys over them; but it has no authority to survey as public lands tracts which were at the date of the township survey properly indicated as covered by the waters of an apparently permanent lake.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 1, 1904.* (E. F. B.)

The Department by decision of March 11, 1901, affirmed the decision of your office rejecting the application of Palo Alto county, Iowa, for the survey of lands in said county, alleged to be swamp and overflowed, which are represented upon the township plat of survey as two lakes, one covering parts of sections 20 and 21, in township 94 N., range 34 W., and the other covering parts of sections 16, 17, 19, 20 and 21, in township 96 N., R. 34 W.

A motion for review of said decision was denied June 21, 1901. Neither of said decisions was reported.

By letter of October 27, 1903, you transmit a motion for reconsideration of said decisions, accompanied by a letter from the governor of the State of Iowa, dated September 8, 1903, requesting that such action may be taken by the Department upon this, and the several applications of various parties now pending before the Department for the survey of lands of similar character, as will result in a speedy and final determination of the claims of the State and of all parties who may assert any right, title, or interest in and to such lands, but without waiving the right or title of the State and insisting that such lands belong to the State in virtue of its sovereign right.

This application was rejected because no sufficient evidence was produced to overcome the presumption as to the correctness of the township surveys or to show any mistake or improper conduct on the part of the surveyor in meandering such areas as bodies of water and closing the surveys upon them. In the decision denying the motion for review it was also stated that the case made by the petition shows that the lands at the date of survey were either swamp and overflowed lands

or were covered by a body of water; and that in either event the United States would have no interest in the lands to be surveyed, as they would inure to the county as grantee of the State if they were swamp and overflowed, and would belong to the State, in virtue of her sovereign right, if they were the beds of lakes at the time of the township survey.

No additional evidence has been produced, but it is now urged in support of the application that the supreme court of Iowa has rendered decisions in two cases holding that lands of the character of the lands in controversy are unsurveyed public lands, to which no one can obtain title except under and by virtue of the laws pertaining to the disposal of the public domain, and that, since the decision of the Department, the supreme court of the United States (*Iowa v. Rood*, 187 U. S., 87) has dismissed the appeal of the State from a decision of the supreme court of Iowa holding that lands of the same character as the lands in controversy were swamp and overflowed lands that passed to the State under the swamp-land grant and through the State to its grantees; that when the application originally came before the Department the governor and the attorney general of the State protested against any action being taken looking to a resurvey of any lands in said State of the character of the lands in controversy, upon the supposition that the title of the State to the beds of all meandered lakes in said State, by virtue of its sovereignty, was fixed by the approval of the survey; and that in view of these decisions the governor of the State now joins in the request that the character of the lands be investigated by the Department and that such action be taken as will enable some one to obtain title to them.

The holding of the supreme court of Iowa in the decisions referred to (*Ogden v. Buckley*, 89 N. W. Rep., 1115, and *Carr v. Moore*, 93 N. W. Rep., 52) is to the effect that the swamp-land grant of September 28, 1850, did not convey a present title to the State of the swamp and overflowed lands within the State, but only an inchoate right to acquire title by patent, and therefore a conveyance by a county could not pass the title to any land that had not been surveyed, identified, and listed by the Secretary of the Interior as swamp land, and patented, although the land may in fact have been swamp and overflowed at the date of the grant. In the latter case it was also held that under the laws of Iowa the title of the abutting owner on waters extends only to high water mark, the title of the bed being in the State.

In *Iowa v. Rood*, *supra*, the appeal of the State was dismissed because no federal question was involved. The State's claim of title rested solely upon the proposition that upon its admission into the Union as a sovereign State, it became the owner of all lakes within its borders, and that the action of the government surveyors in segregating the lake in question by meander lines from the public lands was a

determination by the federal government, through its duly appointed agents, that the lake so segregated was the property of the State. The court held that the State's claim did not involve the construction of any treaty or statute of the United States or the constitutionality of any State statute or authority and that the survey of the lands adjoining the lake and the meander of the lake itself determined nothing as to the title of the lands beneath its waters, "but simply omitted the lands from survey and left their title to be subsequently determined either by State or congressional action. It was obviously beyond the powers of a government surveyor to determine the title to these lands or to adjudicate anything whatever upon the subject."

Counsel call attention to these decisions to emphasize the necessity for departmental action as the only means by which the title to the lands in controversy can be definitely settled and determined. They insist that as the courts will not take cognizance of the claim and right of the grantee to any swamp and overflowed lands under the act of September 28, 1850, that have not been surveyed and identified in the manner provided by law, the beneficiaries under the grant will be entirely remediless without the interposition of executive authority in their behalf, and as they cannot by their own action or by the aid of any other tribunal secure the legal title to such lands, several hundred acres of land of great value will be left without legal ownership, which is not bearing its proportionate share of taxation, and which is without State control.

It may be stated in this connection that the court in *Iowa v. Rood* did not hold that the State had no title to the beds of lakes that had been properly meandered as such and segregated by the public surveys, but it merely held that the action of the surveyor and the approval of the survey determined nothing as to the title of the land under the water, and that the segregation of the lake was not an adjudication by the United States that the lake so segregated and set apart was the property of the State and not a part of the public domain.

In that case the land in controversy was within the meandered lines, but it had been patented to the State as swamp land upon the application of the governor requesting that the necessary steps be taken to determine the character of the unsurveyed lands in certain townships. The plaintiff claimed under that patent.

No principle was announced in either of those decisions that affects the real question in issue here or presents any reason for a modification of the rule under which the application was rejected.

In the decisions complained of the rule was distinctly announced that while the Department has ample authority to examine into the correctness of the public surveys and to cause a resurvey to be made of any public lands that were erroneously or improperly omitted from

survey, such authority will only be exercised when it is clearly shown that such lands were erroneously or improperly omitted and that no sufficient reason then existed for not extending the public surveys over them.

If the lands in controversy at the date of the township survey were in fact covered by bodies of water, which were properly meandered and the public surveys were properly closed upon them, the land department would have no authority to survey the beds of such lakes as public lands. The only question therefore is: Was the survey erroneous and were public lands omitted from such survey? The Department must necessarily in every instance determine that question before it can execute a survey, as it has no authority to survey any lands other than public lands.

These townships were subdivided in 1856. The field notes of survey and the plats thereof show that no lands were left unsurveyed. What are now alleged to be bodies of unsurveyed lands are represented on the township plats as bodies of water, which, so far as it appears from an inspection of the field notes of said survey, seem to have been properly meandered. The public surveys were closed upon the meander lines, which purported to define the limits of the public lands, and the lands bordering on them have been disposed of. The correctness of such survey has stood unchallenged for nearly fifty years, although the grantee of the State had ample opportunity to call attention to any error affecting its right and title, if such error in fact existed. These facts raise such a strong presumption in favor of the correctness of the township survey that no action should be taken looking to a resurvey except upon a definite and affirmative showing of error. No such showing as to the actual condition of the land at the time of the survey is made by the petitioner, but it is alleged that there is not now a lake within the meander line and that there is no indication that there ever was any lake or body of water within the meander line of sufficient importance to warrant the closing of the surveys upon it. It is urged by counsel that this showing is so far suggestive of error in the township survey as to cause an examination to be made by the land department to ascertain whether the land in controversy is swamp and overflowed land within the meaning of the swamp-land act, or whether it is the bed of a lake of such permanent character as ought to have been meandered at the time the township was surveyed, in order that the conflicting claims to such lands may be determined; and that if such examination is allowed he will be able to support by competent and satisfactory testimony the fact that at the time of the survey there was not such a body of water as would justify the meander line as established by the government survey. He does not submit the affidavit of any witness as to the condition of the land at the time of township survey, nor state any fact upon which he bases his opin-

ion that no reason or fact then existed to justify the meander line, except the fact as to the present condition of the land. He expects to supply that evidence, as stated in his motion for review, by causing surveys to be made, levels to be taken, and other evidence to be produced in support of the application.

In denying the motion for review the Department said that the evidence counsel proposed to submit would not determine the character of the land at the date of the survey and was not a sufficient showing to overcome the correctness of the township survey.

It does not appear to be questioned that there was a body of water on which to base the meander line, but it is alleged merely that it was not such a body of water as the surveying regulations contemplated should be meandered. The only fact upon which that opinion is based is the allegation that while there are some places within the meander lines that are low, wet, marshy and covered with reeds and pond grasses, the greater part of the area within such meander lines is fit for cultivation. That appears also to be the only fact upon which counsel predicates his belief that no reason existed at the time of the township survey that should have prevented the extension of the survey over such area.

The application for the survey of lands in Clay county that was considered by the Department in the case of John McClennen *et al.* (29 L. D., 514) alleged that there was not then and never had been any body of water upon which to base the meander lines, which were run over the tops of hills, and that much of the land was high, dry, tillable land that would not have passed to the State as swamp land if it had been properly surveyed. The allegations were supported by numerous witnesses, who testified to material facts upon which the charge "that the meander line of said surveys was so surely wrong as to leave no doubt that a fraud was perpetrated in the making of said survey," was clearly sustained.

In the case of W. L. Hemphill *et al.* (26 L. D., 319) it was alleged that the meander line of the lake as established by the township survey was from thirteen to forty-nine feet above high water mark and above the true banks of the lake. The petition was supported by the affidavits of witnesses who testified that they had known the land from twenty-four to forty years, and that all of the land that the applicant asked to have surveyed could be, and had been, cultivated to crops in any ordinary season. From the configuration of the land as shown by the testimony of witnesses it was obvious that there was not at the time of the township survey any reason or fact that could possibly be construed as justifying the meander line as established by the official survey. Upon such showing you were directed to make an examination of the land, which resulted in a resurvey which was approved. (27 L. D., 119.)

This application is refused for the reason that there is no *prima facie* showing that there was no body of water to which the meander line referred, or that the survey was in error. Upon the facts presented the Department holds that the survey was substantially correct and that it has no authority to now survey as public lands the tract or tracts which were at the date of the township survey properly indicated as covered by the waters of an apparently permanent lake.

APPLICATION FOR SURVEY—CORRECTION OF SURVEY.

MARSHALL DENTAL MANUFACTURING COMPANY.

Lands in the State of Iowa covered by the waters of a lake which was properly meandered at the time of the survey of the township passed to the State by virtue of its sovereignty, and are therefore no longer under the control of the land department as public lands.

The land department will not disturb the public surveys where a resurvey may affect the rights or claims of anyone resting upon the original survey, except upon the clearest proof of accident, fraud, or mistake.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 1, 1904.* (E. F. B.)

With your office letter of October 27, 1903, you transmit the application, and accompanying papers, of the Marshall Dental Manufacturing Company, grantee of Greene County, Iowa, for the survey of a body of land alleged to be swamp and overflowed, but which is designated upon the township plat of survey as a meandered lake in sections 6 and 7, T. 84 N., R. 30 W., and sections 1 and 12, T. 84 N., R. 31 W., known as "Goose Lake."

The field notes of survey show that there was a well-defined lake covering the area indicated, at the time of the township survey in 1853. The only witness who testifies as to the condition of the land at the time of the survey is C. L. Davis, who testified that he was a flagman with the surveying party when the land was surveyed in 1853, although his name does not appear in the returns. The only assistants to the surveyor who appear from the returns to have taken the oath as required by the manual are Joseph L. Johnson and David Buttrick, chainmen, H. C. Caldwell, marker, and A. F. Crowl, axeman. He testifies that he remembers a stake was driven and a mound made at the southeast corner of section 6, about two or two and a half rods from the water's edge at that time; that the surveyor instructed him not to go too near the water, so the chainmen would have a better place to work in going around the lake, as the ground was marshy near the water; and that at the time of the survey the majority of the unsurveyed tract was a marsh. He describes it as a marshy, reedy lake, inhabited by muskrats and in the summer time nearly dry.

The returns of survey show that the deputy found many marshes in surveying the township which are distinctly noted. In running the section lines that intersect the shore of the lake, he entered marshes, but always left the marsh and entered higher ground before reaching the shore of the lake, which is always described as low, flat and marshy, and where he always set his meander post in a mound of earth and sod. It is possible that on account of the low marshy condition of the actual rim of the lake, and for greater security against the destruction of the monuments, he did not set his meander post immediately at the water's edge, but upon higher ground. So that the testimony of Davis that the meander post at one point was not placed at the water's edge, and that the ground near the water was marshy, may not, as to those facts, be inconsistent with the returns. It is not shown that in running the meander the deputy did not delineate the lake substantially as it actually existed.

In the general description of T. 84, R. 31, he says:

This township contains some small marshes which are unfit for cultivation; also a lake in the northeast corner, banks low earth. The surface on margin of lake low and flat; unable to examine the depth of the water in lake owing to the growth of flag bushes and willow on its margin.

Other witnesses who testify as to the condition of the lake several years after the survey characterize it generally as a marshy pond full of reeds, rushes and flags, with a great many muskrat houses among them. None of these witnesses speak definitely of the condition of the lake at the time of the survey or at any period so near to it as to indicate with reasonable certainty the exact condition of the lake when it was surveyed. H. W. Bean, who made a survey of the lake in 1895, with a view to obtaining an outlet for thorough drainage, testified that he found in the lake a vegetable mould and black loam about thirty inches deep at all points, interlaced by a strata of sand from one to six inches deep, except at one place where there is a strata of sand and gravel twenty-two inches deep resting on a subsoil of blue clay.

All of the witnesses testify that the lake has no outlet, that it is a depression in the prairie forming a basin that is fed by the melting snows and rains, thus corroborating the returns of the survey that it had a well-defined rim. There is no sufficient testimony to impeach the correctness of the returns, but, on the contrary, the testimony of the several witnesses, considered in connection with the returns of survey, rather indicate that the bed of the lake has been gradually filled up since the date of survey, probably because of the cultivation of the surrounding lands, causing the deposit into the lake of the vegetable mould and black loam covering the strata of sand and gravel as found by witness Bean.

One of the principal grounds urged in support of the application is

that the present condition of the lake bed is a menace to the health of the neighborhood and that it would be a great benefit to the community living around it if the land could be certified to the State under the swamp-land act for the benefit of its grantees, so that the land could be drained and made subject to taxation. There is with the record a petition, signed by a great number of citizens, urging such action.

There is submitted with the application here a letter from the governor of the State requesting that such action may be taken by the Department upon this application as may result in a speedy and final determination of the claim of the State and of all persons who may assert any right, title or interest in or to said lands or any part thereof. The governor does not waive any claim or right of the State to assert its claim in any investigation or proceeding, judicial or otherwise, that may be had in the Department or in any court. The State is therefore in this proceeding asserting its right to said lands by virtue of its ownership of the beds of all lakes within its borders that were properly meandered.

If at the time of the survey there was a well-defined lake that was properly meandered, as shown by the field notes of survey, the Department would have no authority to convey the lands as public lands, or to certify and patent them to the State under the act of September 28, 1850. The title to the beds of all lakes that were properly meandered vested in the State by virtue of its sovereignty and no reason can be perceived why the State can not assume control of this land and reclaim it by drainage or make any other disposition it may see proper in view of this decision holding that the lake bed is not public land left unsurveyed.

Counsel contend that lake beds of the character of the one in controversy will be without legal ownership and not subject to State control until the Department determines the character of the land, and as authority for this contention cite the case of *Iowa v. Rood* (187 U. S., 87). Their contention is evidently predicated upon the theory that the survey was erroneous and that the State, by virtue of its sovereignty, acquired no title to lakes or ponds which at the time of the survey could have been easily drained or were likely to dry up. That proposition will not be disputed, but no principle was announced in the case cited adverse to the contention of the State that it acquired title by virtue of its sovereignty to the beds of all lakes that were properly meandered and upon which the surveys of the public lands were closed. It is therefore only a question as to whether the body of water that was meandered as a lake was of such permanent character as to justify the meandering of it as such and to segregate it from the body of the public lands, or whether it was erroneously made, and that question must primarily be determined by the land department.

“The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the government, and the land department, charged with the duty of surveying the public domain, must primarily determine what are public lands subject to survey and disposal under the public land laws.” (*Kirwan v. Murphy*, 189 U. S., 35, 54.) But after the land department has disposed of the question, if the legal rights of any party have been invaded, he may seek redress in the courts, which have jurisdiction to determinê whether any lands surveyed and disposed of were public lands and to determine who has the better right to the title.

In *Iowa v. Rood*, *supra*, the land within the meander line of a lake had been patented to the State under the swamp-land act and the plaintiffs below (*Rood et al.*) claimed under that patent. The State claimed that upon its admission to the Union it became the owner of all lakes within its borders, subject to the right of the public to use the same, and that the title to the beds of such lakes was in the State, and that the action of the government surveyors in segregating the lake from the public lands by meander lines was a determination by the government, by its duly authorized agents, that the lake so segregated and set apart was the property of the State and not a part of the public domain. The court dismissed the appeal of the State for the reason that its title, by virtue of its sovereignty, did not involve the validity of any treaty or statute of the United States, or the constitutionality of any State statute or authority, and hence presented no federal question. It also decided adversely to the contention of the State that the segregation of the lake by the public survey, and the approval thereof, determined anything as to the title of the land beneath its waters.

“The land department must necessarily consider and determine what are public lands, what lands have been surveyed, what have been disposed of, and what are reserved.” (*Kirwan v. Murphy*, *supra*, 53.) Under such authority the Department has power to correct surveys upon a proper showing; but, as has been frequently said, the proper rule is to refuse to disturb the public surveys, except upon the clearest proof of accident, fraud or mistake, where a resurvey may affect the rights or claims of anyone resting upon the original survey. As no sufficient proof has been submitted to impeach the correctness of the survey attacked here the application is denied, thereby determining, so far as lies in the power of the Department, that the lands in controversy are not public lands.

In this connection it may be well to call attention to the decision of the court in *Railroad Company v. Smith* (9 Wall., 95), holding that in a proceeding before the courts it is competent to prove by witnesses who know the land that it was swamp and overflowed land within the meaning of the swamp-land grant. In *French v. Fyan* (93 U. S., 169) oral testimony was offered to impeach the validity of a patent to lands

under the swamp-land grant by showing that the lands were not in fact swamp lands, relying upon the authority of *Railroad Company v. Smith*. The court rejected the testimony, holding that the issuance of the patent was conclusive of that question. The decision of the lower court was affirmed upon the ground that the act making the grant confers upon the Secretary of the Interior the power to determine what lands were of the description granted by the act, and made his office the tribunal whose decision on that subject was to be controlling. It was held that the decision in *Railroad Company v. Smith* was not in conflict with that principle and that parol evidence was held in that case competent to prove the character of the land because the Secretary had refused to make a selection or list of such lands and would issue no patent. The court said there was no means by which it could compel the Secretary to act, "and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty." If the doctrine announced in *Railroad Company v. Smith* can be applied in any case, it surely must apply in this, so that the grantees of the State are not remediless because of the refusal of the Department to survey the land.

ACCOUNTS—FEES—TESTIMONY—TRANSCRIPTS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
 GENERAL LAND OFFICE,
 WASHINGTON, D. C., *April 7, 1904.*

To Registers and Receivers:

GENTLEMEN: Your attention is called to the following provisions of law:

Registers and receivers are allowed, jointly, at the rate of fifteen cents per hundred words for testimony reduced by them to writing for claimants in establishing preemption and homestead rights. (Sec. 2238, subdivision 10, R. S.)

A like fee as provided in the preceding subdivision, when such writing is done in the land office, in establishing claims for mineral lands. (Sec. 2238, subdivision 11, R. S.)

Registers and receivers in California, Oregon, Washington, Nevada, Colorado, Idaho, New Mexico, Arizona, Utah, Wyoming, and Montana, are each entitled to collect and receive fifty per centum on the fees and commissions provided for in the first, third, and tenth subdivisions of this section. (Sec. 2238, subdivision 12, R. S.)

That registers and receivers of United States land offices, shall, in addition to the fees now allowed by law, be entitled to charge and receive for making transcripts of the records in their offices for individuals; the sum of ten cents per hundred words for each transcript so furnished; and the transcripts thus furnished, when duly cer-

tified to by them, shall be admitted as evidence in all courts of the United States and the Territories thereof, and before all officials authorized to receive evidence, with the same force and effect as the original records. Act of Congress approved March 22, 1904. (Public—No. 64.)

The register and receiver shall be entitled to the same fees for examining and approving testimony given before the judge or clerk of a court in final homestead cases as are now allowed by law for taking the same. (Act of Congress approved March 3, 1877, 19 Stats., 403.)

This refers to the fees provided for in the tenth and twelfth subdivisions, section 2238, R. S., above mentioned.

Under the timber and stone land act of June 3, 1878, as amended by the act of August 4, 1892, registers and receivers are entitled jointly to a fee of fifteen cents or twenty-two and one-half cents per hundred words, as fixed by subdivisions ten and twelve, respectively, of section 2238, R. S., for testimony reduced to writing for claimants.

No testimony fees are chargeable by registers and receivers in desert land cases.

Section 1, act of March 3, 1891, provides as follows:

And registers and receivers shall be allowed the same fees and compensation for final proofs in timber-culture entries as are now allowed by law in homestead entries.

This refers to the fees provided for in the tenth and twelfth subdivisions, section 2238, R. S., and act of March 3, 1877, which, by the act of March 3, 1891, are made general and applied in all cases where similar services are rendered by registers and receivers; that is, for reducing testimony to writing and examining and approving testimony, both in commuted and noncommuted homestead and timber-culture final proofs.

No fees are chargeable by registers and receivers for examining and approving testimony reduced to writing in a timber and stone land final proof, where such proof is made before an officer designated in section 2294, R. S., as amended by the act of March 4, 1904. (Public—No. 37.)

Your attention is called to the following act of Congress approved March 3, 1883:

AN ACT in relation to certain fees allowed registers and receivers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the fees allowed registers and receivers for testimony reduced by them to writing for claimants in establishing preemption and homestead rights and mineral entries, and in contested cases, shall not be considered or taken into account in determining the maximum of compensation of said officers.

SEC. 2. That registers and receivers shall, upon application, furnish plats or diagrams of townships in their respective districts showing what lands are vacant and what lands are taken, and shall be allowed to receive compensation therefor from the party obtaining said plat or diagram at such rates as may be prescribed by the Commissioner of the General Land Office, and said officers shall, upon application by the proper State or Territorial authorities, furnish, for the purpose of taxation, a list of all lands sold in their respective districts, together with the names of the purchasers, and shall be allowed to receive compensation for the same not to

exceed ten cents per entry; and the sums thus received for plats and lists shall not be considered or taken into account in determining the maximum of compensation of said officers.

Your attention is also called to the following extract from the act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1887, approved August 4, 1886 (24 Stats., 239).

All fees collected by registers and receivers, from any source whatever, which would increase their salaries beyond three thousand dollars each a year, shall be covered into the Treasury, except only so much as may be necessary to pay the actual cost of clerical services employed exclusively in contested cases, and they shall make report quarterly, under oath, of all expenditures for such clerical services, with vouchers therefor.

In accordance with the act of Congress, as quoted, receivers will deposit to the credit of the Treasurer of the United States all moneys received for reducing testimony to writing, and all other fees which by the act of March 3, 1883, were authorized to be retained by registers and receivers (except the amount payable for clerk hire, in accordance with the terms of the law), as other public moneys of the United States received from fees and commissions are deposited. The First Comptroller of the Treasury in a decision (in case of Lambert, receiver at Pueblo, Colorado), dated July 14, 1891, and reaffirmed by letter of September 21, 1891, held that *no other fees can be legally appropriated to the payment of contest clerks than those which have been received for reducing testimony to writing in contest cases*, and that the measure of compensation to a clerk employed in any contest must be limited to the amount of the fee deposited for reducing testimony to writing in that particular contest. All such fees will be reported in detail on the receiver's monthly detailed account-current thereof (Form 4-146), and accounted for in their monthly and quarterly accounts. *But fees not earned (that is, deposits made for services to be rendered), are not to be deposited to the credit of the United States, but to the credit of the receiver and accounted for in his account of unearned fees and unofficial moneys (section 2234, R. S., as amended by the act approved January 27, 1898).*

The register's cancellation fee of one dollar, authorized by the act of May 14, 1880, (modified by act of August 4, 1886), will be paid to the receiver, who will deposit it as other unearned fees and when the entry is cancelled and the notice given he will deposit the same to the credit of the United States as in the case of other fees earned. This fee of one dollar is exclusively a register's fee, of which the receiver is entitled to no portion in making up the maximum compensation of registers and receivers. Should the cancellation not take place, and no notice be given, the fee is to be returned to the depositor.

In computing the fees for reducing testimony to writing, only the

words actually written by registers and receivers, or persons in their employ, must be charged for at the rates allowed by paragraphs 10, 11, and 12, of section 2238, R. S., and no charge is to be made for the printed words. The words actually written must be counted and charged for, and there can be no uniform fee of a specified sum applicable to every case of the same class of entries; that is, registers and receivers can not fix the fee at one dollar or more for each preemption, final homestead, or mineral entry.

Under the second section of the act of March 3, 1883, authorizing a charge to be made for plats or diagrams, the fees for the same are hereby fixed as follows:

For a diagram showing entries only	\$1.00
For a township plat showing entries, names of claimants, and character of entry	2.00
For a township plat showing entries, names of claimants, character of entry, and number	3.00
For a township plat showing entries, names of claimants, character of entry, number and date of filing or entry; together with topography, etc.....	4.00

In no case are fees to be charged for examining and approving testimony given before the judge or clerk of a court except in commuted or noncommuted homestead and timber-culture final proofs.

The attention of registers and receivers is called to section 2242, R. S., which is as follows:

No register or receiver shall receive any compensation out of the Treasury for past services who has charged or received illegal fees; and on satisfactory proof that either of such officers has charged or received fees or other rewards not authorized by law, he shall be forthwith removed from office.

You will be held to a strict compliance with the laws and regulations relating to the matter of fees in all cases.

Registers of land offices have no right officially to receive any moneys whatever except such as are paid to them by receivers as salary, fees, and commissions. Should any money be forwarded to the register or paid to him, he will at once pay over the same to the receiver; and where parties address the register as to the cost of any service required, he will refer the matter to the receiver for answer, as the latter is the proper officer to receive all public moneys.

In order to secure uniformity in the preparation of accounts of receivers relative to moneys received for reducing testimony to writing, and for clerical services rendered exclusively in contest cases under the act of August 4, 1886, the following method will be observed:

Receivers will credit the United States in their accounts as receivers with the gross amount of all fees earned, except such sums as are paid by them for clerk hire exclusively in contest cases, which sums must be deducted from the gross proceeds received, and should not be included in the amounts so credited. They will also debit the United States with the deposits of such receipts exclusive of the amounts for clerk hire

referred to above. In the special disbursing accounts for clerical service exclusively in contest cases, they will credit the United States with the total amounts received from contestants in contest cases, and debit the United States with the amount paid for clerk hire in such cases and also debit the United States with balance, if any, deposited with the U. S. Treasurer, supporting the account with sworn statements and proper vouchers. This account should balance.

The excess of receipts from fees over the expenses of clerical services must be reported in the receiver's weekly statements, monthly fee statements, and in their quarterly and monthly accounts-current.

Receivers will also report in detail on their receiver's monthly statements (Form 4-146) all cancellation fees earned and all receipts for reducing testimony to writing, and also enter on the same the expenses incurred for clerical service.

Whenever money is received from a party in payment of fees, the receipt thereof should be duly acknowledged. It is therefore directed that in cases where testimony, in establishing a preemption, homestead, or mineral claim, or the right to enter land as being valuable chiefly for timber or stone but unfit for cultivation under the act of June 3, 1878, has been submitted and an entry or location is allowed or final homestead papers issued on such testimony, and also where a fee is paid for allowing entries under the timber-lands act of June 3, 1878, the receiver shall indorse on both the original and duplicate receipt, or certificate of location where there is no receipt in the case, an acknowledgment of the amount of fees received for reducing testimony to writing, examining and approving the same, or other special account as the case may be; and that in contested cases where testimony is taken, as also in cases where transcripts of records are furnished, or fees received under the act of March 3, 1883, he shall issue a receipt for the money to any party paying the same (it being the duty of the receiver to receive and receipt for the money in every case), but no duplicate of the special receipt so issued need be transmitted to this office.

This circular is designed to take the place of circulars "M," of July 20, 1883 (2 L. D., 662); August 18, 1886 (5 L. D., 569); November 6, 1886 (5 L. D., 245); March 15, 1887 (5 L. D., 577), November 12, 1891, and April 22, 1898 [26 L. D., 657].

W. A. RICHARDS, *Commissioner*.

Approved, April 8, 1904.

E. A. HITCHCOCK, *Secretary*.

SOUTHERN PACIFIC RAILROAD COMPANY.

Motion for review of departmental decision of October 18, 1899, 29 L. D., 236, denied by Secretary Hitchcock, April 12, 1904.

FOREST RESERVE—SELECTION OF AGRICULTURAL LAND—ACT OF
JUNE 27, 1902.

OPINION.

Agricultural lands selected by the forester of the Agricultural Department under the provisions of the act of June 27, 1902, to be included in the forest reserve provided for in said act as "necessary to the economical administration and protection" of such reserve, do not become part of such contemplated reserve by virtue of their selection for the purpose mentioned, but are merely in the condition of lands withdrawn from settlement or other disposal with a view to their future reservation when the occasion therefor shall arise by the forest reservation coming into existence.

Assistant Attorney-General Campbell to the Secretary of the Interior,
April 13, 1904. (J. R. W.)

I received by reference of April 5, 1904, the letter of the Commissioner of the General Land Office of March 31, 1904, with request for my opinion whether the agricultural lands, not to exceed 25,000 acres, to be included in the forest reservation provided to be created under the act of June 27, 1902 (32 Stat., 400, 403-4), became a part of such forest reserve at the time of approval of the selections, or are they merely in a state of reserve from settlement, entry, or other disposal until the contiguous forestry lands become a forest reservation.

In respect to these agricultural lands the act (ib., 403-4) provides:

Provided, That on the four reservations last aforesaid, where agricultural lands are included within or contiguous to forestry lands and are, in the opinion of the Forester of the Agricultural Department, necessary to the economical administration and protection of the same, said Forester shall, as soon as practicable after the passage of this act as to those lands which have already been examined, and as to the lands not yet examined immediately after the examination and approval of the lists of said lands, of which approval said Forester shall be immediately notified by the Secretary of the Interior, file with the Secretary of the Interior schedules designating according to government subdivisions said agricultural lands, not to exceed fifteen thousand acres of the lands already examined and not to exceed ten thousand acres of the lands yet to be examined, which said agricultural lands so designated shall not be offered for entry and settlement, but shall become and be a part of the forest reserve hereinbefore created.

These lands are not to be selected or to become parts of the forest reservation because of their own adaptability or utility for forestry purposes, but because their inclusion in the reservation is found by the forester to be "necessary to the economical administration and pro-

tection" of the forestry lands. The contemplated reservation of agricultural lands is merely an incident to the main object aimed at—for economy of administration merely—and no part of the object itself. Until the forest reserve contemplated by the act comes into being no agricultural lands can be either included therein or lie contiguous thereto, nor can any question of economy of administration of such forest reserve arise until the reservation exists. The forest reservation contemplated by the act does not come into being until removal of the ninety-five per centum of the timber from the forestry lands, which has not yet been accomplished, and the General Land Office states may not be done for five years or more.

I am therefore of opinion that the agricultural lands in part selected by the forester under the above provisions of the act do not become part of the contemplated forest reservation by virtue of their selection for that purpose, but are merely in the condition of lands withdrawn from settlement or other disposal with view to their future reservation when the occasion therefor shall arise by the forest reservation coming into existence.

Approved:

E. A. HITCHCOCK, *Secretary.*

ARID LAND—WITHDRAWAL—COAL-LAND—ACT OF JUNE 17, 1902.

JOHN HOPKINS.

Lands withdrawn from "settlement, entry, or other form of disposal under the public land laws, except the homestead laws," in accordance with the provisions of the act of June 17, 1902, are not, during the continuance of such withdrawal, subject to disposal under the coal-land laws, where no rights thereto were initiated under such laws prior to the order of withdrawal.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 14, 1904.* (G. N. B.)

August 14, 1903, John Hopkins offered his coal declaratory statement for the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 20, the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 19, T. 56 N., R. 98 W., Lander, Wyoming, alleging possession June 15, 1903, which statement was rejected August 19, 1903, on the ground that the tract described was not subject to disposition under the coal-land laws for the reason that it was included in lands that had been withdrawn from "settlement, entry, or other form of disposal under the public land laws, except the homestead laws," in accordance with the provisions of the act of Congress approved June 17, 1902 (32 Stat., 388).

September 23, 1903, the applicant appealed, and November 19, 1903, your office sustained the action of the local officers.

The applicant has appealed to the Department.

It appears that the tract in question, with other lands, was suspended from disposition and sale under the provisions of the act of June 17, 1902, *supra*, by order of the Secretary of the Interior dated April 21, 1903, which was prior to the assertion of any right therein by the applicant, and hence at that time he had acquired no vested right to said tract. See Instructions (32 L. D., 387-388), where it was held by the Department that:

The withdrawals made by the Secretary of the Interior under authority of the act of June 17, 1902, of lands which in his judgment are required for any irrigation works contemplated under the provisions of said act, have the force of legislative withdrawals and are therefore effective to withdraw from other disposition all lands within the designated limits to which a right has not vested.

See also case of Board of Control, Canal No. 3, State of Colorado *v.* Torrence (32 L. D., 472-474).

It follows from the above that your office decision was right and it is hereby affirmed.

HOMESTEAD—SECOND ENTRY—ACT OF JUNE 5, 1900.

TURNNEY *v.* MANTHEY.

A homesteader who in fact abandoned his entry and in good faith executed a relinquishment thereof prior to June 5, 1900, is entitled, under the provisions of the act of that date, to make a second entry, although his relinquishment was not filed until subsequently to the passage of said act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 20, 1904.* (P. E. W.)

July 26, 1897, John William Manthey made homestead entry, No. 3327, for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 30, T. 95 N., R. 68 W., Chamberlain, South Dakota.

November 1, 1902, Samuel R. Turney initiated contest against said entry, alleging that the entryman was disqualified to make the same in that he had previously, on May 20, 1896, made homestead entry No. 10363, under the name of William Manthey, for lots 1 and 2, Sec. 4, T. 32 N., and lots 5 and 6, Sec. 34, T. 33 N., R. 23 W., in Brown county, Nebraska; that said entry is still of record in the land office at Valentine, Nebraska; that when he made the present entry he averred that he had never before made an entry under the homestead laws; and that he had not in any way secured permission to make a second entry.

A hearing was had, and on January 14, 1903, the local officers rendered their joint decision recommending the cancellation of the entry.

September 19, 1903, your office reversed their decision, held the entry intact and dismissed the contest.

Turney has appealed to the Department.

The evidence taken at the hearing shows that the entryman on May 20, 1896, made the said former entry at the Valentine, Nebraska, land office, under the name of William Manthey; that on May 20, 1897, he signed and acknowledged a relinquishment thereof, endorsed on his duplicate receipt, and delivered the same to his wife with whom he, on the same day, executed an agreement for separation, and to whom he, at the same time gave a bill of sale for their personal property; that the entryman's said wife has continued to reside on the land embraced in said former entry and that said entry is still intact on the records of the land office at Valentine, Nebraska; that a decree of divorce between the entryman and his said wife was granted on June 23, 1898; that when the entryman made the present entry on July 26, 1897, he did not disclose the fact that he had previously made an entry; and that no authority or warrant appears in the files of records or the local office for the allowance to him of a second homestead entry.

On behalf of the entryman it was shown that he was born in Germany, has but little knowledge of the English language, requiring an interpreter to give his testimony; that he has lived upon and cultivated the land embraced in the present entry for more than five years and placed thereon substantial improvements; and that he relinquished the said former entry because he found but a small portion of it tillable. When interrogated as to whether the officer before whom he made out his application for the present entry asked him if he had ever made a former entry, he answered "No," and stated that if such question had been put to him he would have answered "yes." Claimant insisted that he, on May 20, 1897, "had given back to the United States" the land embraced in his former entry and was advised, and thought, he had a right, therefore, to make the second entry; that since their said separation he knew nothing of his wife or the land embraced in the former entry.

It further appears from the records of your office that claimant's said relinquishment in due form, to the United States, of his former entry was endorsed on the receiver's duplicate receipt for said entry under date of May 20, 1897, although the same was not filed until July 6, 1903. It also appears that his receipt for excess land in said entry was assigned to his said wife at their separation. It does not appear by whom the said relinquishment was filed at the Valentine, Nebraska, land office, nor who, if any one, made entry of the land relinquished.

The Department is of the opinion that the evidence on the whole brings the entryman within the scope and privilege of the act of June 5, 1900 (31 Stat., 267, 269), which provides, "that any person who prior to the passage of this act has made entry under the homestead laws, but from any cause has lost or forfeited the same, shall be

entitled to the benefits of the homestead laws as though such former entry had not been made," and was thereunder a qualified homesteader prior to the institution of the contest herein. This treatment of the case is upon the conclusion that Manthey was acting in good faith and believed that when he executed his relinquishment of the first entry he was thereafter entitled to make a second.

Your decision is therefore affirmed, and the entry held intact.

REPAYMENT—ASSIGNEE—ASSIGNMENT SUBSEQUENT TO CANCELLATION.

GEORGE T. GORE.

Repayment of the purchase money paid on a commutation cash entry will not be allowed where the applicant is claiming under a mortgage acquired by assignment executed subsequently to the cancellation of the entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 23, 1904.* (C. J. G.)

An appeal has been filed by George T. Gore, assignee of Arthur P. Toombs, from the decision of your office of December 12, 1903, denying his application for repayment of the purchase money paid on commutation cash entry No. 922, for the SE. $\frac{1}{4}$ of Sec. 18, T. 31 S., R. 28 W., Garden City, Kansas, series.

The entry was made November 16, 1885, and Toombs and his wife executed two mortgages upon the land October 8, 1886, in favor of the Davidson Loan Company; one for \$800.00, and the other for \$120.00 to secure a loan of that amount "Payable in three notes for \$40 each, dated October 1, 1886, and payable in one, two and three years, with interest at 12% after due, until paid." The company, date not given, assigned the \$800.00 mortgage to the Keene Guaranty Saving Bank, Keene, N. H., which in turn assigned the same April 28, 1903, to George T. Gore, the applicant herein. The entry was canceled August 16, 1888.

The application for repayment was denied by your office on the ground that Gore is not an assignee within the meaning of the act of June 16, 1880 (21 Stat., 287), because the assignment to him was after the cancellation of the entry. This ruling is based upon the definition contained in the Instructions Governing Repayments (30 L. D., 430, 434), which is in part as follows:

Those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by law.

February 23, 1904, the attorneys for Gore called attention to the case of *United States v. The Commonwealth Title Insurance and Trust*

Company, which was then pending in the Supreme Court of the United States. The court delivered its opinion in that case April 4, 1904 (193 U. S., —). The facts of the case are set forth in the opinion of the court as well as in the cases of Amanda Cormack (18 L. D., 352), and Commonwealth Title Insurance and Trust Co. (28 L. D., 201). In that case, after final certificate had been issued to the entryman, May 9, 1890, she mortgaged the land to the Northwestern Guaranty Loan Company, May 10, 1890, which assigned the mortgage, June 9, 1890, to the Commonwealth Title Insurance and Trust Company, applicant for repayment. The entry was canceled August 16, 1894, for conflict with the Box Elder Reservation system. Subsequently the company brought suit to foreclose the mortgage, the land was sold to the company and a sheriff's deed was executed and delivered to it. It was held that the company was an assignee within the meaning of the statute and as such entitled to repayment.

In this case Gore did not acquire any interest in the mortgage for more than fourteen years after the cancellation of the entry and the mortgage has not been foreclosed. It is plain that the case referred to does not control here. The assignment to Gore must be held under the circumstances as an attempt to assign the claim arising under the repayment statute. Such an assignment can not be recognized.

Aside from the above there is grave doubt whether Toombs himself would be entitled to repayment were he applying for the same. It seems to have been held that the entry of Cormack, in the case of the Commonwealth Title Insurance and Trust Company, was erroneously allowed and could not be confirmed because of conflict. The only question was therefore as to whether said company was an assignee within the terms of the statute. In *ex parte* Arthur P. Toombs (7 L. D., 215), upon appeal from the decision of your office holding the entry in question for cancellation, and wherein said decision was affirmed, it was said, among other things:

The entry was on its face valid, and might have ripened into complete title. Had appellant abandoned his preemption claim and gone upon the homestead, and complied with the homestead law, his entry could not have been successfully assailed. It was not therefore void, and it became voidable only as a result of his own acts.

It thus appears that the entry of Toombs did not fail of confirmation "for reasons contemplated by law." In this view Gore could not of course occupy any better position than his assignor.

The action of your office denying repayment was proper and is affirmed.

TIMBER AND STONE APPLICATION—SCHOOL INDEMNITY SELECTION.

HALL v. STATE OF OREGON.

An application to purchase under the timber and stone act will not be received, not any rights recognized as initiated by the tender of such application, for a tract embraced in a school indemnity selection of record, until such selection has been canceled upon the records of the local office.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 23, 1904.* (F. W. C.)

The Department has considered the appeal by Della M. Hall from your office decision of October 13, last, sustaining the action of the local officers in rejecting her application to make purchase under the timber and stone act, filed June 10, 1903, covering the SW. $\frac{1}{4}$ of Sec. 21, T. 20 S., R. 11 E., The Dalles land district, Oregon, because of the prior selection of said tract by the State of Oregon as school indemnity, per list No. 261, filed June 7, 1900.

It is true, as claimed in the appeal, that until approved by the Secretary of the Interior there is in reality no selection, the proffer of a list and showing in support thereof being only preliminary proceedings taken for that purpose, but in the orderly administration of the land laws this Department has uniformly accorded to an indemnity school land, railroad, or other selection made in accordance with an act of Congress, pending its final consideration and disposal by this Department, the same segregative effect as an original entry made under the homestead or other public land law. Indeed, in many instances contests have been permitted of such proffered selections and preferred right of entry accorded to the successful contestants.

In the argument filed in support of the appeal under consideration it is alleged that prior to the tender of the application to purchase under consideration, your office had taken action upon the State's indemnity selection and that the basis assigned was held to be defective. It is clear, therefore, that after your office had taken action upon the selection, and pending the final result thereof, no rights could be acquired by the tender of an application for lands included in the selection thus under consideration. It has been fully demonstrated that to permit applications to be filed for lands having such a status could only result in great confusion, and, after full and careful consideration of the matter, the Department affirms your office decision which holds that part of the instructions to local officers of July 14, 1899 (29 L. D., 29), which provides that "no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until said entry has been canceled upon the records of the local office," as applicable to the case under consideration, and for that reason sustains the action of the local officers in rejecting Hall's application to purchase.

FOREST RESERVE—RELINQUISHMENT—ACT OF JUNE 4, 1897.

WILLIAM E. MOSES.

A relinquishment of lands in a forest reserve in the Territory of New Mexico, with a view to the selection of other lands in lieu thereof under the exchange provisions of the act of June 4, 1897, will not be accepted unless in all conveyances affecting the title to the lands relinquished the grantor, if married, was joined by the wife, or it is clearly shown that she is precluded from asserting any interest in the land.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 23, 1904.* (J. R. W.)

William E. Moses appealed from your office decisions of July 22 and December 4, 1903, requiring him to show further proof of his title to lands in Socorro county, New Mexico, relinquished to the United States and assigned as base for his application, number 3721, your office series, under the act of June 4, 1897 (30 Stat., 36), to select in lieu thereof lands at Lewiston, Idaho.

Moses's title is derived from the original entrymen, through powers of attorney to sell and convey given by the entrymen alone, not joined by their wives, executed in 1885. The attorney in fact, in that year, acting under such powers, sold and conveyed the lands, making no recitation that his principals were unmarried. Your office, July 22, 1903, objected upon that ground to the title tendered, and upon Moses's motion for reconsideration of that question, December 4, 1903, adhered to the objection made and held that:

In order to render the land acceptable as a basis for the proposed exchange, there must be afforded evidence of joinder of wife in all instruments affecting title thereto, if grantor under same were married, or, conclusion of such interest be properly shown.

This holding is claimed to be erroneous. It is contended that:

Until the year 1887 there was no legislation requiring the signature of the wife, and as all the transactions involved in this selection took place in the year 1885 and previous thereto, it is obvious that they were not affected by the act above mentioned.

The general rule in the states where the law of community right of property exists in husband and wife, derived from Spanish or French law, is that the husband may during the marriage convey any of the community property without the wife joining. This, however, is not absolute, or without exception. Dembitz on Land Titles, in note page 856, Vol. 2, gives an abridgement from Schmidt's Abridgement of the Laws of Spain and Mexico, as being "till 1884 the law which governed the relation in New Mexico." Article 51 provides that:

The husband alone administers the property of the conjugal partnership during the existence of the marriage, and he can sell and dispose of the same as he thinks proper, provided always he does so without the intention of injuring his wife.

It thus appears that some limitation existed on the husband's power of disposal even prior to 1884, as the power was dependent for validity on absence of intent to injure (or defraud) the wife. A requirement that the wife should join would at least be a reasonable precaution on part of the purchaser to evidence her assent.

The appellant's brief cited the decision in *Barnett v. Barnett* (50 Pac., 337), to show that the joinder of the wife was not necessary. That case did not involve the validity of a conveyance by the husband alone to cut off future claim by the wife, nor did the court discuss that question. The defendant's former wife, divorced for unchastity, brought suit for partition of the community property. Two questions only were involved: First, whether conviction of infidelity forfeited to her husband all her right in the community estate; second, whether during the life of the husband the wife could divest him of control of any part of the community property and recover it to herself. Both questions were decided against the former wife's contention. The decision of neither of these questions determines what is the right of the wife after the husband's death, or after dissolution of the marriage without her fault, in community property which the husband alone conveyed.

In the case of *Crary v. Field* (50 Pac., 342), the New Mexico court held that upon death of the wife the surviving husband had power to sell *so much of* the community property as may be necessary to pay the existing community debts, and that sales made for such purpose divested the title of the heir. The case of *Strong v. Eaken* (66 Pac., 539) involved a construction of the married woman's act of 1884 as affecting the prior law of community property, but had no reference to the question of the husband's power to cut off his wife's interest in such property by a deed executed by himself alone.

Section 3 of the married woman's act of New Mexico of 1884, being Section 1090, Compiled Statutes, provided:

Whenever a married man shall be deserted by his wife, or a married woman shall be deserted by her husband, for the space of one year, or whenever he or she would, for any cause, be entitled to a divorce from such husband or wife under the laws of this Territory, he or she may bring an action in the district court of the proper county, asking for a decree which shall debar him or her so deserting or furnishing grounds for a divorce, from any right or estate by the courtesy or in dower, or otherwise, as the case may be, in or to his or her lands, and which will give such husband or wife full authority to alien, sell, and convey, and dispose of his or her lands, without the interference of or signature of the husband or wife so deserting, or being guilty of acts which would entitle the person bringing such action to a divorce; and the court may grant such decree whenever it shall appear just or expedient, and thereupon the husband or wife shall have full control of his or her real estate, with power to convey the same without the husband or wife joining in the conveyance, and as full as if he or she were unmarried; or the court may by such decree, make such limitations on the power to convey such real estate as may seem meet and proper in the premises.

If only a decree of court could authorize the husband, without the wife joining, "to alien, sell, and convey, and dispose of" his own separate property in which his wife had no interest save that incident to her marriage, it would seem that he was without authority to alien the community property in which she had an interest, at her death descendible to her heir. It would be remarkable and anomalous for the law to protect the wife against the husband's alienation of his separate property without her consent, and not to protect her from his alienation of the community property acquired by their joint efforts and in which she has an estate. No clear decision of the courts of New Mexico being cited, or found by the Department, that construction must be given that seems to be reasonable, with due regard to the duty of the Department to resolve doubts which arise upon titles tendered to the government for acceptance in such way as will protect the government and assure good title to the United States.

Your office decision is affirmed.

INDIAN RESERVATION—ALLOTMENT—PATENT.

LONG JIM.

There is no general authority for the issuance of patent to Indian allottees, and in the absence of an express requirement in the agreement of July 7, 1883, between the United States and the Indians of the Columbia and Colville reservations, and in the act of July 4, 1884, ratifying and confirming the same, that patents shall issue for the lands allotted thereunder, the land department is without authority to issue patents for such lands.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 25, 1904.* (C. J. G.)

The Department has considered the petition of Long Jim, an Indian, for re-review of its decision of July 9, 1902 (not reported), adhering to its former action in denying his application for a patent in fee simple to cover the NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and lot 1, Sec. 11, NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, lot 1, Sec. 14, and lots 1 and 2, Sec. 13, T. 27 N., R. 22 E., Waterville, Washington.

In addition to the petition and subsequently to filing the same, counsel for Long Jim, on two occasions, made a full presentation of his claim in oral arguments.

The facts of the case are set forth in the case of Long Jim *v.* Robinson *et al.* and Cultus Jim *et al. v.* Chappelle *et al.* (16 L. D., 15), showing that Long Jim was allotted the land in question under the agreement of July 7, 1883, between the United States and Chief Moses and other Indians of the Columbia and Colville reservations, in Washington Territory, which was ratified and confirmed by act of

Congress approved July 4, 1884 (23 Stat., 76, 79). The provision of the agreement pertinent here is as follows:

All other Indians now living on the Columbia reservation shall be entitled to 640 acres, or one square mile of land, to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected.

In ratifying and confirming said agreement Congress inserted the following proviso:

That in case said Indians so elect to remain on said Columbia reservation the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians.

It was under this agreement and this act, as stated, that the Department decided in the case referred to that Long Jim was entitled to an allotment, which was accordingly made to him, as above described, April 20, 1894. Your office held that while the agreement provides that the Indians shall be guaranteed in the "possession and ownership" of the lands selected by them, the act provides that the lands so selected shall "be held for the exclusive use and occupation of said Indians;" that it is not thought the words used in the act convey anything more than a possessory right to the use and occupation of the lands, and the title thereto is meant to remain in the government subject to the use of the Indians; and furthermore that no authority is given under said act for the issuance of a patent. Without discussing these matters the Department formally affirmed the action taken by your office in denying the application for patent. It is strenuously contended that the history of these Indians, the agreement with them, the act ratifying said agreement, and the decision of the Department in Long Jim's favor in the case referred to, all tend to show that it was the intention to confer upon him a fee simple title to the land selected; that it was not the intention of Congress to amend or modify in any way the effect of the agreement of July 7, 1883, under which the selection was made; that this being true Long Jim is entitled to evidence of such title in the form of a patent.

There is no general authority for the issuance of patents to Indian allottees. This is indicated by the fact that certain acts specifically provide for their issuance. Neither the treaty in question nor the act of Congress ratifying the same contains any such provision. In view of this fact it is not deemed necessary to determine the mind of Congress in the matter or the effect of said act. It may be, under all the circumstances, that the allotment to Long Jim became presently operative so as to vest in him the full legal title to the land in question, as is contended by him. On the contrary, it may have been the intention of Congress to change the terms of the treaty so as to place limitations upon the right conferred upon Long Jim under his allotment. The

language employed in the act of ratification is clearly susceptible of such construction. Certain it is that a modification of the language used in the treaty was made, whatever may have been the intention of Congress, and in any event no provision was made for issuing a patent. Of the authority of Congress to make such change there is no question. It is well settled that an act of Congress prevails over an earlier treaty with Indians with which it may conflict. *Stephens v. Cherokee Nation* (174 U. S., 445); *Lone Wolf v. Hitchcock* (187 U. S., 553). The sole power to declare the character and effect of titles emanating from the government reposes in Congress. In this view, in the absence of an express requirement to that effect, the Department is without authority, and is justified in declining, to issue patent in this case.

In support of the contention that patent may be issued to Long Jim notwithstanding the absence of an express provision therefor in the agreement and act of ratification, reference is made to the case of *James B. White* (20 L. D., 171). But in that case the agreement with the Indians, in one of its articles, expressly provided for the issuance of patent, and that provision was construed to apply equally to the beneficiaries mentioned in another article of the same agreement. In view of this distinction that case clearly does not constitute a precedent for the issuance of patent in this case where the treaty under which the allotment to Long Jim was made is wholly silent as to a patent. Numerous other decisions are cited, both of the Department and the Supreme Court, but none of them is believed to be a precedent for the issuance of patent in the absence of express statutory authority. In the case of *Shaw v. Kellogg* (170 U. S., 312, 342), it was said:

The land department was, therefore, technically right when it said that the statutes did not order the issue of a patent, and that the case was one in which the granting act with the approved survey and location made a full transfer of title. Very likely if a patent had been issued the courts would not have declared it void, but have sustained it as the customary instrument used by government to make a transfer of the legal title. *Carter v. Ruddy*, 166 U. S., 493. But as there was no statute in terms authorizing a patent, it was not within the powers of the locators to compel the issue of one. No court would by mandamus order such issue in the absence of a specific and direct statute requiring it.

Upon careful consideration of the petition herein and of the arguments of counsel it is not believed that a re-opening of this case is justified, but on the contrary that the decision complained of should be adhered to as making a proper disposition of the application for a patent to cover Long Jim's allotment. The petition is therefore denied.

HOMESTEAD—RESIDENCE—MILITARY SERVICE.

CHARLES H. TULLEY.

Service in the army of the United States, within the contemplation of sections 2304 and 2305, Revised Statutes, dates from the muster-in of the soldier and continues until terminated by his death, muster-out, or other cause, regardless of the actual service rendered.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 25, 1904.* (P. E. W.)

November 8, 1897, John McGinnis made homestead entry, No. 1913, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 10, and the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 3, T. 26 N., R. 43 W., Alliance, Nebraska.

October 26, 1901, he submitted final proof, which was accepted by the local officers, and November 11, 1901, final certificate No. 3255 was issued thereon. Two months later McGinnis died.

January 16, 1903, your office addressed a letter to McGinnis stating that upon the final proof submitted his residence was insufficient and that supplemental proof would be required of such further residence as would, together with his proven residence of three years, ten months and eighteen days, and military service of thirty-six days, constitute the full five years residence required by law. August 3, 1903, there was filed in your office the affidavit of Charles H. Tulley, stating, in substance, that the entryman died two months after making final proof; that during his final sickness, having no means and no known relatives, he sent for affiant, and, stating that his end was near, besought him to purchase said land so that the purchase money might be used to pay the expenses of his last sickness; that relying upon the fact that claimant's final proof had been accepted and final certificate issued by the local officers, and believing, therefore, that the law had been fully complied with, he "purchased the land and took a deed therefor as an act of humanity and not by reason of any prior understanding or agreement whatsoever;" that your said office letter had only recently been delivered to affiant; that affiant knows of no heirs of the deceased; that the discharge paper filed by the deceased entryman with his final proof shows on its face a military service of nearly fifteen months, which with the nearly four years of actual residence on the land by McGinnis would make more than the required five years. Affiant asked that the final proof submitted be accepted and that patent issue thereon. December 17, 1903, your office rejected the said proof and held the entry for cancellation. In a further decision, in February, 1904, your office held: "Residence insufficient. Supplemental proof to be made within lifetime of entry."

Tulley has appealed to the Department.

It appears from the proof that the entryman built his house on the land in November, 1897, and established actual residence therein November 20, 1897; that he made improvements on the land to the value of \$350 and maintained continuous residence thereon until his final illness. Pending your office decision on his said final proof, the War Department was called upon for verification of the military service claimed by the entryman, from July 15, 1863, to November 1, 1864. The report states:

John McGinnis (of Capt. Eaton's Co., Depl. Corps, Dept. of the Monongahela, was mustered into service for during the pleasure of the President, August 18, 1863, and mustered out as a private November 1, 1864. Muster out roll of Co. shows actual service rendered 36 days. The men of this organization are not considered to have been in the service of the United States, except during the period they actually rendered service as shown by the muster out roll.

It was upon this report that your office held the entryman's residence insufficient and rejected his proof.

The essential question presented by this appeal, as to the period of time a person shall be deemed to have served in the army of the United States, as contemplated by sections 2304 and 2305 of the Revised Statutes of the United States, has been before the Department in a number of cases, the last one reported being the recent case of George C. Hazelet (32 L. D., 500). It was said therein that:

"The muster-in" seems to be the act whereby the soldier is regularly accepted into the army, and thenceforth he is in the army of the United States. . . . The period of his service in the army must date from his muster into service.

In the case before us the entryman was mustered into service August 18, 1863, and this date marks the beginning of his service. On that date and by the pivotal act of "muster-in" his status changed from that of civilian to that of soldier. And the status of soldier once established must be held to continue until interrupted by death, discharge, or other cause sufficient to change from that condition or status to another. The period of the entryman's service in the army of the United States is, therefore, the period from said date of muster-in to date of his muster-out, November 1, 1864, viz: one year, two months and thirteen days, even though by reason of special provisions in said company's articles he is considered, in the quoted report from the War Department, to have rendered actual service for only thirty-six days. The proper distinction is to be drawn between the contract of service based upon, and defined by, the articles of the military organization which the soldier joins, and his continuing status after muster-in, as one who is serving in the army from that day forward until his muster-out, during which entire period he is amenable to military jurisdiction and subject to call for active duty. The soldier, when mustered in, obligated himself to remain in the continuing status of one serving in the army and the government so accepted and so held him.

It follows that the entryman was entitled to credit for the said period of one year, two months and thirteen days, which, added to the three years, ten months and eighteen days of his actual residence on the land, completed the required period of five years.

The case is accordingly remanded with directions to accept and approve the final proof submitted by the entryman, if the same is otherwise satisfactory, and to issue patent on the final certificate issued by the local officers; your said decision being hereby reversed.

SCHOOL LAND—INDEMNITY SELECTION—INDIAN RESERVATION.

J. J. WARD.

Sections sixteen and thirty-six of lands in the Territory of Oklahoma which have been sold by the government, furnish a sufficient basis for indemnity school selection, without regard to whether or not the government owned them at the date of the granting act.

The approval of a list of indemnity school selections by the Secretary of the Interior is an adjudication that there was no vital irregularity in the making of the selection.

Lands within the Kickapoo Indian reservation were, by virtue of the provisions of the act of March 2, 1895, subject to selection by the Territory of Oklahoma as indemnity school land prior to the opening of said lands to settlement.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 25, 1904.* (G. B. G.)

This is a petition for review of departmental decision of November 4, 1895 (not reported), adjudging the validity of a list No. 4 of school indemnity selections by the Territory of Oklahoma, embracing 13,500 acres of land in the Oklahoma land district. The petition is filed on behalf of one J. J. Ward, who asks that said decision be vacated, and that he be permitted to enter the SW. $\frac{1}{4}$ of Sec. 24, T. 13 N., R. 1 E.—part of the 13,500 acres aforesaid—under the homestead law. This body of land lies within the former Kickapoo Indian Reservation, and was restored to the public domain by the act of March 3, 1893 (27 Stat., 557, 563), section 3 of which is as follows:

That whenever any of the lands acquired by this agreement with the Kickapoo Indians shall, by the operation of law or proclamation of the President of the United States, be opened to settlement or entry, they shall be disposed of (except sections sixteen and thirty-six in each township thereof), to actual settlers only under the provisions of the homestead and townsite laws (except section twenty-three hundred and one of the Revised Statutes of the United States, which shall not apply): *Provided however,* That each settler on said land shall, before making final proof and receiving a certificate of entry, pay the United States for the land so taken by him, in addition to the fees provided by law, and within five years from the date of the original entry, the sum of one dollar and fifty cents an acre, one-half of which shall be paid within two years.

And by the President's proclamation, issued thereunder May 18, 1895, as follows:

The lands to be opened to settlement are for greater convenience particularly described in the accompanying schedule, entitled "Schedule of lands within the Kickapoo reservation, Oklahoma Territory, to be opened to settlement by proclamation of the President," but notice is hereby given that should any of the lands described in the accompanying schedule be properly selected by the Territory of Oklahoma, under and in accordance with the provisions of said act of Congress approved March second, eighteen hundred and ninety-five, prior to the time herein fixed for the opening of said lands to settlement such tracts will not be subject to settlement or entry.

Prior to the date fixed in this proclamation for the opening of these lands, the Territory of Oklahoma had, through an agent, one D. A. Harvey, selected the land in controversy as indemnity school land on behalf of the Territory of Oklahoma, in lieu of an alleged loss of a section thirty-six within the Osage and Kansas reservation in said territory. At or shortly after the hour of 12 o'clock, noon, on the day of the opening, the said J. J. Ward settled upon the land in controversy, made permanent and valuable improvements thereon, and within the time prescribed by law applied to enter said tract at the local land office, which was rejected because of the prior selection thereof by the territory, and this action was approved by your office in December, 1895, and no appeal being filed, the case was closed by your office letter of September 30, 1896. There was no appeal to the Department by Ward and no rejection of his application by the Secretary of the Interior, as alleged in the petition, but because of the importance of the question involved the case will be considered on its merits.

There are three main contentions. It is urged: 1. That sections sixteen and thirty-six in the Osage and Kansas country in Oklahoma were never granted or reserved or pledged to the territory or future state for the use of schools, and that therefore there was not a proper basis for the selection. 2. That even if a proper basis was assigned in support of this selection, the land in controversy was not properly selected as indemnity school lands, because the agent was not authorized to make it. 3. That the lands within the Kickapoo Indian reservation were not subject to selection as indemnity school lands.

By section 18 of the act of May 2, 1890 (26 Stat., 81, 89-90), the organic act creating the Territory of Oklahoma, it was provided:

That sections 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 the public schools in the state or states hereafter to be erected out of the same.

And section 2275 of the Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), is in part as follows:

And other lands of equal acreage are also hereby appropriated and granted and may be selected by said State or Territory [any State or Territory having a grant,

reservation, or pledge of sections sixteen or thirty-six for the use of schools], where sections sixteen or thirty-six are mineral land or are included in any Indian, military, or other reservation, or are otherwise disposed of by the United States.

It is argued that at the date of the reservation of sections sixteen and thirty-six for the use of schools in Oklahoma, the United States did not own any lands within the Osage and Kansas reservation, and that therefore there could have been no loss of sections sixteen and thirty-six within that reservation, and consequently there was nothing to support this selection.

It is, perhaps, true, and for the purposes of this decision may be admitted, that at the date of the reservation for school purposes in Oklahoma, the United States did not own and consequently did not reserve sections sixteen and thirty-six in the Osage country. But it does not follow, and is not true, that the territory should be denied indemnity therefor; on the contrary, this is sufficient reason for awarding indemnity. These lands had been once owned, and at that time had "been otherwise disposed of by the United States" within the meaning of this language, as used in the act of February 28, 1891, *supra*. Whether this language means disposed of in a different manner than thereinbefore mentioned, or "otherwise" than contemplated by the act making the reservation, is not material. In either case it necessarily means that, if sections sixteen and thirty-six have at the date of survey been disposed of by the United States, the territory shall be entitled to indemnity. State of California (31 L. D., 335, 339); see also Winona and St. Peter Railroad Company *v.* Barney and others (113 U. S., 618, 626).

The contention that this land was irregularly selected is without force. It is not of sufficient importance to warrant inquiry whether the agent, Harvey, was authorized to make the selection, or, if he was not, whether the alleged irregularity of his employment and manner of making the selection was cured by the subsequent action of the territorial legislature ratifying his appointment. These questions lost all vitality they may have ever had upon the approval of the selections by the Secretary of the Interior. That approval was an adjudication that there was no vital irregularity in making the selection. It may be further said, that there was in law no selection until the list was approved, and it then became the selection of the Secretary of the Interior. Todd *v.* State of Washington (24 L. D., 106); see also Wisconsin Railroad Company *v.* Price County (133 U. S., 496). But aside from the authorities on this proposition, the course of procedure in the land department demonstrates it. The original list of selections made by the agent, Harvey, was first submitted to this Department by your office, with a request for instructions. It was upon this request that the said decision of November 4, 1895, was rendered, and in this same decision your office was directed to prepare a list of said

lands "in the regular form and forward it here for my approval." In accordance with these instructions, your office did prepare a clear list of said lands, No. 7, which included the tract in controversy and which was approved by the Secretary of the Interior, December 9, 1895. So that as a matter of fact the selection list was not approved at all, and it is immaterial what elements of irregularity appear in that list, if the lands incorporated therefrom in the clear list were at the date of the proffered selection by the territory subject thereto.

It remains to consider the third and last contention of the petitioner—that lands within the Kickapoo Indian reservation were not subject to selection as indemnity school lands—and this question, whatever might be said of it as a general proposition, may rest upon the terms of the act of March 2, 1895 (28 Stat., 876, 899-900), which provides:

That any state or territory entitled to indemnity school lands or entitled to select lands for educational purposes under existing law may select such lands within the boundaries of any Indian reservation in such state or territory from the surplus lands thereof purchased by the United States after allotments have been made to the Indians of such reservation, and prior to the opening of such reservation to settlement.

The Territory of Oklahoma was "entitled to indemnity school lands . . . under existing law," selected them within the boundaries of an Indian reservation within that territory "from the surplus lands thereof purchased by the United States," and, after allotments had been made to the Indians of the reservation, and by the plain terms of the statute, it had the right to make these selections prior to the opening of the reservation to settlement. The President's proclamation opening the lands in the Kickapoo country to settlement and entry specifically excepted therefrom such of them as had been properly selected by the Territory of Oklahoma under the provisions of the act of March 2, 1895, *supra*, and the tract in controversy having been properly selected under that act, the tract was never opened to settlement and entry, and Ward took nothing either by his alleged settlement or by his application to enter it under the homestead law.

It is argued that the act of March 2, 1895, is a general act, not necessarily inconsistent with the special provisions in the act of March 3, 1893, directing the disposition of these lands to "actual settlers only," and that it does not therefore affect such special provision. This argument is predicated upon the idea that there are other Indian reservation lands in regard to which Congress in providing for their disposition has made no such special provision as is found in the act of March 3, 1893, that the act of March 2, 1895, may operate upon the land within these other Indian reservations, and that therefore the two acts may stand without doing violence to the intention of Congress in either. This argument is more ingenious than sound. In the first place, the act of 1895 is the later expression of legislative intention, and its scope is not limited. It applies in terms to "any Indian reser-

vation." Besides, if the construction contended for were sound, the Territory of Oklahoma would be confined to the Cherokee Outlet for its indemnity school selections, it appearing from an examination of the various acts of Congress opening the many Indian reservations in that territory that all of them, except the one opening the Cherokee Outlet, directed that the lands therein be disposed of to actual settlers under the homestead law. It is inconceivable that Congress intended such result.

The decisions of this Department relied upon by the petitioners are not at variance with these views. Two of them, however, are entitled to special notice. These are the cases of the State of South Dakota (26 L. D., 347), and the State of Nebraska (28 L. D., 358). Both of these cases involved lands within the former Great Sioux reservation, opened to entry under the special provisions of the act of March 2, 1889 (25 Stat., 888), which, while directing that they be disposed of "under the provisions of the homestead law," required certain graded payments to be made by the homesteader, the moneys derived therefrom to be paid into the Treasury of the United States as a trust fund for the benefit of said Indians. It was held in both the cases referred to that lands within that reservation were not subject to school indemnity selection. But the act of March 2, 1895, *supra*, was not referred to in these decisions. Indeed, it had no application to the question there presented. The Sioux Indian reservation had been extinguished and the lands restored to the public domain before the passage of that act, and it could not therefore be given operative effect as to those lands. It seems to apply only to lands within an Indian reservation, and its main purpose was to give states and territories the right to make indemnity school selections of such lands "*prior* to the opening or such reservation to settlement," and could not reasonably have included lands that had once been within an Indian reservation, but had already been opened to settlement.

But aside from this, even if the act of 1895 should be held to be otherwise applicable to reservations theretofore extinguished, it only authorized the selection of lands for educational purposes "from the surplus lands thereof *purchased by the United States* after allotments have been made to the Indians of such reservation," and the surplus lands of this reservation had not at the date of the selections involved in said cases, nor at the date of the decisions, and have not yet, been purchased by the United States within the meaning of said act.

The petition is denied.

FOREST RESERVE—LIEU SELECTION—ACT OF JUNE 4, 1897.

JOHN K. McCORNACK.

Under the exchange provisions of the act of June 4, 1897, the selection of lands in lieu of other lands within a forest reserve relinquished to the United States with a view to such selection, can only be made by or in behalf of the owner of the lands relinquished.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 26, 1904.* (W. C. P.)

John K. McCornack appealed from your office decision of October 12, 1903, rejecting his applications Nos. 5288, 5289, 5290 and 5291 under act of June 4, 1897 (30 Stat., 36), to select the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 25, the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 26, and the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 35, T. 41 N., R. 4 W., B. M., Lewiston, Idaho, land district, in lieu of lots 1, 8 and 9, Sec. 19, T. 5 N., R. 28 W., in the Santa Inez forest reserve, California, relinquished to the United States by Ferdinand S. Phillips, and the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 29, T. 1 N., R. 4 E., in the Black Hills forest reserve, South Dakota, relinquished to the United States by William T. Todd.

One general application was filed, dated May 17, 1902, executed by McCornack, describing himself as "the owner of the scrip right" of the relinquished land, accompanied by a non-mineral and non-occupancy affidavit. This application need not be taken into consideration, as it is evident that the applicant elected to proceed under four other applications, each describing one tract of the land applied for and designating one tract of the relinquished land as base. Each of these applications bears date of May 17, 1902, was executed and presented by McCornack, who describes himself as "the assignee of owner" of the relinquished tract, and is accompanied by a non-mineral and non-occupancy affidavit. To each application is attached an affidavit of McCornack averring that the application is made by him "as the assignee of the original scrippee;" that he "purchased said right in good faith for valuable consideration from the agent of legal holder thereof;" that "he has never heretofore and to the best of his knowledge and belief his grantor has never heretofore made any entry by virtue of the scrip offered herewith;" and that "he is the present owner and legal beneficiary of the said right."

With each application are two instruments; one entitled "power of attorney to select," and the other "power of attorney to sell," those in numbers 5288, 5289 and 5291, being executed by Phillips and wife, and those in 5290 by Todd.

No agent, attorney; donee or grantee is named in any of these instruments, the space for that purpose being left blank. In those instruments executed by Phillips and wife, purporting to confer

authority to select, the granting clause is as follows: "Now, therefore, we Ferdinand S. Phillips and Anna J. Phillips, his wife, of Los Angeles, California, have made, constituted, and appointed and by these presents do hereby make, constitute, and appoint . . . our true and lawful attorney for us and in our names, places and stead to enter into and upon and take possession of each and every tract of public land opened for settlement in any State or Territory of the United States, of equal acreage or any part thereof, in lieu of the following described tract of land: . . ." Each of these instruments contains a clause as follows: "For value received, the receipt whereof is hereby acknowledged, this power of attorney is hereby made and declared to be irrevocable by us or otherwise." The other instruments, after reciting surrender of the base lands, provides: "Now, therefore, we Ferdinand S. Phillips and Anna J. Phillips, his wife, have made, constituted, and appointed and by these presents do make, constitute, and appoint . . . of . . . county, State of . . . our true and lawful attorney for us and in our names, places and stead to enter into and take possession of each and every tract of public land in any State or Territory of the United States that have been or may hereafter be selected by us in lieu of the land surrendered to the United States, as aforesaid, or any portion thereof." This is followed by authority to sell and convey the land and by a clause making the power of attorney for value received, irrevocable.

The power to select executed by Todd makes an unnamed person his agent and attorney "to locate and select" the land to which he is entitled under the provisions of the act of June 4, 1897, in lieu of the land relinquished, describing it. In this instrument there is no clause stating it is for value received and irrevocable. The power to sell executed by Todd is in the same terms as those by Phillips.

Your office rejected the several applications, saying:

The right to make selection under the provisions of said act of June 4, 1897, is conferred upon the owner of land within the limits of a forest reserve and is not assignable; therefore, said McCornack is not entitled to make such selection in his own right by reason of any assignment to him by Phillips and Todd.

Upon appeal errors are assigned as follows:

1. The Honorable Commissioner erred in rejecting the application of the appellant to make lieu selections as shown by the record at a time when the lands attempted to be taken were otherwise unappropriated.
2. The Honorable Commissioner erred in holding and deciding that the appellant could not make lieu selections in his own name in as much as he had paid for the rights which this scrip confers.
3. If assignment No. 2 is not well taken, then the Honorable Commissioner erred in not giving to the appellant J. K. McCornack a permit to obtain from the various persons named, duly executed powers of attorney authorizing the location of the scrip in their names respectively.

The provision of law under which these applications are presented is:

That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

This law does not provide for the issuance of scrip in any form or for the certification of a right of selection. To speak of a "scrip right" under said act is inaccurate and tends to confuse and mislead.

Where a tract within a forest reservation is covered by a patent or its equivalent, the law provides for an exchange of lands between the two owners, the United States and the individual, and nothing in it can be construed as indicating that it contemplated any other or different character of transaction. Holding this view, the Department has from the beginning insisted that a relinquishment and a selection covering all the relinquished land shall be presented together and the matter disposed of as a single transaction. In *F. A. Hyde et al.*, on review (28 L. D., 284, 286), it was said:

The officers of the land department are not authorized to accept, consider or pass upon a relinquishment of the tract within the limits of a forest reservation, except in connection with a proffered or tendered selection of other lands in lieu thereof.

In *William S. Tevis* (29 L. D., 575), Tevis filed a relinquishment and abstract of title with a view to the selection thereafter of land of equal area. Your office refused to accept such relinquishment and Tevis appealed, contending it was not necessary that an application to select lieu land should be filed with the relinquishment of the land used as a basis for selection, but that such application may be made at any time thereafter. This Department quoted a portion of the decision in *F. A. Hyde et al.*, *supra*, as directly in point, and continuing said:

Paragraphs 15 and 16 of the rules and regulations issued June 30, 1897, under said act (24 L. D., 589, 592), clearly require that in all cases of exchange of lands under said act, whether the land relinquished be "a tract covered by an unperfected *bona fide* claim or by a patent," an application to select lieu lands must accompany the relinquishment of the lands included within the limits of a forest reserve.

Further along in said decision (p. 577), is the following:

The Department can not escape the conviction, upon careful consideration, that the act contemplates and that good administration and the best interests of all concerned in the exchange of lands so provided for, require that the steps necessary to complete such exchange, when once initiated, be concluded as promptly as possible, and that as contributory to that end an application to select lieu lands should accompany the papers filed to effect a relinquishment to the United States of the land upon which the lieu selection is based.

In the instructions of March 6, 1900 (29 L. D., 578), the position theretofore taken was adhered to. Paragraph 19 of instructions of July 7, 1902 (31 L. D., 372), is as follows:

A selection based upon land covered by a patent or by a patent certificate must be made by the owner of the land relinquished or by a duly authorized agent or attorney-in-fact; and when made by an agent or attorney-in-fact, proof of authority must be furnished.

In William G. Gosslin (32 L. D., 100, 102), it was said:

No right to make a selection under the act of 1897 can arise until legal title actually exists in the person assuming to convey it to the United States and claiming right to make selection.

In C. W. Clarke (32 L. D., 26, 27), it is said that "a lieu selection under the act of June 4, 1897, is essentially an exchange," and in *Maybury v. Hazletine* (ib., 41, 42), that "the act of June 4, 1897, proposes an exchange with 'the owner' of lands in a forest reserve." The same idea, that said act contemplates a transaction between the individual, the owner of the lands relinquished, and the United States, the owner of the lands selected, is involved and expressed in numerous other decisions of the Department.

The foregoing citations demonstrate that the Department has proceeded from the very first upon the theory that the law in question contemplates that the selection shall be made by or in behalf of the owner of the lands relinquished. This theory is wrong if the hypothesis, that the right of selection is assignable, upon which the appeal herein is based, is right. If the contention of appellant is to be sustained, the declarations of the Department hereinbefore quoted must each and all be held erroneous. It is not believed that there is any good reason for such a course.

The Department has, however, directly and fully considered and decided this question of the assignability of the right of selection arising under said act of June 4, 1897. In *F. A. Hyde*, on review (28 L. D., 284), it was contended that there was error in the original decision (27 L. D., 472) in holding that unsurveyed land was not subject to selection under said act of 1897. After stating this contention, the Department said (p. 286):

Before considering this contention of the motion, the purported assignment by Belden to Hyde should receive some attention. The provision of the statute under which this case arises clearly contemplates an exchange of lands. The parties to the exchange are the United States, on the one hand, and on the other a holder of "an unperfected *bona fide* claim" within the limits of a forest reservation or an owner "by patent" of land so situated. A case is not properly presented for the favorable action of the land department under said provision until there is filed a relinquishment of the tract covered by the unperfected *bona fide* claim or patent and a selection by the claimant or owner of the land in lieu thereof. The officers of the land department are not authorized to accept, consider or pass upon a relinquishment of the tract within the limits of a forest reservation except in connection with a proffered or tendered selection of other lands in lieu thereof. Delivery and acceptance

of the relinquishment are necessary to give it any effect, and until this is done there is no right to lieu land and hence no right to assign. Hyde had no title to the tract described by Belden's deed, had nothing to relinquish, and had no right of selection. His application can not therefore be recognized. Considered as his application alone, it should have been rejected. Inasmuch, however, as both Hyde and Belden now aver that such application was made by the direction of the latter and for his benefit, and since, furthermore, the relinquishment and selection have been presented by Belden himself, as owner of the tract, the case will be considered as if upon the application of Belden from the beginning.

In conclusion it was held:

Where an exchange of land is sought under the act of June 4, 1897, *supra*, the relinquishment and selection can be made only by the claimant or owner of the land within the limits of the forest reservation.

This ruling is fully sustained by the language of the law, which is that "the owner" may relinquish and "may select," and by every consideration of good administration. If it had been intended to create a floating right different language expressing such intention would have been used. That Congress might have so provided can not be doubted, but that it intended to do so is clearly negated by the language used. The contention of appellant in this particular can not be sustained. Because of this conclusion it is not necessary to consider the form of the instruments under which appellant claims or to determine their sufficiency to constitute him an assignee of the claimed right.

It is insisted that if the application to select as assignee be not recognized, then the appellant should be given time and permission "to obtain from the various persons named duly executed powers of attorney authorizing the location of the scrip in their names respectively." The presentation of applications in the names of the respective owners of the relinquished land could not be held to relate back and be effective from the date of presentation of McCornack's unauthorized and invalid application. Such new application would take effect only from the date of its presentation accompanied by the required proofs, especially as to the character and condition at that time of the lands applied for. Even if it were held that the applications now before the Department might be perfected by substituting the names of the respective owners of the relinquished tracts for that of McCornack, the proofs would have to be brought down to the date such substitution was made and rights under the substituted applications would be determined under the facts shown to exist at that time. The decisions of the Department to this effect are too numerous and the rule is too well established to require citation of any cases so holding.

In some cases applicants have been allowed time to make corrections in the papers pertaining to their applications and to supply admissions, but these have been in respect of formal or unessential matters and

the privilege has been given as a matter of grace and not as a matter of right. Here there is no application capable of being perfected. Neither Phillips nor Todd has a foundation application upon which to base a request to be allowed to cure defects or supply omissions. Any proceedings in their behalf must begin with the initial act of presenting a formal application and their rights must be determined as of the date when such application may be presented accompanied by the required proofs.

If applications be hereafter presented in the names of the owners of the relinquished tracts they will receive due consideration and be disposed of under the law and the decisions governing such cases.

For the reasons given the decision of your office rejecting McCornack's applications is affirmed.

HOMESTEAD—INSANE ENTRYMAN—SECTION 441, REVISED STATUTES.

THOMPSON *v.* SWELANDER.

The power vested in the Secretary of the Interior by section 441, Revised Statutes, to supervise all proceedings instituted to acquire portions of the public lands, includes authority to inquire into the mental capacity of an entryman to make entry.

The test of mental capacity to make homestead entry is whether or not the entryman possesses sufficient mind to have a reasonable perception of the nature, effect and legal consequences of his act in making the entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 30, 1904.* (D. C. H.)

On October 15, 1896, Louis A. Swelander made homestead entry for the SE. $\frac{1}{4}$ of Sec. 20, T. 128 N., R. 50 W., Watertown, South Dakota. On November 5, 1901, Thomas P. Thompson filed contest against said entry, alleging that said entry was and is fraudulent, speculative and void, for the reason that for many years prior to the making of said entry the said Louis A. Swelander was and ever since has been a hopeless and confirmed idiot and imbecile, incapable of making a valid homestead entry, and of complying with the requirements of the homestead laws, and that said entry was in fact made for the benefit of Alfred Swelander, the father of the said Louis A. Swelander, and was therefore wholly speculative and could not have been made during any or all of said time for the personal use and benefit of the said Louis A. Swelander because of his mental incapacity.

Notice of contest issued and appears to have been served on the entryman and his guardian, Alfred Swelander. At the hearing both parties submitted testimony, the plaintiff appearing in person and by attorneys, and the defendant appearing by guardian and attorneys. The local officers found in favor of the plaintiff on all the issues of the

contest and recommended that the entry be canceled. Upon appeal, your office, on September 8, 1903, affirmed the findings and recommendation of the local officers and held the entry for cancellation. The claimant has further appealed to the Department specifying errors in substance as follows:

(1) Error in holding that it is within the province of the Department to determine the mental capacity of the entryman under the charge that he is an idiot and incompetent to enter public lands.

(2) Error in admitting in evidence and considering the testimony and other proceedings in the county court of Roberts county, South Dakota, in the matter of the guardianship of Louis A. Swelander.

(3) Error in finding and holding that the entryman ever since childhood had been an imbecile and wholly incapable of making a homestead entry or understanding and comprehending its nature, requirements, legal effect or consequences.

(4) Error in finding and holding that the entry in question was made in the interest of Alfred Swelander, and for his use and benefit.

The case is correctly stated and all the material facts sufficiently set forth in your said decision.

First. The appellant relies upon the decision of the Department in the case of *Olmstead v. Miller* (15 L. D., 399), and contends that under said decision the Department is without authority or jurisdiction to inquire into and investigate the charge of idiocy or mental incompetency of the entryman in this case, and that this question can alone be tried and determined in accordance with the laws of South Dakota where the defendant resided at the time the entry was made and where he still lives. It is true that in the United States the question of jurisdiction and the procedure in lunacy cases are for the most part regulated by statute. In a number of the states the probate courts have jurisdiction, in others the county courts, while in a few states this jurisdiction still remains with the courts of chancery. In some of the states in proceedings to declare a party a *non compos mentis* the inquiry, or judicial finding, must show not only that the party is of unsound mind at the time the appropriate tribunal is called upon to act in the matter, but must also show how long the mental incapacity has existed, and also whether or not the party enjoys lucid intervals. The laws of Dakota providing for and regulating the appointment of a guardian for the insane or incompetent person seem to confine the inquiry alone (as was done in this case) to the ascertainment and determination of the mental condition of the party at the time the county court is called upon to act in the matter. While the decision in *Olmstead v. Miller*, *supra*, appears to support the position assumed by the appellant and to deny the Department the authority and power to inquire into and determine the mental competency of an entryman, yet in the prior case of *Alden v. Ryan* (12 L. D., 690), not overruled,

the Department held that its jurisdiction to determine the validity of a claim to public land involved and carried with it the necessary authority to determine the validity of a relinquishment, and for such purpose to ascertain by proceedings of its own whether the person executing such instrument was of sound mind; and in the later case of *Mefford v. Carver* (18 L. D., 208), where the charge against the defendant therein was strikingly similar to the charge in the case at bar, the Department considered and passed upon the evidence as to the entryman's mental condition, and thereby asserted its jurisdiction in the matter.

"There is no wrong without a remedy," and as the laws of Dakota provided no means by which the mental condition of the defendant at the time the entry in question was made could have been ascertained, unless the Department has authority and power to inquire into and determine the entryman's mental capacity, the plaintiff in this case would not only be deprived of his right to prosecute his contest but the government in this, and other like cases, would be utterly powerless to defend itself against injustice and fraud.

By virtue of statutory authority, section 441 of the Revised Statutes, the Secretary of the Interior is invested with full power to supervise all proceedings instituted to acquire portions of the public lands, and surely it can not be that in matters involving the mental capacity of the entryman, and assailing the very integrity of an entry, the Department is ousted of its said jurisdiction and made to depend entirely upon the machinery of the State court to determine such questions for it, and that too when the law of the State, as in the case at bar, has provided no appropriate mode of procedure for ascertaining the real facts and determining the question at issue.

Second. While the record of the proceedings in the Dakota county court relative to the appointment of the guardian of the defendant in this case can not be used for the purpose of showing that defendant was a *non compos mentis*, or a person of unsound mind, at the time of the making of the said entry, said proceedings may be admitted to show his mental condition at the time they were had, and may be considered as throwing some light on the question under consideration.

Third. The test of mental capacity is whether or not the person possesses sufficient mind to understand in a reasonable manner the nature and character of the act in which he is engaged. The evidence in this case clearly establishes the fact that the entryman was of unsound mind at the time the entry in question was made and that this unsoundness of mind was of such a character that he could have no reasonable perception of the nature, effect and legal consequences of the said act, and the testimony further shows that said incompetency existed for many years prior to the time the entry was made and continued without interruption up to the date of the hearing, except to

become gradually worse as defendant advanced in age. The evidence also justifies the conclusion arrived at by the local officers and by your office that the entry although made in the name of the son, Louis A. Swelander, was in fact the act of the father, Alfred Swelander, and made for his use and benefit.

From a careful examination and consideration of the entire record, no reason appears for disturbing the decision appealed from and it is therefore affirmed.

HOMESTEAD—SOLDIERS' ADDITIONAL—COMMUTATION—RECERTIFICATION.

JOHN H. HOWELL.

Where entry under a certificate of soldiers' additional homestead right, issued under section 2306, Revised Statutes, was commuted under section 2301, Revised Statutes, prior to the act of June 5, 1900, the claimant under said certificate is entitled, under the provisions of said act, to a recertification of said right, which he may again locate as though the former entry thereunder had not been made.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 30, 1904.* (S. V. P.)

On March 10, 1881, a certificate of soldiers' additional right of homestead entry was issued to John B. Barlow for eighty acres, under section 2306 of the Revised Statutes, with the requirement endorsed thereon of residence on and cultivation of the land to be entered thereunder.

On February 27, 1882, Barlow located said certificate on the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 17, T. 23 N., R. 31 W., Springfield land district, Missouri, containing forty acres, leaving unused forty acres of said certified right.

April 21, 1883, Barlow made commutation proof in support of his said additional entry, and on April 26, 1883, paid to the receiver one hundred dollars as the commutation price of the land, and received commutation cash certificate therefor, on which patent was issued to him on May 15, 1884.

On May 21, 1899, an endorsement was made on the certificate of March 10, 1881, showing that the additional right therein certified had been exhausted to the extent of forty acres, and the unused portion, being for forty acres, was recertified.

It does not appear what disposition has been made of the last named certificate, but on August 12, 1902, Barlow sold and assigned to John H. Howell "Whatever right he [Barlow] may yet have in and to the forty acre portion of said certificate that was located by him on the land above described."

On August 29, 1902, Howell applied to your office for the recertification to him of the right of additional entry originally certified to

Barlow, and located by him upon the tract above described, basing his application on the act of June 5, 1900 (31 Stat., 267), which provides that:

Any person who has heretofore made entry, under the homestead laws, and commuted the same under the provisions of section 2301 of the Revised Statutes of the United States, and the amendments thereto, shall be entitled to the benefits of the homestead laws as though such former entry had not been made, except that commutation under the provisions of section 2301 of the Revised Statutes shall not be allowed of an entry made under this section of this act.

It is insisted in support of the application that Barlow's said additional entry for forty acres was commuted under the provisions of section 2301 of the Revised Statutes prior to the passage of the act of June 5, 1900, *supra*, and that therefore he was entitled to make another additional entry as if said commuted entry had never been made, and it is this alleged right of additional entry that is now claimed by Howell, and which he seeks to have recertified in his name.

On April 28, 1903, your office rendered a decision rejecting said application on the ground that the act of June 5, 1900, *supra*, does not apply to soldiers' additional homestead entries made under section 2306 of the Revised Statutes, and from that decision Howell has appealed to this Department.

It is admitted in your decision that it was an error on the part of your office to insert the requirement of residence and cultivation in the original certificate and to permit a commutation payment in lieu of the required residence and cultivation. Still it must be remembered that although such requirement was not authorized by the law as it is now interpreted, yet at the time this certificate issued it was in accordance with the existing construction of the law, and the requirement placed in the certificate was in exact compliance with the rule that then obtained both in your office and in the Department. So, consistently with such rule, Barlow was permitted to commute his additional entry; for if residence and cultivation were required under that entry, then it was proper apparently to permit him to substitute cash in the place of such residence and cultivation, as provided in section 2301 of the Revised Statutes.

It must be remembered that while the rule as announced in the case of John W. Hays (3 C. L. O., 21) obtained, which it did down to June 3, 1897 (24 L. D., 502), a requirement like that placed in this certificate was in strict compliance with departmental construction of the law, and that the holder of such certificate could not acquire title thereunder without complying with the terms imposed in said certificate. This being so, it was incumbent upon Barlow to comply with such terms, either through residence and cultivation of the land, or substitution of cash in lieu of such requirement, or to abandon all claim under the additional right which had been conferred upon him by section 2306

of the Revised Statutes. He chose to commute his entry, paid his money, and received his final certificate, and to that extent it may be said the original certified right was satisfied. But the act of 1900 distinctly provides "that any person who has heretofore made entry under the homestead laws, and commuted the same under the provisions of section 2301 of the Revised Statutes of the United States, and the amendments thereto, shall be entitled to the benefits of the homestead laws as though such former entry had not been made." The only way, logically, by which this legislation can be held not applicable to this case is by the interpolation of the word "lawfully," so that the statute would read "and *lawfully* commuted the same."

It does not seem to the Department that the ordinary rules of construction applicable to remedial statutes will permit this importation of a controlling word, and it is very certain that the equities of the situation are such that no strained construction should be placed upon this statute.

If Congress deemed it advisable to restore to homesteaders the right of entry because they had paid cash for their lands where such payment was clearly receivable in lieu of residence, how much the more are people entitled to a restoration of their original standing where it has been lost through a cash payment exacted by the land department without authority of law.

It is therefore held by the Department that a recertification of this additional right for forty acres should be allowed, if there is no other objection than that discussed herein, and the decision of your office is accordingly reversed.

—

OKLAHOMA LAND—"NEUTRAL STRIP"—PREFERENCE RIGHT—ACT OF
JUNE 6, 1900.

PLASTER *v.* MYERS.

The preference right of entry for thirty days, accorded to settlers upon lands within the "neutral strip" by the act of June 6, 1900, is not lost by failure to maintain the continuity of residence theretofore established thereon, where the settler continues to claim, exercise dominion over, and cultivate the land.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) April 30, 1904. (J. R. W.)

Julia E. Myers appealed from your office decision of October 12, 1903, canceling her homestead entry for the NE. $\frac{1}{4}$ of Sec. 1, T. 7 N., R. 15 W., Elreno, Oklahoma.

August 6, 1901, the land, part of the "Neutral Strip," was opened to entry under the act of June 6, 1900 (31 Stat., 672, 679), which, among other things, provided:

That the settlers who located on that part of said lands called and known as the "neutral strip" shall have preference right for thirty days on the lands upon which they have located and improved.

August 6, 1901, Miss Myers made entry, in the application for which she alleged, in her homestead affidavit, that, "I now reside on the land and have since Aug., 1899, and have improved the same since said date." Her special affidavit claiming preference right alleged—affiant is now an actual and *bona fide* resident upon said tract of land and has been a resident thereon and claimant therefor since about the 10th day of August, 1899; that this affiant has resided on said tract of land at all times since that date and has placed permanent and valuable improvements thereon and that such improvements are of the value of one thousand dollars; that said improvements consist of a four-room frame house, about 40 acres in cultivation and other valuable improvements.

February 8, 1902, Velda A. Plaster filed a contest affidavit, alleging that:

Julia Myers has not resided on the said tract of land at any time during the six months next preceding the 8th day of February, 1902, but that she has wholly abandoned the same. That she has at no time since making her aforesaid entry established her residence on the said land; that she has never established her residence on the said land.

* * * * *

that the said Julia E. Myers never has settled upon the said tract of land and had no improvements nor any evidence of settlement on the said land prior to the time her said entry was made.

There was a hearing at the local office in which both parties fully participated, and the local office found:

a residence was established before the period of six (6) months from the date of her entry. As to the second charge in the affidavit of contest, we find that she did not establish a residence on the land in contest prior to June 6, 1900, but had the legal possession of the said land, and exercised control over it, and received rentals therefrom during the years 1900 and 1901. And in our judgment was the only person exercising control over this land, and improving it, and was the only person entitled to make H. E. under the preference clause of June 6, 1900, and under the President's proclamation opening that land to settlement.

Plaster appealed, and your office found and held that—

The testimony submitted warrants the conclusion that defendant was not in default in the matter of establishing a residence as charged. . . .

In order to entitle her to such [the preference] right at time of entry it was necessary for her to show that at date of the passage of the act of June 6, 1900 (*supra*), she was an actual settler upon the land in good faith (*Kinman vs. Appleby*, 32 L. D., 190). Her own testimony shows that she was not, and it is apparent that her homestead and special affidavit, made at the time of making her application, alleging that she had been a resident upon the land since 1899, were palpably false.

Such being true, she was not entitled to a preferred right of entry, nor was she qualified to make entry under that provision of the act hereinbefore referred to. Her entry being initiated in fraud, it must be held that the same was voidable, and in the presence of the contest can not properly be permitted to stand.

The homestead entry is hereby held for cancellation.

Examination of the evidence adduced shows that the concurring findings of the local office and of your office, that Miss Myers established residence upon the land within six months from the date of the

entry, are fully sustained and will not be disturbed. It remains to determine whether she was within the benefits of the act of June 6, 1900, *supra*, and entitled to its benefits. The benefit of the act extends to "settlers who located on" such lands a preference right to enter the lands they "located and improved." A settler is one who makes a settlement. A settlement is effected and one becomes a settler from the moment that he connects himself with the land by an act clearly indicative of an intent to claim the land under the settlement laws. *Bowman v. Davis* (12 L. D., 415, 417). In the administration of the land laws, settlement implies an intent to reside, and, in respect to lands subject to entry, is always used as equivalent to residence when the question arises between two settlement claimants of land open to entry, and the promptness of establishing actual residence and continuity of residence when established are facts considered in determining the good faith of a settlement claimed. *Delorme v. Cordeau* (29 L. D., 277).

In September, 1899, Myers, at a cost of \$400, acquired the improvements and rights of a prior settler, occupied the house upon the claim, and slept there two weeks continuously. The purchase of improvements is equivalent to the making of them. They consisted of a log house, a four room frame house, two wells, dugout, stable, corral, and more than twenty acres of breaking, and were ample to show an intent in good faith to appropriate the land under the settlement laws. A right thus acquired can only be lost by a voluntary abandonment or by the initiation of an adverse better right in another. Residence established can be changed only when act and intent of the settler unite to effect it. *Anderson v. Anderson* (5 L. D., 6); *Alfred M. Smith* (9 L. D., 146, 147).

From some time in December, 1899, to February 4, or 5, 1902, Miss Myers admits that she slept, ate, and worked in the family of her sister, Mrs. McAtee, on land adjoining her claim, and did not reside on the claim. It is contended that thereby she ceased to be a settler on the land and lost right to claim benefit of the act of June 6, 1900. The evidence, however, unequivocally shows that she continued to assert claim to the tract in controversy, exercising dominion over it, causing it to be cultivated by a tenant, and contributing with others, whose lands were in like condition, to payment of expenses and service of counsel, to prevent allotment of their lands, and to obtain congressional recognition of their settlement rights, her contribution being \$41.00, and that her claim to the land was recognized by her neighbors. During the time from December, 1899, to August 6, 1901, the land was not open to entry. Her condition and the status of the land involved were analogous to that of a settler or entryman during the suspension of an entry or of a township plat. In case of a sus-

pended township plat, in *Hudson v. Docking* (4 L. D., 333, 334), the Department held that:

In respect to residence on the land, the testimony for Hudson is weakest. His immediate family (father and brothers) swear that his claim was his only home, and that he resided there from settlement until date of contest. But there is much evidence tending strongly to the conclusion that this residence was not continuous, and was not what the law and the decisions of the land department require. Hudson was a single man, it is true, and, being poor, he worked around at various places for day wages; but his cabin was not fitted up for a comfortable home, and he probably lived most of the time with his father, who resided on an adjacent tract and who employed him much of the time. There is no doubt in my mind that, from time to time throughout the five years preceding Docking's settlement, Hudson worked and lived on the land; but I am of opinion that there was not that continuous residence which the law ordinarily requires of a pre-emptor.

Narrating the uncertainty whether Hudson's right would ever be recognized, and the uncertainty regarding the status of the land, it was held (*ib.*, 335):

It is manifest that this state of affairs would tend strongly to discourage settlers, and to deter them from making improvements; and it is in evidence that such was its general effect on the settlers in that vicinity. If Hudson had been ousted of his possession by force, the Department certainly would hold him excused from improvement and residence during such enforced absence; I find that such a rule has been recognized in the case of *Williams v. Price* (3 L. D., 486), where a timber-culture claimant failed to comply with the law during a protracted contest; and *a fortiori*, it seems to me, the Department should regard with lenity a partial non-compliance with regulations, when its own act had served notice on Hudson that his rights were extremely doubtful and that everything done on the land was at his peril, and when it had barred all possibility of his making entry during this long period. It is not to be forgotten that Hudson was incited to settle on and claim this tract, by the land department's action in 1878, which recognized it as part of the public domain; and therefore it can not be said that he was chargeable with knowledge of the doubtfulness of his claim when he made his settlement. In view of all the facts in this case, I must hold that Hudson's residence and cultivation prior to the final restoration of the plats in 1883 were sufficient to satisfy the law.

There being no equity in the claim of Hudson's adversary, Docking, Hudson was awarded the land.

Similarly, in *Brunette v. Phillips* (22 L. D., 692), the lack of continuity of residence was excused during suspension of an entry, and it was held (*ib.*, 696) that:

the threats taken in connection with the fact that Phillips's entry was soon thereafter suspended, afford a reasonable excuse for not maintaining the residence which he attempted to establish. . . .

It is urged that the first substantial improvements were made by Phillips just prior to the initiation of contest. It is alleged, however, and the allegation is substantially supported by the evidence, that he conveyed logs to this land for the purpose of building a house as early as March, or April, 1893. He afterwards used this material in building the house he was occupying at date of contest.

More recently, in *Dasher v. Wilborn* (unreported), the facts were similar to those in the case at bar. The defendant was an unmarried

man, who lived, ate, and slept in his father's house on other land than that he claimed as a settler. He was on and around his claim from day to day, but did not until August 6, 1901, build, construct a residence or reside on the land there in controversy and claimed under the act of June 6, 1900. When his entry was attacked because he was not resident of the tract before entry, your office, February 25, 1903, dismissed the contest and the same was affirmed by the Department, June 13, 1903.

The entryman in the present instance has a better case, in that she took up residence on the land December, 1899. The fact that the house she purchased, then supposed to be on the land, on subsequent official survey proved to be on another quarter section does not impeach her good faith. *Keogle v. Griffith* (13 L. D., 7, 8); *Lewis C. Huling* (10 L. D., 83); *Talkington's Heirs v. Hempfling* (2 L. D., 46); *Staples v. Richardson* (16 L. D., 248). The mislocation of the first house which she purchased is clearly shown to be due to reliance by the settlers upon an unofficial survey, whereby the section lines were indicated to be 1100 feet north and about 400 feet west of their position as fixed by the official survey. Before the contest was initiated the entryman erected another house on the land and established residence therein.

The finding by your office of the falsity of the homestead and special affidavits as to actual residence at the time of entry and criticism of the affiant's good faith are not warranted by the record. Her testimony is candid and indicates no fraudulent intent or attempt to deceive. The affidavits do not appear to have been written or planned by herself, and the confusion and excitement incident to the opening day may well have prevented her critical examination of the statements therein.

Were these deliberate false statements, they would not constitute perjury, if the truth or falsity of the facts so stated was immaterial to the validity of the right asserted. The falsity of the statement, if deemed by her material and made deliberately, would merely be a fact for consideration in determining the credit to be given to her testimony, but does not justify the Department in depriving her of a right to which she is entitled under the law. As the evidence clearly shows the validity of her claim to benefits of the act of June 6, 1900, her entry is not made invalid, or fraudulent in its inception by any inaccuracy of statement made in good faith. She may have reasonably believed the statement was substantially true. It worked no prejudice to any right of the plaintiff.

Your office decision is reversed, and the finding and recommendation of the local office is affirmed. The contest is dismissed, and the entry will remain intact.

SWAMP GRANT—ADJUSTMENT—CONTEST.

GAMBLE *v.* STATE OF MINNESOTA.

A contest against the selection of a tract of land by the State of Minnesota under the swamp land grant, initiated by one having no claim of actual and *bona fide* homestead or pre-emption settlement, in which a hearing was had prior to the decision of the Department of March 16, 1903, relating to the adjustment of said grant, but the testimony of one of the witnesses examined at said hearing had not at that date been signed, is not one which has been "carried to a hearing and decision," within the meaning of paragraph numbered five in said decision, and for that reason excepted from the operation of said decision, but comes within the direction contained in paragraph two thereof, and must be disposed of, according to the showing made, by the field notes of survey.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 14, 1904.* (G. B. G.)

The land involved in this case is the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 28, T. 63 N., R. 25 W., Duluth land district, Minnesota, and the case is before the Department upon the appeal of George H. Gamble from your office decision of January 4, 1904, reversing the decision of the local office and adjudging upon the field-notes of survey that the land involved is of the character contemplated by the swamp land grant made to the State of Minnesota by the act of March 12, 1860 (12 Stat., 3).

It appears that this was a contest instituted by Gamble against the selection of said land by the State of Minnesota, and that the case had been heard September 25, 1900, prior to the suspension of swamp land contests in said State by departmental order of January 14, 1902, except that one of the witnesses in the case had not signed his testimony, and for this reason the local officers had not rendered a decision therein, and this was the status of the case March 16, 1903, the date of the decision of this Department in the case of the State of Minnesota (32 L. D., 65), and the regulations issued thereunder April 4, 1903.

By said decision of March 16, 1903, it was directed that:

(2) All existing contests or controversies in which there is no claim of actual and *bona fide* homestead or pre-emption settlement, will be disposed of under the original plan of following the field notes, there being nothing in such contests or controversies which would equitably entitle the claimants adverse to the State to have the contest disposed of under the rule announced in the Lachance decision.

But by paragraph 5 of the same decision it was provided that:

(5) No contest or controversy which has heretofore been carried to a hearing and decision will be in any manner disturbed or affected by these directions.

The appeal urges, in substance, that the Commissioner erred in adjudging by the field-notes of survey that the land described is of the character granted to the State of Minnesota by said act, in the face of

the fact established at the hearing under and in accordance with the regulations promulgated in departmental circular of December 18, 1886, that the tract was not swamp land and not of the character contemplated by said act, the said regulations being in full force and effect when the hearing was had to establish the actual character of the land.

This was, at the date of the promulgation of said decision, an existing contest in which there was no claim of homestead or pre-emption settlement. It therefore comes squarely within the direction given in paragraph 2, above quoted, that the case should be disposed of by the field-notes of survey. Nor does paragraph 5, above quoted, make this case an exception to the rule laid down in paragraph 2. It had not prior to March 16, 1903, been carried to a hearing and decision, and is therefore not of the class of cases which it was said in paragraph 5 should not be "disturbed or affected by these directions."

It is argued with some force that where a contestant has initiated a proceeding under regulations then in force, and under such regulations has done all that was then required of him to do to establish his claim, it is inequitable and unjust to change these regulations to his hurt and to deny him the fruits of his labor. If the facts of this case sustained the assumption upon which this argument is predicated, the Department would give it most careful consideration, but it appears from the record and from the facts hereinbefore stated that at the date the regulations governing swamp land contests in the State of Minnesota were changed, the contestant in this case had not done all that was required of him to establish his claim. The record was not complete; one of the witnesses had failed to sign his testimony, and the record was not in condition for the local officers to render decision thereon. This case does not therefore come either within the letter or spirit of paragraph 5 above quoted, inasmuch as there had not been either a hearing or decision in this case.

The authority of the Secretary of the Interior to change a rule of evidence for the determination of questions of fact in matters within his jurisdiction can not be successfully questioned, and while this Department would be slow to promulgate such rule as would operate inequitably on any class of claimants under the general land laws, this case does not present the matter in such light as to warrant further discussion, there being nothing in it to equitably entitle the claimant to have the contest determined upon evidence other than the field-notes of survey.

The decision appealed from is affirmed.

MINING CLAIM—EXPENDITURE—CLAIMS HELD IN COMMON.

BLACK LEAD LODE EXTENSION.

No part of the value of work done or improvements made upon a group of contiguous mining claims, in pursuance of a general system alleged to have been adopted for the common development of the group and an adjoining claim, can be accredited to the adjoining claim, toward meeting the requirement of section 2325 of the Revised Statutes, relative to the expenditure of five hundred dollars, where any of the several owners of said claim is without interest in the group upon which the improvements are located.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) May 5, 1904. (G. J. H.)

December 23, 1901, R. S. Giuliani *et al.* made entry, No. 3065, for the Black Lead Lode Extension mining claim, survey No. 4238, Salt Lake City, Utah.

June 30, 1903, W. A. Cooke filed a protest against the issuance of patent under said entry, alleging, among other things, that no "assessment, development, or patent work has ever been performed upon or for the benefit" of said claim.

October 24, 1903, your office held the entry for cancellation, for the reason that an expenditure of the value of \$500 had not been made upon or for the benefit of the claim, as required by section 2325, Revised Statutes, and in view of this holding stated that it was not necessary to pass upon the protest.

The entrymen have appealed to the Department.

The improvement relied upon to satisfy the statutory requirement as to expenditure is a tunnel, 280 feet in length, lying wholly outside of the claim, the mouth of which is 664.5 feet from the southwest corner (being the nearest point) of the claim, 146 feet of which they urge should properly be credited to the claim in question. The mineral surveyor in his certificate states that the value of said 146 feet is \$1,022, and that the—

tunnel is being made for the development of this claim and Sur. 4234, Susquehanna, Venice North Extension, Venice No. 3, Venice, Republic, and Venice Lode No. 2 lodes, which all belong to claimant herein, the first 134 ft. was applied to said claim.

The surface ascends steeply from this tunnel to the claim and therefore the tunnel extended will tend to the exploration and development cheaply and thoroughly.

There are no other improvements on the claim.

The claims mentioned in the surveyor's certificate were patented to William C. Hall, August 2, 1902, and form a contiguous group (hereinafter called the Susquehanna group), running in a general northeasterly and southwesterly direction. The claim here in question runs in a north and south direction and joins said group at an acute angle, part of the northwesterly side line of the Venice No. 2 (the northern-

most claim of the group) forming the southerly end line of the Black Lead Lode Extension. The tunnel in question appears to be located partly within the Susquehanna and partly within the Venice North Extension claim, and was constructed prior to the survey of the claim here in question. The entrymen allege that it was constructed with a view to develop the Susquehanna group and also the claim in controversy. They further allege that Giuliani, one of the entrymen, was, at the time the tunnel was constructed, the owner of an interest in the Susquehanna group, and contend, in substance and effect, that under the provisions of section 2324, Revised Statutes, and the amendment thereto of February 11, 1875 (18 Stat., 315), said 146 feet of said tunnel should be accredited to the claim in question. Said provisions and amendment read, respectively, as follows:

On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim. (Sec. 2324, R. S.)

That section two thousand three hundred and twenty-four of the Revised Statutes be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act. (Act February 11, 1875.)

In construing the above provisions, the courts and the Department have held that where several contiguous mining claims are held in common by the same person, association or company, and one general system has been adopted for the purpose of developing them all, the value of the work done and improvements made, whether done on only one of the claims or outside of all of them, is available toward meeting the requirements of the statute relative to expenditure as a condition precedent to obtaining patent. (See *Zephyr and Other Lode Mining Claims*, 30 L. D., 510; 513, and cases there cited; also *Copper Gance Lode*, 29 L. D., 542; *Clark's Pocket Quartz Mine*, 27 L. D., 351, 352.)

The entrymen have not shown, nor do they claim, that the co-owners of Giuliani in the Black Lead Lode Extension ever, at any time, had an interest in the Susquehanna group of claims. There is not, and was not at the date of the application for patent, therefore, a common ownership in the claim here in question and the claims composing the Susquehanna group, such as would constitute them a group of claims

“held in common” within the meaning of the law. (See Golden Crown Lode, 32 L. D., 217, 220.)

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

RIGHT OF WAY—ACTS OF MARCH 3, 1875, AND FEBRUARY 15, 1901.

OPINION.

No rights are acquired by an application for right of way under the act of February 15, 1901, prior to approval thereof by the Secretary of the Interior.

No such right is acquired by virtue of an application for right of way for a railroad under the act of March 3, 1875, before the approval thereof, and prior to the construction of the road, as will prevent the Secretary of the Interior withdrawing the lands covered thereby, for use as a reservoir site, under the provisions of the act of June 17, 1902.

Assistant Attorney-General Campbell to the Secretary of the Interior,
May 6, 1904. (G. B. G.)

By departmental decision of February 11, 1904, in the case of the Denver, Northwestern and Pacific Railway Company *v.* The Hydro-Electric Power Company (32 L. D., 452), the application of said power company, under the act of February 15, 1901 (31 Stat., 790), for right of way in the Grand River Canyon, Colorado, for a pipe line and power house site to be used in the generation and distribution of electricity, was conditionally allowed, but an application by the New Century Light and Power Company, successor in interest to the Hydro-Electric Power Company, for a reservoir site in said canyon, under the acts of March 3, 1891 (26 Stat., 1095, 1101, 1102), and February 15, 1901 (*supra*), was denied. By the same decision it was held that the application of the Denver, Northwestern and Pacific Railway Company to amend its map for a right of way, 5.72 miles, through said canyon, under the act of March 3, 1875 (18 Stat., 482), was superior to the application of the New Century Light and Power Company, above referred to, and the Commissioner of the General Land Office was directed to forward for approval the said Hydro-Electric Power Company's map for pipe line and power house site, and the said railway company's amended map, unless objections other than those considered in the decision should appear.

Under date of April 21, 1904, the Director of the Geological Survey recommended to this Department the withdrawal of certain lands within the Grand River Canyon for irrigation works, in accordance with the provisions of section 3 of the act of June 17, 1902 (32 Stat., 388). And inasmuch as the withdrawal of these lands would interfere with the use of the canyon by both the Hydro-Electric Power Company and the Northwestern and Pacific Railway Company in accordance with their plans as evidenced by the maps above referred to, the

matter has been referred to me for opinion as to whether or not the denial and rejection of said applications for rights of way and the withdrawal of said lands for reservoir purposes under the act of June 17, 1902, *supra*, "can be lawfully done."

It is submitted by the Geological Survey that the Grand River Canyon offers the only practical reservoir site for the storing of waters necessary to the reclamation of about two million acres of land on the lower Colorado river; that this land can be reclaimed only through a system of irrigation which includes this reservoir site, and that its reclamation will furnish support for a population of one million inhabitants; that if the said railway company's amended map should be approved in accordance with the decision referred to it must result, either that the present reclamation scheme will be abandoned, or that the government will be forced to pay the railway company a large sum in damages for the removal of its road bed; that the right asked for by the said railway company will be, if granted, under the act of 1875, *supra*, a mere gratuity, and that inasmuch as the land is needed by the government, the land department should, in view of the circumstances, refuse to incur it in such way as must ultimately put the government to vast expense or cause its abandonment of an important enterprise.

These considerations involve questions of executive discretion and under the reference do not fall within the scope of the opinion desired. The question submitted is, whether the applications for rights of way tentatively adjudged by the decision referred to in favor of said power company and said railway company may be denied, and whether the Secretary may refuse to approve the maps therein directed to be submitted.

It is well settled that an application for right of way under the act of February 15, 1901, *supra*, is without effect unless, acting thereon, the Secretary of the Interior by his approval grants the permission for use as applied for. The applicant takes no right whatever by virtue of an application filed under that act.

A more serious question arises, however, in regard to the application of said railway company for right of way under the act of March 3, 1875, *supra*, especially in view of the action heretofore taken by the Department thereon. In the case of *Jamestown and Northern Railroad Company v. Jones* (177 U. S., 125), it was held that the right of way granted to a railroad company by the act of March 3, 1875, took effect upon the construction of the company's road without regard to the time of filing the map prescribed by said act. It was further said, at page 131 of said decision, that the company might secure the grant in advance of construction, "by filing a map as provided in section 4." The question of the effect of the filing of such map was not, however, directly involved in that case, and what was said upon this question

was not at all necessary to the decision therein. In view of other decisions of the supreme court, especially that of *Noble v. Union River Logging Railroad Company* (147 U. S., 165), it would seem that the language used on p. 131 of the decision in 177 U. S., above mentioned, was not only in the nature of dicta, but also that its effect, if literally followed, would be to cause conflict with other decisions in which the question was directly involved.

From an examination of the said decision in 147 U. S., *supra*, it is apparent that no vested rights are secured under the act of 1875 by the mere *filing* of the map therein provided for. In that case, at page 176, it was said: "The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided, and *his approval was noted upon the plats*, the first section of the act vested the right of way in the railroad company," and it was held that the approval by the Secretary of the Interior of the railroad company's map created a vested right, which it was not within his power or within the power of his successor in office to annul. This holding is put clearly upon the ground that the final act of the executive was the approval of the map by the Secretary of the Interior, and that thereafter the land department was without jurisdiction. It necessarily results, if the final act of the executive in the administration of said act is the approval of maps filed thereunder, that until such approval, the company's road not having been constructed, the Secretary of the Interior, in the exercise of a sound discretion, may take such action with regard to the land involved as is permitted by all of the laws of the United States applicable thereto.

This case would seem to be conclusive of the questions here presented. The decision of this Department, above referred to, did not in law amount to an approval of the amended map for right of way of the Denver, Northwestern and Pacific Railway through the Grand River Canyon. It was merely an adjudication that this company had a superior right under such amended application to the use of said canyon for railway purposes over that of the New Century Light and Power Company for reservoir purposes. No other question was considered. The case was remanded to the General Land Office with express directions to submit said map for the approval of the Department only in the absence of objections other than those considered in the decision itself. That map has not as yet been submitted in accordance with said directions, there has been no approval thereof by the Secretary of the Interior, and there is no evidence before the Department that the company's road has been constructed.

I advise you that, if in your judgment good administration demands the rejection of said applications of the Hydro-Electric Power Com-

pany and the Denver, Northwestern and Pacific Railway Company for rights of way in the interest of the irrigation scheme proposed by the Director of the Geological Survey, you are authorized to do so. In this connection, I call your attention especially to the aforesaid ruling that a right of way may be acquired under the act of 1875 by construction, and suggest that, if the government desires the use of this canyon for irrigation purposes, the lands should be speedily withdrawn. But in view of the very considerable expense to which the interested companies have been put, and in view of the aforesaid decision of the Department in their favor, it would seem that the withdrawal should, for the time being, be temporary and provisional, and that these companies should have special notice thereof and be accorded an opportunity to be heard.

Approved:

E. A. HITCHCOCK, *Secretary.*

RULES AND REGULATIONS UNDER THE ACT OF FEBRUARY 20, 1904,
FOR THE SALE OF A PART OF THE RED LAKE INDIAN RESERVATION
IN THE STATE OF MINNESOTA.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 10, 1904.

The act of Congress of February 20, 1904 (33 Stat., 46), provides:

SEC. 3. That the Secretary of the Interior is hereby authorized and directed to sell, subject to the homestead laws of the United States, under such rules and regulations as he may prescribe, in tracts not to exceed one hundred and sixty acres to each individual, all that part of the Red Lake Reservation, in the State of Minnesota, lying westerly of the range line between ranges thirty-eight and thirty-nine west of the fifth principal meridian, approximating two hundred and fifty-six thousand acres. And the said land shall be sold for not less than four dollars per acre, and shall be sold upon the following terms: One-fifth of the price bid therefor to be paid at the time the bid is made, and the balance of the purchase price of said land to be paid in five equal annual installments, due in one, two, three, four, and five years from date of sale, respectively, payment to be made to the receiver of the United States land office for the district in which said land may be situated. And in case any purchaser fails to make such annual payments promptly when due, or within sixty days thereafter, all rights in and to the land covered by his or her purchase shall at once cease, and any payments made shall thereupon be forfeited and the Secretary of the Interior shall thereupon declare such forfeiture by reoffering said land for sale. And no patent shall issue to the purchaser until the purchaser shall have paid the purchase price and in all respects complied with the terms and provisions of the homestead laws of the United States: *Provided*, That such purchaser shall have the right of commutation as provided by section twenty-three hundred and one of the Revised Statutes of the United States, by paying for the land at the price for which it sold, receiving credit for payments previously made: *Provided further*, That such purchaser shall make his final proof conformable to

the homestead laws within six years from the date of sale; that aliens who have declared their intention to become citizens of the United States may become purchasers under this act, but before making final proof and acquiring title must take out their full naturalization papers; and that persons who may have heretofore exhausted their rights under the homestead law may become purchasers under this act: *Provided further*, That after the first sale hereunder shall be closed, the lands remaining unsold shall be subject to sale and entry at the price of four dollars per acre by qualified purchasers, subject to the same terms and conditions as herein prescribed as to lands sold at said first sale: *Provided further*, That all lands above described which shall remain unsold at the expiration of five years from the date of the first sale hereunder, shall be offered for sale at not less than four dollars per acre (and lands remaining unsold after such sale shall be subject to private entry and sale at said price) without any conditions whatever except the payment of the purchase price: *And provided further*, That wherever the boundary line of said reservation runs diagonally so as to divide any Government subdivision of a section, and the owner of that portion of such subdivision now being outside of the reservation becomes the purchaser of that portion of such subdivision lying within the reservation, residence and improvements upon either portions of such subdivision as provided by the homestead law, shall constitute a compliance as to all such Government subdivisions.

* * * * *

The Secretary of the Interior is hereby vested with full power and authority to make such rules and regulations as to the time of notice, manner of sale, and other matters incident to the carrying out of the provisions of this act as he may deem necessary, and with authority to continue making sale of said lands until all of said lands shall have been sold.

In addition to the price to be paid for the land the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre.

The lands ceded by the agreement made with the Red Lake and Pembina Indians belonging on the Red Lake Indian Reservation, in the State of Minnesota, which said agreement was, by the said act of Congress, modified, amended, ratified, and confirmed, are described as follows:

All that part of the Red Lake Indian Reservation lying west of the range line between ranges 38 and 39 west of the fifth principal meridian.

The tract of land ceded and to be disposed of hereunder aggregates 256,143.58 acres.

By virtue of the authority conferred by the said act of Congress, it is hereby ordered and directed that the land above described be offered at public auction at not less than \$4 per acre to the highest qualified bidder under the said act, upon the terms mentioned therein, at a public place in the town of Thief River Falls, in the State of Minnesota, beginning at 9 a. m. on Monday, the 20th day of June, 1904. The sale will be conducted by an officer, to be hereafter appointed by me, subject to the following rules:

1. The sale will begin at 9 o'clock a. m., and continue on that and succeeding days, not Sundays, until each tract shown on a printed

schedule approved by me has been sold, or offered for sale, as herein provided.

2. The lands to be sold will be arranged on said schedule in tracts of approximately 160 acres each, in the order in which they are to be offered for sale. The arrangement or order, except where it will be necessary to vary the same on account of the lands containing Indian graves or improvements, which must be offered for sale last, or on account of a meandered stream, will be as follows: Beginning with section 1, township 15 $\frac{1}{2}$ north, range 43 west, the sale will proceed with the land in that and the townships as they lie in a tier south thereof, then with the succeeding tiers as they lie on the east of the first tier in the same order from north to south. The order of offering will be, as to the sections, in their numerical order, in each township, except where varied as aforesaid, and as to quarter sections, first, the NE. $\frac{1}{4}$; second, the NW. $\frac{1}{4}$; third, the SE. $\frac{1}{4}$; and fourth, the SW. $\frac{1}{4}$; of the townships in their order as aforesaid.

3. Sixty tracts will be offered each day for the first two days and 80 tracts on each and every day, not Sunday, thereafter until all of said lands have been sold or offered for sale as herein provided.

4. The register and receiver of the land district in which said lands are situated will be in attendance at such sale from day to day, and all homestead entries made under such sale will be made before such officers, as herein indicated.

5. When a tract is sold the successful bidder must immediately present himself before the register and receiver and file his application for a homestead entry with proper proof of his qualifications as a homesteader by the usual homestead and other affidavits, except the nonsaline affidavit, which will not be required until final proof, except that he will not be required to allege that he has not exhausted his right by a homestead entry made or perfected before the date of said act of February 20, 1904, or to describe such entry, or if made after said act and before the date of the act of April 28, 1904 (33 Stat., 527), if he shall show himself entitled to make another homestead thereunder. He will also then pay to the said receiver the first payment required by said act of February 20, 1904, for said land, to wit: One-fifth of the purchase price and also, in addition thereto, the usual fees and commissions required by law to be paid on such entries where the price of the land is \$1.25 per acre.

6. If any purchaser shall fail to present himself before said officers or to show himself qualified to make homestead entry for such land or to pay the first payment of one-fifth of the amount of his bid or the fees and commissions due on his entry, as provided and required in said act and in rule five above, within twenty-four hours from the time when his bid was accepted, he will not thereafter be recognized as a bidder at said sale, and the tract or tracts so bid in and not entered

by such purchaser will at once be reoffered for sale, subject to the same requirements, conditions, and qualifications of purchase as before.

7. If the register and receiver shall decide adversely as to the qualifications of any successful bidder and reject his application, such decision shall be final, and no right of appeal will lie therefrom. Any rule of practice or other regulation of the Department conflicting with this rule is hereby suspended, so far as it may affect the applications under this sale, during the continuance of this public sale.

8. The officer conducting such sale or the Commissioner of the General Land Office is given full authority at any time before or during the progress of such sale to postpone or discontinue the same if he shall have reason to believe that any combination, collusion, conspiracy, or agreement exists or is being formed among or on behalf of bidders or prospective bidders at such sale.

9. The Commissioner of the General Land Office may make any rule or regulation, not inconsistent with these rules or regulations, in order to effectuate the same.

10. Power is reserved to enlarge, change, modify, or annul these rules or any of them at any time before or during the sale, if public interest shall seem to demand such enlargement, change, modification, or annulment.

W. A. RICHARDS, *Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

CEDED LANDS IN RED LAKE INDIAN RESERVATION—HOMESTEAD
ENTRY—QUALIFICATIONS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 27, 1904.

The following persons are not qualified to make homestead entry in the Red Lake ceded lands to be sold at Thief River Falls, Minnesota, sale beginning June 20, 1904:

1. Any person who has made a homestead entry after February 20, 1904, and is not entitled to make another entry under the act of April 28, 1904 (33 Stat., 527).

2. A married woman, unless she has been deserted or abandoned by her husband.

3. One not a citizen of the United States, and who has not declared his intention to become such.

4. Anyone under 21 years of age, not the head of a family, unless he served in the Army or Navy of the United States for not less than fourteen days during actual war.

5. Anyone who is the proprietor of more than 160 acres of land in any State or Territory.

6. One who has acquired title to, or is now claiming under any of the agricultural public land laws, in pursuance of settlement or entries made since August 30, 1890, an amount of land which, with the tract now sought to be entered, will exceed in the aggregate 320 acres.

W. A. RICHARDS, *Commissioner.*

Approved:

THOS. RYAN, *Acting Secretary.*

SCHOOL LANDS—SEC. 2, ACT OF FEBRUARY 2, 1863—ACT OF JUNE 17, 1902.

INSTRUCTIONS.

Until so authorized by Congress, neither the Department nor the territorial government of Arizona has the power to dedicate for use in connection with an irrigation project under the act of June 17, 1902, lands in said Territory which, by section 2 of the act of February 2, 1863, have been reserved, for school purposes, to the future State to be erected including the same.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 10, 1904.* (J. R. W.)

The Department is in receipt of your office letter of April 29, 1904, concerning the improvements and rights of George E. Shute in the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 36, T. 4 N., R. 13 E., G. & S. R. M., Gila county, Arizona, proposed to be acquired, in connection with the Salt River project, under the act of June 17, 1902 (32 Stat., 388). The abstract of title disclosed that title is in the United States and that the land is in reservation under section 2 of the act of February 24, 1863 (12 Stat., 664, 665, Sec. 1946 R. S.), to be granted for school purposes to the future state which shall be erected, including the land within its boundaries. In consequence of this condition of the title, the Department held that purchase of the property could not be authorized. Your office requests advice: "Whether specific action of Congress is necessary in order to divest the territory of its power over the land."

Congress having by the act of 1863 reserved such land from any sale or disposal, with view to granting it to a future state that may be erected, no power exists in any authority but Congress to make any disposal of the title or in any way to affect it, or to dedicate the land to other purposes than that for which it has been so reserved. By the act of April 7, 1896 (29 Stat., 90), the Territory of Arizona is author-

ized temporarily to lease such land for terms not longer than five years, such lease, however, to terminate at the admission of the future state to which the title shall be granted. The territory is thus denied power to affect the title to the land or to grant leases or right of control or use beyond the period of continuance of territorial government. The declared purpose of Congress is that the full and unincumbered title shall pass to the future state. It is therefore beyond the power of the territory to grant any valid preference right of purchase or of renewal of leases, or to compensate present lessees for improvements, which shall be obligatory upon the future state. Until Congress makes appropriation of such lands, or authorizes the Department to do so, no action of the Department or of the territorial government can vacate the present existing reservation or dedicate the land to the irrigation project.

Your office states that in Arizona improvements on public lands are regarded as property and possessory rights thereto are recognized and protected. This is the general rule in all the states and territories containing public lands. Such rights have no validity against the government, nor against the future state for which the reservation is made.

The territory is, however, given authority to lease such lands for limited times, to expire in any event upon the erection of a state government. The leasehold during the territorial existence is therefore an estate held under authority of Congress and is property; and if in the way of the irrigation project may be acquired. It would, however, be inexpedient to acquire the existing leasehold right if the government must therewith assume the obligation to pay rent, or if, in default of rent being paid, the supervisors of Gila county may terminate the leasehold and grant another similar right.

Your office will therefore confer with the present holder of the leasehold and with the proper local authorities, in the event that acquisition of the possessory right and improvements is necessary to prosecution of the irrigation project, and will report at what price they can be obtained. In such case, however, prior to reporting the matter to the Department for approval, it will be necessary that the Board of Supervisors, or other proper territorial authorities, consent to the purchase, waiving further payment of rent and agreeing not in future to make a lease of the same land during the period of territorial existence. When the matter is presented in such form the Department will consider the advisability of such purchase in each particular case.

TIMBER AND STONE APPLICATION—PRELIMINARY AFFIDAVIT.

PATRICK McNAMEE.

Where an applicant to purchase under the act of June 3, 1878, states in his preliminary affidavit that he has personally examined the land, and it subsequently appears from his final proof that he had not made personal examination of the land prior to making such affidavit, his application will be rejected.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 10, 1904.* (A. S. T.)

On April 21, 1902, Patrick McNamee applied to purchase under the act of June 3, 1878 (20 Stat., 89), the SW. $\frac{1}{4}$ of Sec. 24, T. 31 N., R. 13 W., W. M., Seattle land district, Washington, and in support of his application filed his affidavit, wherein he alleged that:

I have personally examined said land and from my personal knowledge state that said land is unfit for cultivation and valuable chiefly for its timber, that it is uninhabited and contains no mining or other improvements.

On November 7, 1902, he offered proof in support of said application, from which it appeared that the applicant had not, prior to filing his application, personally examined the land, but that after filing his application and before offering his proof he had personally examined the land, and that it was of the character of land subject to entry under said act. With said proof he filed his affidavit, wherein he alleged that prior to filing his application he had been advised that it was not necessary that he should personally examine the land before filing his application, and that he employed and paid another party to examine the land for him, and upon his report and upon his (affiant's) general knowledge of the character of the lands in that vicinity, he made the affidavit as to the character of the land; that he did not know when he filed said affidavit that it contained the statement that he had personally examined the land, and that he had acted in perfect good faith and endeavored to comply with all the requirements of the law.

On November 12, 1902, the local officers forwarded said proof and affidavit to your office for instructions, and on November 4, 1903, your office rendered a decision instructing the local officers to reject said application. From that decision the applicant has appealed to this Department.

The general circular of July 11, 1899 (page 46), section 8, requires that:

The sworn statement before the register and receiver required as above (section 2 of the act) must be made upon the personal knowledge of applicant, except in the particulars in which the statute provides that the affidavit may be made upon information and belief.

In order to comply with this requirement it is necessary that the applicant should personally examine the land, as he could not otherwise acquire such personal knowledge.

This case is in all material respects similar to the case of L. W. Walker (11 L. D., 599), cited in your said decision, and in that case it was held that although the statute did not prescribe the form of the affidavit to be sworn to by the applicant, it did require him to make oath to certain facts in relation to the character and condition of the land, and that to enable him to ascertain the facts to be sworn to it was necessary for him to personally examine the land, and it was held that the statement required in the affidavit that he had personally examined the land is not an unreasonable requirement, since 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 was held that where the applicant falsely states in his preliminary affidavit that he had personally examined the land, the right of purchase should be denied.

In the case of Mary E. Gardner (16 L. D., 560), also cited in your said decision, it was held that where the application was prepared under the instructions and personal supervision of the local officers, and the words, "I have personally examined the land," were stricken out of the blank form, and where the applicant was allowed to make proof and payment for the land, there being no adverse claim, and no evidence of bad faith, and the proof showing that the land was of the character contemplated in the act, the entry should be allowed to stand, and it was pointed out that the principal feature distinguishing that case from the case of L. W. Walker, *supra*, was that in the Walker case the affidavit alleged that he had personally examined the land, while in that case no such statement was made in the affidavit, and it was because the statement was *not* made in the affidavit that the entry was allowed to stand, while in the Walker case the entry was canceled because the statement was *falsely* made in the affidavit, the false statement being taken as evidence of bad faith on the part of the applicant.

A similar ruling was made by this Department in the case of Gutter *v.* Sternseher, decided on December 6, 1901 (not reported).

In the case of John O'Gorman and twenty-five others, decided by this Department on March 4, 1902 (not reported), the applicants in their preliminary affidavits had alleged that they had personally examined the lands, and upon being informed that an agent of your office proposed to subject them and their final proof witnesses to rigid cross-examinations in order to ascertain whether or not they had acted in good faith, they declined to offer proof, although they had published notice of their intention to offer such proof, and they thereupon applied for leave to readvertise notice of intention to offer final proof, and your office on October 12, 1901, denied their application. They appealed to this Department, where on March 4, 1902, your said decision was affirmed. In that case the Department said:

The applicants severally made affidavit that they had personally examined the land and as to their own knowledge of its character; this they could not have done

unwittingly. They are in no position to ask clemency when in the position of having made a sworn statement that a personal examination of the land had been made by themselves, when in fact no such examination had been made.

The applicant in the case at bar states in his special affidavit that he had been informed that it was not necessary for him to personally examine the land before filing his application. Conceding that he had been so advised, that fact constitutes no excuse for having falsely stated in his application that he had made such examination, when in fact he had not done so. He states in his affidavit that he did not know when he swore to his application that it contained the allegation that he had personally examined the land, but the register before whom he was sworn to the application certified that the affidavit was read over to him in his (the register's) presence before he signed his name thereto. Said statement is plainly printed in the affidavit, and if, after having an opportunity to read it, and having it read over to him, he signed and swore to it without knowing its contents, such rashness and negligence are indicative of bad faith on his part.

Following the ruling in the cases hereinbefore referred to, his application must be rejected.

Your said decision is therefore affirmed, and the application is rejected.

DESERT LAND ENTRY—PARTIAL ASSIGNMENT.

LUTHER J. PRIOR.

The assignment of a portion only of a desert land entry will not be recognized by the land department.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 10, 1904.* (A. W. P.)

On May 2, 1902, James William Compton, sr., made desert land entry No. 296, for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 8, T. 8 N., R. 30 E., Walla Walla, Washington, land district.

By letter of transmittal of July 1, 1902, the local officers forwarded to your office an assignment executed by Compton on June 26, 1902, to Luther J. Prior, for the east half of his entry, being the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 8, containing forty acres. No action appears to have been taken by your office relative to the validity of this assignment, and on April 17, 1903, Prior submitted annual proof for the first year, again alleging himself to be the assignee of the said entryman to that portion of the tract last above described, which proof was transmitted to your office on April 28, thereafter.

By decision of October 20, 1903, you held that:

The said proof is unsatisfactory for two reasons, viz: No evidence is furnished showing the assignment and the law and regulations made thereunder do not con-

template nor recognize an assignment of a part but the whole of an entry. For these reasons said proof stands rejected.

Upon receipt of the above decision the local officers, by letter of October 24, 1903, called your attention to the fact that, as shown by their records, they had transmitted an assignment from Compton to Prior to your office by letter of July 1, 1902. The attention of your office being thus called to the same, you held by decision of November 9, 1903, that:

Said assignment is not recognized for the reason that it is for a portion of the entry and not for the whole, as this office declines to recognize the assignment of a part of any entry.

From your said decisions Prior has appealed to the Department, urging in support of his appeal that the assignment in question was executed in good faith, for which the consideration appears to have been one hundred dollars; that believing himself to be the lawful assignee of the said forty acres he did within the first year expend, in the necessary improvement of the said tract, the sum of forty dollars, proof of which was properly made and forwarded to the local office; and that he had no notice of the decision of your office until October 24, 1903, a period of sixteen months from the date of assignment, and several months after he had expended the necessary amount for the first year's improvement of the tract.

By decision of April 15, 1880, in the case of S. W. Downey (7 C. L. O., 26), the Department held that desert land entries made under the act of March 3, 1877 (19 Stat., 377), were not assignable, and following said decision it was uniformly held that the transfer of such entries, whether by deed, contract, or agreement would vitiate the entry. The act of March 3, 1891 (26 Stat., 1095), however, added five sections, numbered from four to eight, inclusive, to the desert land act of March 3, 1877, *supra*, sections 5 and 7 of which the Department holds give the entryman the right to assign at any time prior to submission of final proof. Section 5 provides "that no land shall be patented to any person under this act unless he or his assignors" shall have fully complied with the specific requirements of the law; and upon a satisfactory showing thereof, section 7 provides also that "a patent shall issue therefor to the applicant or his assigns." In the application of these amendatory sections of the desert land law, however, as held by the decisions appealed from, it appears that your office has uniformly declined to recognize the assignment of the part of any such entry, holding in effect that the entryman could make but one assignment for the entry, and for which but one patent would issue.

The Department has carefully examined the sections above referred to and is fully convinced of the correctness of this construction. These sections expressly provide that upon a satisfactory showing of

compliance with the legal requirements of the desert land law, as amended, a patent shall issue to the entryman or his assigns. In other words, that for each "entry" (which the Department holds refers uniformly to the original entry—Fred W. Kimble, 20 L. D., 67), but one patent shall issue, and while Congress by the act of March 3, 1891, *supra*, recognized, and in effect approved of the right of assignment, it is plain that it contemplated only the assignment of such an entry in its entirety. If it were conceded, for the purpose of argument though not admitting, that any broader or more liberal interpretation in this respect might be given to the desert land law, as amended by the act of March 3, 1891, *supra*, yet certain it is that even for the purpose of a good administration of the same, your office was entirely warranted in placing such a construction thereon, which is accordingly fully approved by the Department.

The equitable features of the case at bar, however, are entitled to some consideration. In this respect it appears that while the assignment in question was promptly transmitted by the local officers to your office, yet no action was taken thereon as to the sufficiency of the same until almost sixteen months after date of execution. In the meantime Prior, believing himself to be the lawful assignee of the tract in question, for which he had given a valuable consideration, had fenced the land, thus improving the same as required by law, annual proof of which was submitted at the close of the year, and which was not rejected by your office until more than six months thereafter because of the assignment, then for the first time considered.

In view of the above facts, the Department is of the opinion that final action on the annual proof of Prior and the assignment in question should be delayed for a reasonable time, which your office may indicate, in order to afford him an opportunity to secure from Compton an assignment or relinquishment of the remaining forty acre subdivision of his entry. In this connection, it also appears, so far as disclosed by the record, that the only annual proof for the first year offered in support of this entry was that made by Prior, which applies only to the east half of said tract (the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$), no proof having been offered for the west half of the entry (the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$). You will therefore direct the local officers to call upon Compton to show cause within thirty days from notice hereof why that part of his entry last above described should not be canceled for failure to submit in support thereof the annual proof required by the provisions of the desert land law.

In the event of the cancellation of this part of Compton's entry for failure to submit such proof, or upon a relinquishment executed by him, the assignment to Prior would be for the whole of the remainder of the entry, and hence could be properly recognized as an assignment of the original desert land entry. If there be no such cancella-

tion of the remaining part of this entry as herein indicated, however, or Prior fail to secure an assignment of the same from Compton within the time suggested, his annual proof will stand rejected in conformity with the decision of your office appealed from.

The case is accordingly remanded.

MINERAL LAND—CLASSIFICATION—PROTEST—NOTICE.

NORTHERN PACIFIC RAILWAY COMPANY.

Publication of notice of a hearing ordered on a protest against the mineral classification of land under the act of February 26, 1895, must be made in a newspaper published nearest the land; and the register is clothed with discretionary power to designate the newspaper in which the publication shall be made, but this power is subject to review by the Commissioner of the General Land Office and the Secretary of the Interior, and when found to have been abused by the designation of a newspaper not published nearest the land a hearing had in pursuance of such notice will be set aside.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 10, 1904.* (A. C. C.)

In the months of October, November and December, 1900, and January, February and March, 1901, the commissioners appointed under the act of February 26, 1895 (28 Stat., 683), entitled "An act to provide for the examination and classification of certain mineral lands in the States of Montana and Idaho," filed, in accordance with the terms of said act, in the Coeur d'Alene, Idaho, land office, six separate reports, in which they classified as mineral in character the land therein described, situated in Shoshone county, Idaho, and over which the public survey had not been extended.

Notice of the classification seems to have been published for the statutory period in a newspaper published at the capital city of Idaho; also in three newspapers published in Shoshone county, Idaho, viz., The Wardner News, The Wallace Press, and The Mullan Mirror. May 29, July 26, September 13, and September 29, 1902, the Northern Pacific Railway Company filed its verified protests against the acceptance of said classification, in which protests it was alleged, among other things, in substance and effect, that the lands embraced in said reports were non-mineral in character. By stipulation signed by the attorney for the Northern Pacific Railway Company and the United States attorney for the State of Idaho, who at the request of the Secretary of the Interior, had been directed by the Attorney-General to appear for and represent the government, it was agreed "that the hearing in the above protests may be set for the same date, and that all of said protests shall be heard as one." Whereupon a hearing was ordered to be had November 20, 1902, before the local

officers at the Coeur d'Alene, Idaho, land office. Notice of the hearing was published only in the St. Maries Courier, a semi-weekly newspaper printed and published in the town of St. Maries, Kootenai county, Idaho, which newspaper, presumably, was designated for the purpose by the register of the local land office. By another stipulation, signed by the parties to the former one, the hearing was continued until December 4, 1902, at which time said parties appeared, whereupon the protests in respect to a part of the lands involved were withdrawn and the hearing was had as to the remaining lands, but only the railway company submitted evidence as to their character.

January 27, 1903, the local officers, from the evidence submitted, found such remaining land to be non-mineral in character. Subsequently the record in the case was forwarded to your office.

July 2, 1903, A. G. Kerns, of Wallace, Idaho, as attorney for Adam O'Donnell, W. S. Sims, and John H. Hanson, filed in your office a petition, accompanied by affidavits to support the same, in which it was alleged, among other things, in substance and effect, that prior to December, 1902, petitioners and others were and now are the owners of lode mining claims located within the mining district wherein the lands so found to be non-mineral are situated; that the greater part of the lands found to be non-mineral in character are in fact of known mineral character; that petitioners had no notice of the filing of the protests, or of the hearing ordered and had thereon, and did not know the result of the hearing until June, 1903. They therefore asked that a hearing be had upon the petition.

August 8, 1903, your office held, among other things, that due notice of the hearing had been given, and that the evidence submitted thereat warranted the finding of the local officers thereon. Whereupon said finding was affirmed in respect to "all odd numbered sections within the area involved;" and the classification made by the commissioners "as to all lands against which the protests of the company were formally withdrawn," was allowed to stand. The petitioners filed an appeal, due notice of which was given the railway company, and alleged therein, among other things, in substance and effect, that the notice of the hearing was only published in the St. Maries Courier, which had "a circulation of less than one hundred copies per week . . . and no circulation whatever throughout the district" where the lands involved are situated.

October 8, 1903, in a communication addressed to your office, the United States attorney for Idaho, recommended "that action be taken looking to the reopening of the case and the submitting of additional proof," for the reason that a large number of citizens of Idaho appear to be interested in mineral claims located upon the lands which were involved in the hearing; that they had no previous notice of the hearing; and that they desired to submit evidence to show that the lands found

to be non-mineral in character are in fact mineral lands. October 24, 1903, in reply to said communication, your office advised said United States attorney that—

if any of the parties in interest will submit affidavits relative to the character of the lands in question, specifying dates of their discoveries and locations, kind of mineral, estimated value thereof, whether same are situate upon what will be odd numbered sections of the townships when surveyed, and any other facts pertinent to the issue involved, such allegations will be given careful consideration by this office, and if deemed sufficient to warrant such action they will be afforded an opportunity to present testimony in support of their allegations, as the classification of lands under the act of February 26, 1895, does not become final until such classification is approved by the Secretary of the Interior.

October 13, 1903, the Bald Mountain Mining and Milling Company, a corporation, submitted an affidavit of its president, to the effect that said company was the owner of five valid lode mining claims, a mill-site, and a tunnel site, situated in the St. Regis mining district, Shoshone county, Idaho, and has expended in developing the same the sum of fourteen thousand dollars.

By letter of October 31, 1903, your office advised the president of said company that his affidavit did not state whether the mining claims of his company were "upon odd or even numbered sections;" that the decision of your office of August 8, 1903, related only to odd numbered sections; that the classification referred to does not become final until approved by the Secretary of the Interior; and that if he will submit affidavits showing whether or not the mining locations of his company were situated "upon what will be odd numbered sections when the land shall have been surveyed, same will receive due consideration."

November 2, 1903, your office forwarded all the papers in the case to the Department.

March 26, 1904, Talfourd P. Linn and Dan Wendel, by resident counsel, filed a petition in the case, which was sworn to by Linn, and which was accompanied by the affidavit of Wendel. It was alleged therein, among other things, in substance and effect, that December 30, 1902, they made entry for the Copper Kopje and sixteen other lode mining claims (survey No. 1757, made in June, 1902), located upon unsurveyed lands within the Mt. Regis mining district, Shoshone county, Idaho, and which were involved in the said protests filed by the railway company, and the hearing subsequently had thereon; that they had had no notice of the hearing prior thereto; that the notice thereof was not published in a newspaper in the county of Shoshone, Idaho, where the lands embraced in the classification referred to are situated; and that the St. Maries Courier—

in which the notice of said hearing was published was not at the time of such publication a newspaper of general circulation in the county of Shoshone.

Those who have appeared in opposition to the railway company, attack the validity of the hearing in question, and the proceedings had thereunder, upon several alleged grounds, only one of which it is necessary to consider, viz.: Was notice of the hearing published as required?

Section five of the act in question provides, among other things, in substance and effect, that hearings ordered upon protests filed against the acceptance of a classification "shall be conducted" as "contests involving the mineral or nonmineral character of land in other cases."

By letter of instructions of August 10, 1895 (21 L. D., 108), in respect to said act of February 26, 1895, it is provided, in part, that—

In all cases where the land has been classified as mineral and protests alleging it to be non-mineral are filed, service of notice by publication, at the expense of the protestant, as in ordinary hearings, must be had.

Section 2335 of the Revised Statutes provides, among other things, in substance and effect, that where, "in cases of contests as to the mineral or agricultural character of land," publication of notice is necessary, it shall be by publication "in a newspaper, to be designated by the register of the land-office as published nearest to the location of such land."

The purpose of requiring notice by publication is mainly to diffuse information and notice respecting the hearing in the vicinity of the lands involved "and among those whose residence or presence in that locality bespeak their interest" therein "or their knowledge thereof," in order that all parties concerned in the lands may have an opportunity to assert and protect such interests at the hearing. See *Tough Nut*, etc. (32 L. D., 359, 360). In view of the provisions of said section 2335, this purpose is only accomplished by publishing the notice in a newspaper published nearest to the land.

While the statute vests in the register discretionary power to determine under the supervision of the Commissioner of the General Land Office, and the Secretary of the Interior, the newspaper that is published nearest to the land, this discretion is subject to review, and if abused, to correction by the officers last named.

Was the notice of the hearing published in a newspaper nearest to the lands? And if not, did the register abuse the discretion vested in him by the statute? As has been seen, this notice was published in the *St. Maries Courier*, a newspaper published at the town of St. Maries, while the notice of the classification was published in the *Wardner News*, a newspaper published at the town of Wardner; the *Wallace Press*, a newspaper published at the town of Wallace; and the *Mullan Mirror*, published at the town of Mullan. As shown upon the map of the State of Idaho, issued by your office in 1899, the town of St. Maries, is about twenty-five miles, in a direct line, from the west boundary line of the lands involved; the town of Wardner about

twelve miles, the town of Wallace about six miles, and the town of Mullan about six miles from the north boundary line thereof; and that the lands, taken as a whole, are nearer the last named towns than they are to St. Maries. It would seem, therefore, that the notice of the hearing was not published in a newspaper published nearest to the lands, and that the register abused the discretion vested in him by designating the St. Maries Courier, as the newspaper in which to publish the notice.

As the United States Attorney for Idaho appeared at the hearing only for the Government (See Opinion Asst. Atty. Genl., 28 L. D., 295, 297), such appearance did not waive notice on behalf of third parties who were interested in sustaining the classification made by the commissioners.

It follows from the above that the hearing was unauthorized. Your office is accordingly directed to vacate and set aside the same, together with all proceedings thereunder. Should the railway company apply for a new hearing, notice of the same, when allowed, should be given as required by the statute and the rules and regulations made in pursuance thereof, and a special agent of your office should be detailed to make a thorough examination of said lands with regard to their mineral character with the view of furnishing evidence at such hearing, and a proper officer of the Department will be detailed to be present and to represent the government thereat.

Notify all parties who have appeared herein of the action taken and instruct the local officers to see that notice of any future hearing is specially given to these parties and any others who may file notice of claim to any of these lands.

RAILROAD AND WAGON ROAD GRANT—SETTLERS—ACT OF FEBRUARY
26, 1904.

INSTRUCTIONS.

Instructions defining scope of investigation directed to be made by the act of February 26, 1904, with a view to legislation for the relief of settlers on certain lands in Sherman county, State of Oregon, within that part of the grant made by the act of February 25, 1867, to aid in the construction of what was afterwards known as The Dalles military wagon road, overlapped by the withdrawal made under the grant of July 2, 1864, in aid of the construction of the Northern Pacific railroad.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 11, 1904.* (F. W. C.)

Your office letter of the 2d instant invites departmental consideration to the act of Congress approved February 26, 1904 (33 Stat., 51), entitled "An act for the relief of settlers on lands in Sherman county, in the State of Oregon."

February 25, 1867 (14 Stat., 409), a grant was made to the State of Oregon to aid in the construction of what was afterwards known as The Dalles military wagon road. This grant was by the State conferred upon the The Dalles Military Wagon Road Company, the present claimant under said grant being the Eastern Oregon Land Company.

The grant made by the act of July 2, 1864 (13 Stat., 365), in aid of the construction of the Northern Pacific railroad, provided for a railroad via the valley of the Columbia River to a point at or near Portland. A map of general route of this part of the line was filed August 13, 1870. The road was never definitely located in this vicinity and the grant appertaining to this portion of the road was declared forfeited by the act of September 29, 1890 (26 Stat., 496).

As the wagon road grant runs in a southeasterly direction from The Dalles on the Columbia River, it was overlapped by the withdrawal made upon the map of general route of the Northern Pacific railroad, and, following the forfeiture act of September 29, 1890, this Department, in considering the rights of the wagon road company within the conflict, held, as the Northern Pacific was the prior grant, that the lands within the conflict were excepted from the wagon road grant and were restored to the public domain by said forfeiture act. Said lands were accordingly opened to general disposition under the public land laws and numerous entries were made thereof, which, for the purpose of the investigation directed to be made by the act of February 26, 1904, are divided into two classes: homestead or settlement claims and purchasers under the forfeiture act of 1890.

In certain suits brought by the Eastern Oregon Land Company to have its rights under the wagon road grant within said conflict judicially determined, the supreme court on January 8, 1900, held that the wagon road grant was in nowise affected by the Northern Pacific land-grant, as the latter never acquired precision by the definite location of the line of its road opposite the conflict in question, and therefore sustained the claim made to the lands under the wagon road grant. See *Wilcox v. Eastern Oregon Land Company* (176 U. S., 51); *Messinger v. Eastern Oregon Land Company* (ib., 58).

The object of the investigation directed to be made is to gather such information as will form a basis for legislation for the relief of those who, misled by the erroneous action of this Department in restoring lands, the property of the wagon road company, went thereon and made valuable improvements, or, being thereon, continued to improve the land, looking to the United States for a title under the act of 1890. The claims have been twice reported upon by this Department, the reports being incorporated in what are known as Senate Document No. 8, 2d Session, 56th Congress, and Senate Document No. 240, 1st Session, 57th Congress. In the latter document is incorporated a report made by C. E. Loomis, during January, 1902,

he then being a special agent of your office, and contains considerable information with regard to the status at that time of claims theretofore asserted to these lands under the general land laws. From the data gathered by Mr. Loomis it appears that since the decisions by the supreme court many of the persons who had settled upon and entered lands within the wagon road grant have been dispossessed; that some of the entrymen have abandoned their claims and were not at the time of his investigation in the vicinity of these lands; that others had died, and, in some instances, the original claimant had sold the improvements made upon the land to persons then in possession holding under the wagon road grant; and it will, perhaps, be difficult to secure the information desired as to all these claims.

The act of February 26, 1904, directs investigation with regard to the first class—

HOMESTEAD OR SETTLEMENT CLAIMS.

- (1) To ascertain the names of *all* settlers, with or without entry, where the settlement was made after the restoration of these lands under the erroneous holding before referred to;
- (2) Description of land settled upon; and
- (3) The value of the improvements made by such settlers; also the value of the lands settled upon at certain stated times; namely:

THOSE DISPOSSESSED.

With regard to this class inquiry is to be directed:

- (1) As to the date when settlement was commenced and the date such settler was dispossessed;
- (2) The reasonable value of the improvements placed upon the land by the settler, reckoned as of the date he was dispossessed; and
- (3) The reasonable value of the land settled upon at the date of the ouster.

THOSE STILL IN POSSESSION.

With regard to this class inquiry is to be directed:

- (1) As to the date when settlement was commenced;
- (2) The reasonable value of the improvements placed upon the land by the settler, reckoned as of the date of the passage of the act of February 26, 1904; and
- (3) The reasonable value of the land settled upon at the date of the passage of said act of February 26, 1904.

SETTLERS WHO PURCHASED OF GRANTEE UNDER WAGON ROAD GRANT.

Inquiry is also directed to be made as to whether any of these settlers made purchase of the lands settled upon from The Dalles Military Wagon Road Company or its successor the Eastern Oregon Land

Company, since the decisions of the supreme court referred to, namely, January 8, 1900, and as to any such it is required that there be ascertained:

- (1) The names of any such purchasers;
 - (2) The dates when such purchases were made;
 - (3) Descriptions of the lands purchased; and
 - (4) The amount of money or other consideration paid in each instance.
- With regard to the second class:

PURCHASERS UNDER ACT OF SEPTEMBER 29, 1890,

it is required that this Department ascertain:

(1) The names of all persons who made entry under the provisions of section 3 of the act of September 29, 1890 (26 Stat., 496), and amendments;

(2) The description of the lands entered under said act; and

(3) The value of the improvements made upon such lands respectively as of the following dates:

(a) *Where ousted* between dates of the restoration of the lands by this Department and the date such entryman was ousted; and

(b) Where still in possession, between the date of restoration and the passage of the act of February 26, 1904.

A special agent fully equipped for this character of work should be selected and detailed by your office for the purpose of making a personal examination or investigation of these claims and reporting separately thereon, along the lines herein detailed. The report made by special agent Loomis and incorporated in Senate Document No. 240, 1st session, 57th Congress, should be made the basis of his investigation and report. He should also be present at the time any of the claimants make showing under the privilege herein extended for the purpose of representing the interests of the government.

The act of February 26, 1904, makes it the duty of the Secretary of the Interior to investigate and ascertain the facts with regard to these claims and the several claimants should be put to as little expense as possible, in furnishing the information desired. There may be claims, however, based on settlement and occupancy without entry, not embraced in special agent Loomis's report, of which this Department has no present knowledge, and it will perhaps be difficult if not impossible, at this time, to secure the information desired with regard to all claims heretofore asserted to any of these lands through the investigation herein directed to be made by a special agent, and it is therefore deemed advisable to afford all claimants an opportunity to make showing on their own behalf in support of their claims before the local land office at a fixed time, after due notice.

In order, therefore, that all persons intended to be benefited by the proposed legislation may be advised of the opportunity hereby

extended them of making a showing under their claims to these lands, it is directed that a notice, which should contain a copy of the act in full, be given and published in a newspaper having general circulation in the vicinity of the lands in question, and if necessary two papers should be selected, advising all persons who settled upon or entered any of these lands under the permission of this Department, that they may appear at the local land office at a date to be fixed in the notice, which should be not less than forty days from the date of the first publication, and make proof of their claims within the scope of the investigation directed by the act of February 26, 1904. Special notice should be issued to all those having made entry of any portion of these lands, or referred to in special agent Loomis's report, the same to be given by the local officers either personally or by registered mail addressed to the last-known address of such persons as shown by the records or known to those officers, and the special agent detailed for this investigation should also be instructed while making his investigation in the field, to advise the parties, so far as within his power, of the opportunity extended them and give them all possible aid in making showing of settlement and improvements under the investigation directed, either before himself in the field or at the local land office.

The local officers should be specially advised to see that such examinations as may be had before their office are conducted within the scope of the inquiry directed to be made by the act of February 26, 1904, and at the conclusion of the investigation, should forward all showings to your office, together with the report of the special agent in the premises, when the data will be compiled in convenient shape for report to Congress.

A further branch of inquiry is directed by the legislation, namely, with regard to negotiations with the Eastern Oregon Land Company for the purpose of ascertaining at what price and on what terms said company will relinquish the lands settled upon, together with improvements thereon, but this branch of the investigation will be conducted independently and under the immediate direction of the Department.

HOMESTEAD ENTRIES—ALIENS—VOID DECLARATIONS OF INTENTION—
ACT OF APRIL 23, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 13, 1904.

Registers and Receivers, United States Land Offices.

GENTLEMEN: Your attention is called to the following act of Congress, entitled "An act to validate certain original homestead entries

and extend the time to make proofs thereon," approved April 23, 1904 (33 Stat., 298):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where aliens have heretofore made original homestead entries, based upon void declarations of intention to become citizens of the United States made before United States Commissioners, such original entries are hereby validated, and the time of such entrymen in which to make final proof on their entries is hereby extended for a period of two years, to enable such entrymen to legally secure final naturalization papers: Provided, That nothing in this act shall be held to affect existing adverse claims to land embraced in such entries.

SEC. 2. That this act shall take effect and be in force from and after its passage.

The act validates all *original* homestead entries which were made prior to the passage of the act by persons of foreign birth who had theretofore declared their intention to become citizens of the United States before United States Commissioners, provided no adverse claim had attached to the land covered by any such entry.

Said act also extends the time for the submission of final proof on all such entries for a period of two years. Persons having entries affected by this act will, therefore, be entitled to nine years from the date of the entry within which to legally secure final naturalization papers and submit final proof in support of their entries.

You will observe, however, that the act does not dispense with proof of final naturalization when proof is made on any such entry.

Very respectfully,

J. H. FIMPLE, *Acting Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

SETTLERS UPON WISCONSIN CENTRAL RAILROAD AND THE DALLES
MILITARY WAGON ROAD LAND GRANTS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 13, 1904.

Registers and Receivers, United States Land Offices.

GENTLEMEN: The act of April 19, 1904 (33 Stat., 184), reads as follows:

That all qualified homesteaders who, under an order issued by the land department, bearing date October twenty-second, eighteen hundred and ninety-one, and taking effect November second, eighteen hundred and ninety-one, made settlement upon and improved any portion of an odd-numbered section within the conflicting limits of the grants made in aid of the construction of the Chicago, Saint Paul, Minneapolis and Omaha Railway and the Wisconsin Central Railroad, and were thereafter prevented from completing title to the land so settled upon and improved by reason of the decision of the Supreme Court in the case of Wisconsin Central

Railroad Company against Forsythe, One hundred and fifty-ninth United States, page forty-six; and all qualified homesteaders who made settlement upon and improved any portion of an odd-numbered section within the conflicting limits of the grants made in aid of the construction of the Northern Pacific Railroad and The Dalles military wagon road, under orders issued by the land department treating such lands as forfeited railroad lands, and were thereafter prevented from completing title to the land so settled upon and improved by reason of the decision of the Supreme Court in the case of Wilcox against Eastern Oregon Land Company, One hundred and seventy-sixth United States, page fifty-one, shall, in making final proof upon homestead entries made for other lands, be given credit for the period of their bona fide residence upon and the amount of their improvements made on the lands for which they were unable to complete title: *Provided*, That no such person shall be entitled to the benefits of this act who shall fail to make entry within two years after the passage of this act: *And provided further*, That this act shall not be considered as entitling any person to make another homestead entry who shall have received the benefits of the homestead law since being prevented, as aforesaid, from completing title to the lands as aforesaid settled upon and improved by him.

To entitle a homestead claimant to the benefits intended to be conferred by this act, he must have been a qualified homesteader at the time of his settlement and residence upon his original claim, and his entry must be made within two years from the date of the approval of this act—to wit, on or before April 19, 1906—and those persons who have received the benefits of the homestead law since being prevented from completing title to the lands settled upon and improved by them within the limits of the grants named, for the reasons set forth in the act, are excluded from its benefits.

Therefore, when any homestead claimant in making final proof on his entry claims credit, under the provisions of this act, for the period of his residence upon and the amount of his improvements made on his original claim, you will require him to make affidavit describing such claim by legal subdivisions and setting forth the facts relative to his settlement, residence, and improvements thereon, which must be corroborated by the affidavits of at least two witnesses having knowledge of such facts, and said affidavits must satisfactorily show compliance with the law to the extent claimed, as they will form a part of the final proof for the land, title to which is sought.

You will also require the claimant to make affidavit that he has not received the benefits of the homestead law since being prevented from completing title to the land originally settled upon and claimed.

Very respectfully,

J. H. FIMPLE, *Acting Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

OPENING OF SIOUX INDIAN LANDS OF THE ROSEBUD RESERVATION,
SOUTH DAKOTA.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, by an agreement between the Sioux tribe of Indians on the Rosebud Reservation, in the State of South Dakota, on the one part, and James McLaughlin, a United States Indian inspector, on the other part, amended and ratified by act of Congress approved April 23, 1904 (33 Stat., 254), the said Indian tribe ceded, conveyed, transferred, relinquished, and surrendered, forever and absolutely, without any reservation whatsoever, expressed or implied, unto the United States of America all their claim, title, and interest of every kind and character in and to the unallotted lands embraced in the following-described tract of country now in the State of South Dakota, to wit:

Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle of the main channel of said river to the intersection of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel of latitude to its intersection with the tenth guide meridian; thence north along said guide meridian to its intersection with the township line between townships one hundred and one hundred and one north; thence east along said township line to the point of beginning.

The unallotted and unreserved land to be disposed of hereunder approximates 382,000 acres, lying and being within the boundaries of Gregory County, South Dakota, as said county is at present defined and organized;

And whereas, in pursuance of said act of Congress ratifying the agreement named, the lands necessary for subissue station, Indian day school, Catholic and Congregational missions, are by this proclamation, as hereinafter appears, reserved for such purposes, respectively;

And whereas, in the act of Congress ratifying the said agreement, it is provided:

SEC. 2. That the lands ceded to the United States under said agreement, excepting such tracts as may be reserved by the President, not exceeding three hundred and ninety-eight and sixty-seven one-hundredths acres in all, for subissue station, Indian day school, one Catholic mission, and two Congregational missions, shall be disposed of under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish war or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as

amended by the act of March first, nineteen hundred and one, shall not be abridged: *And provided further*, That the price of said lands entered as homesteads under the provisions of this act shall be as follows: Upon all lands entered or filed upon within three months after the same shall be opened for settlement and entry, four dollars per acre, to be paid as follows: One dollar per acre when entry is made; seventy-five cents per acre within two years after entry; seventy-five cents per acre within three years after entry; seventy-five cents per acre within four years after entry, and seventy-five cents per acre within six months after the expiration of five years after entry. And upon all land entered or filed upon after the expiration of three months and within six months after the same shall be opened for settlement and entry, three dollars per acre, to be paid as follows: One dollar per acre when entry is made; fifty cents per acre within two years after entry; fifty cents per acre within three years after entry; fifty cents per acre within four years after entry, and fifty cents per acre within six months after the expiration of five years after entry. After the expiration of six months after the same shall be opened for settlement and entry the price shall be two dollars and fifty cents per acre, to be paid as follows: Seventy-five cents when entry is made; fifty cents per acre within two years after entry; fifty cents per acre within three years after entry; fifty cents per acre within four years after entry, and twenty-five cents per acre within six months after the expiration of five years after entry; *Provided*, That in case any entryman fails to make such payment or any of them within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and held for cancellation and the same shall be canceled: *And provided*, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry, as now provided by law, where the price of the land is one dollar and twenty-five cents per acre: *And provided further*, That all lands herein ceded and opened to settlement under this act, remaining undisposed of at the expiration of four years from the taking effect of this act, shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one purchaser.

* * * * *

SEC. 4. That sections sixteen and thirty-six of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose; and in case any of said sections, or parts thereof, of the land in said county of Gregory are lost to said State of South Dakota by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract herein ceded, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

And whereas all of the conditions required by law to be performed prior to the opening of said tracts of land to settlement and entry have been, as I hereby declare, duly performed;

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power vested in me by law, do

hereby declare and make known that all of the lands so as aforesaid ceded by the Sioux tribe of Indians of the Rosebud Reservation, saving and excepting sections 16 and 36 in each township, and all lands located or selected by the State of South Dakota as indemnity school or educational lands, and saving and excepting the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 25, T. 96 N., R. 72 W. of the fifth principal meridian, which is hereby reserved for use as a sub-issue station; and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 23, T. 96 N., R. 72 W. of the fifth principal meridian, which is hereby reserved for use as an Indian day school; and saving and excepting the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 25, T. 95 N., R. 71 W. of the fifth principal meridian, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 20, T. 95 N., R. 70 W. of the fifth principal meridian, both of which tracts are hereby reserved for use of the American Missionary Society for mission purposes; and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 7, T. 96 N., R. 71 W. of the fifth principal meridian, which is hereby reserved for the Roman Catholic Church for use for mission purposes, will, on the 8th day of August, 1904, at 9 o'clock a. m., in the manner herein prescribed, and not otherwise, be opened to entry and settlement and to disposition under the general provisions of the homestead and town site laws of the United States.

Commencing at 9 o'clock a. m. Tuesday, July 5, 1904, and ending at 6 o'clock p. m. Saturday, July 23, 1904, a registration will be had at Chamberlain, Yankton, Bonesteel, and Fairfax, State of South Dakota, for the purpose of ascertaining what persons desire to enter, settle upon, and acquire title to any of said lands under the homestead law, and of ascertaining their qualifications so to do. To obtain registration each applicant will be required to show himself duly qualified, by written application to be made only on a blank form provided by the Commissioner of the General Land Office, to make homestead entry of these lands under existing laws, and to give the registering officer such appropriate matters of description and identity as will protect the applicant and the Government against any attempted impersonation. Registration can not be effected through the use of the mails or the employment of an agent, excepting that honorably discharged soldiers and sailors entitled to the benefits of section 2304 of the Revised Statutes of the United States, as amended by the act of Congress approved March 1, 1901 (31 Stat., 847), may present their applications for registration and due proofs of their qualifications through an agent of their own selection, having a duly executed power of attorney, but no person will be permitted to act as agent for more than one such soldier or sailor. No person will be permitted to register more than once or in any other than his true name.

Each applicant who shows himself duly qualified will be registered and given a nontransferable certificate to that effect, which will entitle him to go upon and examine the lands to be opened hereunder; but

the only purpose for which he can go upon and examine said lands is that of enabling him later on, as herein provided, to understandingly select the lands for which he will make entry. No one will be permitted to make settlement upon any of said lands in advance of the opening herein provided for, and during the first sixty days following said opening no one but registered applicants will be permitted to make homestead settlement upon any of said lands, and then only in pursuance of a homestead entry duly allowed by the local land officers, or of a soldier's declaratory statement duly accepted by such officers.

The order in which, during the first sixty days following the opening, the registered applicants will be permitted to make homestead entry of the lands opened hereunder, will be determined by a drawing for the district publicly held at Chamberlain, South Dakota, commencing at 9 o'clock a. m., Thursday, July 28, 1904, and continuing for such period as may be necessary to complete the same. The drawing will be had under the supervision and immediate observance of a committee of three persons whose integrity is such as to make their control of the drawing a guaranty of its fairness. The members of this committee will be appointed by the Secretary of the Interior, who will prescribe suitable compensation for their services. Preparatory to this drawing the registration officers will, at the time of registering each applicant who shows himself duly qualified, make out a card, which must be signed by the applicant, and giving such a description of the applicant as will enable the local land officers to thereafter identify him. This card will be subsequently sealed in a separate envelope which will bear no other distinguishing label or mark than such as may be necessary to show that it is to go into the drawing. These envelopes will be carefully preserved and remain sealed until opened in the course of the drawing herein provided. When the registration is completed, all of these sealed envelopes will be brought together at the place of drawing and turned over to the committee in charge of the drawing, who, in such manner as in their judgment will be attended with entire fairness and equality of opportunity, shall proceed to draw out and open the separate envelopes and to give to each inclosed card a number in the order in which the envelope containing the same is drawn. The result of the drawing will be certified by the committee to the officers of the district and will determine the order in which the applicants may make homestead entry of said lands and settlement thereon.

Notice of the drawings, stating the name of each applicant and number assigned to him by the drawing, will be posted each day at the place of drawing, and each applicant will be notified of his number, and of the day upon which he must make his entry, by a postal card mailed to him at the address given by him at the time of registration. The result of each day's drawing will also be given to

the press to be published as a matter of news. Applications for homestead entry of said lands during the first sixty days following the opening can be made only by registered applicants and in the order established by the drawing. The land officers for the district will receive applications for entries at Bonesteel, South Dakota, in their district, beginning August 8, 1904, and until and including September 10, 1904, and thereafter at Chamberlain. Commencing Monday, August 8, 1904, at 9 o'clock a. m., the applications of those drawing numbers 1 to 100, inclusive, must be presented and will be considered in their numerical order during the first day, and the applications of those drawing numbers 101 to 200, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applications assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry under such drawing.

To obtain the allowance of a homestead entry, each applicant must personally present the certificate of registration theretofore issued to him, together with a regular homestead application and the necessary accompanying proofs, and make the first payment of \$1 per acre for the land embraced in his application, together with the regular land office fees, but an honorably discharged soldier or sailor may file his declaratory statement through his agent, who can represent but one soldier or sailor as in the matter of registration. The production of the certificate of registration will be dispensed with only upon satisfactory proof of its loss or destruction. If at the time of considering his regular application for entry it appear that an applicant is disqualified from making homestead entry of these lands, his application will be rejected, notwithstanding his prior registration. If any applicant shall register more than once hereunder, or in any other than his true name, or shall transfer his registration certificate, he will thereby lose all the benefits of the registration and drawing herein provided for, and will be precluded from entering or settling upon any of said lands during the first sixty days following said opening.

Any person or persons desiring to found, or to suggest establishing, a townsite upon any of the said ceded lands, at any point, may, at any time before the opening herein provided for, file in the land office a written application to that effect, describing by legal subdivisions the lands intended to be affected, and stating fully and under oath the necessity or propriety of founding or establishing a town at that place. The local officers will forthwith transmit said petition to the Commis-

sioner of the General Land Office with their recommendation in the premises. Such Commissioner, if he believes the public interests will be subserved thereby, will, if the Secretary of the Interior approve thereof, issue an order withdrawing the lands described in such petition, or any portion thereof, from homestead entry and settlement and directing that the same be held for the time being for townsite settlement, entry, and disposition only. In such event the lands so withheld from homestead entry and settlement will, at the time of said opening and not before, become subject to settlement, entry, and disposition under the general townsite laws of the United States. None of said ceded lands will be subject to settlement, entry, or disposition under such general townsite laws except in the manner herein prescribed until after the expiration of sixty days from the time of said opening.

All persons are especially admonished that under the said act of Congress approved April 23, 1904, it is provided that no person shall be permitted to settle upon, occupy, or enter any of said ceded lands except in the manner prescribed in this proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry. After the expiration of the said period of sixty days, but not before, and until the expiration of three months after the same shall have been opened for settlement and entry, as hereinbefore prescribed, any of said lands remaining undisposed of may be settled upon, occupied, and entered under the general provisions of the homestead and townsite laws of the United States in like manner as if the manner of effecting such settlement, occupancy, and entry had not been prescribed herein in obedience to law, subject, however, to the payment of four dollars per acre for the land entered, in the manner and at the time required by the said act of Congress above mentioned. After the expiration of three months, and not before, and until the expiration of six months after the same shall have been opened for settlement and entry, as aforesaid, any of said lands remaining undisposed of may also be settled upon, occupied, and entered under the general provisions of the same laws and in the same manner, subject, however, to the payment of three dollars per acre for the land entered in the manner and at the times required by the same act of Congress.

After the expiration of six months, and not before, after the same shall have been opened for settlement and entry, as aforesaid, any of said lands remaining undisposed of may also be settled upon, occupied, and entered under the general provisions of the same laws and in the same manner, subject, however, to the payment of \$2.50 per acre for the land entered, in the manner and at the times required by the same act of Congress. And after the expiration of four years from the taking effect of this act, and not before, any of said lands remaining

undisposed of shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than 640 acres to any one purchaser.

The Secretary of the Interior shall prescribe all needful rules and regulations necessary to carry into full effect the opening herein provided for.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this 13th day of May, in the year of our Lord 1904, and of the Independence of the United States the one hundred and twenty-eighth.

By the President:

[SEAL.]

THEODORE ROOSEVELT.

JOHN HAY,

Secretary of State.

OPENING OF CEDED SIOUX INDIAN LANDS OF ROSEBUD RESERVATION—ACT OF APRIL 23, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 23, 1904.

Register and Receiver, U. S. Land Office, Chamberlain, South Dakota.

GENTLEMEN: The following regulations are hereby prescribed for the purpose of carrying into effect the opening of the ceded Sioux Indian lands of the Rosebud Reservation in the State of South Dakota, provided for in the act of Congress of April 23, 1904 (33 Stat., 254), and in the President's proclamation of May 13, 1904, thereunder:

First. Applications either to file soldiers' declaratory statement or make homestead entry of those ceded lands must, on presentation, in accordance with proclamation opening said lands to entry and settlement, be accepted or rejected, but local officers may, in their discretion, permit amendment of a defective application during the day only on which same is presented.

Second. No appeal to General Land Office will be allowed or considered unless taken within one day, Sundays excepted, after the rejection of the application.

Third. After rejection of an application, whether an appeal be taken or not, the land will continue to be subject to entry as before, excepting that any subsequent applicant for the same land must be informed of the prior rejected application and that the subsequent application, if allowed, will be subject to the disposition of the prior application upon the appeal, if any is taken from the rejection thereof, which fact must be noted upon the receipt or certificate issued upon the allowance of the subsequent application.

Fourth. Where an appeal is taken the papers will be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior with appropriate recommendation, when the matter will be promptly decided and closed.

Fifth. Applications to contest entries allowed for these lands filed during the sixty days from date of opening will also be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior with proper recommendation when the matter will be promptly decided.

Sixth. These regulations will supersede, during the sixty days from the opening of these ceded lands, any rule of practice or other regulation governing the disposition of applications with which they may be in conflict, and will apply to all appeals taken from the action of the local officers during said period of sixty days.

Seventh. The purpose of these regulations is to provide an adequate and speedy method of correcting any material errors in local offices, and at the same time to discourage groundless appeals and put it out of the power of a disappointed applicant to indefinitely tie up the land or force another to pay him to withdraw his appeal.

Eighth. You will observe that the President's proclamation, hereinbefore referred to, requires you to be in attendance at Bonesteel and receive applications for homestead entry there from August 8, 1904, to September 10, 1904, both dates inclusive, for said land. You will take such of your tract books and other records as may be necessary to Bonesteel for such purpose, and you will act upon such applications and conduct any correspondence concerning same from that place until said date in same manner as if you had remained at Chamberlain.

Give all possible publicity, through the press and otherwise, to these regulations.

W. A. RICHARDS,
Commissioner of the General Land Office.

Approved:

THOS. RYAN,
Acting Secretary.

CEDED LANDS IN ROSEBUD INDIAN RESERVATION—HOMESTEAD
ENTRY—QUALIFICATIONS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 23, 1904.

The following persons are not qualified to make homestead entry in the ceded portion of the Rosebud Indian Reservation, South Dakota:

1. Any person who has made a prior homestead entry and is not

entitled to make a second homestead entry. Under the act of June 5, 1900 (31 Stat., 267), any person who prior to June 5, 1900, made a homestead entry, but from any cause had lost, forfeited, or commuted the same, is entitled to make a second homestead entry; under the act of May 22, 1902 (32 Stat., 203), any person who made final five-year proof, prior to May 17, 1900, on lands to be sold for the benefit of Indians and paid the price provided by law opening the land to settlement, and who would have been entitled under the "free homestead" law to have received title without such payment, had not proof been made prior thereto, is entitled to make a second homestead entry; under the act of April 28, 1904 (33 Stat., 527), any person who prior to April 28, 1904, made homestead entry but was unable to perfect the entry on account of some unavoidable complication of his personal or business affairs, or on account of an honest mistake as to the character of the land, provided he made a *bona fide* effort to comply with the homestead law and did not relinquish his entry for a consideration, is entitled to make a second homestead entry; under section 2 of said act any person who has made a homestead entry of a quantity of land containing less than 160 acres, contiguous to the ceded lands of said reservation, and is still owning and occupying the same, may enter a sufficient quantity of said lands to make up the full amount of 160 acres; under section 6 of the act of March 2, 1889 (25 Stat., 854), any person who has made a homestead entry for less than 160 acres, and has received the receiver's final receipt therefor, is entitled to enter enough additional land, not necessarily contiguous to the original entry, to make 160 acres.

2. A married woman, unless she has been deserted or abandoned by her husband.

3. One not a citizen of the United States, and who has not declared his intention to become such.

4. Anyone under 21 years of age, not the head of a family, unless he served in the Army or Navy of the United States for not less than fourteen days during actual war.

5. Anyone who is the proprietor of more than 160 acres of land in any State or Territory.

6. One who has acquired title to, or is now claiming under any of the agricultural public land laws, in pursuance of settlement or entries made since August 30, 1890, an amount of land which, with the tract now sought to be entered, will exceed in the aggregate 320 acres.

W. A. RICHARDS, *Commissioner*.

Approved:

THOS. RYAN, *Acting Secretary*.

TIMBER AND STONE ACT—PERSONAL EXAMINATION OF LAND.

GRACE P. FEATHERSTONE.

Purchase under the provisions of the act of June 3, 1878, will not be allowed where the applicant states in his preliminary affidavit that his knowledge as to the character and condition of the tract applied for is based upon information and belief and testifies in final proof proceedings that he has never personally examined the land.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 17, 1904.* (E. P.)

August 21, 1902, Grace P. Featherstone filed application to purchase, under the provisions of the act of June 3, 1878 (20 Stat., 89), the NW. $\frac{1}{4}$ of Sec. 26, T. 45 N., R. 3 E., B. M., Coeur d'Alene land district, Idaho.

In making her sworn statement Mrs. Featherstone uses the printed blank form furnished by your office. But that portion of said form which reads: "have personally examined said land, and from my personal knowledge state," has been erased and other words inserted in lieu thereof, so as to make her statement read: "I am informed and believe, and on such information and belief allege, that said land is unfit for cultivation and valuable chiefly for its timber; that it contains no mining or other improvements." The necessary allegations as to other particulars are satisfactorily set forth in said statement.

The applicant submitted final proof November 13, 1902. In that proceeding she testified that she had never seen the land applied for, but that her sworn statement as to the character and condition thereof was based upon information obtained from two of her final proof witnesses, both of whom she alleged (and it so appears from their testimony) had personally examined the land.

The testimony shows that the applicant is a citizen of the United States and a married woman; that the application was not made for the benefit of her husband or any person other than herself; that the money with which she proposed to pay for the land was money which she had inherited from her father; that there were no improvements on the land; that it was unfit for cultivation, contained no minerals and was chiefly valuable for its timber.

In explanation of her failure to make a personal examination of the land applied for, she filed the affidavit of her husband, Albert H. Featherstone, who deposes as follows:

That he is well acquainted with the NW. $\frac{1}{4}$, Sec. 26, T. 45 N., R. 3 E., B. M.; that said land is about 30 miles from the head of navigation on the St. Joseph River, which is the nearest accessible point to the land by the ordinary means of travel and is about 50 miles from the nearest railroad and that to reach the said tract of land it is necessary to go by trail about 20 miles to Mica creek and from Mica creek a distance of about 10 miles on foot over very rough and mountainous country where there are no trails to the said tract of land; that owing to the character of the country between said Mica creek and said land, which is covered with a heavy growth of

timber and underbrush, and owing to the fact that there are no trails into the said land, it is now and has at all times since the said land was surveyed been practically impossible for a woman or any other person not used to traveling in the mountains, to go upon the land to inspect the same; that at the time that Grace P. Featherstone made her sworn statement No. 1017, she was, ever since has been, physically unable to make the trip to the said land to inspect the same.

The local officers rejected said proof on the ground that the applicant had failed to make a personal examination of the land, and this action was, by decision of November 25, 1903, affirmed by your office.

The case is now before the Department on the appeal of Mrs. Featherstone.

The applicant contends in her appeal that her proof satisfactorily shows that the land applied for is subject to entry under the provisions of the act of June 3, 1878, *supra*, and that she is qualified and entitled to enter the same. She therefore insists that to require her to make a personal inspection of the land would be not only useless, but, in view of its inaccessibility so far as she is concerned, would, in effect, deprive her of her rights under the law.

In support of her said appeal she cites, and very largely relies upon, a decision rendered June 25, 1901, by the Circuit Court of Appeals for the Seventh Circuit, in the case of Hoover *v.* Salling (110 Fed. Rep., 43).

For many years the Department has been of opinion, and has so held in many cases, that said act of June 3, 1878, requires an applicant under the provisions thereof to allege in his sworn statement, and of his own personal knowledge, that the land applied for is of a certain character and in a certain condition (Circular, May 21, 1887, 6 L. D., 114; L. W. Walker, 11 L. D., 599; Grace *v.* Carpenter, 14 L. D., 436; Sturm *v.* Taylor, 22 L. D., 719; Theresa McManus, 29 L. D., 653), and it is obvious that such knowledge can be acquired only by the applicant's going on or to the land and making a personal inspection thereof. The Department has heretofore carefully considered the decision cited by appellant, wherein it is held that an applicant under said act is not required to make a personal inspection of the land applied for before filing his initial statement. Said decision, however, while highly persuasive, has not been accepted as authority for changing the requirement of the Department in this respect.

An allegation as to the character and the condition of such land, based on the personal knowledge of the applicant, being in the opinion of the Department a statutory requirement, it can not therefore permit the same to be dispensed with, notwithstanding the fact that the enforcement of said requirement may, in some cases, preclude an applicant, situated as is the applicant in the case at bar with reference to the land involved, from making timber and stone entry of a certain desired tract.

The decision appealed from is accordingly affirmed.

ARID LAND—HOMESTEAD ENTRY—ACT OF JUNE 17, 1902.

INSTRUCTIONS.

Persons making homestead entry of lands within the irrigable area of any project commenced or contemplated under the provisions of the act of June 17, 1902, will be required to comply fully with the requirements of the homestead law as to residence, cultivation and improvement; and failure to supply water from such works in time for use upon the land entered will not justify a failure to comply with the law and to make proof thereof within the time required by the statute.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 17, 1904.* (E. F. B.)

In compliance with the recommendation of the Director of the Geological Survey, I enclose herewith for transmission to the proper local land office, maps prepared by the engineers of the reclamation service showing the "farm units" or limit of area per entry which they recommend should be prescribed for lands that may be made susceptible of irrigation from the contemplated irrigation works to be constructed under the act of June 17, 1902 (32 Stat., 388), known as the Minidoka project in the State of Idaho.

These maps have been prepared by the engineers of the reclamation service with a view to carrying into effect the provision contained in the fourth section of said act requiring the Secretary of the Interior to give public notice of the limit of area per entry which in his opinion may be reasonably required for the support of a family, and, pursuant to the instructions contained in the letter of the Department of August 21, 1903 (32 L. D., 237), that in connection with the classification surveys a report be made designating the areas that shall be taken for each homestead entry, and the particular legal subdivision or subdivisions that shall constitute an entry, with regard to equalizing the entries as far as possible.

It is not deemed advisable to determine absolutely the acreage that may be considered sufficient for the support of a family in any project in advance of certain preliminary acts required to be done before the giving of such notice, but in view of the fact that the lands that are susceptible of irrigation from such works, which have been withdrawn under the provisions of the act, may be entered under the homestead laws at any time, subject to the provisions, charges, terms and conditions of the act, and in view of the further fact that the limit of area, or "farm unit" recommended by the engineers of the reclamation service as indicated by said maps, will probably be adopted and enforced at the proper time, it is deemed advisable in the interest of the settler, as well as of the government, that he should be notified at the time of his application to enter said lands that all entries that may be irrigable by such project will be limited as to area to the quantity and form shown by said maps.

The Director also recommends that the officers of the proper land office be instructed to inform homestead applicants that the lands that may be irrigable from said contemplated work will be subject to a charge of from \$25.00 to \$35.00 per acre. This suggestion is understood to be based upon probability only as no contract has been let, but it is assumed that the reclamation service is in possession of sufficient data from which to estimate the probable cost of supplying water from the contemplated source and whatever information is given to settlers as to the probable charge for water should be so qualified.

These instructions are for the information solely of the local officers of the district or districts in which the Minidoka project is located, but the Director submits a very important suggestion as to certain information that should be given by the local officers of every land district to every person making application to enter lands withdrawn under the reclamation act from entry or disposal except under the homestead law.

While it is contemplated that the reclamation of such lands is to be accomplished by means of the waters supplied by the proposed irrigation works and that the lands will be subject to a charge for the use of such water, there is no modification of the homestead law in its application to said lands nor has the Secretary of the Interior any authority to extend the time for the establishment of residence, to change any condition of the homestead law as to the maintainance of such residence and the cultivation of the land, or extend the time in which the entryman must make full compliance with the law and make final proof thereof. The entryman is bound to comply with the homestead law in every respect from the date of the entry or subject the entry to cancellation, although it may be impossible, as it will in the majority of cases, to successfully cultivate the land without irrigation from the contemplated source. As it is very uncertain when the waters of any particular project will be available it is clearly the duty of the Department to discourage the making of entries until it is apparent that a supply can be had within a reasonable time by giving the applicant notice in all cases of the true condition, so that he may not inadvisedly make entry where, under the conditions then existing, a compliance with the law would be practically impossible.

You will therefore prepare a circular letter to the local land officers instructing them to notify all persons who apply to make entry of lands within the irrigable area of any project commenced or contemplated under the reclamation act, that they will be required to comply fully with the homestead law as to residence, cultivation and improvement of the land, and that the failure to supply water from such works in time for use upon the land entered will not justify a failure to comply with the law and to make proof thereof within the time required by the statute.

RECORDS—PRODUCTION IN COURT—ACT OF APRIL 19, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 18, 1904.

To the Registers, United States Land Offices.

SIRS: Your attention is called to the act of April 19, 1904 (33 Stat., 186), which reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the register of any United States land office shall be served with a subpoena duces tecum or other valid legal process requiring him to produce, in any United States court or in any court of record of any State, the original application for entry of public lands or the final proof of residence and cultivation or any other original papers on file in the General Land Office of the United States on which a patent to land has been issued or which furnish the basis for such patent, it shall be the duty of such register to at once notify the Commissioner of the General Land Office of the service of such process, specifying the particular papers he is required to produce, and upon receipt of such notice from any register of a United States land office the Commissioner of the General Land Office shall at once transmit to such register the original papers specified in such notice, and which such register is required to produce, and to attach to such papers a certificate, under seal of his office, properly authenticating them as the original papers upon which patent was issued; and such papers so authenticated shall be received in evidence in all courts of the United States and in the several State courts of the States of the Union: *Provided*, That the Secretary of the Interior shall make rules and regulations to secure the return of such documents to the General Land Office, after use in evidence, without cost to the United States.*

As soon as any subpoena or process mentioned in this act shall have been served upon you, you should at once forward a copy thereof to this office where appropriate action thereunder will be taken.

All papers and records, forwarded to you under the provisions of this act, should be constantly retained in your possession and always kept under your personal control, and in no event should they be permitted to be attached as exhibits or filed of record in any cause pending in any court, but they should, after they have been used in evidence, be enclosed by you in secure envelopes and returned to this office by registered mail.

Very respectfully,

W. A. RICHARDS,
Commissioner.

Approved:

THOS. RYAN, *Acting Secretary.*

RULES AND REGULATIONS FOR SALE OF LANDS IN GRANDE RONDE
INDIAN RESERVATION—ACT OF APRIL 28, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 19, 1904.

The act of Congress of April 28, 1904 (33 Stat., 567), provides:

SEC. 2. That for the purpose of carrying the provisions of this act into effect, the Secretary of the Interior shall be, and he is hereby, authorized and directed to sell, under such rules and regulations as he may prescribe, and at such times and places as he may designate, and shall, within thirty days after the ratification of this agreement, advertise all that part of the Grande Ronde Reservation remaining unallotted on the date of the said agreement, excepting the four hundred and forty acres of land reserved for Government uses at the time their allotments in severalty were made, said unallotted lands approximating twenty-five thousand seven hundred and ninety-one acres: *Provided*, That said lands shall be advertised for sale in Government sections or parts of sections, and shall be sold only by separate sealed bids, and the Secretary of the Interior shall reserve the right to reject any or all of said bids: *Provided*, That the Secretary of the Interior may also receive bids in bulk for the whole tract of land thus offered for sale or separate bids for that part of said tract lying on the north side of the reservation and consisting, approximately, of thirteen thousand acres, and for that part of said tract lying on the south side of the reservation and also consisting of, approximately, thirteen thousand acres: *And provided further*, That no bids shall be accepted until the sum of all bids received shall equal or exceed twenty-eight thousand five hundred dollars, all of which said amount, when received, shall be paid to the said Indians in cash pro rata, share and share alike, in accordance with the terms of said agreement.

The land ceded by the agreement made with the Willamette tribes and other Indians belonging on the Grande Ronde Reservation in the State of Oregon, which said agreement was, by the said act of Congress, modified, amended, ratified, and confirmed, are described as follows:

All that part of the Grande Ronde Reservation remaining unallotted on the date of the said agreement, excepting the four hundred and forty acres of land reserved for Government uses at the time their allotments in severalty were made, said unallotted lands approximating twenty-five thousand seven hundred and ninety-one acres.

The tract of land cited to be ceded and disposed of hereunder aggregates 26,301.65 acres.

By virtue of the authority conferred by the said act it is hereby ordered and directed that on and after Monday, the 1st day of August, 1904, at 9 a. m., and until Monday, the 8th day of August, 1904, at 11 o'clock a. m., sealed bids will be received at the local land office at Oregon City, Oregon, for the said lands which are more particularly described in the schedule hereto attached.

The said sealed bids must be prepared, filed, received, opened, and acted on in accordance with the following rules and regulations:

First. Each bid must be made on a form similar to that attached hereto, which shall be furnished upon application to the register and

receiver of the Oregon City, Oregon, land office, or the Commissioner of the General Land Office, and must be signed by the bidder, who shall be a citizen of the United States, and who shall therein give his post-office address.

Second. Each bid must be sealed in a separate envelope, which shall be addressed to the "Register and Receiver, United States Land Office, Oregon City, Oreg.," and such said envelope must bear an indorsement across its face showing that it contains a bid for the ceded lands of the Grande Ronde Indian Reservation, and must not bear any indication of the amount of such bid or the description of the tract bid for.

Third. Each bid must be accompanied by a check, payable to the Secretary of the Interior, certified by the proper official of a national bank, for 20 per cent of the amount of such bid, which check must be, by the bidder, placed in the envelope containing the bid before its sealing and delivery to the register and receiver.

Fourth. No bid will be considered that is received by such register and receiver before 9 a. m. on Monday, the 1st day of August, 1904, or after 11 o'clock a. m. on Monday, the 8th day of August, 1904.

Fifth. Bids will be received for the lands as they are arranged on the attached schedule, the arrangement showing the lands in tracts of quarter sections where possible. This arrangement has been varied only where the full quarter section is not found, and in some cases it will be noted that less than 160 acres may be bid for. No bid will be considered describing the tract bid for otherwise than as it appears on the schedule, or which undertakes to cover and describe parts of several tracts.

Sixth. Each bidder may present bids for any number of tracts, but with each bid must make and transmit the deposit above required.

Seventh. No bid will be accepted for said lands which shall be at a less rate than \$1.25 per acre for the land embraced in such bid, and unless all bids received shall equal or exceed \$28,500.

Eighth. The bids will be opened by the register and receiver at their said office in the presence of such bidders who may care to attend, on Monday, the 8th day of August, 1904, at 1 p. m., and the register and receiver will indorse on each bid the name of the bidder, the amount of the bid, and the amount of the deposit, immediately as the bids are opened.

Ninth. The register and receiver will then transmit the several bids with the certified checks to the Commissioner of the General Land Office, with their recommendations for acceptance or nonacceptance, in each case, and the Commissioner will in turn transmit the said bids to the Secretary of the Interior with his recommendation in the premises.

Tenth. Notice of the award by the Secretary of the Interior upon said sealed bids will be given to each of the bidders by the Commissioner of the General Land Office through the ordinary mail to the address

given in his bid. The names of the successful bidders will also be given to the press as a matter of news.

Eleventh. The balance due on all of the accepted bids, after crediting thereon the respective certified checks, will become due and must be paid to the register and receiver of the said local land office within thirty days from the date of the mailing of the notice by the Commissioner of the General Land Office, as aforesaid, and if not so paid, or if a successful bidder shall fail within said thirty days to submit proof of his citizenship to the said register and receiver, the amount deposited with such bid, as hereinbefore provided, will be forfeited to the United States, to be disposed of as other proceeds arising from said sale under said act, and the land will be thereafter reoffered under such rules and regulations as may be prescribed by the Secretary of the Interior.

Twelfth. The right is hereby reserved to reject any or all of said bids for said lands.

Thirteenth. Upon the payment of the amount of their bids by the purchasers, as hereinbefore provided for, the register and receiver will issue the ordinary cash certificates and receipts, modified by indorsements across the face thereof showing that same are issued for lands of Grande Ronde Indian Reservation under the act of April 28, 1904 (33 Stat., 567), which will be transmitted to this Office as a basis of patent. A duplicate receipt will be given to the purchaser by the receiver upon the full payment.

Very respectfully,

W. A. RICHARDS,
Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

Bid.

THE SECRETARY OF THE INTERIOR.

SIR: I,, of, State of, a citizen of the United States, do hereby bid and offer to pay per acre for the following-described lands, of the Grande Ronde Indian Reservation, Oreg.:

Sections

.....

..... T. S., R. W.

I herewith inclose certified check of for dollars, the same being 20 per cent. of the total amount of this bid for the above-described land, the same to be retained and credited as part payment of the purchase price should this bid be accepted, or retained by the United States as a forfeit on my part if this bid is accepted and I should fail within thirty days from the mailing of the notice by the Commissioner of the General Land Office of its acceptance to furnish evidence of my citizenship and to pay the register and receiver at the Oregon City, Oreg., land office the balance due on this bid.

This .. day of, 1904.

[Schedule omitted.]

SECOND AND ADDITIONAL HOMESTEAD ENTRIES—ACT OF APRIL 28,
1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 20, 1904.

Registers and Receivers, United States Land Offices.

GENTLEMEN: Your attention is called to the provisions of an act of Congress entitled, "An act providing for second and additional homestead entries, and for other purposes," approved April 28, 1904 (33 Stat., 527), a copy of which is hereto attached.

The first section of said act allows any person who has theretofore made a homestead entry and was unable to perfect the same on account of some unavoidable complication of his personal or business affairs, or on account of an honest mistake as to the character of the land, to make a second entry, providing it is shown to the satisfaction of the Commissioner of the General Land Office that he made a bona fide effort to comply with the homestead law, and that he did not relinquish his entry or abandon his claim for a consideration.

A person applying to make entry under this section should be required to file a formal application for a specific tract of land, on the regular homestead blanks, modified to show that the entry is made under the act of April 28, 1904, and to furnish a description of his former entry by section, township, and range, or the number of the entry, and land office where made.

He should also be required to furnish an affidavit, duly corroborated by one or more disinterested witnesses, setting forth in full the complications of his personal or business affairs that prevented his perfecting title to the land covered by his first entry, or where the failure to perfect title was caused by a mistake as to the character of the land entered the manner in which such mistake occurred, and the specific reasons that render the land worthless for agricultural purposes should be fully set forth. The affidavit should also show whether the applicant ever resided upon, improved, or cultivated the land embraced in his former entry, and if so, to what extent, and that he did not abandon his claim thereto or relinquish his entry for a valuable consideration.

When such application is presented you will make proper notations on your records and transmit all the papers for action by the Commissioner of the General Land Office. You should accompany each application with your report and recommendation in the premises.

The second section is substantially a reenactment of section 5 of the act of March 2, 1889 (25 Stat., 854), only modified so as to apply to entries for less than 160 acres each made after the date of the act

(April 28, 1904), as well as those made before, and provides for an additional entry of land which shall be contiguous to the land embraced in the original entry, for which the final proof of residence and cultivation made on the original entry shall be sufficient, but of which no party shall have the benefit who does not, at the date of his application therefor, own and occupy the land covered by his original entry, and which shall not be permitted, or if permitted shall be canceled, if the original entry should fail for any reason prior to patent, or should appear to be illegal or fraudulent. Applicants for additional entries under this section will be required to produce evidence that they own and occupy the land embraced in their original entries, to be properly described by legal subdivisions and by reference to the number and date of the original entry, and the evidence to consist of their own affidavits, corroborated by the affidavits of disinterested witnesses executed before any officer authorized to administer oaths in such cases in the county, parish, or land district in which the land applied for is situated, under section 2294, United States Revised Statutes, as amended by act of March 4, 1904 (33 Stat., 59). In addition to this the proper homestead application and affidavit must be filed, which may be on the forms prescribed under the act of March 3, 1879 (4-018 and 4-086), *properly modified by you so as to show the section and act under which application is made*, and the affidavit modified by striking out the portion that refers to military services, which is not required under this act.

Section 3 prohibits the commutation, under the provisions of section 2301, Revised Statutes, of an entry made under this act. You will be careful to refuse all applications made to commute such entries.

Very respectfully,

J. H. FIMPLE, *Acting Commissioner.*

Approved.

E. A. HITCHCOCK, *Secretary.*

[PUBLIC—No. 208.]

AN ACT providing for second and additional homestead entries, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has heretofore made entry under the homestead laws, but who shall show to the satisfaction of the Commissioner of the General Land Office that he was unable to perfect the entry on account of some unavoidable complication of his personal or business affairs, or on account of an honest mistake as to the character of the land; that he made a bona fide effort to comply with the homestead law and that he did not relinquish his entry or abandon his claim for a consideration, shall be entitled to the benefit of the homestead laws as though such former entry had not been made.

SEC. 2. That any homestead settler who has heretofore entered, or may hereafter enter, less than one-quarter section of land may enter other and additional land lying contiguous to the original entry which shall not, with the land first entered

and occupied, exceed in the aggregate one hundred and sixty acres, without proof of residence upon and cultivation of the additional entry; and if final proof of settlement and cultivation has been made for the original entry when the additional entry is made, then the patent shall issue without further proof: *Provided*, That this section shall not apply to or for the benefit of any person who does not own and occupy the lands covered by the original entry: *And provided*, That if the original entry should fail for any reason prior to patent, or should appear to be illegal or fraudulent, the additional entry shall not be permitted, or, if having been initiated, shall be canceled.

SEC. 3. That commutation under the provisions of section twenty-three hundred and one of the Revised Statutes shall not be allowed of an entry made under this act.

Approved, April 28, 1904.

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FOREST RESERVE—WITHDRAWAL—ACT OF JUNE 27, 1902.

OPINION.

Prior to becoming part of a forest reserve by the removal of ninety-five per centum of the timber therefrom, lands withdrawn for forestry purposes under the act of June 27, 1902, are merely in a state of withdrawal with a view to future reservation, and remain under the administrative power of the Secretary of the Interior as the head of the land department.

Assistant Attorney-General Campbell to the Secretary of the Interior
May 21, 1904. (J. R. W.)

I received by reference of May 13, 1904, with request for opinion thereon, the papers in the application of Iah-bid-aun-ah-quod, a Win-nibigoshish Indian, for allotment of lands for himself, wife, and children on the Chippewa of the Mississippi Reservation, Minnesota, from the lands included within the provisions of the act of January 14, 1889 (25 Stat., 642).

The lands in question are included in the first selection for the future Minnesota National Forest Reservation, made by the forester of the Department of Agriculture, June 10, 1903, approved June 20, 1903, under the act of June 27, 1902 (32 Stat., 400). The papers show that the Indian, with his family, has resided on one of the tracts involved for the last thirteen or fourteen years, and has valuable improvements thereon. As the act of June 27, 1902, provides that "nothing herein contained shall interfere with the allotments to the Indians heretofore and hereafter made," and the act of 1889 saved to the Indians the right to claim allotments upon the reservations where they reside, it appears that the selection by the forester of the lands thus occupied and claimed by the Indian was unauthorized and erroneous.

The question presented is, whether elimination of the tracts from selection for the future reservation must needs be made by the President under the powers vested by the act of June 4, 1897 (30 Stat., 34, 36), or whether they may be eliminated by relinquishment of the forester of the Department of Agriculture.

Under the act of June 27, 1902 (32 Stat., 400, 402), the forest reservation thereby provided to be created does not come into being until the removal of the ninety-five per centum of timber on forestry lands. The act provides that—

As soon as the merchantable pine timber now thereon shall have been removed from any tract, subdivision, or lot, as herein provided, such tract, subdivision, or lot shall, without further act, resolution, or proclamation, forthwith become and be part of a forest reserve.

Until such time the lands withdrawn from other disposal, with view to becoming a part of the proposed forest reserve, are lands merely withdrawn with view to future reservation, and remain under the administrative power of the Secretary of the Interior as head of the land department. They may be relinquished by the forester of the Department of Agriculture, or may, upon sufficient reason, as for preservation of rights attaching prior to his selection of them, be eliminated from reservation by the Secretary of the Interior.

Approved:

THOS. RYAN, *Acting Secretary.*

FOREST RESERVE—TITLE TO BASE LANDS—ACT OF JUNE 4, 1897.

WILLIAM E. MOSES.

The United States will not accept title, under the exchange provisions of the act of June 4, 1897, from one of several claimants to ownership, nor will it accept title only *prima facie* good.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *May 21, 1904.* (J. R. W.)

William E. Moses filed a motion for review of departmental decision of February 20, 1904 (unreported), rejecting his application, number 3691, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 17, with other lands, T. 40 N., R. 3 E., B. M., Lewiston, Idaho, in lieu of lands relinquished to the United States in a forest reserve.

The ground of the motion is that due force was not given to the statute of limitations of the State of Colorado, in which State the land assigned as base for the selection is situated. The statute relied upon provides:

That every person in the peaceable and undisputed possession of lands or tenements, including mining claims, under claim and color of title made in good faith, . . . who shall for five successive years hereafter continue in such possession, and shall also, during said time, pay all taxes legally assessed on said lands, tenements, or mining claims, shall be held and adjudged to be the legal owners of said lands, tenements, or mining claims, to the extent and according to the purport of his or her proper title or pre-emption. All persons holding under such possession

by purchase, devise, or descent, before said five years shall have expired, and who shall continue such possession and continue to pay the taxes aforesaid, so as to complete the possession of and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section.

Nothing in the record before the Department, in the abstract of title, or otherwise, showed that the selector and his grantors had for five years or for any other period of time prior to the relinquishment held and enjoyed the peaceable and undisputed possession of the premises relinquished to the United States. Such may have been the fact, and in such case, subject to sundry exceptions which prevent the running of the statute, the possessor would acquire title good against the older title arising by patent from the United States. But the evidence of such title would not be matter of record, but would rest *in pais*, liable to be lost by the death of witnesses and title would forever rest in the uncertainty that necessarily attends titles of such character. There remains outstanding two other record claims of title—one that originating in patent from the United States, and another than that of Moses originating in a tax sale. While such claims of title exist of record and are not shown to be effectually barred, title can not be accepted by the United States under the exchange provisions of the act of June 4, 1897.

But if it were shown by matter of record that peaceable and undisputed possession of the premises had been held by Mr. Moses and his grantors for the period of five years prior to his relinquishment, such fact would not satisfactorily show his title to be good under the law and judicial decisions of the State of Colorado. There are special exceptions to the running of statutes of limitation created by sections 2913 and 2914, Mills's Annotated Statutes of Colorado, in favor of persons under disabilities, which take away the conclusiveness of a title depending for its validity upon the general provisions for limitations of actions. A title resting only on color and limitation is only *prima facie* good, and though the burden of proof rests upon him denying it, it may be successfully attacked even in the hands of a *bona fide* holder. This is shown by the decision of the supreme court in *De Foresta v. Gast* (20 Colo., 307; 38 Pac., 244), cited by Mr. Moses to support his contentions, which held that:

In the absence of proof to the contrary, the fact that a person has acquired, and for a period of 11 years has held, a tax deed to land, and has during said period paid all the taxes on the land, is sufficient evidence of his good faith in the transaction.

The United States proposes exchange of land only with "the owner." It does not propose under the act of June 4, 1897, to accept title from one of several claimants to ownership, and where several claims of title appear of record none of them can be received in exchange for public lands until the proponent settles all controversy as to the validity of his claim of title and shows that all adverse claim against it is effec-

tually barred. The United States will not accept a title only *prima facie* good, by the acceptance of which it is liable to be drawn into litigation by another adverse claimant.

The motion therefore presents no reason to vacate, recall, or modify said decision, and none appearing otherwise the motion is denied and said decision is adhered to.

SOLDIERS' ADDITIONAL HOMESTEAD—EXTENT OF RIGHT—
ASSIGNMENT.

GUY A. EATON.

The right to make soldiers' additional homestead entry is limited to such an amount of land as added to the amount previously entered shall not exceed one hundred and sixty acres, even though the entryman may have paid cash for a portion of the original entry as excess land.

One entitled to make additional homestead entry under section 2306, Revised Statutes, may sell and assign his right in such amounts as he deems proper, and each assignee of a fractional portion of such right is entitled to locate the same upon public land, regardless of the number of assignments made by the original owner or the amount of the right still retained by him.

One application of the rule of approximation is allowed to each original right of soldiers' additional homestead entry, and where the right is divided, the rule may be applied only in the location of one portion thereof.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) May 21, 1904. (A. S. T.)

On June 2, 1902, Guy A. Eaton, as assignee of Erasmus Gaw, applied to make soldiers' additional homestead entry for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 35, T. 68 N., R. 19 W., Duluth land district, Minnesota, based on the service of said Gaw for more than ninety days during the war of the rebellion and on the homestead entry made by him on December 26, 1865, for the W. $\frac{1}{2}$, lot 2, of the NE. $\frac{1}{4}$, and the E. $\frac{1}{2}$, lot 2, of the NW. $\frac{1}{4}$ of Sec. 5, T. 26 N., R. 28 W., Boonville land district, Missouri, containing 80.50 acres.

It appears that in making said original entry said Gaw paid cash for the excess over eighty acres of the land—viz: for one half acre—and in his assignment of the right of additional entry he assigned it as a right to enter 79.50 acres.

Your office, on August 12, 1903, rendered a decision wherein it was held:

that the following evidence is required to complete the case: An assignment by the soldier entryman of the remaining portion of his right, to wit: .50 acres, to which he appears to be entitled by reason of having paid the price of the excess over 80 acres in his original entry, and an affidavit to show that he has not sold, conveyed, or assigned or in any manner exercised said right to .50 acres theretofore. Also an assignment by the intermediate assignee, if any, to the same effect, with an affidavit showing *bona fide* ownership.

In response to said requirement of your office the applicant filed the affidavit of Lewis C. Black, the intermediate assignee, alleging that the soldier demands \$10.00 for the remainder of his right of additional entry, which affiant considers extortionate; and the applicant asked that the requirements of your said decision of August 12, 1903, be waived and his entry allowed.

On March 14, 1904, your office rendered a decision treating the application to waive the requirements of your former decision as a motion for review of said decision, and proceeded to deny the same, and held that: "The rule of approximation may not be applied in this case, inasmuch as there is a portion of the right still outstanding. See circular approved by the Department August 7, 1903 (32 L. D., 206)," and your office adhered to your said decision of August 12, 1903. The applicant has now appealed to this Department.

The original entry embraced 80.50 acres, but your office held that because the entryman paid cash for the half acre in excess of 80 acres, he had a right of additional entry under section 2306 of the Revised Statutes for 80 acres. This Department does not concur in that holding. Said section allows an additional entry to each person entitled thereunder for a quantity of land which, when added to the amount previously entered, shall not exceed one hundred and sixty acres. Gaw had previously entered 80.50 acres, and if he be allowed 80 acres additional, it will make the whole amount exceed one hundred and sixty acres; therefore he was only entitled to an additional entry for 79.50 acres, which added to the amount previously entered by him would make exactly one hundred and sixty acres, and he seems to have so understood it when he made the assignment, for he says in the assignment that: "Whereas the undersigned, Erasmus Gaw, is entitled to an additional entry for 79.50 acres," therefore he assigns said right. But if he had been entitled to an additional right for eighty acres, as held by your office, it was error to hold that the assignee of a portion of the right could not locate the portion assigned to him, unless he procured from the soldier an assignment of the remainder of the right.

In the case of William C. Carrington (32 L. D., 203) it was held that one possessed of a right of additional homestead entry under section 2306 of the Revised Statutes may sell and assign the same in such amounts as he deems proper, and that each assignee of a fractional portion of such right is entitled to locate the same upon public land, regardless of the number of assignments made by the original owner of the right or the amount of the right still retained by him.

Your office also erred in holding that the rule of approximation can not be applied in this case. The entire right originally due the soldier is offered as a basis for the entry applied for, but if, as supposed by your office, the soldier had still retained a portion of his right, the rule

of approximation has never been applied to an entry made under said right, and the circular referred to in your said decision contemplates and permits one application of said rule to each original right of additional homestead entry under said statute.

Your said decision is therefore reversed, and, if there be no other objection, said application will be allowed.

DESERT LAND ENTRY—AREA—ACT OF AUGUST 30, 1890.

STUART *v.* BURKE.

The limitation in the act of August 30, 1890, as to the amount of land that may be acquired by any one person under the public land laws, applies only to the acquisition of title, and not to the amount of land that may be entered or filed upon under such laws.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, May 21, 1904.* (A. W. P.)

Edwin E. Stuart has appealed from your office decision of October 6, 1903, wherein you affirm the action of the local officers dismissing his contest against John L. Burke's desert land entry No. 2833, made April 28, 1900, for lots 6 and 7, Sec. 30, T. 7 S., R. 31 E., and lots 1, 2, 3, and 4, and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 25, T. 7 S., R. 30 E., Blackfoot, Idaho, land district.

Stuart initiated contest against said entry April 3, 1902, alleging that it is—

illegal for the reason that the records of the U. S. land office at Blackfoot, Idaho, show that said Burke had exhausted his desert right prior to the 28th of April, 1900, by reason of having filed theretofore homestead entry No. 7399 for lots 10 and 11, 30, 7 So., 31 east, and lots 6, 7, 8 & 10, 31, 7 So., R. 31 east, 161.73 acres, and relinquished the same on said April 28th, 1900.

Notice issued thereon and on July 28, 1902, when the case came up for hearing, on motion of the contestee the local officers dismissed the contest on the ground that the affidavit of contest did not state a cause of action.

Upon appeal therefrom, as stated, your office, by decision of October 6, 1903, affirmed the action of the local officers, holding, in substance, that the restriction or limitation as laid down in the act of August 30, 1890 (26 Stat., 391), applies only to "acquisition of title," and not to the amount of land that may be "entered or filed upon" under the agricultural public-land laws, and that at the time defendant made the entry in question, which was for 313.78 acres, he relinquished a homestead entry previously made, and therefore was and is not seeking to acquire title to more than three hundred and twenty acres. From this decision Stuart has appealed to the Department.

In answer to the question raised by appellant, attention is directed to General Land Office circular, issued January 25, 1904, wherein, on page 79, in calling attention to that part of the act of August 30, 1890, *supra*, relative to the restriction on the acquisition of title to agricultural public land, it is stated that:

In view of this legislation, all applicants to file or enter under any of the land laws of the United States will be required to make affidavit showing that since August 30, 1890, they had not acquired title to, nor are they claiming under any of the agricultural public-land laws, an amount of land which, together with the land sought to be entered, will exceed in the aggregate 320 acres. . . . (See Form 4-102 b, p. 272.)

The decision of your office being in conformity therewith is accordingly hereby affirmed.

RECLAMATION ACT—LANDS HELD IN PRIVATE OWNERSHIP—USE OF WATER.

INSTRUCTIONS.

To entitle an applicant for the use of water for lands held in private ownership within the irrigable area of an irrigation project under the act of June 17, 1902, to the benefits of the act, he must hold the title in good faith, and not for the purpose of evading the provisions of the law, and his occupancy must be *bona fide* and in his own individual right.

Acting Secretary Ryan to the Director of the Geological Survey, May
(F. L. C.) 21, 1904. (E. F. B.)

By letter of April 30, 1904, you request to be advised upon a question which you say has arisen in connection with the operation of the reclamation act as to the disposition of lands in private ownership in blocks of more than one hundred and sixty acres.

The practical question upon which you ask to be advised is whether a person who is the owner of more than 160 acres of land irrigable under a project of the reclamation service may convey the surplus over one hundred and sixty acres to members of his family and thus entitle the grantees of the several tracts to the benefit of that provision of the act of June 17, 1902 (32 Stat., 388), allowing lands in private ownership to be irrigated by the waters of said irrigation project upon the condition that—

No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any land owner unless he be an actual *bona fide* resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.

The owner of realty may convey an absolute estate in such realty to his wife or to his children, vesting in them the legal title where

they are *sui juris* and competent to hold, or to trustees for their benefit where they are not competent to take the legal title, and love and affection is a sufficient consideration to sustain such conveyance. No reason appears why one holding lands within the irrigable area of any project constructed under said act under such conveyance should not be entitled to the benefit of the act if he or she is an actual *bona fide* resident on the land or occupant thereof residing in the neighborhood of such land, provided, the conveyance is made and accepted in good faith for the purpose of actually vesting the title in such grantee and not with a view to evade the provisions of the law.

Cases may arise in the administration of the act of attempts to evade its spirit and purpose by pretended transfers of portions of large bodies of land, but no feasible plan suggests itself for preventing transfers of the character you mention, to individuals of the same family.

The Secretary of the Interior undoubtedly has authority to refuse the use of water for any lands except such as come within the provisions of the act, and he may prescribe rules and regulations to be observed by applicants for the use of water for lands in private ownership, but it is not practicable to frame a general rule to govern in determining whether the title of a claimant to lands within an irrigable area is such as to entitle him to benefits of the act, except that such title must be held in good faith and not for the purpose of evading the provisions of law, and the occupancy must be *bona fide* and in the claimant's individual right. The source of the title is immaterial. Whether the ownership is actual and whether the occupancy is in the *bona fide* and absolute right of the claimant is a question that can only be determined in each particular case when it arises.

SCHOOL LAND—INDEMNITY SELECTION—SWAMP LAND.

STATE OF CALIFORNIA *v.* KOONTZ ET AL.

On the filing of the township plat of survey, intending applicants for lands under the public land laws and those desiring to make selection of any portion thereof under congressional grants, should have equal opportunity in making claim to the lands.

In making selections under the grant of school lands the State may forward a list through the mails, and where a list is so forwarded and reaches the local land office before the time of opening, it should be considered as proffered after the claims of all those present at the time of the opening of the office have been received; and a list so accepted as to tracts free from conflict should not be canceled because prematurely filed.

The State of California is entitled to indemnity for lands in sections sixteen and thirty-six which have passed to the State under the swamp land grant.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *May 23, 1904.* (F. W. C.)

The State of California has appealed from your office decision of April 16, 1903, rejecting its list of school indemnity selections filed December 24, 1901, for lands in T. 5 S., R. 20 E., M. D. M., Stockton land district.

The plat of that portion of said township surveyed by Pearson was officially filed December 24, 1901, and the lands became subject to entry and selection upon the opening of the land office at 9 a. m. on that date.

December 23, 1901, the surveyor-general and *ex officio* register State lands, prepared and forwarded through the mails, from Sacramento, the list of selections in question, which list was received at the district land office on the morning of December 24, 1901, between the hours of eight and nine a. m. This list included lands within that portion of the township previously surveyed but the greater portion from lands surveyed by Pearson.

At the opening of the office at 9 a. m., applications were presented by Singleton N. Koontz, George R. Standart and Lowell Standart to purchase portions of the lands included in the State's list under the timber and stone act of June 3, 1878 (20 Stat., 89), and notices were thereupon issued for publication, fixing March 11, 1902, as the date upon which proof would be offered under said applications, of which the State was duly advised.

With the exception of the tracts in conflict, the local officers accepted the State's selections, giving to each a serial number.

The applicants to purchase made proof as advertised, the State being represented, whereupon the local officers, treating the selections and applications to purchase as simultaneously filed, divided, the register holding that the State's selection was invalid, because of defective bases, the base lands having passed to the State under the swamp land grant, and for that reason recommended the rejection of the State's application, and the receiver being of opinion that the parties should bid for the right of entry.

In the decision appealed from your office held that the State's selection, as to the lands included in the Pearson survey, was prematurely filed, and for that reason rejected the list as to such lands, even where there were no conflicts, and as to the lands without the Pearson survey, held that there were prior appropriations of record at the time of the filing of the list and also rejected the selections as to such lands.

As to the lands included in the Pearson survey, your office decision finds support in departmental decisions in cases of William Herth (22 L. D., 385), *Benson v. State of Idaho* (24 L. D., 272), and Zeigler

v. State of Idaho (30 L. D., 1); and as to the lands claimed in any lawful manner at the time of the official filing of the plat of such survey, the Department affirms your office decision rejecting the State's selections. It can not be held, however, that the State's application was illegal or void because received through the mails before 9 a. m., upon the date fixed for receipt of entries; at most it was irregularly presented. *Dickie v. Kennedy* (27 L. D., 305).

On the filing of the plat of survey, intending applicants for lands under the public land laws and those desiring to make selection of any portion thereof under congressional grants, should have equal opportunity in making claim to the lands. The manner of presenting these claims is controlled entirely by departmental regulations.

If the State desires, she might, through the proper person, present her list of selections at the local land office and in this manner would be accorded the same consideration as other applicants present at the time of opening the district land office. She may, however, forward her list to the local office through the mails, but in the event that it reaches that office before the time of opening, it should be considered as proffered after the claims of all those present at the time of the opening of the office have been received. *Lewis v. Morris* (27 L. D., 113, 118).

Where, as in this case, the list was accepted as to lands not claimed at the time of the filing of the plat, no good reason appears for, at this day, canceling such selections, and to that extent, and for the reasons herein given, your office decision is reversed and such selections will be permitted to stand unless other and sufficient reasons appear for canceling the same. The reason assigned by the register for rejecting a part of the list, viz., that the base passed to the State under the swamp grant, is not sufficient to defeat the selection. *State of California* (31 L. D., 335).

As to the lands without the Pearson survey, so far as the same had been appropriated by entry or otherwise, prior to the filing of the list in question, your office decision is affirmed.

HOMESTEAD CONTEST—DEATH OF ENTRYMAN.

HEIRS OF STEVENSON *v.* CUNNINGHAM.

Upon the death of a homestead entryman the right to the entry goes to his widow, or in case of her death to his heirs, or devisee, free from defect on account of any default on the part of the entryman in the matter of residence or otherwise, and the widow, heirs, or devisee, as the case may be, may complete the entry by either residing on the land or cultivating the same for the required period, but need not do both.

Departmental decision in the case of *Makemson v. Snider's Heirs*, 22 L. D., 511, overruled.

See 77 Dec 41 50 119

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *May 23, 1904.* (A. S. T.)

On October 26, 1892, Logan Burgess made homestead entry for the NW. $\frac{1}{4}$ of Sec. 21, T. 15 N., R. 16 W., Kingfisher land district, Oklahoma.

On October 6, 1896, Charles O. Owens filed an affidavit of contest against said entry, charging that "Logan Burgess has abandoned said tract 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."

A hearing was had upon a notice which was served by publication. Upon the testimony submitted by the contestant, the local officers recommended the cancellation of the entry.

There was no appeal from said action of the local officers, and on September 22, 1897, your office affirmed said action and held the entry for cancellation. The entry was canceled, the case was closed, and on November 30, 1897, Charles O. Owens made homestead entry for the land.

Logan Burgess died on December 24, 1894, leaving Elizabeth Burgess, his widow, surviving. The fact of his death was not made known to your office prior to the cancellation of said entry. Elizabeth Burgess was subsequently married to a man named Cunningham, and on learning that said entry had been canceled upon the contest of Owens, she applied to reopen the case, alleging that she was lawfully married to Logan Burgess on November 4, 1894; that he died on December 24, 1894, leaving her his widow and sole heir; that no notice of said contest was ever served upon her, and that the land in question had been cultivated for her each year since the death of said Logan Burgess.

Your office on July 2, 1898, reopened the case and directed that a hearing be had between Owens and Mrs. Cunningham, which was accordingly done, and on May 23, 1899, your office rendered a decision wherein it was found that a portion of the land had been cultivated each year since the death of Burgess, and held that the cultivation was for the benefit of Mrs. Cunningham. You therefore held Owens's entry for cancellation and reinstated the entry of Burgess.

Owens applied to reopen the case, and your office on March 29, 1901, rejected his application.

On February 9, 1901, John Stevenson filed an affidavit of contest against said entry of Burgess, alleging, in substance, that Burgess never established his residence on the land; that he died in the fall of 1894, leaving Elizabeth Burgess his widow, who had since married a man named Cunningham, and that she had at no time resided upon or cultivated the land in question. Notice issued fixing the hearing for

June 4, 1901, on which day both parties appeared. It seems that Mrs. Cunningham had offered final proof in support of said entry and final certificate had issued to her, and for that reason the local officers dismissed the contest, whereupon Stevenson filed a protest against the final proof offered by Mrs. Cunningham. Said protest was forwarded to your office, and on June 28, 1901, your office ordered a hearing, and on November 2, 1901, forwarded to the local office the final proof that had been submitted by Mrs. Cunningham.

Both parties appeared on November 11, 1901, and a hearing was had, both offering testimony.

Stevenson died on April 1, 1902, and his widow, Nancy Stevenson, was substituted as plaintiff.

On May 19, 1902, the local officers found in favor of the contestant and recommended the cancellation of the entry, from which action the defendant appealed to your office, where on September 5, 1903, a decision was rendered affirming the action of the local officers and holding the entry for cancellation, and from that decision the defendant has appealed to this Department.

The proof shows that neither Logan Burgess in his lifetime, nor his widow since his death, ever resided on the land in controversy.

In your said decision of May 23, 1899, it was found that a portion of the land had been cultivated each year since the death of the entryman, and that such cultivation inured to the benefit of Mrs. Cunningham. This was an issue in the contest between Owens and Mrs. Cunningham, and was expressly raised in her petition to reopen the case. Testimony was offered by both Owens and Mrs. Cunningham bearing upon this issue, and your decision finding in her favor on this question had become final, and hence the entry was not subject to a second contest on that ground. However, the proof taken on the contest of Stevenson abundantly shows that the land was cultivated for Mrs. Cunningham each year after the death of the entryman up to the time of the hearing. Logan Burgess had failed to pay for some breaking that was done in his lifetime, and his widow paid for it after his death. She rented the land to different persons, and had more breaking done, and at the time of the hearing it was rented to a man named McNight, who testified that he rented it from Mr. and Mrs. Cunningham in 1899, and had held it under that lease ever since.

It is difficult to see how your office in view of this proof could find as you did in said decision of September 5, 1903, that:

A decided preponderance of the testimony shows that the land was cultivated by miscellaneous parties in their own interests and under the impression that the same had been abandoned by the entryman before his death and later by his successor in interest, the defendant.

As before stated, neither Logan Burgess in his lifetime nor his widow after his death ever resided on the land in question, and it is

now insisted in behalf of the contestant that inasmuch as the entryman died more than six months after making the entry, and without establishing his residence on the land, it was incumbent upon his widow to establish her residence there after his death in order to hold the entry valid, and in support of this contention counsel cites the case of *Makemson v. Snider's Heirs* (22 L. D., 511), wherein it was held (syllabus):

The failure of a homesteader in his lifetime to establish residence on the land, due time having elapsed therefor prior to his death, and the subsequent failure of his heirs to reside thereon, require the cancellation of the entry.

That decision seems to be based on the theory that a residence is required on each homestead; in other words, that a home on the land is essential to the validity of a homestead claim. While that is true as a general rule, there are various exceptions to the rule. It is well settled by a long line of decisions that where a homestead entryman dies within six months after making his entry and without establishing residence on the land, his heirs may complete the entry by proof of cultivation and improvement of the land for the necessary period and without the establishment of residence on the land. *Swanson v. Wisely's Heirs* (9 L. D., 31); *Stewart v. Jacobs* (1 L. D., 636); *Brown v. Naylor* (14 L. D., 141). In all these and various other cases it has been held that title to a homestead may be acquired without the establishment of residence on the land.

Section 2291 of the Revised Statutes provides that in case of the death of a homestead entryman, if his widow, or in case of her death his heirs, or devisee, shall prove by two credible witnesses "that he, she, or they have resided upon *or cultivated* the same for the term of five years immediately succeeding the time of filing the affidavit . . . he, she or they . . . shall be entitled to a patent as in other cases provided by law." This statute plainly allows the widow or heirs of a deceased homestead entryman to complete the entry, either by residing on the land, or by cultivating and improving it for the specified period, and they are not required to do both, but may adopt whichever they choose, and may thus earn title to the land regardless of whether or not the entryman had resided on the land. *Tauer v. The Heirs of Walter A. Mann* (4 L. D., 433).

The case of *Makemson v. Snider's Heirs*, *supra*, seems to be based upon the theory that where the entryman was in default as to residence at the time of his death, his heirs take the entry subject to all the consequences of his default, and that inasmuch as he could only have cured his default by establishing his residence on the land prior to contest, it was necessary for his heirs to cure his default by doing what he would have been required to do had he lived.

Upon the death of the entryman the right to the entry was cast upon his widow; it came to her as a valid, live, subsisting entry, free

from any taint or defect on account of the default of the entryman; she was in no way chargeable with such default, nor required to cure it, and the fact that it had been subject to contest during the lifetime of the entryman did not affect her right to complete it in either of the two ways provided by law—i. e., by residing on the land, or by cultivating it for the prescribed period. She chose the latter method, and the entry can not be canceled on the ground that she did not also adopt the former. The affidavit of contest charges that she did not do either of the things required by law, but, as above stated, it was found by your office in the case of *Owens v. Burgess*, reopened on the petition of Mrs. Cuninghame, that she had caused the land to be cultivated each year since the entryman's death, and the proof in this case abundantly shows the same fact. This was all that was required of her by the law. She was not accountable for the past default of the entryman, and her entry can not be canceled without proof of default on her part.

If a contest could be maintained against the heirs of a deceased entryman on account of his default, there is no limit of time within which such a contest might be initiated prior to the issuance of patent, and the heirs who may be ignorant of the entryman's default may expend large sums of money in cultivating and improving the land, and after they have done so and thus made the land valuable, it may be taken from them upon a contest charging a default that existed long before they had any connection with the land, and of which they had no knowledge whatever. This would be manifestly unjust and inequitable, and therefore the law will not allow the cancellation of the entry except for some default on their part, and in this case no such default is shown on the part of the widow.

Your said decision is therefore reversed, said contest is dismissed, and the entry will remain intact.

The case of *Makemson v. Snider's Heirs*, *supra*, and all other cases in conflict with this decision are hereby overruled.

RAILROAD GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.

NORTHERN PACIFIC RAILWAY COMPANY.

Lands lost to the Northern Pacific Railway Company within the primary limits of the grant made by the joint resolution of May 31, 1870, do not constitute a sufficient base for the selection of lands within the indemnity limits of the grant made by the act of July 2, 1864; but where, prior to January 1, 1898, such a selection was proffered, of lands properly subject to selection but for a homestead entry covering the same, and a valid base for such selection is substituted, though subsequently to the act of July 1, 1898, the conflicting claims of the entryman and the company as thus presented are subject to adjustment under said act.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *May 23, 1904.* (F. W. C.)

The Department has considered the appeal by the Northern Pacific Railway Company from your office decision of September 5 last, wherein it was held that the conflicting claims of said company and James E. Stringer, to the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 25, T. 29 N., R. 7 E., Seattle land district, Washington, are not subject to adjustment under the provisions of the act of July 1, 1898 (30 Stat., 597, 620).

From said decision it appears that the tract in question is within the indemnity limits of the grant made in aid of the construction of the Northern Pacific railroad by act of July 2, 1864 (13 Stat., 365), being opposite the portion of the branch line extending from Ainsworth to Tacoma in the State of Washington.

July 14, 1894, Stringer was permitted to make homestead entry of this land. January 10 following, the company tendered an indemnity list of selections, including this tract, known as list No. 56, which was rejected by the local officers because of adverse claims of record. Upon appeal the action of the local officers was affirmed by your office decision of March 28, 1895.

June 30, 1902, Stringer submitted final proof upon his entry, upon which final certificate was issued the same day. At the time of the proffer of the company's indemnity list of selections the company was contending that the revocation of the indemnity withdrawals made on account of this grant was in violation of law; that the grant was deficient and that as a consequence an indemnity selection was not necessary to prevent other disposition of the land within the indemnity belt of its grant.

Certain cases were instituted in the courts to have judicially determined the rights of said company within its indemnity belt and said cases were carried to the Supreme Court of the United States, but therein the contentions of the company were not upheld, but the practice of this Department, which refused to recognize any right within the indemnity belt prior to the proffer of a good and sufficient selection, was sustained. These decisions of the court, however, were long subsequent to the action by your office in sustaining the rejection of the list in question. See *Hewitt v. Schultz* (180 U. S., 139).

The company did not appeal from the decision of your office of March 28, 1895, but such decision was in accordance with the uniform rulings of this Department, and it can not be held therefore that by such failure to appeal the company abandoned its claim under its proffered selection of this land.

In the list proffered January 10, 1895, the company designated as a base for the selection in question portions of sections 21 to 27, T. 9 N.,

R. 4 W., State of Washington, and said lands do not appear to have since been used as a base for the selection of other lands. Said tracts are within the primary limits of the grant extending northward from Portland, Oregon, to Puget Sound, in aid of the construction of which a grant was made by the joint resolution of May 31, 1870 (16 Stat., 378).

This Department has ruled that the grants made by the act of 1864 and the resolution of 1870 are to be adjusted separately, so that it must be held that the base assigned for the tract in question in the list as originally presented was not a sufficient base. The company has since, however, substituted a new base for the selection in question which upon examination is found by your office to be sufficient to support the selection. This action, however, was taken after July 1, 1898, and the only question remaining to be considered is: Was the claim of the company one which, in absence of all individual claims, would enable it to have obtained title to this land? Your office decision appealed from found that it was not, because of the insufficient base. This, however, does not seem sufficient, in the absence of an adverse claim, to have prevented completion of title under the railroad selection. The land selected was otherwise subject to the selection, and it has been the uniform practice of this Department in the matter of indemnity selections to permit railroad companies to supply a new base for an existing selection where that originally presented is, for any reason, held insufficient.

From a careful consideration of the entire matter it is the opinion of this Department that the record discloses such conflicting claims to this land on January 1, 1898, as are subject to adjustment under the act of July 1, 1898, *supra*, and the record is herewith returned that the case may be disposed of under said act.

CEDED PORTION OF GREAT SIOUX INDIAN RESERVATION—SCHOOL LANDS—ACT OF MARCH 30, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., May 24, 1904.

Registers and Receivers, Chamberlain, Huron, Pierre, and Rapid City, South Dakota.

GENTLEMEN: Your attention is called to the act of March 30, 1904 (33 Stat., 154), entitled "An act to authorize the State of South Dakota to select school and indemnity lands in the ceded portion of the Great Sioux Reservation, and for other purposes."

Said act provides—

"That the State of South Dakota shall have the right to select school indemnity or other lands granted to the State by the enabling act providing for the admission of said State into the Union in the ceded portion of the Great Sioux Reservation in South Dakota, and said lands are hereby made subject to such selection.

"SEC. 2. The general laws for the disposal of the public lands of the United States are hereby extended and made applicable to the said ceded portion of the Great Sioux Reservation in the said State."

No specific instructions are deemed necessary under said act.

You will allow selections to be made of lands within the ceded portion of the Great Sioux Reservation, by the proper State authorities, of school indemnity and other lands granted to the State by the enabling act of February 22, 1889 (25 Stat., 676), and you will also allow entries, to be made of such lands under the general laws for the disposal of the public lands of the United States, being governed by existing rules and regulations appertaining thereto.

Very respectfully,

J. H. FIMPLE, *Acting Commissioner.*

Approved:

THOS. RYAN, *Acting Secretary.*

INDIAN HOMESTEAD—ALIENATION BY HEIRS—ACT OF MAY 27, 1902.

JIM CROW.

The provisions of the act of May 27, 1902, authorizing the sale and conveyance of inherited Indian lands by the heirs of a deceased allottee, apply to the heirs of all Indian claimants for portions of the public lands, to whom a trust or other patent containing restrictions upon alienation has been issued, whether the claim was initiated under what are known as Indian homestead laws or under Indian allotment laws.

Assistant Attorney-General Campbell to the Secretary of the Interior,
May 25, 1904. (W. C. P.)

The Commissioner of Indian Affairs, by letter of April 16, 1904, having asked whether lands inherited from a deceased Indian homesteader come within the provisions of the act of May 27, 1902 (32 Stat., 245, 275), authorizing the sale and conveyance of inherited Indian lands, the matter has been referred to me for opinion.

The act of May 27, 1902, provides:

That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee and all lands so patented

to a white allottee shall thereupon be subject to taxation under the laws of the State or Territory where the same is situate: *Provided*, That the sale herein provided for shall not apply to the homestead during the life of the father, mother, or the minority of any child or children.

In the case submitted, Jim Crow, a Winnebago Indian, made homestead entry for the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 33, T. 26 N., R. 11 E., Wisconsin, upon which he made final proof in 1896. A patent was issued to him containing the stipulation that the land should "not be subject to alienation or incumbrance either by voluntary conveyance or by the judgment, decree or order of any court, or subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty years from the date of the patent issued therefor," as provided in section 5 of the act of January 18, 1881 (21 Stat., 315, 317).

This Indian, it is stated, died in 1899, leaving one heir, a nephew. This land was not in a strict technical sense "allotted" to the Indian, but in all other respects the case comes within the letter of the act of May 27, 1902, and in all respects comes within the spirit of that law. The earlier provisions for allowing Indians to acquire title to public lands conferred upon them a right to make homestead entry, coupled, however, with restrictions upon alienation.

By the act of March 3, 1875 (18 Stat., 402, 420), it was declared that any Indian the head of a family or twenty-one years of age, who shall have abandoned his tribal relations, shall be entitled to the benefits of the homestead law of May 20, 1862 (12 Stat., 392), with a proviso that the title of lands thus acquired shall not be subject to alienation or incumbrance for a period of five years from date of the patent issued therefor. The act of January 18, 1881, *supra*, extends the period of non-alienation as to the Winnebagoes, making it twenty years. The act of July 4, 1884 (23 Stat., 76, 96), provided that Indians then or thereafter located on public lands might avail themselves of the homestead laws as fully and to the same extent as citizens of the United States and that lands thus acquired should be held in trust as follows:

All patents therefor shall be of legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

This was followed soon after by the general allotment act of February 8, 1887 (24 Stat., 388), which, after providing for allotments of lands in Indian reservations, declared that any Indian not residing upon a reservation who shall make settlement upon lands of the United States may have the same allotted to him and his children in quantities

and manner prescribed for Indians residing upon reservations. The provision in this act as to the form, effect, and conditions of patents to be issued is the same as that of the act of 1884, *supra*. The general allotment act, so far as it affects public lands, and the preceding Indian homestead provisions, are so clearly connected that they should be construed *in pari materia* as relating to the same subject-matter. The later allotment act but carries forward the policy of the former enactments to give Indians a right to secure homes upon the public domain.

Congress has recognized that allotment claims are of the same nature as homestead rights. A fund had been provided for assisting Indian homesteaders and carried upon the books of the Treasury Department under the title "Homesteads for Indians," and by the act of March 3, 1891 (26 Stat., 989, 1007), the Secretary of the Interior was authorized and directed to apply the balance of this fund for the employment of allotting agents "to assist Indians desiring to take homesteads under section 4," of the act of February 28, 1887.

Here Congress characterized claims under the allotment act as homesteads. Claims under the various laws relating to Indian homesteads may with equal propriety be characterized as allotments. In fact the terms mean substantially the same thing so far as the laws in which they are found affect the public lands and so far as the interests of the Indian claimant are concerned.

This Department has considered Indian homesteads upon practically the same footing as Indian allotments upon the public lands. It is held that the government is bound to protect the rights of the Indian homesteader during the trust period, that no preference right of entry is obtained by contest against an Indian homestead and a relinquishment of an Indian homestead entry does not become effective until approved by this Department. (Doc Jim, 32 L. D., 291.) These rules apply also to Indian allotments. The control, jurisdiction and obligations of the Department are the same in one case as in the other.

The objects of the laws relating to Indian homesteads are the same as those relating to Indian allotments on the public lands, the status of the Indian claimant is the same under both classes of laws, the duties and obligations of the government are the same. Both the legislative and the executive branches of the government have recognized these similarities of purpose in the laws, standing of claimants thereunder, and obligations of the government. These facts lead irresistibly to the conclusion that said provision of the act of May 27, 1902, should be construed to include within its intendment and purview, heirs of Indian claimants for portions of the public lands, to whom a trust or other patent containing restrictions upon alienation has been issued, whether the claim was initiated under what are known as Indian homestead laws or under Indian allotment laws.

Approved:

THOS. RYAN, *Acting Secretary*.

REPAYMENT—DESERT LAND ENTRY—COMPACTNESS.

PETER J. BACCA.

Where a part of a desert land entry is voluntarily relinquished by the entryman, repayment of the purchase money paid on such relinquished portion will not be allowed, on the ground that the entry was non-compact and could not have been confirmed, where the entry upon its face does not show such a departure from a reasonable requirement of compactness as would necessarily preclude its confirmation, and it is not shown by the record, or otherwise disclosed, that said entry was not as compact as the situation of the land and its relation to other lands would admit of.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, May 25, 1904.* (C. J. G.)

An appeal has been filed by Peter J. Bacca from the decision of your office of January 20, 1904, denying his application for repayment of a portion of the purchase money paid by him on desert land entry No. 169, made February 3, 1899, at Pueblo, Colorado.

The entry originally embraced lot 4, Sec. 3, T. 32 S., SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 33, and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 34, T. 31 S., R. 64 W. March 30, 1903, Bacca relinquished lot 4, Sec. 3, and the land in section 34, without prejudice to his right to make final entry for the remainder of his claim, to wit, the land in section 33.

As set forth in the decision from which the appeal herein is taken, the final proof papers of Bacca, filed April 7, 1903, show that the relinquished portion of his entry remained unreclaimed for want of sufficient water to irrigate the same. The application for repayment was denied by your office because of voluntary relinquishment on the part of the entryman and it did not appear that the entry was erroneously allowed and could not be confirmed, or that it was canceled in part for conflict, within the purview of the act of June 16, 1880 (21 Stat. 287).

The allegation is made on appeal here that the entry was erroneously allowed and could not have been confirmed because it was non-compact in form. No attempt is made to show that the entry could have been made in different form from that in which it was allowed, attention merely being called to its face. Even if it be conceded that the entry on its face did not conform to the requirements of the statute and the regulations thereunder in the matter of compactness, that would not necessarily have justified the rejection of Bacca's desert land application or precluded the confirmation of the entry. It must also appear that the entry was not as compact "as the situation of the land and its relation to other lands will admit of." This condition is not clearly determinable from the plat of survey and field notes, nor is it otherwise disclosed. But the case is similar to that of Chester

Call (32 L. D., 471), both as to the available information regarding the surrounding conditions of the entry at the time it was made and as to its face, wherein it was said:

It is not at all conclusive that there was a violation of the statutory requirement of compactness in the allowance of this entry. It is not clearly determinable from the plat of survey and field notes, nor is it otherwise disclosed, that said entry was not as nearly in the form of a technical section as the situation of the land and its relation to other lands would admit of. Besides, upon its face the entry does not show such a departure from any reasonable requirement of compactness as would necessarily preclude its confirmation.

It is impossible to escape the conclusion that the entry was one that would have been confirmed in its entirety had Bacca complied with the law as to reclamation, a matter solely within his province. Under the circumstances his relinquishment of a portion of the entry can be regarded in no other light than a voluntary act, which, under a long line of decisions, does not constitute a proper ground for repayment.

The decision of your office is affirmed.

FOREST RESERVE—INDIAN ALLOTMENTS—ACT OF JUNE 4, 1897.

OPINION.

Land within a forest reserve covered by an Indian allotment may constitute a proper basis for exchange under the provisions of the act of June 4, 1897.

Assistant Attorney General Campbell to the Secretary of the Interior,
May 26, 1904. (W. C. P.)

The Department of Agriculture has recommended the establishment of a forest reserve in northern California to be known as the Modoc Forest Reserve. A number of Indian allotments are located within the boundaries proposed for this reservation and you have requested my opinion whether these allotments will form bases for exchanges under the provisions of the act of June 4, 1897 (31 Stat., 11, 36). The provision in question reads as follows:

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

The purpose of this provision is to eliminate, so far as may be practicable, private holdings within the boundaries of forest reserves. It is desirable both for the convenient and effective protection of the timber within the reserve and for the relief of the private holder.

The Indian allottee to whom a first or trust patent has been issued, is a private holder entitled to the same measure of relief as any other individual and it is just as important that his rights within the reserve be eliminated as that any other individual rights should be gotten out of the way. The status of such an allottee after the issuance of a first patent has been likened to that of a homestead claimant after a final certificate has been issued. The right of such a homestead claimant to enjoy the benefits of the act of 1897 can not be questioned. The Indian allottee has apparently been placed in even a better position than the homestead claimant. By the act of April 23, 1904 (33 Stat., 297), it is provided that no conditional patent in favor of an Indian allottee, except in cases therein specified, shall be subject to cancellation without authority of Congress. There seems to be no good ground for holding that an Indian allottee may not claim the benefits of the exchange provisions in the act of June 4, 1897.

There is a possibility that any one of these Indian allotments may at any time become a proper base for a lieu selection under said act. By section 7 of the act of May 27, 1902 (32 Stat., 245, 275), it is provided that the adult heirs of any deceased Indian to whom a trust patent has been issued for lands allotted to him may sell and convey the lands thus inherited. The mere fact that an allotment may be located within the boundaries of a forest reserve would not prevent a sale thereof by the heirs of a deceased Indian allottee.

After careful consideration of the question, I am of opinion, and so advise you, that in determining the boundaries of the proposed forest reserve, Indian allotments should be considered as coming within the exchange provision of the act of June 4, 1897.

Approved:

THOS. RYAN, *Acting Secretary.*

FOREST RESERVATION—YOSEMITE NATIONAL PARK—WAGON ROAD.

OPINION.

The Secretary of the Interior has authority to permit the owner of lands within the Yosemite National Park to construct and use a wagon road over the park lands, to be at all times under the exclusive control of the former, where necessary for the purpose of ingress and egress in the appropriate development and utilization of the latter's property, under such restrictions and regulations as shall "provide for the preservation from injury of all timber, mineral deposits, natural curiosities, or wonders within said reservation, and their retention in their natural condition."

*Assistant Attorney General Campbell to the Secretary of the Interior,
May 26, 1904. (F. H. B.)*

I am in receipt, by your reference of the 7th instant, of the application of A. H. Ward for permission to construct, "under such reasonable rules as the Secretary of the Interior may prescribe and under his

supervision and at applicant's own cost and expense and without cost or liability on the part of the United States," a wagon road commencing at a point on the north bank of the Merced river at the western boundary of the Yosemite National Park, in California, thence in a general easterly direction, following the general course and grade of said river, "to the junction of the Coulterville toll road with the road owned by the State of California," etc., for purposes of ingress and egress from certain mining claims and patented lands claimed to be held and owned by the applicant. I am asked for my "opinion upon the question, whether the Secretary of the Interior is authorized to grant the privileges desired."

By the act of October 1, 1890 (26 Stat., 650), whereby the reservation now known as the "Yosemite National Park" was established and the lands therein described were "reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and set apart as reserved forest lands," no specific authority is given the Secretary to grant any such permission as is here sought. Nor is such authority conferred by any subsequent statute. The reservation act does provide, however, that nothing therein contained shall be construed to affect "any *bona fide* entry of land made within the limits" of the reservation "under any law of the United States prior to the approval" of the act. In an opinion, rendered July 20, 1897 (25 L. D., 48), and approved by the Secretary of the Interior, Assistant Attorney General Van Devanter held the mining claim there under consideration, owned by a Mr. Cordes, to fall within the terms of the saving clause of the act, and added (p. 51):

The necessary use of the park lands for purpose of ingress and egress Mr. Cordes should, in my opinion, be permitted to enjoy, subject to such reasonable rules as the Secretary of the Interior may make under the authority given him in said act (See opinion of Mr. Assistant Attorney General Shields, dated January 5, 1892, in case of Hite Lode and Mill Site). This will apply, of course, to the use of the trail already constructed by him along Bloody Canon.

The applicant, Ward, does not ask the grant of a "right of way"—an easement chargeable upon the park lands—but merely a license or bare permission to construct, at his own cost and without in any wise affecting the rights of the United States, a wagon road over certain of the park lands, to be used by him, when completed, for purposes of ingress and egress in connection with his claimed lands within the reservation, but to be at all times under the exclusive control of the Secretary of the Interior and subject to such ultimate disposition and further use as the latter may prescribe or permit. In the application it is stated that the route therein outlined is now covered by a narrow and at some points dangerous trail, traversable only by a man or horse; so that the extent of the permission sought is, practically, to convert that trail into a passable and safe wagon road.

I have no doubt, and so express the opinion, that you have authority to extend such permission, upon satisfactory evidence of the applicant's right of possession of or title to the lands claimed by him and that the construction and use by him of such a road is a "necessary use of park lands for purpose of ingress and egress" in the appropriate development and utilization of his property; the permission given to be enjoyed under such restrictions and regulations as shall "provide for the preservation from injury of all timber, mineral deposits, natural curiosities, or wonders within said reservation, and their retention in their natural condition."

Approved:

THOS. RYAN, *Acting Secretary.*

SWAMP LANDS—KLAMATH INDIAN RESERVATION.

STATE OF OREGON.

Lands in the State of Oregon reserved under the treaty concluded October 14, 1864, with the Klamath and other tribes of Indians, were reserved in pursuance of a law enacted prior to the swamp land grant of May 12, 1860, to said State, and for that reason are excepted from the operation of said grant.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *May 26, 1904.* (F. W. C.)

The Department has considered the appeal by the State of Oregon from your office decision of November 18, 1903, wherein you held that the lands within the Klamath Indian reservation, in said State, are excepted from the operation of the grant of swamp lands to said State, made by the act of March 12, 1860 (12 Stat., 3), the first section of which provides as follows:

That the provisions of the act of Congress entitled "An act to enable the State of Arkansas and other states to reclaim the 'swamp lands' within their limits," approved September twenty-eight, eighteen hundred and fifty, be, and the same are hereby, extended to the States of Minnesota and Oregon: *Provided*, That the grant hereby made shall not include any lands which the government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act.

The lands in question were at the date of the passage of the act of 1860 within what is commonly known as Indian country, not embraced within any defined reservation, but the Indian title thereto had not been extinguished; in fact, no treaty had yet been made with the bands of Indians occupying these lands looking to the extinguishment of such title. That it was within the power of Congress to grant such lands, subject to the Indian right of occupancy, can not be questioned. See *Buttz v. Northern Pacific R. R. Co.* (119 U. S., 55), and cases

therein cited. The question for consideration in this case is as to whether these lands were reserved, sold or disposed of (in pursuance of any law enacted prior to 1860) prior to the confirmation of title to be made under the swamp land grant, for if they were they are specifically excepted from the swamp land grant to the State.

It becomes necessary to examine the legislation of Congress with regard to Indian rights within the former Territory, now State, of Oregon, in order to determine this matter.

The act of August 14, 1848 (9 Stat., 323), established the territorial government of Oregon and by section one provided—

That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed.

This act gives plain recognition to the Indian title or right of occupancy as theretofore exercised within the boundaries of the Territory thereby established, and clearly establishes a policy with respect to the extinguishment of such title or right of occupancy in pursuance of which a treaty between the United States and the Klamath and Modoc tribes and Yahooskin bands of Snake Indians, was concluded October 14, 1864, and proclaimed February 17, 1870 (16 Stat., 707). By this treaty said tribes of Indians ceded to the United States all their right, title and claim to all the country theretofore claimed by them, the same being referred to by boundaries specifically described in article 1 of said treaty, but it was provided that a certain described tract within the country ceded, should be set apart as a residence for the Indians and held and regarded as an Indian reservation, the same being also specifically described in said article 1 of the treaty. The reservation established under this treaty includes the lands here in question and within its boundaries a large portion of the lands have been allotted to the individual members of the tribes through the intervention of the Indian Bureau of this Department, but patents have not as yet issued upon said allotments.

While the allotments were in progress, the State indicated a purpose to claim portions of the land under the swamp land grant, and upon the matter being reported to this Department you were directed January 4, 1901 (30 L. D., 395), to give notice to the governor of Oregon of all surveys that had been or might thereafter be completed and confirmed within the limits of the Klamath Indian reservation in said State, to the end that any claim the State might desire to make to any of such lands under the swamp land grant, might be presented at the earliest date; and in accordance with the notice thus given, on

November 17, 1902, the United States surveyor-general for the district of Oregon reported to your office what is known as swamp land list No. 82, embracing a total area of 92,378.09 acres of land within the limits of this reservation. Notice of the tracts thus claimed by the State was given by your office to the Commissioner of Indian Affairs and from his report made thereon it appears that allotments have been heretofore made to individual Indians embracing 55,281.84 acres of the lands included in said list No. 82. This list of swamp selections has never received departmental approval, so that there has been no confirmation of title to such lands under the swamp land grant.

In the case of State of Minnesota (27 L. D., 418), which involved a construction of the swamp land grant of March 12, 1860, it was held that "the issuance of patent is the final and only act of confirmation of title under the swamp land grant, and as no patent has yet issued for any of these lands it follows that the reservation was made before the title of the State to any of the lands therein was confirmed." The lands in question in that case were within what is known as the White Earth reservation in the State of Minnesota. Those lands were originally embraced within the Indian country, but were ceded to the United States by treaty of February 22, 1855 (10 Stat., 1165), and remained unreserved public lands of the United States free from any Indian claim, until reserved under the treaty of May 7, 1864 (13 Stat., 693). It was, therefore, held that the swamp lands within the limits of that reservation passed to the State under the swamp land grant of 1860. See also State of Minnesota (32 L. D., 328).

In the matter of the lands included within the Klamath Indian reservation in the State of Oregon, the Indian title still remains unextinguished and such title was in the same condition at the date of the passage of the swamp land grant of 1860 as it was after the treaty of 1864. The treaty concluded in 1864 and proclaimed in 1870 but reduced the extent of the possession of these Indians, and was made in pursuance of the policy declared by the act of August 14, 1848, *supra*; hence, the reservations provided for therein were established in pursuance of a law enacted prior to the swamp land grant of 1860.

In this connection see also State of Minnesota (22 L. D., 388), wherein it was held that lands within the Red Lake Indian reservation in the State of Minnesota, having a status very similar to the lands here in question, were held to have been excepted from the grant of swamp lands made to that State by the act of March 12, 1860, *supra*. In the opinion of this Department therefore the grant made by the act of March 12, 1860, did not include any of the lands within the Klamath Indian reservation.

Your office decision is accordingly affirmed and the list of selections presented on behalf of the State of Oregon November 17, 1902, for lands within the Klamath Indian reservation will stand rejected.

REPAYMENT—DESERT LAND ENTRY—COMPACTNESS—CHARACTER OF LAND.

HEIRS OF GILBERT S. BAILEY.

Repayment of the purchase money paid on a desert land entry will not be allowed, on the ground that the entry is non-compact, where upon its face the entry does not show such a departure from a reasonable requirement of compactness as would necessarily preclude its confirmation.

Where land entered under the desert land law is not of the character subject to entry under that law, but is expressly represented by the entryman to be of such character, and the entry is allowed upon such representation, the entry is not "erroneously allowed" within the meaning of the repayment law, and the entryman is therefore not entitled to repayment of the purchase money paid on such entry.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *May 28, 1904.* (C. J. G.)

An appeal has been filed by the heirs of Gilbert S. Bailey from the decision of your office of April 5, 1904, denying their application for repayment of the purchase money paid by said Gilbert S. Bailey on desert land entry No. 930, for the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$, Sec. 8, SE. $\frac{1}{4}$, Sec. 7, NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 18, T. 31 N., R. 69 W., Cheyenne, Wyoming.

The entry was made October 17, 1883, and canceled May 1, 1889, for failure to make final proof and payment. Repayment is claimed on the ground that the entry was non-compact in form. Your office finds:

The entry was allowed at the proper price (\$1.25 per acre), it was as compact in form as the nature and prior appropriation of surrounding lands would permit and was otherwise regular and lawful.

Upon examination the Department is of opinion that the finding in the case of Chester Call (32 L. D., 471), to wit: "Upon its face the entry does not show such a departure from any reasonable requirement of compactness as would necessarily preclude its confirmation," is applicable to this case, and it is so held.

In a supplemental appeal filed in behalf of these heirs, it is alleged that the land involved was not desert in character. When the entryman in this case filed his declaration he represented said land to be desert in character, and like representations were made by his witnesses. In the case of George A. Stone (25 L. D., 110), it was said:

Stone's desert land entry was not "erroneously allowed." The "allowance" is the act of the local officers, and not the act of the entryman. Upon the showing made by Stone and his two witnesses, the land appeared to be desert in character and it became the duty of the local officers to allow his application to enter. Had the entryman sustained the allegations made in his application, the entry would not have been canceled. Unfortunately for him, these allegations were not sustained, and the entry was canceled because the land was not desert in character. Upon the proof presented the allowance of the entry was correct. The error was not in the

"allowance," but in the proofs presented by the entryman. This, then, is not a case where the entry was "erroneously allowed," and it is not one in which the law authorizes me to cause repayment to be made.

And in the same case, on review (25 L. D., 111), it was held, syllabus:

If the land entered is not of the character contemplated by the law under which the entry is made, but is expressly represented by the entryman to be of such character, and the allowance of the entry is procured by such representation, the entry in such case is wrongfully procured, and not "erroneously allowed" within the meaning of the repayment law.

In the case of William M. Bernard (2 L. D., 693), it was held, syllabus:

Where one relinquishes a desert land claim on the assumption that the land is in fact agricultural, he is estopped by his prior proofs from denying its desert land character, and is not entitled to repayment.

In the case of Kern Oil Co. *et al.* v. Clarke (on review, 31 L. D., 288, 300), it was said:

The land officers are not required, and from the nature of things could not be required, to take judicial cognizance of the physical condition of lands with respect to which, in the discharge of their duties, they are called upon to act.

The decision of your office is hereby affirmed.

REPAYMENT—DESERT LAND ENTRY—COMPACTNESS—CHARACTER OF LAND.

JOHN C. CHARLTON.

Repayment of the purchase money paid on a desert land entry will not be allowed, on the ground that the entry is non-compact, where upon its face the entry does not show such a departure from a reasonable requirement of compactness as would necessarily preclude its confirmation.

The act of entering land under the desert land law carries with it the necessary implication that the land is susceptible of reclamation, and the entryman is not entitled to repayment of the purchase money paid on such entry on the ground that the location and position of the land is such that it can not be reclaimed.

The act of March 3, 1877, places the burden of proof as to the character of the land entered thereunder upon the entryman and his witnesses, and where he states in his declaration that he has personally examined the land and each legal subdivision thereof, repayment of the purchase money paid on such entry will not be made on the ground that the land is not of the character contemplated by the law.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) May 31, 1904. (C. J. G.)

An appeal has been filed by John S. Charlton from the decision of your office of April 26, 1904, denying his application for repayment of the purchase money paid by him on desert land entry No. 27, Ute series, for the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 17, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 8, and S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 7, T. 1 S., R. 1 W., Montrose, Colorado.

The entry was made March 10, 1892, and canceled June 10, 1897, because the statutory period in which to submit proof had expired. Repayment is claimed on two grounds, viz: That the entry was non-compact in form, and the land was not desert in character. With respect to the first ground the case is clearly covered by that of Chester Call (32 L. D., 471), wherein it was said: "Upon its face the entry does not show such a departure from any reasonable requirement of compactness as would necessarily preclude its confirmation." There is nothing in the desert land act or in the regulations thereunder that requires an entry to be absolutely in square form. Under the second ground it is alleged that the land entered was "high bench or mesa land, fully 140 feet above the level of any stream, and therefore irreclaimable." Notwithstanding these alleged conditions the entryman stated in his declaration that he applied to enter the land after an actual personal examination of each and every legal subdivision thereof, and undoubtedly on the assumption that it was susceptible of irrigation. In paragraph 10 of the circular of your office of June 27, 1887 (5 L. D., 708), it is stated, among other things, that a person who makes a desert land entry before he has secured a water right does so at his own risk. In the case of Lucy C. Hallack (24 L. D., 542), wherein repayment was denied, it was said:

The land was subject to entry and was regularly entered. No error or mistake of any kind, with respect to the entry, was made on the part of the government. If any error or mistake was made, it was simply an error of judgment on the part of the entryman, as to whether the portion of the entry afterwards canceled, could be reasonably and successfully reclaimed. The land embraced by the entry was voluntarily selected by the entryman, but failing to reclaim a portion of the entry, she executed a relinquishment of that portion and, hence, the cancellation.

The act of entering land under the desert land law carries with it the necessary implication that the land is susceptible of reclamation. The act of March 3, 1877 (19 Stat., 377), places the burden of proof as to the character of the land entered thereunder upon the entryman and his witnesses. Section 2 of said act 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.

This feature is controlled by the rule in the case of George A. Stone (on review, 25 L. D., 111), the syllabus of which is:

If the land entered is not of the character contemplated by the law under which the entry is made, but is expressly represented by the entryman to be of such character, and the allowance of the entry is procured by such representation, the entry in such case is wrongfully procured, and not "erroneously allowed," within the meaning of the repayment law.

In the case of William M. Bernard (2 L. D., 693), it was held, syllabus:

Where one relinquishes a desert land claim on the assumption that the land is in fact agricultural land, he is estopped by his prior proofs from denying its desert land character, and is not entitled to repayment.

That an abandonment is equivalent in effect to a relinquishment needs no demonstration. In the case of Kern Oil Co. *et al. v. Clarke* (on review, 31 L. D., 288, 300), it was said:

The land officers are not required, and from the nature of things could not be required, to take judicial cognizance of the physical condition of lands with respect to which, in the discharge of their duties, they are called upon to act.

The decision of your office herein is affirmed.

HOMESTEAD—NEBRASKA LANDS—ACT OF APRIL 28, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 31, 1904.

Registers and Receivers U. S. Land Offices, Nebraska.

GENTLEMEN: I inclose herewith a printed copy of the act of Congress, approved April 28, 1904 (33 Stat., 547), entitled "An act to amend the homestead laws as to certain unappropriated and unreserved lands in Nebraska."

It is directed by the law that in that portion of the State of Nebraska lying west and north of the line described therein, and marked in red ink upon the map transmitted herewith, upon and after June 28, 1904, except for such lands as may be hereafter and prior to said date excluded under the proviso contained in the first section thereof, homestead entries may be made for and not to exceed in area 640 acres, the same to be in as nearly a compact form as possible, and must not in any event exceed 2 miles in extreme length.

Under the provisions of the second section, a person who within the described territory has made entry prior to April 28, 1904, under the homestead laws of the United States, and who now owns and occupies the lands theretofore entered by him, may make an additional entry of a quantity of land contiguous to his said homestead entry, which, added to the area of the original entry, shall make an aggregate area of not to exceed 640 acres; and he will not be required to reside upon the additional land so entered, residence upon the original homestead being accepted as equivalent thereto; but final entry will not be allowed on such additional land until five years have elapsed after making the entry.

Such additional entry must be for contiguous lands and the tracts embraced therein must be in as compact a form as possible, and the extreme length of the combined entries must not in any event exceed 2 miles.

In accepting entries under this act the compliance thereof with the requirement as to compactness of form should be determined by the relative location of the vacant and unappropriated lands, rather than by the quality and desirability of the desired tracts.

By the second proviso of section 3, such entrymen who now own and occupy their homesteads are allowed a preferential right for ninety days after April 28, 1904, within which to make the additional entry allowed by section 2 of the law.

Until the period of ninety days after the passage of the act has elapsed you will require parties making entry to furnish a special affidavit to the effect that the lands applied for are not adjoining the land of any entryman, other than himself or herself, who is entitled to the preferential right under said law.

By the first proviso of section 3, any person who has made a homestead entry prior to his application for entry under this act, and has resided upon and cultivated the same for the period required by law, will be allowed to make an additional entry for a quantity of land, which added to the area of the land embraced in the former entry shall not exceed 640 acres, but residence and cultivation of the additional land will be required to be made and proved as in ordinary homestead entries.

Under said act no bar is interposed to the making of second homesteads for the full area of 640 acres by parties entitled thereto under existing laws, and applications therefor will be considered under the instructions of the respective laws under which they are made.

Upon final proof, which may be made after five years and within seven years from date of entry, the entryman must prove affirmatively that he has placed upon the lands entered permanent improvements of the value of not less than \$1.25 per acre for each acre, and, with the exception of those entitled to make additional entries of adjoining land under section 2, such proof must also show residence upon and cultivation of the land for the five-year period as in ordinary homestead entries.

A person who has a homestead entry upon which final proof has not been submitted and who makes additional entry under the provisions of section 2 of the act will be required to submit his final proof in the original entry within the statutory period therefor, and final proof upon the additional entry will also have to be submitted as hereinbefore set forth.

In the making of final proofs the homestead proof forms will be used, modified when necessary in case of additional entries made under the provisions of section 2.

It is provided by section 3 that the fees and commissions on all entries under the act shall be uniformly the same as those charged under the present law for a maximum entry, at the minimum price, viz, at the time application is made, \$14, and at the time of making final proof, \$4, to be payable without regard to the area embraced in the entry.

In case the combined area of the subdivisions selected should upon applying the rule of approximation thereto be found to exceed in area the aggregate of 640 acres, the entryman will be required to pay the minimum price per acre for the excess in area.

Entries made under this act are not subject to the commutation provisions of the homestead law.

Before said act shall become operative you will be advised as to the lands that it may be deemed practicable to irrigate under the national irrigation law or by private enterprise which will be excluded from entry under the proviso contained in the first section thereof.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved, May 25, 1904.

THOS. RYAN, *Acting Secretary.*

[PUBLIC—No. 233.]

AN ACT To amend the homestead laws as to certain unappropriated and unreserved lands in Nebraska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after sixty days after the approval of this act entries made under the homestead laws in the State of Nebraska west and north of the following line, to wit: Beginning at a point on the boundary line between the States of South Dakota and Nebraska where the first guide meridian west of the sixth principal meridian strikes said boundary; thence running south along said guide meridian to its intersection with the fourth standard parallel north of the base line between the States of Nebraska and Kansas; thence west along said fourth standard parallel to its intersection with the second guide meridian west of the sixth principal meridian; thence south along said second guide meridian to its intersection with the third standard parallel north of the said base line; thence west along said third standard parallel to its intersection with the range line between ranges twenty-five and twenty-six west of the sixth principal meridian; thence south along said line to its intersection with the second standard parallel north of the said base line; thence west on said standard parallel to its intersection with the range line between ranges thirty and thirty-one west; thence south along said line to its intersection with the boundary line between the States of Nebraska and Kansas, shall not exceed in area six hundred and forty acres, and shall be as nearly compact in form as possible, and in no event over two miles in extreme

length: *Provided*, That there shall be excluded from the provisions of this act such lands within the territory herein described as in the opinion of the Secretary of the Interior it may be reasonably practicable to irrigate under the national irrigation law, or by private enterprise; and that said Secretary shall, prior to the date above mentioned, designate and exclude from entry under this act the lands, particularly along the North Platte River, which in his opinion it may be possible to irrigate as aforesaid; and shall thereafter, from time to time, open to entry under this act any of the lands so excluded, which, upon further investigation, he may conclude can not be practically irrigated in the manner aforesaid.

SEC. 2. That entrymen under the homestead laws of the United States within the territory above described who own and occupy the land heretofore entered by them, may, under the provisions of this act and subject to its conditions, enter other lands contiguous to their said homestead entry, which shall not, with the land so already entered, owned, and occupied, exceed in the aggregate six hundred and forty acres; and residence upon the original homestead shall be accepted as equivalent to residence upon the additional land so entered, but final entry shall not be allowed of such additional land until five years after first entering the same.

SEC. 3. That the fees and commissions on all entries under this act shall be uniformly the same as those charged under the present law for a maximum entry at the minimum price. That the commutation provisions of the homestead law shall not apply to entries under this act, and at the time of making final proof the entryman must prove affirmatively that he has placed upon the lands entered permanent improvements of the value of not less than one dollar and twenty-five cents per acre for each acre included in his entry: *Provided*, That a former homestead entry shall not be a bar to the entry under the provisions of this act of a tract which, together with the former entry, shall not exceed six hundred and forty acres: *Provided*, That any former homestead entryman who shall be entitled to an additional entry under section two of this act shall have for ninety days after the passage of this act the preferential right to make additional entry as provided in said section.

Approved, April 28, 1904.

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Lands in the Bitter Root Valley above Lolo Fork, opened to settlement by the act of June 5, 1872, are not subject to disposal under the timber and stone act; but where such lands have been sold under the latter act, and patents have issued therefor, no rights will be recognized as initiated against such lands by an application to purchase the same under the act of June 5, 1872, while the patents therefor are outstanding.....	492
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Circular of September 17, 1897, 25 L. D., 258, in so far as it prohibits the commutation of entries under the act of June 3, 1896, upon Chippewa lands, overruled.....	3
The provisions of the act of May 27, 1902, authorizing the sale and conveyance of inherited Indian lands by the heirs of a deceased allottee, apply to the heirs of all Indian claimants for portions of the public lands, to whom a trust or other patent containing restrictions upon alienation has been issued, whether the claim was initiated under what are known as Indian homestead laws or under Indian allotment laws	657
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Promulgation of an order of withdrawal of lands for the purpose of carrying into effect the provisions of section five of the act of June 27, 1902, is not essential, since said lands were never opened to settlement or entry; but where prior to final action under said act, in the absence of such promulgation and in ignorance of the order of withdrawal, a townsite settlement was in good faith made upon lands included therein, under the act of February 9, 1903, the land department may modify the order of withdrawal and exclude therefrom the lands embraced in the townsite application.....	319
There is no general authority for the issuance of patent to Indian allottees, and in the absence of an express requirement in the agreement of July 7, 1883, between the United States and the Indians of the Columbia and Colville reservations, and in the act of July 4, 1884, ratifying and confirming the same, that patents shall issue for the lands allotted thereunder, the land department is	

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without authority to issue patents for such lands	568	chiefly valuable for mineral at the time when the State's right would attach, if at all	117
Insanity.		A mineral return by the surveyor-general does not have the effect to establish the character of lands as chiefly valuable for mineral, and can not of itself operate to take lands out of the grant to the State, as mineral lands; this can only be done by proof clearly showing that the lands were, at the time when the right of the State would have attached, known to contain valuable deposits of mineral, and to be chiefly valuable on account of such deposits	117
The power vested in the Secretary of the Interior by section 441. Revised Statutes, to supervise all proceedings instituted to acquire portions of the public lands, includes authority to inquire into the mental capacity of an entryman to make entry	583	Publication of notice of a hearing ordered on a protest against the mineral classification of land under the act of February 26, 1895, must be made in a newspaper published nearest the land; and the register is clothed with discretionary power to designate the newspaper in which the publication shall be made, but this power is subject to review by the Commissioner of the General Land Office and the Secretary of the Interior, and when found to have been abused by the designation of a newspaper not published nearest the land a hearing had in pursuance of such notice will be set aside	611
The test of mental capacity to make homestead entry is whether or not the entryman possesses sufficient mind to have a reasonable perception of the nature, effect and legal consequences of his act in making the entry	583	Mining Claim.	
Where a settler, by his settlement and residence upon and improvement of a tract of land, has "regularly initiated" a claim thereto with the intention of entering the same under the homestead law, and becomes insane before the expiration of the time during which his residence, cultivation and improvement are required by law to be continued in order to entitle him to make proper proof and perfect his claim, the person legally authorized to act for him may, under the provisions of the act of June 8, 1880, make the required proofs and perfect the claim for the benefit of the settler.	522	GENERALLY.	
Irrigation.		Circular of mining laws and regulations approved July 26, 1901, reapproved for reprinting in pamphlet form, December 18, 1903	367
See <i>Arid Land; Final Proof.</i>		A patent issued under the general townsite laws, for lands embraced in an unincorporated townsite, is inoperative to convey title to any lands known to be valuable for minerals at the date of the townsite entry, or to any valid mining claim or possession held under the mining laws at the date of such entry	211
Judgment.		The interest of a co-owner in a mining claim, which may be acquired under the forfeiture provision of section 2324, Revised Statutes, is the share or interest of such co-owner in the purely possessory rights under the mining location, and not in any rights arising under an application for patent.	93
So far as the rights of the entryman are concerned, a final judgment of cancellation by the land department is operative and effective from the moment of its rendition; but no application will be received nor any rights recognized as initiated by the tender of an application for the land embraced in such entry until the cancellation of the entry has been noted on the records of the local office	102	A co-owner who has been omitted from an application for patent to a mining claim can not, by subsequent recourse to forfeiture proceedings against the applicant co-owner, acquire any right in himself to make entry under the application	93
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Until patent has issued the land department has jurisdiction to inquire and determine whether or not a claimant for lands under the public land laws has complied therewith; and, if entry has been made, to inquire and determine whether or not it was properly allowed, and, if found not to have been so allowed, it is the duty of said department to vacate and cancel such entry	383		
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A grant of lands to a State for school purposes does not carry lands known to be			

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Any lands ceded by either of said agreements, which have been heretofore set aside and reserved by the Secretary of the Interior for county-seat town sites, under the act of March 3, 1901, or which have been reserved and appropriated, by authority of law, for any other specific purpose, are not subject to the operation of the mining laws. 95

LOCATION.

A location under the mining laws made upon land covered by a subsisting mineral entry becomes effective upon the cancellation of such entry, if rights thereunder are then being and are thereafter asserted according to such laws 477

APPLICATION.

Application for mineral patent should not be received where the land therein included is embraced in a pending application of another party 220

Where, because of an incurable default on the part of the applicants for a mineral patent, entry for one of the several claims in common embraced in the application is refused, the refusal is in effect a rejection of the application to the extent of such claim 220

Application for patent to public land claimed and located for valuable mineral deposits may be filed only by a person, association, or corporation (otherwise authorized) who has, or have, *claimed and located* a piece of land for such purposes and complied with the terms of the mining laws in other respects, or by the grantee or grantees of such locator or locators 217

Where an application for mineral patent is filed by an association of persons, one of whom is without interest in any one or more of the claims embraced in the application, the proceedings had thereunder are to the extent of such claim or claims without statutory authority, and a nullity 217

Where an applicant for patent to a mining claim, after the expiration of the period of publication of notice of the application, voluntarily defers making entry until after the close of the calendar year in which the period of publication ends, his negligence, in the presence of an alleged relocation of the claim after the termination of that year, is fatal to the entry 200

The length of the interval of time between the end of the period of publication, or the finality of pending adverse proceedings in court or protest proceedings in the land department, and the date of entry, is immaterial, so long as entry is made before the close of the then current calendar year; and the principle with respect to the completion of the patent proceedings is the

same whether the time remaining to the applicant within which to make entry as aforesaid be only a day or several months. 200

NOTICE.

The discretionary power lodged in the register by section 2325 of the Revised Statutes, to designate the newspaper in which notice of an application for patent to a mining claim shall be published, is subject to review by the Commissioner of the General Land Office and the Secretary of the Interior, and where it is found that there has been an abuse of such power, a new publication will be ordered. 359

The notice of an application for patent to a mining claim published in a newspaper, in accordance with the requirements of section 2325 of the Revised Statutes, should substantially conform to the notice as posted upon the claim, and should contain sufficient correct data to put persons of ordinary intelligence and prudence interested in the land applied for upon inquiry, and "to enable any one interested to ascertain with accuracy the position of the claim" 388

Where an application for patent is filed and the proceedings carried to entry by a mineral claimant in the names of himself and his co-owner company, without authority from the latter, and the entry is subsequently canceled for defects in the patent proceedings, upon notice to the former alone, the co-owner company, by claiming under the patent proceedings and asking the reinstatement of the canceled entry, thereby ratifies and confirms the assumed authority exercised by its co-claimant in its behalf, validates the notice upon which the entry was canceled, and is not in position to object that the entry was canceled upon insufficient notice 228

DISCOVERY AND EXPENDITURE.

An aggregate expenditure in labor or improvements upon one of several contiguous claims held in common is acceptable in satisfaction of the statutory requirement only when such expenditure actually promotes, or directly tends to promote, the practically contemporaneous development of all the claims concerned; and a scheme of successive development of such claims, in the absence of an expenditure for the direct benefit of each, is not within the spirit of the privilege accorded by the statute 401

No part of the value of work done or improvements made upon a group of contiguous mining claims, in pursuance of a general system alleged to have been adopted for the common development of the group and an adjoining claim, can be accredited to the adjoining claim, toward meeting the requirement of section 2325 of the Revised Statutes, relative to the expenditure of five

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hundred dollars, where any of the several owners of said claim is without interest in the group upon which the improvements are located 595

An excavation made upon one of a group of placer mining claims containing a deposit or formation of marble so near the surface as to be most advantageously removed by means of quarries, and which manifestly does not tend to facilitate the extraction of the marble from the other claims of the group, or to promote their development, is not such an improvement as may be accepted in satisfaction of the statute requiring an expenditure of \$500 in labor or improvements upon or for the benefit of each of the claims constituting the group as a condition to obtaining patent thereto 85

PLACER.

A placer mining claim upon unsurveyed public land to be valid must be located upon the ground in such shape and position as to conform, as nearly as practicable, to the "United States system of public-land surveys and the rectangular subdivisions of such surveys" 198

The requirement of section 2331 of the Revised Statutes, that all placer mining claims shall conform, as nearly as practicable, to the "United States system of public-land surveys, and the rectangular subdivisions of such surveys," applies with equal force whether such claims are located upon surveyed or unsurveyed public lands 363

The lateral surface area reserved under section 2333, Revised Statutes, from the grant by a placer patent, together with a vein or lode known to exist within the boundaries of the placer claim at the date of and not included in the placer application, is limited to twenty-five feet on each side of the center of the vein or lode 513

A "gulch" placer claim, which can not, by reason of its environment, practicably be conformed to the system of public-land surveys, and the rectangular subdivisions thereof, may, upon sufficient and satisfactory showing, be entered if in shape and position approximating such system as nearly as the conditions will reasonably permit 363

Directions given that in all cases involving "gulch" placer claims, a full and explicit report, touching the situation and scope of the claim or claims involved and the physical or topographical conditions surrounding them, which are relied upon to bring them within the principle applicable to "gulch" placers, should be required of the deputy mineral surveyor who makes the survey, to be verified under the certificate of the surveyor-general, and that such other evidence should be required as may in any case be deemed necessary to satisfactorily establish the existence of the proper and requisite conditions 401

MILL SITE.

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Section 2337, R. S., does not contemplate the location of a separate mill site for each of a group of contiguous lode claims held and worked under a common ownership .. 128

The statute requires that a mill site be used or occupied by the proprietor of the vein or lode for *mining* or *milling* purposes; and some step in or directly connected with the process of mining or some feature of milling must be performed upon, or some recognized agency of operative mining or milling must occupy, the mill site at the time patent is applied for to come within the purview of the statute. 128

The statute in terms permits only "non-mineral land, *not contiguous* to the vein or lode," to be appropriated for mill-site purposes 128

In Alaska, the boundary lines of a mill-site location can not lawfully be laid within sixty feet of the shore line of navigable streams, inlets, gulfs, bays, or the sea 128

Missouri Home Guard.

See *Homestead*.

Notice.

See *Mining Claim; Practice*.

Occupancy.

See *Oklahoma Lands*.

Occupant.

See *Oklahoma Lands*.

Oklahoma Lands.

The provision in the act of June 6, 1900, providing for the opening of certain lands in Oklahoma to settlement and entry, "that the settlers who located on that part of said lands called and known as the 'neutral strip' shall have preference right for thirty days on the land upon which they have located and improved," applies only to such persons as had made settlements and improvements on said lands and were maintaining the same at the date of the passage of said act 190

The preference right of entry for thirty days, accorded to settlers upon lands within the "neutral strip" by the act of June 6, 1900, is not lost by failure to maintain the continuity of residence theretofore established thereon, where the settler continues to claim, exercise dominion over, and cultivate the land 588

One who at the date of the act of June 6, 1900, was by force and fraud deprived of the possession of a tract of land within the "neutral strip" upon which he had theretofore settled and made improvements, was nevertheless a settler upon said tract within the meaning of that act and entitled to the benefits of its provisions 526

The provision of section 22 of the act of May 2, 1890, that not less than ten acres shall be reserved for public purposes in

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 every townsite in the Territory of Oklahoma, is a general provision applicable to all lands in said Territory open to settlement and entry at the time of the passage of the act, except those expressly withheld from its operation, and to all lands in said Territory thereafter opened to settlement and entry; and there is nothing in the act of June 6, 1900, to except the lands thereby opened to settlement and entry from the force and effect of said provision. 502

A contest against a homestead entry of lands within the territory opened to entry under the President's proclamation of July 4, 1901, on the ground that the entryman, at the date of his registration, was disqualified to make such entry because at that time a minor and not the head of a family, will not be sustained where it is shown that he was duly qualified to make homestead entry on the date the entry in question was allowed. 403

The unauthorized and illegal occupancy for townsite purposes of public lands, subject to homestead entry only under the President's proclamation of July 4, 1901, constitutes no bar to such entry thereof by one who asserts a right by virtue of compliance in good faith with the law and regulations relating to the entry of such lands. 71

Of the lands ceded to the United States by the Wichita and affiliated bands of Indians under agreement ratified by the act of March 2, 1895, sections 16 and 36, 13 and 33, reserved for school purposes, are by the provisions of said act made subject to the operation of the mining laws; but the like numbered sections reserved for school purposes of the lands ceded by the Comanche, Kiowa and Apache Indians under agreement ratified by the act of June 6, 1900, are not subject to the operation of such laws. 95

Any lands ceded by either of said agreements, which have been heretofore set aside and reserved by the Secretary of the Interior for county-seat town sites, under the act of March 3, 1901, or which have been reserved and appropriated, by authority of law, for any other specific purpose, are not subject to the operation of the mining laws. 95

Circular of August 20, 1903, amending instructions of February 25, 1897, relating to lands in Greer county 236

The preference right of entry accorded by section 1 of the act of January 18, 1897, relating to lands in Greer county, Oklahoma, is limited to *bona fide* occupants of the land on March 16, 1896. 308

Under said section a widow is entitled to make entry of any land in said county, not exceeding one hundred and sixty acres, upon which her deceased husband had actually established a residence prior to March 16, 1896, which she can perfect under her widow's right; and can also enter in her individual right other lands, not exceeding one

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 hundred and sixty acres, of which she was an actual *bona fide* occupant on March 16, 1896, and can purchase, in her individual right, one hundred and sixty acres of additional land of which she was in actual possession on said date; but she has no right of purchase of additional land, as widow, under said section, by virtue of any occupancy of her husband 308

The purpose of the words "excepting for school purposes," inserted in section 5 of the act of January 18, 1897, providing for the entry of lands in Greer county, Oklahoma, is to except from the obligation to make payment imposed by said section, all lands patented thereunder by reason of being occupied for school purposes. 195

Parks and Cemeteries.

Circular of June 12, 1903, relative to acquiring title to parks and cemeteries on public lands. 156

Paragraph one (1) of circular of June 12, 1903, amended, March 29, 1904. 512

Patent.

The legal title created by the issue of a patent for public land relates back to the inception of the equitable title arising from payment therefor; and where after the acquisition of equitable title and prior to issue of patent the land is transferred, the legal title, upon issue of the patent, inures to the benefit of the grantee. 100

A patent issued under the general townsite laws, for lands embraced in an unincorporated townsite, is inoperative to convey title to any lands known to be valuable for minerals at the date of the townsite entry, or to any valid mining claim or possession held under the mining laws at the date of such entry. 211

There is no authority for the insertion, in patents issued under railroad land grants, of the clause, "excepting all mineral land, should any such be found in the tracts aforesaid;" and directions are given that in all future railroad land-grant patents said excepting clause be excluded 342

In the administration of statutes permitting the heirs of a deceased entryman to prove up and receive final certificate and patent under his claim, such certificate and patent will issue in the name of the deceased entryman in cases where the right to patent accrues prior to his death, and in the name of his heirs generally in cases where the right to patent does not accrue until after he has died, or where the entryman at the time of his death is not competent to take title, although the right thereto may have been fully earned. 407

There is no general authority for the issuance of patent to Indian allottees, and in the absence of an express requirement in the agreement of July 7, 1883, between

the United States and the Indians of the Columbia and Colville reservations, and in the act of July 4, 1884, ratifying and confirming the same, that patents shall issue for the lands allotted thereunder, the land department is without authority to issue patents for such lands. 568

Practice.

See *Rules Cited and Construed*, page xxv.

An affidavit as a basis for service by publication of notice of a contest against a homestead entry, must show what efforts have been made to secure personal service; and where such affidavit fails to show that inquiry as to the whereabouts of the entryman was made at his address of record, and also fails to show that inquiry has been recently made in the vicinity of the land, it does not show due diligence. 37

The purpose of a motion for review is to permit parties to call attention to and to ask correction of errors in findings of fact or conclusions of law affecting and defining the rights of the parties; and such motion will not lie for review of a decision by the Secretary of the Interior relating to the procedure of the land department in the execution of its judgment, therefore rendered, finally defining and determining the rights of the parties. 269

Pre-emption.

Where an application to file pre-emption declaratory statement is erroneously rejected because of supposed conflict with a railroad grant, the land covered thereby being subsequently held not to have passed under the grant, and the applicant had fully complied with the law and earned title to the land prior to his death, his declaratory statement will be considered as having been filed when tendered, and his heirs will be allowed to perfect the claim for their own benefit. 243

Preference Right.

See *Contestant*.

Price of Land.

See *Railroad Lands*.

Private Claim.

The right of purchase accorded by the act of January 14, 1901, to purchasers from the Algodones Grant claimants, is limited to *bona fide* settlers and residents on the land, having a permanent home thereon of which they might have been deprived but for said statute. 11

In case of a conflict of claims under the act of January 14, 1901, between one who subsequent to the decision of the Court of Private Land Claims, sustaining the grant, and prior to May 23, 1898, the date of the decision of the Supreme Court holding said lands to be the property of the United States, had purchased from the grant claim-

ants a portion of said lands and had established his home thereon, and one who prior to the passage of said act had occupied a portion of the land with the intention of entering the same under the homestead or desert land laws, the respective rights of the claimants must be determined by priority of initiation. 286

The right to purchase from the United States accorded by the act of January 14, 1901, is limited to those who purchased the lands claimed by them from the grant claimants subsequent to the decision of the Court of Private Land Claims, sustaining the grant, and prior to May 23, 1898, the date of the decision of the Supreme Court holding said lands to belong to the United States, and who established permanent homes on the lands so purchased. 287

A mere squatter upon a portion of an odd-numbered section within the primary limits of the grant to the Atlantic and Pacific railroad, made by the third section of the act of July 27, 1866, at the date of the attachment of said grant, without recognition or protection by law or treaty, who applies to make entry of such land as a "small holding claim," under the provisions of section 17 of the act of March 3, 1891, as amended by the act of February 21, 1893, has no such claim or right as will except the land from the operation of said grant. 83

A double confirmation of title to the same land, made under the fourth section of the act of March 3, 1867, by the commissioners appointed for the purpose of ascertaining the rights of persons claiming land in the territories of Orleans and Louisiana under the French or Spanish government, in favor of two different claimants, one claiming under a Spanish patent and the other through such patentee and by right of occupancy, does not have the effect to vest in either of the confirmees a greater estate than was covered by the patent, or to give to either party any right that he could not have acquired under the Spanish government. 370

Public Land.

There is no authority to make such executive withdrawal of public lands in a State as will reserve the waters of a stream flowing over the same from appropriation under the laws of the State, or will in any manner interfere with its laws relating to the control, appropriation, use, or distribution of water. 254

The land department will take no action looking to the disposal of public lands pending congressional consideration of questions before it for its special order. 492

Railroad Grant.

See *Railroad Lands; Right of Way; Wagon Road Grant*.

INDEMNITY.

Rights acquired by settlement and improvement upon unsurveyed land, and duly and timely asserted upon filing of the plat of survey, will, as against an intervening indemnity railroad selection, made under the act of August 5, 1892, be protected in its entirety, even though the lands claimed lie in different quarter-sections and the improvements of the settler are shown to be confined to a single quarter-section 8

SELECTION.

A selection made under a railroad or other grant, in accordance with existing regulations, and duly accepted or recognized by the local officers, is a "lawful filing" within the meaning of that term as used in the excepting clause of the proclamation of June 29, 1898, creating an addition to the Pine Mountain and Zaca Lake forest reserve. 51

LANDS EXCEPTED.

A mere squatter upon a portion of an odd-numbered section within the primary limits of the grant to the Atlantic and Pacific Railroad, made by the third section of the act of July 27, 1866, at the date of the attachment of said grant, without recognition or protection by law or treaty, who applies to make entry of such land as a "small holding claim," under the provisions of section 17 of the act of March 3, 1891, as amended by the act of February 21, 1893, has no such claim or right as will except the land from the operation of said grant. 83

MINERAL LANDS.

There is no authority for the insertion, in patents issued under railroad land grants, of the clause, "excepting all mineral land, should any such be found in the tracts aforesaid;" and directions are given that in all future railroad land-grant patents said excepting clause be excluded. 342

The classification of land under the sixth section of the act of February 26, 1895, does not take effect, and is in no sense final, until approved by the Secretary of the Interior. 24

The Secretary has the power to disapprove a classification made under said section 6, even though no protest be filed against the same, if such classification does not correctly represent the character of the land. 24

The act of 1895 does not have the effect of suspending mineral locations made prior to its passage, nor does it apply in cases where, prior to the approval of the classification, claimants under the mining laws have *prima facie* established, through proper proceedings, the mineral character of the land, and their claims have passed to entry. 24

ADJUSTMENT.

The grants to the State of Minnesota in

aid of the construction of a railroad "from Stillwater, by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch *via* St. Cloud and Crow Wing, to the navigable waters of the Red River of the North," made by the acts of March 3, 1857, March 3, 1865, and March 3, 1871, are in effect one grant and should be adjusted as an entirety. 21

Departmental decisions of June 10, 1891 (unreported), and October 1, 1891 (13 L. D., 353), recalled; and the decision of February 26, 1889 (8 L. D., 255), accepted as stating the correct rule of adjustment. 21

The act of July 1, 1898, refers to conditions existing at the time of its passage, and if the conditions were such at that time as to permit the adjustment of the conflicting claims of the Northern Pacific Railway Company and an individual claimant, to a tract selected by the company within the indemnity limits of its grant, the fact that the land department failed to proceed under the act until after the individual claimant had relinquished his claim in order that his son might make entry thereof, will not prevent such adjustment being made, and the action of the individual whose claim was pending at the date of the passage of the act, in so relinquishing his entry, will be considered as equivalent to an election on his part to retain the land for the purpose of the adjustment. 369

The completion of a pre-emption filing subsequently to the passage of the act of July 1, 1898, under a declaratory statement filed prior to said act, for land listed by the Northern Pacific Railroad Company within the indemnity limits of its grant, is equivalent to an election by the claimant to retain the land, and the fact that the land department failed to list the land for relinquishment by the company until after the intervention of another claim for the land, will not prevent an adjustment being made under said act on account of the claim pending at the date of the passage of the act. 367

Lands lost to the Northern Pacific Railway Company within the primary limits of the grant made by the joint resolution of May 31, 1870, do not constitute a sufficient base for the selection of lands within the indemnity limits of the grant made by the act of July 2, 1864; but where, prior to January 1, 1898, such a selection was proffered, of lands properly subject to selection but for a homestead entry covering the same, and a valid base for such selection is substituted, though subsequently to the act of July 1, 1898, the conflicting claims of the entryman and the company as thus presented are subject to adjustment under said act. 654

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FORFEITURE.	
The act of March 2, 1889, forfeited lands granted to the State of Michigan by the act of June 3, 1856, in aid of the construction of certain railroads, and the third section of that act confirmed certain disposals made of the forfeited land by proper officers of the United States, with a proviso "that nothing herein contained shall be construed to confirm any sales or entries of lands, or any tract in such State selection upon which there were <i>bona fide</i> pre-emption or homestead claims on the first day" of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed." <i>Held:</i> That such proviso is a saving clause in favor of such claimants who may entitle themselves to patents, and not an excepting clause which would prevent the confirmation becoming effective as to such lands upon abandonment of the claims thereto	126

Railroad Lands.

Circular of May 13, 1904, under act of April 19, 1904, relative to settlers upon Wisconsin Central railroad and The Dalles military wagon road grants	620
Instructions defining scope of investigation directed to be made by the act of February 26, 1904, with a view to legislation for the relief of settlers on certain lands in Sherman county, State of Oregon, within that part of the grant made by the act of February 25, 1867, to aid in the construction of what was afterwards known as The Dalles military wagon road, overlapped by the withdrawal made under the grant of July 2, 1864, in aid of the construction of the Northern Pacific railroad	615
Directions given for the suspension, until December 1, 1903, of all proceedings for the patenting, under the Union Pacific railroad land grant, of the odd-numbered sections in certain designated boundaries within the limits of said grant, and also for the suspension until said date, from location and disposition of every character under any of the public land laws, other than the mining laws, of certain other lands within said designated boundaries, all in the Evanston land district, Wyoming, with a view to permitting such lands to be prospected and explored for oil deposits supposed to be contained therein	48
Lands within the primary limits of the grant of May 12, 1864, in aid of the construction of the McGregor and Missouri River railroad, which were erroneously included within the meander lines of a lake, are not for that reason excepted from the provisions of said act increasing in price the alternate sections along the line of road therein provided for	107

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A pre-emption settlement initiated and maintained with full knowledge of a prior soldiers' additional homestead entry covering the same land is not such a <i>bona fide</i> claim as would serve to defeat confirmation of such existing homestead entry by section 3 of the act of March 2, 1889	393
Where lands otherwise coming within the provisions of section 5 of the act of March 3, 1887, and not known to be mineral in character at the time of their purchase from the railroad company, are subsequently found to be mineral, they are not for that reason excepted from the right to purchase granted by said section	77
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